SENTENCE REVIEW AND SENTENCE DISPARITY: A CASE STUDY OF THE CONNECTICUT SENTENCE REVIEW DIVISION

*by Pamela Samuelson**

INTRODUCTION

Over twenty years ago a prisoner uprising brought the problem of sentence disparity[1] in Connecticut to public attention. In response

---

* B.A., University of Hawaii; J.D., Yale University. From June 1976 through September 1977, the author was a Research Associate at the Vera Institute of Justice in New York City. She is presently an associate at Willkie, Farr & Gallagher in New York City.

This article grew out of work that began when the author was employed by Professors Hans Zeisel of the University of Chicago and Shari Diamond of the University of Illinois in Chicago to collect and code data for a study of the Connecticut Sentence Review Division. The work of Professors Zeisel and Diamond has been submitted to the Law Enforcement Assistance Administration under the title, "Sentence Review in Massachusetts and Connecticut." The author is grateful to them for providing her with an opportunity to become involved in research on this institution and for their assistance in the early stages of her analysis of the data. The author also wishes to acknowledge Professor Daniel Freed of the Yale Law School, without whose continual encouragement and valuable suggestions this article would never have found its way into print; Stephen Frazzini, the author's co-worker during the data collection and preliminary analysis stages, for his many insights; the Connecticut Judicial Department, members of the Sentence Review Division, Mr. Palten, the Executive Secretary of the Division, and his assistant, Mrs. Margolis, for their active and generous co-operation with this research.

The data for this evaluation was collected between January and June 1975. In addition to gathering information on individual cases from SRD files, court records, and presentence reports, the author and her co-worker observed two days of SRD hearings and interviewed a total of eight judges (six of whom had served on the SRD), a dozen lawyers (both prosecuting and defense), eleven prisoners who had appealed their sentences, the former and present executive secretaries to SRD, two persons who had served on the Prison Study Committee which had recommended creation of the SRD, and the Committee's secretary.

1. Unless otherwise indicated "sentence disparity" will mean an inequitable imposi-

to this uprising,[2] the Connecticut General Assembly in 1957 created the Sentence Review Division (hereinafter referred to as "SRD"),[3] a panel of three superior court judges which has been conducting hearings to determine the fairness of sentences since 1958.[4] The right to

---

tion of penalties on similar offenders for similar crimes. The difficulties of defining sentence disparity more precisely are discussed at greater length later in this introduction. *See* notes 16, 17 *infra* and accompanying text.

2. During the summer of 1956 inmates of Connecticut's Wethersfield Prison staged an uprising of major proportions. That summer Governor Abraham Ribicoff appointed a Prison Study Committee to both investigate the reasons for the prisoner unrest and propose legislation to remedy legitimate prisoner grievances.

In its first report, the Prison Study Committee stated that a major complaint of the convicts was an inequitable distribution of penalties imposed on similar offenders for similar offenses. FIRST INTERIM REPORT OF THE GOVERNOR'S PRISON STUDY COMMITTEE (Nov. 19, 1956), *reprinted in Minutes of Proceedings on House Bill No. 276 Before the Joint Standing Committee on the Judiciary and Governmental Functions* (Feb. 28, 1957) 377 [hereinafter cited as PRISON STUDY REPORT]. The Committee investigated the allegations of sentence disparity by examining prison files of 200 inmates and found "a marked variation in the sentences of prisoners who have substantially similar backgrounds and have been convicted of the same offense." *Id.* at 3.

At that time recipients of the more severe penalties could not challenge their sentences as unduly harsh or unreasonable because the Connecticut Supreme Court of Errors had refused to review any sentence which did not exceed the statutory maximum. *See* State v. LaPorta, 140 Conn. 610, 102 A.2d 885 (1954); State v. Horton, 132 Conn. 276, 43 A.2d 744 (1945). While not concluding that sentence disparities were unjustifiable, the Committee stated that the problem was that prisoners perceived a disparity and could do nothing about it. The Committee therefore recommended to the General Assembly that it establish a tribunal to which prisoners could apply for review of their sentences.

3. *See* 1957 Conn. Pub. Acts 436, CONN. GEN. STAT. §§ 51-194 through 51-197 (1977). The sentence review bill adopted by the General Assembly was modeled substantially after the proposed legislation recommended by the Prison Study Committee in its PRISON STUDY REPORT, note 2 *supra*. The only change of significance was that the bill enacted did not include the power to increase sentences. The statute was amended before the SRD commenced reviews to give the SRD the power to increase sentences and to make the right to apply for review retroactive so that all prisoners who had complained of sentence inequities would be entitled to a hearing. 1957 Conn. Pub. Acts 14 (Sept. Sess. 1957).

4. The SRD's jurisdiction originally was limited to the review of prison sentences. In 1963 the statute was amended to make reformatory commitments reviewable. 1963 Conn. Pub. Acts 584. Jail sentences were not eligible for sentence review unless the jail term was imposed concurrent with or consecutive to a prison or reformatory sentence in which case SRD had jurisdiction over both. An Act Establishing Procedure for Review of Sentences Imposed by the Superior Court, 1957 Conn. Pub. Acts 436, § 2, CONN. GEN. STAT. § 51-195 (1958 rev.). However, in 1977 the statute was amended to provide that any person sentenced to imprisonment for a term of one year or more may apply to the SRD. *See* 1977 Conn. Pub. Acts 77-224. The SRD has no power to review capital punishment sentences. *See* State v. Delgado, 161 Conn. 536, 290 A.2d 339 (1971) (death sentence held not a prison sentence within the meaning of CONN. GEN. STAT. § 51-195 (1971)).

apply for sentence review is the defendant's alone,[5] but there is a risk attached to the right, for the SRD has the power to increase as well as to reduce or affirm a sentence.[6] This is the first empirical study to inquire: (1) Whether there is sentence disparity in Connecticut; (2) whether the SRD has responded to any such sentence disparity; and (3) whether the SRD is an appropriate tribunal to correct sentence disparities.[7] Given the extensive debate over sentence disparity and what to do about it,[8] perhaps an evaluation of one existing mechanism for the control of sentence disparity can contribute insights into the difficulties of sentencing reform.

The initial research design contemplated a two-stage evaluation of the SRD. The first stage of the research involved the selection of a sample of defendants who appealed their sentences to the SRD (hereinafter referred to as "applicants") for comparison with a sample of defendants eligible for sentence review who chose not to apply (hereinafter referred to as "nonapplicants"). All 157 defendants sen-

5. Comments made at the legislative hearing on the sentence review bill indicate that the Prison Study Committee considered the possibility of allowing the state as well as the defendant to apply for review of sentences and of making sentence review mandatory. *See Minutes of Proceedings on House Bill No. 276 Before the Joint Standing Committee on the Judiciary and Governmental Functions* 403-04 (Feb. 28, 1957) (testimony of O'Sullivan, J.). The Committee rejected the proposals on the ground that they would have greatly increased the SRD caseload. For a complete discussion of the mechanics of the sentence review process, see Part II, § A *infra*.

6. The SRD can order a modification of a sentence to any statutorily authorized penalty that the sentencing judge could have imposed. CONN. GEN. STAT. § 51-196 (1977). For a discussion of cases in which the SRD has ordered reductions or increases in sentences, see Part II, §§ C & D *infra*.

7. The one previous study of the SRD concentrated on the SRD's review standard and not on whether there was evidence of sentence disparity. *See* Note, *Appellate Review of Primary Sentencing Decisions: A Connecticut Case Study*, 69 YALE L.J. 1453 (1960) [hereinafter cited as *Connecticut Case Study*].

8. For a discussion of the problem of widespread differences in sentences for similar offenders or crimes and in judicial sentencing practices, see D. CURTIS, P. O'DONNELL & M. CHURGIN, TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM (1977); M. FRANKEL, CRIMINAL SENTENCES (1973); W. GAYLIN, PARTIAL JUSTICE (1974); J. HOGARTH, SENTENCING AS A HUMAN PROCESS (1971) [hereinafter cited as SENTENCING]; A. PARTRIDGE & W. ELDRIDGE, THE SECOND CIRCUIT SENTENCING STUDY (1974) [hereinafter cited as SECOND CIRCUIT STUDY]; A. VON HIRSCH, DOING JUSTICE (1976); Diamond & Zeisel, *Sentencing Councils: A Study of Sentence Disparity and Its Reduction*, 43 U. CHI. L. REV. 109 (1975) [hereinafter cited as *Sentencing Councils*]. The most recent draft of a proposed revision of the United States Criminal Code includes provisions to create a sentencing commission to set guidelines for federal sentencing practices. S. 181, 95th Cong., 1st Sess. §§ 3801-3806 (1977), *reprinted in* 123 CONG. REC. 5406-07 (daily ed. Jan. 11, 1977). Attorney General Griffin Bell, Senator Edward Kennedy, and Senator John McClellan have announced their support for this bill. N.Y. Times, May 2, 1977, at 1, col. 1.

tenced in the superior court of the three largest counties in Connecticut[9] who filed their SRD applications during 1972 became the applicant study population.[10] This group was compared with a random sample of 225 nonapplicant defendants sentenced in the same courts during the same time period.[11] The aims of the comparison were: (1) To attain some insight into what types of defendants apply for sentence review; (2) to discover, to the extent that applicants and nonapplicants were comparable, whether there were discernible sentence disparities for similar crimes; and (3) if there were disparities, to inquire whether they could be justified on objective, rational grounds such as the defendants' personal background characteristics and prior criminal histories. The second stage of the research was to

9. The Superior Courts of Hartford County at Hartford, Fairfield County at Bridgeport, and New Haven County at New Haven (Waterbury cases excluded). We selected the Superior Courts at Hartford, Bridgeport, and New Haven because they handle the majority of criminal felony cases. In fiscal year 1973, for example, 62% of superior court cases were disposed of in these three courts. 24TH REPORT OF THE JUDICIAL COUNCIL OF CONNECTICUT 42-46 (1974) [hereinafter cited as 24TH REPORT]. The 157 defendants convicted in these three counties who filed sentence review applications during 1972 constituted 68% of the 230 applicants sentenced in all Connecticut superior courts in 1972. (Ninety-seven of the applicants that year had been sentenced in circuit courts.) Another factor in our choice of these three courts was that we wanted some geographical diversity in the sample and yet we also wanted to limit the number of courts visited in order to draw the sample.

10. The applicant population was identified by a search through the SRD log book, which lists the name, docket number, and date of filing for each application. We obtained as much information on the SRD cases as we could from the SRD files. In many instances (as where the application was untimely, the sentence ineligible for review, or the appeal withdrawn) the SRD files contained very little information about the defendant, his background, and his crimes.

11. After collecting the basic information from SRD files on the 157 applicants, we went to the Superior Courts in Hartford, Bridgeport, and New Haven to draw the nonapplicant sample from the court docket books. The docket books list the defendant's name, the charges, and the final dispositions of the cases. We first made a list of docket numbers of nonapplicants sentenced to prison or reformatory terms beginning in mid-December 1971 (some 1972 applicants had been sentenced in late December 1971) through the end of December 1972. (In New Haven, we took the docket numbers from a sample of cases sentenced in Superior Court in 1972 which Malcolm Feeley, a Russell Sage fellow, had taken from the court docket books. We then checked the New Haven docket books to assure that the sample was complete.) We excluded from our list of eligible nonapplicants those who had been sentenced to suspended prison and reformatory terms because such defendants rarely apply to the SRD. In Hartford we found 220 eligible nonapplicants, in Bridgeport 137 nonapplicants, and in New Haven 114 nonapplicants. From the Hartford cases, we selected every third case, from the Bridgeport cases, every other case, and from New Haven the first two of every three cases until we got a sample of 75 cases from each county court. We obtained information on the nonapplicants by checking the presentence reports on file in the probation departments in each county.

determine the extent to which the SRD attempted to and did reduce sentence disparities in the cases it reviewed. This analysis was based on data collected on the crimes and sentences of those defendants whose cases were reviewed by the SRD and on the opinions the SRD wrote in those cases. The research population selected for this phase of the research was comprised of all applicants who filed their sentence appeals during 1962, 1967, and 1972 and whose cases the SRD heard on the merits.[12]

In the process of analyzing the data from the first stage of the research, certain limitations of the data and research design became evident which precluded a definitive measurement of sentence disparity. First, the number of cases was small, particularly as one began introducing several variables at one time, such as specific crime and prior criminal record. Second, the analysis was limited because it was based on cases from only three counties and included only prison and reformatory sentences.[13] Finally, and most signifi-

12. We wanted to study three years of applications in order to see whether the types of cases appealed to the SRD and the types of cases the SRD modified had changed over time. The year 1972 was selected as the most recent year for study over the years 1973 and 1974 because for the latter years complete log entries did not exist.

