

ORIGINAL

FILED

October 24 2013

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA

AF 06-0185

FILED

IN RE: RULES OF THE
SENTENCE REVIEW DIVISION

OCT 24 2013

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

SENTENCE REVIEW DIVISION DISCUSSION OF COMMENTS

The Sentence Review Division (hereinafter SRD) has reviewed and considered comments by Honorable Richard Simonton, District Judge filed with the Supreme Court on July 23, 2013 and comments of Tim Fox, Attorney General filed with the Supreme Court on August 2, 2013.

Comments were received only about the Rules noted below. The SRD concludes that only the noted rules require discussion.

RULE 1

Judge Simonton suggested that the Rule should include language creating a rebuttable presumption that Defendant received a copy of documents, notice, and applications for sentence review.

The SRD concludes that the proposed language is not necessary. There is a general presumption in the law that that which should have been done in the regular course of events has been done. The burden lies with the person who would suggest otherwise. SRD concludes there is no necessity to reiterate a firmly established maxim. In addition, any party who petitions for relief has the burden to establish the basis for the requested relief. Further, SRD continues to operate in accord with these premises.

RULE 3

Judge Simonton suggests that commas are needed.

SRD declines to adopt the suggestion. At most, the recommendation is a matter of style.

RULE 9

Judge Simonton suggests that the Rule should explicitly provide that the presiding officer shall determine the order and length of presentations.

SRD has operated smoothly under the inherent authority of the presiding officer to preside, to moderate, and to decide issues of presentation. SRD concludes that the proposed language merely recites the obvious. SRD declines to adopt the suggestion.

RULE 11

Judge Simonton suggests, in essence, that the entire District Court file and transcripts of all hearings be provided to SRD for review of an application by a defendant.

SRD members have discovered no need for the entire District Court record. Instead, SRD members have identified those portions of the information available to the District Court at sentencing which are useful for review and have directed SRD staff to provide that data. Further, the Rule obviously provides discretion for SRD to request other information from the District Court file in the event it is necessary. SRD does not believe it is advisable to mandate wholesale reduplication of documents which are not necessary. Even though SRD has moved to electronic document transfer, there is no necessity or advantage to the proposed Rule.

SRD declines the suggestion.

RULE 12

Judge Simonton suggests that Rule 12 may be deleted.

SRD proposed the Rule in part, perhaps, in deference to previous authors and also to allow for remand which would provide direction to an applicant with potential merit but whose application is inadequate/incomplete.

However, in the interest of brevity, SRD is content to remove Rule 12 in its entirety from the proposals. Nothing of significance is lost by its removal.

RULE 14

The Attorney General suggests that a decision of SRD be provided to the criminal history repository of the Montana Department of Justice in addition to other parties listed in the proposed Rule.

SRD does not object to the proposal and includes the suggestion in its proposed Rules.

SUGGESTED NEW RULES

The Attorney General suggests that more rules will resolve perceived problems regarding finality of action.

The Attorney General laments imprecision in ascertaining the status of an application for review, for example, when an application is in existence, pending, active, final, etc. It appears to SRD that if such a question exists, the issue should be posed to SRD and answered based on the facts of the particular case. SRD is not satisfied that creation of more rules will solve the concern. By logical extension, the Attorney General suggests that if enough rules are promulgated, there will be no more disagreements on their interpretation. The failure of that logic is self evident.


SRD is sympathetic to the concern. For example, the statute plainly provides that there is no appeal from its decisions. SRD marvels that some applicants have invoked the transparent device of applying for supervisory control to obtain interlocutory appeal. Notwithstanding that no appeal at all is allowed and that interlocutory appeals are disfavored and that applicants have requested supervisory control only after a final decision and that applicants propose to appeal from the Supreme Court to the Supreme Court, some applicants have nonetheless sought that relief. However, SRD doubts that more rules would allay this problem.

SRD declines to take up the Attorney General's suggestion to promulgate more rules.