13. All felony offenders may be sentenced to prison, but only a minority are. In fiscal year 1972 (July 1, 1971 to June 30, 1972), 3,439 sentences were imposed in Connecticut Superior Courts, 28% of which were prison sentences and nine percent of which were reformatory sentences. Nearly 500 more felony offenders sentenced in that year were given suspended sentences than were sentenced to prison. *See* 23RD REPORT OF THE JUDICIAL COUNCIL OF CONNECTICUT 42 (1973) [hereinafter cited as 23RD REPORT]. The research reported here does not take into account any disparity which might exist between those sentenced to prison or reformatory terms and those sentenced to fines, suspended terms, or jail. Nevertheless, some cognizance should be taken of statewide patterns of sentencing for various crimes. The following table shows the percentages of offenders sentenced to prison or reformatory terms and to suspended terms for selected offenses during fiscal year 1972 in superior courts:

Offenses	Number Sentenced	Percent to Prison/Reform	Percent to Suspended Sentence
All Drug	1147	35%	42%
Burglaries	435	39%	41%
Robberies	334	78%	14%
Larcenies	212	23%	61%
Sex (except Rape)	174	29%	40%
Forgery	146	30%	52%
Aggrav. Assaults	133	33%	39%
Escape	87	60%	26%
Auto Theft	62	21%	61%
Manslaughter	57	82%	14%
Rape	24	75%	13%

cantly, there were three major conceptual problems inherent in research of this type which made it very difficult to measure sentence disparity to any conclusive degree: (1) There is little consensus about what "sentence disparity" is;[14] (2) there is no general agreement as to what critical variables influence sentencing decisions;[15] and (3) plea bargaining distorts any comparison of sentences for similar crimes.

The definitional problem with sentence disparity is both a question of the appropriate standard for judgment and the degree of variation from that standard one is willing to tolerate before labelling it disparity. Assume that A, B, C, and D, who have similar prior criminal histories, have all been convicted of armed robbery and are sentenced as follows: A to one year in prison, B to three years, C to five years, and D to eight years. All have different sentences and so, by definition, the sentence of each is disparate as compared to the others. The SRD has tended to treat as sentence disparity only those sentences which are so patently excessive as to constitute an arbitrary and unreasonable sentencing decision.[16] By this standard, D's sen-

---

23RD REPORT at 43. This table indicates that suspended sentences were not reserved for offenders who had committed only the most minor felonies. In 1972, only murder and abortion convictions led exclusively to incarceration; for all other offenses at least some defendants received suspended terms. This suggests that there is a potential for even greater sentence disparity if one looks at all felony sentences and not just prison and reformatory terms.

14. "Sentence disparity" literally means sentence differences, but the term has been used to encompass different concepts. The Second Circuit Study defined sentence disparity as "dissimilar treatment by different judges of defendants who are similarly situated." SECOND CIRCUIT STUDY, *supra* note 8, at 3. The report distinguished its definition of sentence disparity from definitions others use:

> It should be noted that this definition excludes two other phenomena that are sometimes referred to as disparity. First it excludes dissimilar treatment of similarly situated defendants by the same judge. . . . Second, the definition used here excludes disproportionately dissimilar treatment of unlike situations: we do not deal with the question whether sentences for stealing government checks are unduly harsh when compared with sentences for income tax evasion.

Id. For yet another definition of sentence disparity, see Diamond & Zeisel, *supra* note 8, at 131. For examples of sentence disparities, see J. BENNETT, OF PRISONS AND JUSTICE, S. DOC. NO. 70, 88th Cong., 2d Sess. 311 (1964).

15. For a thorough examination of the differing judicial perceptions of the importance of various factors in sentencing see J. HOGARTH, *supra* note 8, at 6. Concerning differences in perceptions of the importance of various factors in the sentencing process in Connecticut, *see* G. Jacobs & R. Lynton, Sentencing in Connecticut (unpublished thesis in Yale Law School Library). Jacobs and Lynton reported on the responses of Connecticut judges, prosecutors, public defenders, and probation officers to questionnaires concerning the importance of 23 factors in the sentencing process.

16. For a complete discussion of the SRD's standard of sentence review, *see* Part II, section B *infra*. *See also Connecticut Case Study, supra* note 7, at 1476-77. Other appel-

tence might not be disparate if the SRD believed that the appropriate range of sentences for armed robbery was four to eight years. In contrast, one might define sentence disparity as a comparative disproportionality of one sentence to sentences generally given to similar offenders for similar crimes.[17] Thus if the average sentence for armed robbery for offenders with similar prior criminal records was four years in prison, then, by this definition, D's sentence, being twice the normal sentence, would be an example of sentence disparity. A's sentence would also be disparate because it would be significantly less than the normal sentence for that offense. The sentences of B and C would be disparate or not, according to how much deviance from the norm one was willing to tolerate.

Prisoners also tend to perceive sentence disparity as a comparative phenomenon. They see themselves as relatively more deprived than others whose sentences are less than theirs. D in the example above would experience the greatest relative deprivation in comparison to A, B, and C. C would feel more deprived than A or B. B would feel deprived comparing his sentence to A's, even though he might know that he was fortunate not to be sentenced as harshly as C or D. Of the four only A would have no reason to feel aggrieved by his or her sentence in comparison with those received by others. A prisoner understandably would tend to have little tolerance for sentence differences where any sentence for a similar crime was less than his or hers. To a judge there may seem to be little difference between sentencing a defendant to prison for two or three years, but to a prisoner one year makes a very big difference.

Any attempt to measure sentence disparity empirically[18] must be

late courts performing sentence review functions appear to use a similar standard. *See* Erwin, *Five Years of Sentence Review in Alaska*, 5 UCLA-ALAS. L. REV. 1 (1975). The American Bar Association has recommended that only "grossly excessive" sentences be reduced. ABA SPECIAL COMM. ON STANDARDS FOR CRIMINAL JUSTICE, THE ADMINISTRATION OF CRIMINAL JUSTICE 411 (1960 draft).

17. This is my own definition. To complete this definition, one obviously would have to define what "similar" offenders and crimes are. *See* discussion of prisoner complaints to the SRD in Part II, section A *infra*.

18. The most conclusive way to measure sentence disparity is to have different judges, using the same information, sentence the same person. The SECOND CIRCUIT STUDY, *supra* note 8, involved such a simulated sentencing exercise. District court judges of the circuit rendered sentencing judgments in about 30 hypothetical cases based on presentence reports. The study of these responses revealed very substantial sentence disparities both in the types of sentences judges said they would impose and in the lengths of sentences. In the summer of 1975 Connecticut judges met to discuss the results of a similar study; the results were not published.

preceded by the selection of critical variables influencing the sentencing decision. However, selection of the critical variables affecting sentences is difficult because there is no preestablished set of variables which a majority of judges, lawyers, scholars, or social scientists would agree to be determinative.[19] Thus, the researcher must sort through a multitude of factors of potential relevance in sentencing to select those to be deemed critical variables, and must be prepared to defend these choices. The researcher must also arrive at precise ways to define and measure the obviously critical variables such as the crime and the offender's prior criminal history.[20]

Plea bargaining[21] further complicates the process of analyzing

---

While simulated sentencing studies allow a more definitive measurement of sentence disparity, they present difficulties. One is inherent in the fact of simulation: there is no real person before the judge to be sentenced. Another is that in such experiments judges may moderate their judgments, aware that their sentencing decisions are being studied. Finally, such studies tell us only about disparity as to one person and not about variances in penalties for similar offenders who committed similar crimes. For discussions of other empirical studies of sentence disparity, *see* E. GREEN, JUDICIAL ATTITUDES IN SENTENCING 8-20 (1961); Diamond & Zeisel, *supra* note 8, at 111-16; Hagan, *Extra-Legal Attributes and Criminal Sentencing: An Assessment of a Sociological Viewpoint*, 8 LAW AND SOC. REV. 357 (1974).

19. Among the factors that might be considered critical variables influencing the sentencing decision are the following: The type of plea the defendant entered; the degree of the defendant's cooperation with law enforcement authorities in investigation or prosecution of other cases; the defendant's contrition; the defendant's willingness to testify against codefendants; the emotional state of the defendant at the time of the offense; the defendant's sobriety at the time of the offense; the defendant's intelligence, age, marital status, employment status, and past hardship; the existence of a prior relationship between the defendant and the victim; the defendant's "leadership" or "passive participation" in the crime; and the anger of or injury to the complainant.

20. This is not as easy as it sounds. The researcher must decide whether to base the comparisons on the original charges, the conviction charges, or the facts of the offense, which in many cases will differ from one another. The researcher must then decide what types of crimes within the same crime category are to be regarded as more serious than the others. For example, a burglary of a dwelling and a burglary of a commercial establishment may fall within the same grade of statutory burglary, but there may be an unwritten rule in a jurisdiction that the former is more serious than the latter.

Prior criminal record is another variable difficult to categorize satisfactorily. The researcher must decide whether to include juvenile records as a variable, how to categorize such things as youthful offender adjudications (which are technically not convictions), whether to consider arrests not leading to conviction, whether to determine the seriousness of prior convictions by the original charges or conviction charges, and what weight to give to past misdemeanors and felonies.

21. By plea bargaining I mean negotiations between defense counsel and the prosecutor (sometimes also the judge) whereby the prosecutor exchanges charge concessions and/or a sentence recommendation for the defendant's plea of guilty. *See generally* D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL (1966).

sentence disparity. Particularly in a jurisdiction like Connecticut where plea bargaining pervades the criminal justice system,[22] sentence disparity and plea bargain disparity are interrelated problems. Just as judges have very broad discretion over what sentence to impose, prosecutors have virtually untrammeled discretion over what charge concessions[23] to grant and what sentence recommendations[24] to make in order to induce defendants to plead guilty. In the process of negotiating with a defense lawyer about a guilty plea, prosecutors are free to consider the strength or weakness of the state's case and the likelihood of the defense winning a pretrial motion to suppress evidence.[25] Plea bargaining is thus an ad hoc process of compromise, the outcome of which is often based as much on the strategic skill of the lawyers and on administrative factors, such as the prosecutor's caseload, as on what the defendant actually did.[26] Because Connecticut judges routinely defer to prosecutorial sentence recommendations,[27]

22. Convictions by guilty plea accounted for 96% of all superior court convictions during fiscal year 1972. *See* 23RD REPORT, *supra* note 13, at 41. Connecticut prosecuting and defense attorneys reported in interviews that in virtually every case in which a felony offender pleads guilty, some plea bargaining has occurred. For a discussion of plea bargaining in Connecticut, *see* J. CASPER, AMERICAN CRIMINAL JUSTICE: THE DEFENDANT'S PERSPECTIVE (1972).

23. A charge concession is a prosecutor's reduction in the severity of a charge (*e.g.*, from robbery first degree to robbery third degree) or dismissal or nolle of one or more other pending charges as part of the inducement for a defendant to plead guilty.

24. A Connecticut defense lawyer may seek three types of agreements with a state's attorney about a sentence recommendation: (1) The prosecutor will promise to make a specific agreed-upon recommendation and to urge the court to accept it; the defense lawyer will also urge the court to impose the recommended sentence (known as an "agreed rec"); (2) the prosecutor will tell defense counsel what sentence he will recommend to the judge, and defense counsel will reserve the right to argue for a lesser sentence; and (3) the prosecutor will promise to make no specific recommendation on sentence, and it is understood defense counsel will urge the court to impose a lenient sentence.

25. Both prosecuting and defense lawyers agreed that such considerations were common in Connecticut.† For an explanation of the symbol † see note following note 47.

26. For discussions of factors affecting the outcome of plea bargaining efforts *see* Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179 (1975); Alschuler, *The Trial Judge's Role in Plea Bargaining* (pt. 1), 76 COLUM. L. REV. 1059 (1976); White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 439 (1971).

27. The judges and lawyers interviewed reported that judges will impose an "agreed rec" sentence in almost all cases and will give the state's recommendation serious consideration in the other cases.† *See* J. CASPER, *supra* note 22, at 87. Judges defer to prosecutorial sentence recommendations, especially in "agreed rec" cases, because they believe that if the prosecutor's ability to deliver on plea bargained promises is seriously impaired, pleas will not be so readily forthcoming.

the actual sentencing power in Connecticut is largely in the hands of prosecutors.[28]

The analytical problems raised by plea bargaining can be illustrated as follows: assume that A, B, and C have similar backgrounds and that A and B have been charged with robbery in the first degree, a class B felony carrying a maximum penalty of twenty years, and C with robbery in the third degree, a class D felony carrying a maximum penalty of five years. The prosecutor in A's case refuses to reduce the charge because he has a solid case against A. After two months of pretrial detention, A finally capitulates, pleads guilty to the original charge, and is sentenced to five years in prison. Because of possible defects in the state's case, the prosecutor agrees to reduce the charge in B's case to robbery third and to recommend a two year prison term, which the judge in due course imposes. C, readily admitting his guilt, pleads guilty to robbery third on the prosecutor's promise to recommend one year in jail, which the sentencing judge thinks is too lenient and C is sentenced to two years in prison. If A and B committed the same crime, is it sentence disparity when B receives three years less as a sentence simply because the prosecutor was not sure of his evidence? If B committed a far more serious crime than C, is it sentence disparity that B and C are sentenced to the same amount of time? The researcher who wants to measure sentence disparity must develop a very sophisticated calculus to cope with the distortions plea bargaining is likely to introduce into the analysis.

While these limitations preclude a conclusive quantitative measurement of sentence disparity, the data presented below do strongly suggest that sentence disparity in the sense of comparative disproportionality was prevalent in the research population, that those who applied for sentence review were recipients of sentences harsher than those received by similar defendants for similar crimes, and that there were no objective factors which would explain the discrepancies in sentences. Because the disparity in sentences was so pervasive, it was expected that applicants had been convicted of more serious crimes or of more crimes or had had worse prior criminal records. But they did not. Despite a diligent search for objective factors to explain the sentence disparities, none were found. This then is the

28. " 'The prosecutor is the man who gives the time' is the standard refrain of defendants," according to J. CASPER, *supra* note 2, at 87. The manner in which the prosecutor's power over sentencing affects sentence disparity will be explored further in Part III *infra*.

basis for the assertion that the data suggest a significant disparity in sentences for similar crimes and similar offenders. The data also yield valuable insights into the process of sentencing and plea bargaining in Connecticut. Perhaps most importantly, this research effort may be useful in the development of a conceptual framework for future empirical research on sentence disparity.

Part I presents a comparison of the sentences, crimes, and prior criminal histories of the 157 applicants and the 225 nonapplicants. It demonstrates that, although applicants and nonapplicants had similar prior criminal histories, and were originally charged with and subsequently convicted of similar crimes, applicants were sentenced to substantially more severe terms, on the average, than nonapplicants. Part II presents an evaluation of cases in which the SRD ordered sentence modifications. This evaluation demonstrates that while the SRD has reduced a few grossly excessive sentences, it has not, except in a limited number of cases involving similar codefendants, addressed sentence disparity in the sense of comparative disproportionality. Not having seriously addressed this problem, the SRD has done little to reduce such disparities. Part III discusses the reasons why the SRD has not done more to reduce sentence disparity in the sense of comparative disproportionality, these reasons being: (1) The strong institutional disincentives operating on the SRD judges; (2) the lack of information for making sentence comparisons; (3) the magnitude of the task; and (4) the lack of inclination to begin the task. Part III proposes that the SRD and Connecticut's Judicial Department should recognize sentence disparity as comparative disproportionality and should commence research on sentencing practices in Connecticut, using information from such research to develop sentencing guidelines. The SRD can, if it chooses, play a major role in the development of such guidelines.

I. Sentence Disparities Between SRD Applicants and Eligible Nonapplicants

A. *An Overview of Sentence Patterns in the Applicant/Nonapplicant Sample*

The comparison of the applicant and nonapplicant groups began with an overall comparison of the sentences imposed on the members of the two groups. Because sentence appeals imply that applicants are complaining that their sentences are too severe, one might expect that applicants as a group had received longer minimum and maximum sentences. Tables 1 and 2 demonstrate that this is the case.

TABLE 1

Minimum Sentences[29]

	APPLICANTS		NONAPPLICANTS	
Years	*Percent*	*Number*	*Percent*	*Number*
1	9%	(14)	19%	(42)
2	25	(38)	56	(126)
3	18	(28)	14	(31)
4	8	(12)	4	(9)
5	19	(29)	4	(10)
More than 5	22	(34)	3	(7)
Total	101%	(155)	100%	(225)

The applicants' sentences are remarkably different from those of nonapplicants. Thirty-four percent of the applicants had sentences with minimum terms of two years or less; an overwhelming seventy-six percent of nonapplicants had such sentences. Similarly, thirty-nine percent of the applicants were sentenced to a maximum term of five years or less; eighty percent of the nonapplicants had maximum terms of five years or less.

The range of sentences imposed on applicants and nonapplicants is essentially the same: some offenders in each group had minimum

29. Two of the applicant sentences did not involve incarceration and are excluded from this table. Sentences are rounded up to the nearest year.

Eighty-five percent of the applicants and 77% of the nonapplicants received prison sentences. A prison sentence may be imposed on any convicted felon aged 16 years and older. Connecticut presently has an indeterminate sentencing statute, which provides that every prison sentence has a minimum and maximum term, and that the minimum term can be no more than one-half the maximum term. CONN. GEN. STAT. § 53a-35 (1977). However, prior to September 1, 1971, the effective date of Connecticut's Penal Code, defendants could receive a minimum term which almost equalled the maximum term. Some defendants in the applicant/nonapplicant sample were sentenced under the old statutory sentencing provisions because they had been charged with their crimes before the Penal Code went into effect.

Reformatory commitments may be imposed on a defendant between the ages of 16 and 21 if the court finds the youth amenable to treatment at a reformatory. CONN. GEN. STAT. §§ 18-73 to 76 (1977). Fifteen percent of the applicants and 23% of the nonapplicants received reformatory sentences. Although the court can commit a youth to the reformatory for a definite period of time, virtually all of the reformatory commitments in the sample were for an indefinite period.

In accordance with the Board of Parole's guidelines, reformatory sentences are treated in Table 1 as having minimum terms of nine months for commitments of up to two years, 12 months for commitments of up to three years, 14 months for commitments of up to four years, and 15 months for commitments of up to five years. *See* CONNECTICUT BOARD OF PAROLE, STATEMENT OF ORGANIZATION AND PROCEDURES 5-6 (July 1, 1975) [hereinafter cited as PAROLE BOARD STATEMENT].

TABLE 2

Maximum Sentences[30]

	APPLICANTS		NONAPPLICANTS	
Years	*Percent*	*Number*	*Percent*	*Number*
3 or less	8%	(12)	20%	(44)
4 to 5	32	(49)	61	(136)
6 to 10	41	(64)	16	(38)
More than 10	19	(30)	3	(7)
Total	100%	(155)	100%	(225)

terms of one year and some had minimums of more than five years; some had maximum terms of three years or less and some maximum terms of ten years or more. Where the groups differ is in the concentration of sentences within similar ranges.

Tables 3 and 4 provide a somewhat different perspective on the minimum and maximum terms of applicants and nonapplicants.

TABLE 3

Application Status by Length of Minimum Sentence

	NUMBER OF YEARS						
Status	*1*	*2*	*3*	*4*	*5*	*6 or more*	*overall*
App.	25%	23%	47%	57%	74%	83%	41%
Nonapp.	75%	77%	53%	43%	26%	17%	59%
Total	100%	100%	100%	100%	100%	100%	100%
Number	(56)	(164)	(59)	(21)	(39)	(41)	(380)

TABLE 4

Application Status by Length of Maximum Sentence[31]

	NUMBER OF YEARS				
Status	*3 or less*	*4-5*	*6-10*	*11 or more*	*overall*
App.	21%	26%	63%	81%	41%
Nonapp.	79%	74%	37%	19%	59%
Total	100%	100%	100%	100%	100%
Number	(56)	(185)	(102)	(37)	(380)

30. Two applicant sentences which did not involve incarceration are excluded from this table.

31. Two applicant sentences which did not involve incarceration are excluded from this table.

Tables 3 and 4 show that those in the sample who had had heavier sentences were far more likely than those with lesser sentences to apply for sentence review. Out of the total sample of defendants with minimum sentences of one and two years, the overwhelming majority are nonapplicants; in contrast, the overwhelming majority of those with minimum sentences of five years or more are applicants. Similarly, the majority of those with maximum sentences of from zero to five years are nonapplicants, while the majority of those with maximum sentences of six years or more are applicants.[32]

The data from Tables 1 through 4 suggest three things: (1) There is a substantial disparity between the sentences of applicants and nonapplicants; (2) those who were sentenced more harshly were more likely to apply for sentence review; and (3) a substantial proportion of sentence review applicants had minimum sentences of two years or less (34%) and maximum sentences of five years or less (40%). Stated another way, serious offenders with very heavy sentences are not the sole applicants for sentence review.

B. *Sentence Comparisons for Selected Conviction Offenses and Original Charges*

The overall sentence disparity demonstrated in Tables 1 through 4 means little without some evidence that one is comparing similar types of crimes and criminals. Although a fuller discussion of the comparability of applicants and nonapplicants will follow,[33] it is important to consider initially the evidence of sentence disparity in cases where applicants and nonapplicants have been convicted of the same crime. Table 5 compares the average minimum sentences of applicants and nonapplicants convicted of the same crime.[34] The first

32. The same pattern emerges even if one excludes from consideration the sentences of those offenders who were convicted after trial and whose sentences might be harsher because they did not plead guilty. *See* Tables 1 & 2 in Appendix A *infra*.

33. *See* Part I, Section C *infra*.

34. The offenses selected for sentence comparisons were those for which there was a sufficiently large number of cases to make meaningful comparisons: where fewer than 15 offenders in the entire applicant/nonapplicant sample were convicted of a particular offense, sentence comparisons were not made. Defendants who were convicted of more than one offense were categorized according to the most serious conviction charge against them; defendants who were convicted of two crimes in the same class of felonies were categorized according to the more serious crime. The criterion of whether or not the offender had a prior felony conviction was used to determine the impact of the *severity* of prior criminal record on the application rate. While a more intricate set of controls (no record, misdemeanor record, one felony, many felonies) would have been preferable, the sample was not large enough to permit these gradations.

column presents the overall average for each group and the disparity between them; in the second and third columns the averages for persons having no previous felony record and those having a previous felony record are presented. Table 6 presents the average minimum sentences of applicants and nonapplicants according to the most serious offense with which they were originally charged.[35] It too presents an overall average for each group and the disparity between them, and averages for those with no prior felony record and those with a prior felony record.