The Rules as amended, including the deletion of previous proposed Rule 12 and the additional language suggested by the Attorney General in Rule 14 are attached. In accord with Section 346-18-901(4), SRD proposes and plans to adopt the attached Rules over the signature of the three presently serving District Court Judges.

On behalf of the SRD,

Dated: October 21, 2013.



LOREN TUCKER, Presiding Officer

STATE OF MONTANA
SENTENCE REVIEW DIVISION OF THE SUPREME COURT

RULES

In accord with Title 46, Chapter 18, Part 9 of the Montana Code Annotated, the Sentence Review Division of the Supreme Court (hereinafter Division) hereby adopts the following rules which supersede all previous rules.

RULE 1. The Clerk of District Court (hereinafter Clerk) shall serve upon persons who have been sentenced to a term of 1 year or more in the State prison or to the custody of the Department of Corrections:

- 1) A copy of the Sentence and Judgment
- 2) Notice of the Right to Apply for Sentence Review
- 3) Two copies of the Application for Sentence Review

Forms shall be approved by the Division.

RULE 2. Within sixty (60) days after sentence was imposed, a defendant may apply for the sentence to be reviewed by the Division.

If an appeal to the Supreme Court or petition for post conviction relief is filed, the 60 day period commences when the appeal or petition is complete.

Application for review of sentence does not stay execution of the sentence.

RULE 3. The Division shall not consider issues which could have been or should have been addressed in District Court by appeal or post conviction relief.

RULE 4. Application for Sentence Review shall be filed with the Clerk for the county from which the defendant was sentenced. In the event the defendant has been sentenced in more than one county, separate applications shall be filed with each Clerk if defendant requests each sentence to be reviewed.

RULE 5. Upon filing the application for Sentence Review, the Clerk shall complete and file the Clerk's certificate of service and shall within ten (10) business days, serve a copy of the Application for Sentence Review upon the Judge who imposed the sentence, the County Attorney of the County from which the defendant was sentenced and defendant's counsel of record. The Clerk shall mail the original Certificate of Service and deliver all required documents to the Secretary for the Division (hereinafter Secretary).

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RULE 6. Defendant, the State, and the sentencing Judge may file briefs within 30 days after notice of the application for review is served by the Clerk.

RULE 7. The Secretary shall record the date the application for review was received by the Clerk. If the application is untimely, the Secretary shall promptly notify the defendant to file within thirty (30) days a statement of reasons why the Division should hear a late application. The Division will review late applications only upon good cause shown.

RULE 8. The Secretary shall serve notice of the time and place for Review at least thirty (30) days before such hearing to each of the following:

- 1) The Judge who imposed the sentence;
- 2) The County Attorney for the county from which the defendant was sentenced;
- 3) The defendant;
- 4) The defendant's attorney of record;
- 5) Any other person who has requested notice.

RULE 9. Proceedings shall be informal to the extent possible. The Rules of Evidence do not apply.

RULE 10. The defendant shall have the right to appear and to be represented by counsel.

RULE 11. The Secretary shall provide to the Division from the District Court file such documents as the Division may require.

The Division shall consider only information which was available to the sentencing Judge at the time of sentencing.

RULE 12. The sentence imposed by the District Court is presumed correct. The sentence shall not be reduced or increased unless it is clearly inadequate or clearly excessive.

RULE 13. The Secretary shall file the original decision of the Division with the Clerk where defendant was sentenced and mail copies of the decision to:

- 1) The Judge who imposed sentence;
- 2) The County Attorney;
- 3) The criminal history repository of the Montana Department of Justice;
- 4) The defendant;
- 5) The defendant's attorney if represented by counsel;
- 6) The principal officer of the institution where defendant is incarcerated.

RULE 14. A record of proceedings before the Division shall be made by recording or otherwise and shall be retained for two years after a written decision is rendered.

RULE 15. Without convening the entire Division, the Presiding Officer may rule on procedural issues not affecting the substance of a review.

These rules are effective the ____ day of October, 2013.

SENTENCE REVIEW DIVISION

Presiding Officer, Hon. Loren Tucker

Member, Hon. Bradley G. Newman

Member, Hon. Kathy Seeley