Tables 5 and 6 demonstrate that, in all but one of the crime categories,[36] applicants for sentence review were sentenced more severely than nonapplicants, both on the basis of conviction offenses and on the basis of original charges. For five of the seven selected conviction offenses the overall average sentence of applicants was at least one year greater than that of nonapplicants, and in two of the crime categories it was more than two years greater.[37] The disparity between applicants and nonapplicants is even greater when the comparison is based on original charges. In six of the seven original charge categories, applicants for sentence review were sentenced, on the average, more than one year more severely than nonapplicants and in five of the seven categories, more than two years more severely.

---

35. The difference in the conviction offenses and original charges listed in Tables 5 & 6 is due to the fluctuation in the numbers of defendants charged with and convicted of these offenses. For example, Table 6 shows the average minimum sentence for 17 offenders originally charged with murder. Murder is absent from Table 5 because only three offenders were convicted of murder.

36. This category is robbery in the third degree. The number of cases involved is small and the disparity is slight. The applicant average is lower here because all five applicant sentences were reformatory commitments for up to five years, having minimum terms of one and one-quarter years. *See* note 29 *supra*. Some of the nonapplicants had similar reformatory sentences, but about half had prison sentences with minimum terms ranging from one and one-half to three years.

37. A disadvantage of the use of averages for comparative purposes is that one cannot tell from the averages whether there are a few very heavy sentences in one group, but not in another, which created the disparity in averages, or whether, on the whole, most offenders in each group had sentences close to the group average. However, with one exception, the disparity between the groups shown in Table 5 was not due to a few very heavy sentences. The exception is the burglary category. In Tables 5 & 6 burglary third was heavily weighted by one 10-to-20-year prison term; none of the other burglary sentences for applicants had a minimum higher than three years. In contrast, disparity in average minimum and maximum terms for the other listed crimes was due primarily to a wide gap between many sentences in each group and not just to the weight of one or two sentences.

TABLE 5

Average Minimum Sentence in Years by Conviction Offense, Application Status, and Prior Felony Convictions[38]

Conviction Charge	Status/ Disparity			Prior Felony Convictions: No		Yes	
		Avg.	Number	Avg.	Number	Avg.	Number
Sale Narcotics	App.	3.6	(31)	2.9	(14)	3.8	(16)
	Nonapp.	2.0	(62)	1.8	(18)	2.1	(40)
	Disp.	1.6		1.1		1.7	
Possession Narcotics	App.	2.9	(7)	2.1	(4)	4.0	(3)
	Nonapp.	1.5	(17)	1.4	(4)	1.6	(12)
	Disp.	1.4		0.7		2.4	
Robbery 1st	App.	5.6	(23)	5.0	(14)	6.6	(9)
	Nonapp.	3.2	(19)	3.1	(3)	3.2	(16)
	Disp.	2.4		1.9		3.4	
Robbery 2nd	App.	3.0	(14)	1.9	(7)	4.1	(7)
	Nonapp.	2.1	(17)	1.6	(7)	2.7	(8)
	Disp.	0.9		0.3		1.4	
Robbery 3rd	App.	1.3	(5)	1.3	(2)	1.3	(3)
	Nonapp.	1.6	(21)	1.5	(10)	1.7	(11)
	Disp.	−0.3		−0.2		−0.4	
Burglary 3rd	App.	2.7	(9)	1.2	(3)	3.5	(6)
	Nonapp.	1.6	(15)	0.9	(4)	1.6	(10)
	Disp.	1.1		0.3		1.9	
Manslaughter 1st	App.	8.2	(10)	6.2	(5)	3.3	(5)
	Nonapp.	3.8	(14)	3.9	(8)	3.3	(5)
	Disp.	4.4		2.3		6.7	

These sentence disparities do not disappear when one compares applicants and nonapplicants on the basis of prior criminal history. In five of seven original charge categories, applicants with no prior

38. In several instances, the number of cases for those with no prior felonies and those with prior felonies does not add up to the total number of cases for the overall average. This is because in several cases the author could not discover whether the defendant had a felony record. The negative signs in the robbery third disparity category indicate that applicants convicted of this offense were sentenced more leniently than were nonapplicants. Although six applicants were convicted of robbery third, only five are shown in Table 5 because one received a sentence which involved no incarceration. The sentence averages for *maximum* terms according to conviction offense are shown in Table 3 of Appendix A *infra*.

TABLE 6

Average Minimum Sentence in Years by Original Charge, Application Status, and Prior Felony Convictions[39]

Original Charge	Status/ Disparity			Prior Felony Convictions: No Avg.	No Number	Yes Avg.	Yes Number
Sale	App.	3.5	(36)	2.6	(18)	4.2	(17)
Narcotics	Nonapp.	1.9	(75)	1.8	(20)	2.0	(50)
	Disp.	1.6		0.8		2.2	
Robbery	App.	4.4	(40)	3.9	(22)	5.0	(18)
1st	Nonapp.	2.1	(55)	1.8	(19)	2.4	(33)
	Disp.	2.3		2.1		2.6	
Assault	App.	3.9	(8)	4.1	(7)	2.5	(1)
1st	Nonapp.	1.8	(13)	1.9	(6)	1.8	(6)
	Disp.	2.1		2.2		0.7	
Burglary	App.	4.2	(7)	3.8	(4)	4.8	(3)
1st & 2nd	Nonapp.	1.9	(13)	1.7	(6)	2.1	(7)
	Disp.	2.3		2.1		2.7	
Burglary	App.	2.6	(9)	1.3	(4)	3.6	(5)
3rd	Nonapp.	1.8	(8)	1.0	(1)	2.0	(7)
	Disp.	0.8		0.3		1.6	
Murder	App.	15.6	(8)	13.0	(3)	17.0	(5)
	Nonapp.	4.5	(9)	5.1	(4)	4.1	(5)
	Disp.	9.1		7.9		12.9	
Manslaughter	App.	5.6	(6)	5.8	(4)	5.3	(2)
1st	Nonapp.	2.9	(8)	2.7	(6)	1.3	(1)
	Disp.	2.7		3.1		4.0	

felony record were sentenced an average of more than one year more severely than nonapplicants. Similarly, in six of the seven original charge and conviction offense categories, applicants with a prior felony record were sentenced more harshly than nonapplicants by an

39. As in Table 5, the number of cases for those with no prior felonies and those with prior felonies does not always add up to the total number of cases for the overall average. *See* note 36 *supra*. Defendants with life sentences for murder are treated as having 25-year minimum terms because that is the number of years the Parole Board considers to be the minimum for life sentences. *See* PAROLE BOARD STATEMENT, *supra* note 29, at 26. The sentence averages for maximum terms by original charge are shown in Table 4 of Appendix A *infra*.

average of one year or more.[40] The average disparity for those with a prior felony record was two years or more in three of the seven conviction offense categories and five of the seven original charge categories.

C. *Factors Which Might Explain Disparities Between Applicants' and Nonapplicants' Sentences*

Tables 1 through 6 clearly demonstrate that SRD applicants had been sentenced more severely than nonapplicants even when the type of crime and criminal record are considered. While sentence differences such as these are, in a literal sense disparities, the specific term "disparity" is ordinarily reserved to describe unjustifiable or arbitrary differences in sentences.[41] Thus, it is necessary to consider whether there are any objective grounds on which the different sentences of applicants and nonapplicants can be justified. Several factors might possibly explain the sentence differences between applicants and nonapplicants: (1) Personal background characteristics; (2) prior criminal history; (3) seriousness of original charges and conviction offenses; (4) type of plea; (5) sentencing patterns of particular judges; (6) nature of legal counsel (public defender or private attorney); and (7) the system of plea bargaining.

1. *Offenders' Personal Background Characteristics*

Table 7 compares the most salient characteristics of applicants' and nonapplicants' personal backgrounds. Certain characteristics of potential relevance to the sentencing process—such as the defendants' demeanor—have been omitted because they are not susceptible to measurement, and thus the tables must be qualified by these omissions. However, in general, these tables demonstrate that applicants had similar or more favorable personal background characteristics than did nonapplicants. Consequently, it is difficult to assert that these factors could account for the differences in their sentences.

---

40. Applicants with no prior felony convictions were sentenced to at least twice the minimum terms of nonapplicants when average sentences are computed by original charge for five of the seven offenses shown in Table 6. Applicants who had been convicted of felonies on prior occasions were sentenced to twice the minimum sentences of nonapplicants for five of the seven offenses in Table 6.

41. *See, e.g.*, Harris, *Disquisition on the Need for a New Model for Criminal Sanctioning Systems*, 77 W. VA. L. REV. 287, 288 (1975): "It is generally granted that for disparity to exist differences in sentences must be unwarranted or improper." *See also* Second Circuit Judicial Conference, *Appellate Review of Sentences*, 32 F.R.D. 249, 264 (1962) (remarks of Sobeloff, J.).

TABLE 7[42]

Personal Background Characteristics

Background Characteristics	*Applicants*		*Nonapplicants*	
Age				
16-20	26%		28%	
21-25	33		31	
26-30	20		19	
31-40	15		13	
41 or older	7		9	
Total	101%	(157)*	100%	(224)
Racial/Ethnic Group				
White	34%		28%	
Black	56		58	
Hispanic	10		13	
Other	–		0.4%	
Total	100%	(154)	99.4%	(216)
Sex				
Male	96%		94%	
Female	4		6	
Total	100%	(157)	100%	(225)
Marital Status				
Single	45%		58%	
Married	30		18	
Common Law	6		3	
Sep./Divorced	16		20	
Widowed	3		1	
Total	100%	(155)	100%	(214)

cont'd.

* Numbers in parentheses indicate number of applicants or nonapplicants about whom such information was available.

42. The variations in the number of cases in the categories of Table 7 are due to the unavailability of such information in the SRD files or in presentence reports. Under the occupation category, the "unemployed" subcategory was for persons who were not just temporarily unemployed, but who appeared in the presentence report to have no real occupation. The "other" subcategory was used for those who had been students, retired, or disabled. Employment stability was defined as follows: Very stable: one year or more at the same job; somewhat stable: six months to one year at one job in the past year; somewhat unstable: less than six months at one job in the last year; very unstable: some record of employment in the past year for short periods of time; no recent employment: no employment in the past year. A defendant was defined as having a drug problem if, according to the presentence report, he or she (1) Was addicted to a narcotic substance; or (2) using a drug at the time of the offense; or (3) used illicit drugs on a regular basis. A defendant was defined as having an alcohol problem if he or she was drunk at the time of the offense or was reported in the presentence report to be an alcoholic or a heavy user of alcohol.

TABLE 7 (*cont'd*)

Personal Background Characteristics

Background Characteristics	*Applicants*		*Nonapplicants*	
Educational Level				
Dropout	65%		79%	
H.S. Dipl./GED	20		17	
College	12		3	
In School	3		1	
Total	100%	(155)	100%	(215)
Occupation				
Professional	5%		2%	
Skilled	5		4	
Semi-skilled	23		17	
Unskilled	31		36	
Unemployed	30		41	
Other	6		1	
Total	100%	(154)	101%	(214)
Employment History				
Very Stable	26%		14%	
Somewhat Stable	6		6	
Somewhat Unstable	11		9	
Very Unstable	28		27	
No Record	28		43	
Total	99%	(141)	99%	(208)
Drug/Alcohol Problems				
Drug	57%		64%	
Alcohol	18		12	
Both	2		–	
Neither	23		24	
Total	100%	(136)	100%	(210)

Almost no differences are apparent between applicants and nonapplicants in terms of age, race, sex, and drug or alcohol problems. To the extent that the groups differ in terms of marital status, educational levels, occupations, and employment histories, the differences appear to favor rather than disfavor the applicants. Applicants as a group were somewhat better-educated, had been employed somewhat more often and in more skilled jobs, and had somewhat more stable employment histories than nonapplicants. Thus, it ap-

TABLE 8[43]

Prior Criminal History

Criminal History	*Applicants*		*Nonapplicants*	
Prior Adult Convictions				
0	24%		13%	
1-3	33		36	
4-6	19		23	
7-9	10		10	
10 or more	14		19	
Total	100%	(156)	101%	(214)
Prior Felony Conv.				
0	56%		36%	
1	15		22	
2-3	18		24	
4 or more	12		17	
Total	101%	(156)	99%	(214)
Prior Conv. for Same Offense				
0	79%		73%	
1	12		14	
2	6		7	
3 or more	3		6	
Total	100%	(156)	100%	(214)
Prior Incarceration				
None	49%		48%	
Less than 1 yr.	28		23	
1-5 yr.	19		26	
More than 5 yr.	4		3	
Total	100%	(156)	100%	(213)

pears that the substantially more severe sentences of applicants cannot be explained on the basis of less favorable personal background characteristics.

2. *Offenders' Prior Criminal Histories*

Table 8 compares the prior criminal histories of the applicants and nonapplicants. Because Table 8 indicates that applicants generally

43. The number of prior convictions in Table 8 reflects the number of individual convictions rather than the number of occasions on which the defendant had been convicted.

had less serious prior criminal histories than nonapplicants, it is unlikely that differences in prior criminal history can explain the harsher sentences received by applicants.

Applicants and nonapplicants were very similar in terms of the proportions of those with prior convictions and those with prior incarceration for the same offense. Where there were differences between applicants and nonapplicants, these differences again favored the applicants. Applicants had fewer prior adult convictions and fewer prior felony convictions than nonapplicants.[44] Thus, the data suggest that the sentence disparity between applicants and nonapplicants cannot be traced to differences in prior criminal record.

3. *Original Charges and Conviction Offenses*

Another factor which might explain the sentence disparity between applicants and nonapplicants is the comparative seriousness of their original charges and conviction offenses. If the applicants had been either originally charged with or ultimately convicted of more serious crimes than the nonapplicants, such a difference might justify the eventual sentence disparity between applicants and nonapplicants. Tables 9 and 10 present such a comparison.

Tables 9 and 10 demonstrate that applicants were neither originally charged with nor ultimately convicted of more serious crimes than nonapplicants.[45] Although the numbers in some offense categories such as homicides and sex offenses are quite small, in general similar proportions of applicants and nonapplicants were originally charged with and convicted of the specified crimes. The one exception to this pattern occurs in the category of drug offenses, where the difference between applicants and nonapplicants again favors the applicants.[46]

---

44. Applicants had also been on probation or parole at the time of the offense with less frequency than nonapplicants: 28% of applicants had been on probation or parole at the time of the offense as compared to 40% of nonapplicants.

45. Applicants and nonapplicants were also comparable in terms of the number of counts with which they were originally charged and of which they were ultimately convicted. *See* Appendix A, Tables 5 & 6 *infra*.

46. The somewhat lower concentration of drug offenders in the applicant group indicates that drug offenders with prison sentences were somewhat less likely than other offenders to apply for sentence review. Both defense lawyers and state's attorneys reported that because of the large number of drug cases in 1972 and because of the general similarity of the underlying facts in drug cases, sentence recommendations by state's attorneys and sentences imposed by judges have become somewhat more stan-

TABLE 9

Original Charges[47]

	Applicants		*Nonapplicants*		*Total*
	Percent	*Number*	*Percent*	*Number*	*Number*
Drug Offenses	26%	(41)	35%	(79)	(120)
Sale					
Narcotics	23	(36)	33	(75)	(111)
Possession					
Narcotics	1	(2)	1	(3)	(5)
Other	2	(3)	1	(1)	(4)
Robbery	29%	(45)	27%	(61)	(106)
1st	26	(41)	24	(55)	(96)
2nd	3	(4)	3	(6)	(10)
3rd	–	–	–	–	–
Burglary	10%	(16)	9%	(21)	(37)
1st	2	(3)	2	(4)	(7)
2nd	3	(4)	4	(9)	(13)
3rd	6	(9)	4	(8)	(17)
Homicide	9%	(14)	7%	(17)	(31)
Murder	5	(8)	4	(9)	(17)
Manslaughter 1st	4	(6)	4	(8)	(14)
Manslaughter 2nd	–	–	–	–	–
Sex Offenses	10%	(16)	7%	(15)	(31)
Rape	4	(6)	2	(4)	(10)
Other	6	(10)	5	(11)	(21)
Assaults	5%	(8)	6%	(13)	(21)
1st	5	(8)	6	(13)	(21)
2nd	–	–	–	–	–
3rd	–	–	–	–	–
Larcenies	4%	(6)	3%	(6)	(12)
Other Crimes	7%	(11)	6%	(13)	(24)
Total Crimes	100%	(157)	100%	(225)	(382)

dardized for drug offenses than for other offenses. This more standardized sentencing pattern was suggested by these lawyers as the reason for the lower proportion of drug offenders who applied for review.

47. The data on offenses in Tables 9 & 10 represent the most serious crime with which each defendant was originally charged or of which the defendant was convicted. Seriousness was measured first by class of felony: *i.e.*, if an offender committed two crimes, one a Class B and one a Class D felony, the defendent was categorized as a Class B felon. If offenders were convicted of two crimes of the same class—for example,

TABLE 10

Conviction Offenses

	Applicants		*Nonapplicants*		*Total*
	Percent	*Number*	*Percent*	*Number*	*Number*
Drug Offenses	26%	(41)	36%	(81)	(122)
Sale					
Narcotics	20	(31)	28	(62)	(93)
Possession					
Narcotics	4	(7)	8	(17)	(24)
Other	2	(3)	1	(2)	(5)
Robbery	27%	(43)	25%	(57)	(100)
1st	15	(23)	8	(19)	(42)
2nd	9	(14)	8	(17)	(31)
3rd	4	(6)	9	(21)	(27)
Burglary	10%	(16)	10%	(22)	(38)
1st	2	(3)	–	(1)	(4)
2nd	3	(4)	3	(6)	(10)
3rd	6	(9)	7	(15)	(24)
Homicide	10%	(15)	7%	(16)	(31)
Murder	2	(3)	–	–	(3)
Manslaughter 1st	6	(10)	6	(14)	(24)
Manslaughter 2nd	1	(2)	1	(2)	(4)
Sex Offenses	10%	(15)	7%	(15)	(30)
Rape	2	(3)	1	(3)	(6)
Other	8	(12)	6	(12)	(24)
Assaults	5%	(8)	6%	(14)	(22)
1st	3	(5)	2	(4)	(9)
2nd	2	(3)	4	(10)	(13)
3rd	–	–	–	–	–
Larcenies	6%	(9)	3%	(6)	(15)
Other Crimes	6%	(10)	6%	(14)	(24)
Total Crimes	100%	(157)	100%	(225)	(382)

manslaughter first and robbery first—the defendant was categorized under the more serious of these two offenses.

The year 1972 was a year of transition from the old penal provisions of CONN. GEN. STAT., Title 53 (1958) to the new Penal Code, CONN. GEN. STAT., Title 53a (1972). Some of the offenders convicted and sentenced in 1972 had been charged prior to September 1, 1971, the effective date of the Penal Code. For those offenders, the nearest equivalent Penal Code offense was used to determine the seriousness of their original charges and conviction offenses.

4. *Other Factors: Not-Guilty Pleas, Sentencing Judges, and Type of Counsel*

Tables 7 through 10 demonstrate that the sentence disparity between SRD applicants and nonapplicants cannot be justified on the basis of inherent personal characteristics or the type of crime committed. On the contrary, applicants and nonapplicants had remarkably similar personal background characteristics and criminal histories, and had been charged with and convicted of crimes of comparable seriousness. Indeed, where there were differences between the two groups, these differences appeared to favor the applicants over the nonapplicants. Thus, it became necessary to look beyond the applicants and nonapplicants themselves and into the functioning of the criminal justice system in Connecticut in order to uncover factors which might explain the sentence disparity between applicants and nonapplicants.

Three factors were selected as possibly explaining the sentence disparity: (1) The effect of not-guilty pleas; (2) the sentencing patterns of the judiciary; (3) the type of counsel assisting the defendant. If a very large proportion of applicants had pleaded not guilty and had gone to trial, the heavier sentences of applicants might be explained as a penalty for having pleaded not guilty. Had the majority of applicants been sentenced by a few judges known for their harshness, one might attribute the sentence disparity to these judges. Or if those who applied for sentence review had been represented by private attorneys and those who did not apply by public defenders, one might hypothesize that private attorneys were more zealous in representing their clients after sentencing and/or less skillful in obtaining favorable sentences. In fact, none of these factors explains the sentence disparities between the groups.

a. Not-Guilty Pleas

Defense attorneys in Connecticut commonly believe that a defendant who is found guilty after trial will be sentenced more severely than if he had pleaded guilty.† The statistics from the applicant/nonapplicant sample would appear to confirm this view: while only two percent of the nonapplicants had pleaded not guilty, twenty-one percent of the applicants had pleaded not guilty.[48] Put

† Throughout the text and footnotes, this symbol (†) is used to designate those instances in which the authority for a given proposition is a personal interview the author conducted.

48. That is, five of the 225 nonapplicants and 33 of the 157 applicants. In fiscal year

another way, eighty-seven percent of the defendants who pleaded not guilty eventually became SRD applicants.[49]

However, there are two reasons why, despite the disproportionate number of applicants who pleaded not guilty, this factor does not explain the substantial disparities in sentences between the groups. One is that those who pleaded not guilty constitute only ten percent of the sample. The other is that removing the sentences of those convicted after trial from the computation of sentence averages does not eliminate the disparity. While the disparity in sentences was diminished somewhat for drug offenders, it was virtually unchanged in three offense categories and actually increased in two offense categories.[50] Thus, the penalty for going to trial experienced by a few applicants is not the factor which explains the substantial sentence disparity experienced by the entire applicant group.

b. Sentencing Judges

During a given year, almost all superior court judges will serve at least one judicial term on the criminal side of the court, and hence impose some sentences on criminal offenders. However the bulk of sentences each year is imposed by a relatively small number of judges, the presiding judges of the three major county courts at Hartford, New Haven, and Bridgeport. A primary responsibility of the presiding judge is to sentence offenders who have pleaded guilty.[51] Table 11 shows the number of sentences imposed by individual judges on applicant and nonapplicant offenders and the percentage by sentencing judge of defendants in the sample who subsequently applied for sentence review. One can distinguish presiding judges from

1972, three percent of the criminal convictions in superior courts were obtained after trial. *See* 23RD REPORT, *supra* note 13, at 41.

49. Three factors probably account for a higher rate of applications for review from offenders who pleaded not guilty: (1) A sense of penalty for having gone to trial, (2) knowledge of a plea bargain offer prior to trial, and (3) the possibly more litigious nature of those who contested their guilt.

50. *See* Table 7 in Appendix A, *infra*, for a recalculation of these sentence averages for those who pleaded guilty only. The disparity in average sentences was reduced from 1.6 years to 1.0 years by removal of not-guilty-plea cases for sale of narcotics, and from 1.4 years to 0.6 years for possession of narcotics. The disparity remained unchanged for robbery second, robbery third, and burglary third. The overall disparity increased in the robbery 1st category by 0.2 years, although it rose by 1.1 years considering the averages for those with prior felony records. The disparity in manslaughter cases increased from 4.4 to 5.5 years when those who pleaded not guilty were excluded from the averaging.

51. The presiding judge may delegate this task to fellow judges, either on a regular or occasional basis. Usually the most senior of the judges assigned to the criminal side of the court will be designated the presiding judge for the county.

other judges in Table 11 by the greater number of sentences they imposed.[52]

TABLE 11

Number of Sentences Imposed by Individual Judges and Percent Appealed to SRD

Judge	*Total Sample Cases Sentenced*	*Percent SRD Applications*
A	52	40%
B	40	35
C	39	54
D	37	51
E	36	28
F	26	35
G	26	38
H	15	33
I	13	23
J	12	83
K	11	45
L	9	33
M	9	33
N	8	38
O	7	57
P	7	14
Q	6	83
R	5	20
S	5	20
Others	19	47
Overall	382	41%

Five of these judges—C, D, J, O, and Q—accounted for a disproportionate number of sentences appealed to SRD. All of these judges have reputations as harsher-than-average sentencers.[53] However, considering both the number of judges who sentenced defendants in the sample and the fact that at least a few sentences of each judge listed were appealed to SRD, it appears that the substantial sentence

52. The presiding judges for the New Haven, Hartford, and Fairfield County Superior Courts during the three judicial terms of 1972 were: Judges A (twice), B, C, D, E, F, and G.

53. Knowledge of the reputations of these judges was obtained from interviews with defense lawyers. One defense attorney said he would expend considerable effort to avoid having his clients sentenced by two of these judges.

disparity between applicants as a group and nonapplicants as a group cannot be attributed to the arbitrary decisions of a few harsh sentencers.

c. Type of Counsel

No offender in the applicant/nonapplicant sample was without counsel when sentenced. For most offenders appearing in the superior court having a lawyer meant having a public defender. In the applicant/nonapplicant sample fifty-four percent of defendants were represented by public defenders, a figure closely resembling the statewide percentage of public defender representation.[54] While the proportion of defendants represented by public defenders was relatively similar in both the applicant and nonapplicant groups, the proportion of defendants with private attorneys was somewhat larger in the applicant group. This indicates that offenders with private attorneys were more likely to apply for review. The only data available to determine why more offenders with private attorneys apply for sentence review are impressions derived from interviews which suggest that private attorneys: (1) Sometimes actively encourage application and rarely actively discourage it; (2) have an interest in possible further fees; and (3) often feel obligated to follow through with the case. Defendants represented by public defenders apply for review relatively frequently, sometimes because the defender encourages it and sometimes because the defendant is dissatisfied with his sentence and/or the services of his public defender. However, public defenders reported that they would sometimes discourage the defendant from sentence review either because of the futility of the process or because of the possibility of sentence increase.[55] Caseload is a problem for public defenders.[56] Because sentence review is a further drain on a public defender's time, he may be unlikely to encourage sentence review when chances for modification are slim.

---

54. Fifty-two percent of the defendants in the state who came before superior courts during fiscal year 1972 were represented by public defenders. *See* 23RD REPORT, *supra* note 13, at 41.

55. None of the private attorneys interviewed reported discouraging sentence appeals.

56. Public defender caseloads were quite heavy in 1972. In fiscal year 1972, six full-time and 11 part-time public defenders handled a total of 2,420 cases in superior courts in the state.

TABLE 12

Representation at Sentencing

Group	Private Attorney	Public Defender	LAA Attorney*	Special P.D.	Total	
App.	41%	52%	4%	3%	100%	(157)
Nonapp.	30%	56%	10%	4%	100%	(225)

* New Haven only.

The small size of differences in percentages of applicants' and nonapplicants' type of counsel and the data from interviews suggest that the substantial sentence disparity between applicants and nonapplicants cannot be traced to a failure of the criminal justice system to provide adequate counsel for applicants. On the contrary, if it is true that defendants originally represented by public defenders were less likely to apply for review because public defenders were more adept at initially securing advantageous sentences, then this resource was equally available to those applicants and nonapplicants unable to secure private counsel. If the choice of attorney ultimately resulted in the imposition of a harsher sentence, then the responsibility for that choice of attorney lies with the applicants themselves and not with the criminal justice system in Connecticut.

D. *Plea Bargaining as a Potential Source of Sentence Disparity*

Thus far, the attempt to explain the substantial sentence disparity between applicants and nonapplicants on the basis of factors such as the offenders' personal backgrounds, the crimes they committed, the types of pleas they entered, and the type of counsel representing them has proved inconclusive. However, a crucial aspect of the state's criminal justice system which may be a significant factor in producing the sentence disparity between applicants and nonapplicants has not yet been considered. This is the practice of plea bargaining.

Plea bargaining is the preferred mode of disposing of criminal cases in the superior courts of Connecticut. Convictions by guilty pleas represent ninety-seven percent of all superior court convictions,[57] and in virtually every such case, the plea of guilty was

57. This was true in both fiscal years 1972 and 1973. *See* 23RD REPORT, *supra* note 13, at 41; 24TH REPORT, *supra* note 9, at 42-46.

entered by the defendant after an understanding had been reached between the state's attorney and the defense lawyer.† The great majority of defendants in the applicant/nonapplicant sample pleaded guilty: seventy-nine percent of the applicants and ninety-eight percent of the nonapplicants. Thus it is reasonable to conclude that plea bargaining was an important factor in the sentences ultimately received by applicants and nonapplicants.

Before proceeding with a discussion of the plea bargains made by applicants and nonapplicants, the interrelationship between plea bargaining and sentence disparity must be considered. A prosecutor in Connecticut can have an impact on the type and length of sentence a defendant may receive in two major respects: (1) In the number and type of charge concessions he is willing to grant, and (2) in the sentence recommendation he makes to the sentencing judge. The charge concessions a prosecutor may grant are of two types: (1) A reduction of a charge to a lower level felony or misdemeanor, or (2) a nolle or dismissal of other pending charges. One direct consequence of obtaining a charge concession is that it reduces the maximum penalty exposure a defendant faces at sentencing. For example, a charge reduction of burglary in the first degree to burglary in the third degree, reduces the maximum penalty exposure a defendant faces at sentencing from twenty years to five years.[58] A decision to nolle other pending charges also reduces penalty exposure. A defendant originally charged with four counts of burglary in the third degree can reduce his maximum penalty exposure from twenty to five years by pleading guilty to one count of burglary third.[59] Reduction of maximum penalty exposure also affects the minimum term which may be imposed on a defendant. For example, a reduction in maximum penalty exposure from twenty to five years means a corresponding drop in the possible length of minimum term from ten years to two and one-half years.[60]

A prosecutor may also affect the sentence a defendant will receive through the power to recommend a sentence to the court. Negotiations between the prosecutor and the defense lawyer often focus on what sentence the prosecutor will recommend at sentencing. If not satisfied with the prosecutor's proposed sentence recommendation, the defense lawyer may withdraw from plea negotiations and

58. CONN. GEN. STAT. §§ 53a-35, 53a-101, 53a-103 (1977).
59. *Id.*
60. CONN. GEN. STAT. § 53a-35 (1977).

continue to contest the case until the prosecutor is willing to make a more lenient recommendation. The prosecutor's sentence recommendation is usually accorded great weight by the sentencing judge, particularly when the prosecutor or defense lawyer makes it known that this recommendation is an "agreed recommendation," that is, both defense and prosecution agree that it is the appropriate sentence for the case.[61]

Unfortunately, information on the sentence recommendation agreements made by states' attorneys in cases of those who did not apply for sentence review was inaccessible to this study.[62] Even in the absence of such data, one can easily see that the ad hoc practice of plea bargaining is a potential cause of sentence disparity. Assume that two defendants, A and B, are arrested and initially charged with the same offense. However, in the process of plea bargaining, A negotiates an agreed sentence recommendation whereby he will be permitted to plead guilty to an offense carrying a lesser penalty. B is unable to negotiate such a bargain and must plead guilty to the originally charged offense. A's ability to negotiate a plea to a lesser offense may have no relation to his personal background characteristics, his prior criminal record, or the severity of the offense committed; the prosecutor may be willing to make a lenient sentencing recommendation because of the persistence of A's counsel or because the case involves an illegal search and seizure. When both A and B emerge from the sentencing process, it is extremely likely that B will have received a substantially longer sentence than A. However, because both A and B were originally charged with the same offense, B can rightfully complain that he has been the victim of sentence disparity. Because of the pervasiveness of plea bargaining and because applicants as a group received substantially more severe sentences than nonapplicants, it is extremely likely that many applicants could trace their sentence disparity to the process of plea bargaining.

Although complete information was not available on the sentence recommendation agreements made by states' attorneys, information

61. For a more complete discussion of agreed recommendations, *see* notes 120-30 *infra* and accompanying text.

62. Information on the state's attorney's sentence recommendation and the type of agreement made is contained in the court stenographer's minutes concerning the sentencing hearing and is not publicly available. Information on sentence recommendations agreements of applicants was available because the SRD file contained comments from the sentencing hearing transcript.

was available on the charge concessions obtained by applicants and nonapplicants. These data confirm the hypothetical arguments advanced above concerning plea bargaining's potential as a source of sentence disparity.

Over seventy-five percent of the defendants in the applicant/nonapplicant sample who pleaded guilty had obtained charge concessions of some kind. Table 13 indicates the kinds of charge concessions granted to those who pleaded guilty.

Those who applied for sentence review were about equally as successful as the nonapplicants in obtaining charge reductions. However, there is some evidence that nonapplicants were more successful in obtaining more substantial charge reductions. For example, of the thirty-one nonapplicants who had originally been charged with robbery first and who pleaded guilty to reduced robbery charges, fifty-two percent (sixteen of thirty-one) pleaded guilty to robbery second and forty-eight percent to robbery third. Of the sixteen applicants who had robbery first charges reduced to other robbery charges, eighty-one percent (thirteen of sixteen) pleaded to robbery second and only three pleaded to robbery third.[63] Nonapplicants were also more successful in obtaining charge nolles: forty-four percent of the nonapplicants received such charge nolles as compared with only thirty-five percent of the applicants.[64]

It must be recognized that these data do not conclusively demonstrate that plea bargaining is the crucial factor in the substantial sentence disparity between applicants and nonapplicants. However, part of this inconclusiveness can be traced to the very inaccessibility of data on agreed sentence recommendations. When viewed in conjunction with an abstract analysis of the plea bargaining system, the data that are available suggest that plea bargaining is a potential cause of sentence disparity between applicants and nonapplicants.

---

63. *See* Part II, Section E *infra* for a detailed discussion of these robbery cases.

64. Compare Tables 5 and 6 in Appendix A. Nonapplicants originally charged with four or more counts were more successful than comparable applicants in avoiding being convicted of one or more counts. Thirty percent of applicants were originally charged with four or more counts; 15% of applicants were convicted of four or more counts. Thirty-two percent of nonapplicants were originally charged on four or more counts; eight percent were convicted on four or more counts. The percentage of applicants avoiding conviction on four or more counts was, therefore, 15% of the applicant pool; and the percentage of nonapplicants avoiding conviction on four or more counts was 24%.

TABLE 13

Charge Concessions to Defendants Pleading Guilty

Group	Reduced	Nolled	Reduced & Nolled	Plea to Orig. Charges	Other
App.	25%	35%	9%	28%	3%
Nonapp.	25%	44%	12%	20%	–

E. *The Problem in Microcosm: Sentence Disparity Among Robbery Offenders*

The most compelling evidence that applicants for sentence review were sentenced substantially more harshly than nonapplicants emerges by closely examining offenders who committed one type of offense. Selected for this analysis were the eighty-nine offenders who were originally charged with robbery in the first degree and who eventually were convicted of some degree of robbery.[65] These eighty-nine cases were selected for a closer study of sentence disparity because: (1) They comprise a large percentage of the applicant/nonapplicant sample (twenty-three percent); and (2) the fact situations underlying the charge of robbery in the first degree are very similar,

65. Robbery in the first degree is defined in Connecticut's Penal Code, CONN. GEN. STAT. § 53a-134 (1977) as follows:

> (a) A person is guilty of robbery in the first degree when, in the course of the commission of the crime or of immediate flight therefrom, he or another participant in the crime: (1) Causes serious physical injury to any person who is not a participant in the crime; or (2) is armed with a deadly weapon; or (3) uses or threatens the use of a dangerous instrument; or (4) displays or threatens the use of what he represents by his words or conduct to be a pistol, revolver, rifle, shotgun, machine gun or other firearm; except that in any prosecution under this subdivision, it is an affirmative defense that such pistol, revolver, rifle, shotgun, machine gun or other firearm was not a weapon from which a shot could be discharged. Nothing contained in this subdivision shall constitute a defense to a prosecution for, or preclude a conviction of, robbery in the second degree, robbery in the third degree or any other crime.
>
> (b) Robbery in the first degree is a class B felony.

Before the Penal Code took effect the comparable offense was robbery with violence, CONN. GEN. STAT. § 53-14 (1958 rev.). Robbery first carries a maximum penalty of 20 years. CONN. GEN. STAT. § 53a-35 (1977); robbery with violence carries a maximum penalty of 25 years. CONN. GEN. STAT. § 53-14 (1958 rev.). Thirteen of the applicant robbers in this sample and 14 of the nonapplicant robbers in the sample were charged under § 53-14.

typically involving an armed robbery in which no one is hurt and no more than several hundred dollars in value is taken.

Table 14 demonstrates that the average sentence of applicants originally charged with robbery first was substantially heavier than the average sentence for comparable nonapplicants. The first set of averages includes prison sentences only; the second set includes both prison and reformatory sentences.[66]

TABLE 14[67]

Average Minimum and Maximum Terms of Those Originally Charged with First Degree Robbery

	MINIMUM		MAXIMUM	
Group	*Prison Only*	*Prison & Reform.*	*Prison Only*	*Prison & Reform.*
App.	4.9 yrs.	4.5 yrs.	9.9 yrs.	9.4 yrs.
Nonapp.	3.2 yrs.	2.4 yrs.	7.2 yrs.	6.2 yrs.
Disp.	1.7 yrs.	2.1 yrs.	2.7 yrs.	3.2 yrs.

The average prison sentence of applicants convicted of first degree robbery was five to ten years in prison, while the average sentence of nonapplicants was three to seven years. Thus, there was a disparity of almost two years in minimum term and almost three years in maximum term. Including both prison and reformatory sentences in the averaging process, the disparity remained constant. The average sentence of applicants was approximately four and one-half years to nine and one-half years, while the average sentence of nonapplicants was approximately two and one-half years to six years. This represented a sentence disparity of more than two years in minimum sentence and more than three years in maximum sentence.

66. The reason for averaging separately first prison sentences and then prison and reformatory sentences was the uneven distribution of reformatory sentences between the groups. Four of the applicants and 22 of the nonapplicants were sentenced to the reformatory. Since a reformatory commitment of up to five years has a minimum of 15 months, not separating the two averages would have suggested that the disparity was due only to reformatory sentences. The averages in Table 14 show that this is not so.

67. These averages are only for the 89 defendants who were originally charged with robbery first and who were eventually convicted of some degree of robbery. The "prison only" column represents the average for 34 applicants and the average for 28 nonapplicants. One sentence of nonconfinement for one applicant is omitted from the averages.

Even after controlling for prior criminal record and counting only those who pleaded guilty, the disparity did not decline. Table 15 shows that the minimum sentences of applicants who pleaded guilty were about two years more severe than those of nonapplicants who pleaded guilty, even when those with no prior felony convictions were separated from those with prior felony convictions.

TABLE 15[68]

Average Minimum Sentences of Those Originally Charged With Robbery First Who Pleaded Guilty, According to Presence or Absence of Prior Felony Conviction

	NO PRIOR FELONY CONVICTION		PRIOR FELONY CONVICTION	
Group	*Prison Only*	*Prison & Reform.*	*Prison Only*	*Prison & Reform.*
App.	4.5 yrs.	3.9 yrs.	5.4 yrs.	5.1 yrs.
Nonapp.	2.7 yrs.	1.8 yrs.	3.3 yrs.	2.6 yrs.
Disp.	1.8 yrs.	2.1 yrs.	2.1 yrs.	2.5 yrs.

Looking only at prison sentences, the average minimum sentence for applicants with no prior felony conviction was sixty-seven percent more severe than the average for nonapplicants, and for applicants with prior felony convictions, the average minimum sentence was sixty-four percent more severe than for nonapplicants. Including both prison and reformatory sentences, the average minimum sentence for applicants was twice that of nonapplicants, regardless of whether or not they had prior felony convictions.

One factor which might explain a disparity of this magnitude is the comparative severity of the robberies committed by the defendants in each group. However the evidence presented below suggests that robberies committed by the applicants were typical robberies

68. Twenty-two of the applicants and 18 of the nonapplicants had no prior felony convictions. Sentences of two nonapplicants whose prior criminal record was unknown were omitted from these averages.

and were not more severe than the robberies committed by nonapplicants.

Four indicators of the gravity of a robbery offense are: (1) Whether a weapon was carried; (2) whether the victim sustained any physical injury; (3) the value of the property taken by the robber; and (4) the circumstances or location of the robbery. Examining the robberies of applicants, we found that in all cases the applicant carried some sort of weapon, that in ninety-one percent of the cases the victim sustained no physical injury, and that in eighty-two percent of the cases, the amount taken was less than $1000, and that in seventy-six percent of the cases the robbery took place in a business establishment rather than in the victim's home or in the streets.[69] Because of these factors it would appear that the robberies committed by applicants may be characterized as typical robberies.[70] The one factor that might appear to explain the more severe sentences of the applicants is the presence of a weapon in over ninety percent of the cases. However, it must be remembered that the sample of robbery offenders was drawn from those applicants and nonapplicants originally charged with robbery in the first degree. Since an element of first degree robbery is the presence of a weapon,[71] it is reasonable to assume that a similar proportion of applicants carried a weapon during their crimes: presumably, this would have been necessary for these applicants to have been originally charged with first degree robbery. Thus, the disparity in the applicants' sentences does not appear to be justified on the basis of the gravity of their offenses.

---

69. The facts concerning the robbery offenses committed by applicants were obtained from SRD files. Twenty-seven applicants had carried guns, five had carried knives, two had carried other weapons (five unknown). Thirty-two of the robberies involved no injury to the victim, but in one case the victim was beaten and in two cases the victim was shot with a gun (four unknown). In 17 cases the robber took less than $100, in 10 cases he took more than $100 but not more than $1,000, and in six cases he took more than $1,000 (six unknown). The robberies took place as follows: Five at banks, seven at gas stations, three at liquor stores, eleven at other types of businesses, and eight in the streets or in the victim's home (five unknown).

70. *See* Dershowitz, *Let the Punishment Fit the Crime*, N.Y. Times, Dec. 28, 1975, § 6 (Magazine) 7, 27:

> A very large proportion of armed robberies are committed by unmarried males in their early 20's who never finished high school and who have been unemployed for more than a year. The robbery typically consists of an entry into a local store late at night with a loaded pistol; the store clerk and a few customers are frightened but not otherwise injured, and the robber takes several hundred dollars.

71. *See* note 65 *supra*.

A comparison of the offenders' personal backgrounds also does not appear to justify the substantially heavier sentences imposed on applicants. Five characteristics of personal history were selected for comparison of applicants and nonapplicants: (1) The age of the defendant; (2) the employment history of the defendant; (3) whether the defendant had a history of drug or alcohol problems; (4) the defendant's number of prior adult convictions; and (5) the defendant's number of prior felony convictions. Table 16 presents a comparison of applicants and nonapplicants based on these five factors.

The number of prior criminal convictions on a defendant's record is probably the single most important factor in the background of a criminal offender at sentencing. Table 16 demonstrates that applicants generally had fewer prior convictions than nonapplicants, and that the application rate was inversely proportional to the number of prior convictions. Eleven of the thirty-nine (twenty-eight percent) applicant robbers had no prior convictions as compared with seven of forty-eight (fifteen percent) of the nonapplicants. Table 16 demonstrates that applicant-robbers generally had fewer felony convictions as well. While fifty-six percent of the applicant robbers had no prior felonies, only thirty-eight percent of the nonapplicant robbers could claim this status. Applicants tended to be somewhat older than nonapplicants, but this factor alone would hardly appear to account for the substantial sentence disparity between the groups. Applicants were no more likely to have drug or alcohol problems than nonapplicants; and applicants were more likely than nonapplicants to have more favorable employment histories. In short, the differences in personal background characteristics do not explain the sentence disparity between applicants and nonapplicants.

However, the practice of plea bargaining may explain why the sentences of nonapplicants were less severe on the average than the sentences of applicants. Through plea bargaining, forty-seven of the eighty-nine defendants originally charged with robbery in the first degree, fifty-three percent, were able to plead guilty to less serious degrees of robbery. Nonapplicants seemed to have been more successful at plea bargaining than those who applied for sentence review. This can be demonstrated by the percentage of offenders in each group who pleaded guilty to reduced charges and by the percentage of offenders who pleaded guilty to the lowest degree of robbery. Forty-one percent of the applicant robbers pleaded guilty to reduced robbery charges as compared with sixty-two percent of the nonappli-

TABLE 16[72]

Comparison of Robbery Offender Characteristics

	Applicants		*Nonapplicants*	
Age				
16-20	26%	(10)	62%	(31)
21-25	54	(21)	26	(13)
26 or older	21	(8)	12	(6)
Total	101%	(39)	100%	(50)
Employment History				
Very Stable	23%	(8)	4%	(2)
Somewhat Stable	9	(3)	6	(3)
Somewhat Unstable	14	(5)	6	(3)
Very Unstable	20	(7)	33	(16)
No Record	34	(12)	50	(24)
Total	100%	(35)	99%	(48)
Drug or Alcohol Problem				
Drug	67%	(24)	65%	(30)
Alcohol	6	(2)	9	(4)
Both	–	–	–	–
Neither	28	(10)	26	(12)
Total	101%	(36)	100%	(46)
Number of Prior Adult Convictions				
0	28%	(11)	15%	(7)
1-3	31	(12)	31	(15)
4-6	23	(9)	31	(15)
7 or more	18	(7)	23	(11)
Total	100%	(39)	100%	(48)
Number of Prior Felony Convictions				
0	56%	(22)	38%	(18)
1	15	(6)	15	(7)
2	15	(6)	23	(11)
3 or more	13	(5)	25	(12)
Total	99%	(39)	101%	(48)

72. For definitions of the employment stability and drug/alcohol subcategories, *see* note 42 *supra*. Concerning the calculation of convictions, *see* note 45 *supra*.

cant robbers.[73] More significantly, only three of the sixteen (nineteen percent) applicants who pleaded guilty to reduced charges pleaded guilty to robbery in the third degree as compared to fifteen of the thirty-one (forty-eight percent) nonapplicants who pleaded guilty to reduced charges. These defendants who were able to plead guilty to robbery third drastically reduced the maximum penalty exposure they faced at sentencing. For a defendant who had been charged originally with robbery first and who pleaded guilty to robbery third, the decrease in maximum penalty exposure at sentencing would be from twenty to five years.[74] In addition, the highest minimum term an offender convicted of robbery third could receive was two and one-half years.[75] Thus the fact that fifteen of the fifty nonapplicants (thirty percent) were convicted of robbery third as compared to three of the thirty-nine applicants (seven percent) may in large measure explain the ultimate sentence disparity between applicants and nonapplicants.

F. *Conclusion*

In Part I we have seen that there is a very substantial disparity between the sentences imposed on applicants and nonapplicants for sentence review. We have looked at a variety of objective factors, such as characteristics of the offenders' backgrounds, their prior criminal records, and the nature of their original changes and conviction offenses, in order to explain the disparity in sentences and found these factors to be inconclusive. We have also considered three aspects of the administration of criminal justice in Connecticut—the effect of not guilty pleas, the sentencing patterns of the judiciary, and the type of counsel assisting the defendant—and found these factors equally inconclusive in explaining sentence disparity. However, one plausible hypothesis that explains in part the substantial differences in sentences is differing degrees of success at plea bargaining; there is some evidence nonapplicants were somewhat more successful at plea bargaining than applicants.[76] We have seen also that plea bargaining has an impact on sentencing both in terms of the extent to which the exposure a defendant faces at sentencing is diminished by charge

73. Seven of the robbery defendants who applied for review were convicted after trial. Excluding those who were convicted after trial the percentage for applicants is 50%.

74. CONN. GEN. STAT. §§ 53a-134, 53a-136, 53a-35 (1977).

75. *Id.*

76. *See* text at 33-36, 41-43 *supra*.

concessions and in terms of sentence recommendation agreements which vary according to the circumstances of the individual case.

The data presented in Part I thus suggest that the decision to apply for sentence review made by defendants in this sample was a rational one. That is, there was an objective basis for their claims that they were victims of sentence disparity: they had been sentenced more harshly for similar conviction offenses or similar original charges than their nonapplying counterparts, but no objective factors were found to justify the harsher sentences they received. Because there appears to be a rational basis for their claims of disparity, curiosity should lead us to inquire how the SRD responds to their claims of disparity. It is to a consideration of what the SRD does about sentence disparities that we now turn.

II. WHAT THE SRD DOES ABOUT SENTENCE DISPARITY

A. *The Sentence Review Process*

The sentence review process is set in motion by the filing of an application with the clerk of the sentencing court.[77] After sentence is imposed, each defendant eligible for sentence review is notified by the clerk of the right to apply for review within thirty days.[78] Notice of the right to appeal the sentence includes notice that the SRD has the power to increase or decrease the sentence.[79] Appealing a sen-

77. CONN. GEN. STAT. § 51-195 (1977). Failure to file with the appropriate clerk will preclude sentence review. In State v. Rice, 27 Conn. Supp. 149, 232 A.2d 504 (SRD June 22, 1967), the applicant had filed his sentence review application with the clerk in the wrong county; the SRD held that it had no jurisdiction over his case.

78. CONN. GEN. STAT. § 51-195 (1977). Once the applicant files an application, the sentencing judge is notified of the sentence appeal. The SRD is very strict about the filing of the application within 30 days. An application postmarked on the 30th day but received later is considered untimely. *See, e.g.*, State v. Zappone, 28 Conn. Supp. 196, 256 A.2d 521 (SRD Dec. 4, 1968); State v. Dyson, 27 Conn. Supp. 128, 231 A.2d 656 (SRD June 1, 1967); State v. Jensen, 27 Conn. Supp. 108, 231 A.2d 86 (SRD Apr. 3, 1967). However, if the applicant's sentence review application is filed late for reasons beyond his or her control, he or she may be able to challenge the sentence by filing a petition for a writ of habeas corpus. *See*, State v. Morrissette, 29 Conn. Supp. 131, 134, 275 A.2d 284, 285 (SRD Feb. 17, 1971) (clerk failed to inform applicant of his right to sentence review; applicant's prison counselor, after being given applicant's SRD application, failed to mail the application; the court stated in dicta: "the defendant should be able to test these problems in some collateral proceeding, perhaps by way of habeas corpus. The resolution of these questions is beyond this Division's powers.").

79. CONN. GEN. STAT. § 51-195 (1977).

tence does not stay its execution.[80] The Connecticut Supreme Court has called sentence review a critical stage of the criminal process at which the defendant has a constitutional right to be represented by counsel,[81] and the lawyer who represented the defendant at sentencing is obliged to represent the defendant before the SRD.[82]

Sentence review hearings have always been conducted in the prison or at the reformatory.[83] Normally it takes between four and six months after the application has been filed for a case to be heard.[84] Just before each hearing commences, the applicant is given a last opportunity to withdraw the application.[85] Applicants are present

---

80. *Id.*

81. Consiglio v. Warden, 153 Conn. 673, 220 A.2d 269 (1966).

82. Section 2348 of the CONNECTICUT PRACTICE BOOK states that it is the responsibility of the attorney of record to attend the sentence review proceeding and represent the client unless excused by the SRD for exceptional reasons. If the applicant has petitioned for a writ of habeas corpus on the grounds of inadequate representation by counsel or if the lawyer cannot attend the review for other reasons, the Executive Secretary of the SRD will arrange for the appointment of other counsel if the applicant cannot afford to hire another lawyer.

83. The SRD is not required by statute to conduct hearings. However, the first SRD panel decided to conduct hearings to enable applicants to express their grievances, and this tradition has continued. Review hearings are generally scheduled once a month, except during July and August, with approximately 25 cases scheduled for each hearing. Hearings on individual cases may last from five minutes to an hour and a half, but are usually 10 to 15 minutes in length.

84. Of the 164 defendants who filed SRD applications in 1972 and whose cases eventually were reviewed, 113 (69%) had to wait four to six months for review. Another 26 (16%) had to wait seven months or more.

Once a defendant files an application for sentence review, the clerk of the court will forward the application to the Executive Secretary of the SRD in Hartford for processing. The Executive Secretary will order a copy of the presentence report and a transcript of the sentencing hearing. The Secretary then prepares a synopsis of the case which includes a brief description of the facts of the offense, the applicant's prior criminal history, a summary of salient factors about the applicant's social history, and excerpts from the sentencing hearing. The synopsis usually indicates the state's sentence recommendation and the type of plea bargain the case involved if any. When the case is set down for a hearing, synopses of all cases to be heard that day are compiled into a notebook which the Secretary distributes to the SRD judges approximately a week before the hearing. The Executive Secretary schedules all SRD hearings and notifies the parties of the time and place of the hearing.

85. An SRD judge will ask the applicant if he understands that the SRD has the power to increase as well as to decrease the sentence, and whether, with that understanding, the applicant is willing to proceed with the review. Occasionally, the SRD will allow an applicant to withdraw after the SRD hearing. An attorney who represented one of the 1972 applicants at the SRD hearing reported that after the hearing the SRD offered to let the defendant withdraw, strongly suggesting that if he did not, the SRD would increase the sentence. For a more complete analysis of those applicants who ultimately withdraw their applications, *see* Appendix B *infra*.

during oral argument by their attorneys and the state's attorney, and may make a personal statement about why their sentences should be modified. A few weeks after the hearing the applicant is notified in writing of the SRD's decision.[86] No further appeal of the sentence is authorized.[87]

The SRD is required by statute to issue a written opinion announcing its decision to affirm or modify the sentence in each case.[88] Originally, all SRD opinions were to be published,[89] but in 1959 the General Assembly amended the sentence review statute to make publication discretionary.[90] Despite the fact that decisions still may be

86. At the end of each hearing day, the SRD judges meet to discuss whether any cases merit modification. Each judge is assigned to write an opinion in every third case. The judge who writes the opinion in a given case will have the full SRD file on the applicant at his disposal. When a judge has finished a draft of the opinion, it is sent to the other judges for their signature. The Executive Secretary then makes photocopies for distribution to the applicant, his attorney, the state's attorney, the sentencing judge, the SRD judges, the Chief Justice of the Connecticut Supreme Court, the warden of the correctional facility, and the Supreme Court Reporter. This process may be expedited where the modification ordered will result in the defendant's release. The SRD does not resentence the defendant when it modifies the sentence; it only orders the sentencing court to modify the sentence.

87. CONN. GEN. STAT. § 51-196 (1977).

88. CONN. GEN. STAT. § 51-196 (1977) provides: "The decision of the review division in each case shall be final and the reasons for such decision shall be stated therein."

89. *See* 1957 Conn. Pub. Acts 436, § 3. The Prison Study Committee stated that without a publication provision:

> [I]t is difficult, if not impossible to determine the basis for modification of sentence or dismissal of an application for review, and the opportunity to provide a guide to sentencing is lost. To be fully effective, the procedure should enable the trial judge to examine review decisions to determine, for example, what factors his brothers weigh most heavily in sentencing.

PRISON STUDY REPORT, *supra* note 2, at 387.

90. *See* 1959 Conn. Pub. Acts 194. In urging passage of the amendment making publication of SRD opinions discretionary, Rep. Shulansky stated at a committee hearing:

> Those of you who are familiar with the [Connecticut] Law Journal know that much space in the Law Journal is taken up by these numerous [SRD] memoranda, many of which do not have any real public interest. Now it's possible that a decision of the SRD might be noteworthy for some particular purpose and in that instance, it ought to be printed. So that the reporter feels that he should be given discretion to select for publication those decisions which might be noteworthy from a standpoint of precedents or for some other reason and not continue to clog up the Law Journal with all these things of no particular interest and application.

Minutes of Proceedings on H. Bill No. 3469 Before the Joint Standing Committee on the Judiciary and Governmental Functions 1017-18 (March 10, 1959). The cost of publication of SRD opinions was apparently a factor in the legislative decision to make publication discretionary. Rep. Shulansky stated that the cost of publication was about four dollars a page and, "I don't think it's necessary to go to this expense." *Id.* at 1018.

published,[91] they rarely are.[92] Although these opinions potentially could be scholarly and thorough articulations of the rationale for the SRD's modification or affirmance,[93] in practice they are mere formalities.[94] At most they are of some psychological value to the defen-

91. CONN. GEN. STAT. § 51-196 (1977). The sentence review statute vests in the reporter of judicial decisions the discretion to determine which opinions should be published: "[T]he reporter of judicial decisions . . . shall select therefrom for publication such decisions as he deems will be useful as precedents or will serve the public interest and shall prepare them for publication in the manner in which decisions of the supreme court of errors [sic] are prepared." *Id.* Published decisions appear in the Connecticut Law Journal and if the reporter so directs, in the Connecticut Supplement. *Id.*

The SRD has a policy of stamping "approved for publication" on the face of any decision which it thinks ought to be published. However, the reporter of judicial decisions does not always publish those cases that the SRD has approved for publication. Two 1972 applicant cases, State v. Klahr, (Conn. SRD Mar. 30, 1973) and State v. Maltio, (Conn. SRD Mar. 30, 1973) were stamped as approved for publication, but neither was published. When the author wrote to the reporter to inquire why these cases had not been published although approved for publication, she received a terse response from the reporter's office to the effect that since the statute gave the reporter the authority to publish, the SRD's stamp of approval was "necessarily meaningless." Letter from Francis J. Drumm, Jr., Administrative Assistant to the Reporter of Judicial Decisions, to Pamela Samuelson (July 11, 1975). More recently, the SRD has approved for publication at least two other cases which have not as yet been published. They are State v. Frazier (Conn. SRD 1975) and State v. Rivera (Conn. SRD, May 24, 1977).

92. The following table shows the number of decisions published in each year since SRD's inception:

Year	Decisions Published	Year	Decisions Published
1958	24	1968	6
1959	3	1969	2
1960	16	1970	2
1961	18	1971	3
1962	11	1972	2
1963	15	1973	1
1964	7	1974	0
1965	24	1975	0
1966	0	1976	0
1967	36	1977	0

93. Only one judge in the 20 years of SRD's history has attempted to make SRD opinions scholarly and meaningful explanations of sentencing principles as they relate to the circumstances of the particular case. His dissent in State v. Amiot (Conn. SRD June 28, 1967) (Rubinow, J.), is a model sentence review opinion. This dissent was suppressed by fellow judges who overrode his approval of the dissent for publication. An edited version of the *Amiot* dissent appears in GOLDSTEIN, SCHWARTZ, & DERSHOWITZ, CRIMINAL LAW: THEORY AND PROCESS 39-42 (1974).

94. Rarely longer than two pages, most SRD opinions follow a standard formula: (1) A statement that the applicant was convicted after guilty plea or trial of a certain offense(s); (2) a recitation of the statutory penalty for the offense(s); (3) the sentence imposed; (4) whether the charge was reduced or other counts nolled or dismissed or both; (5) a brief description of the facts of the offense(s); (6) a statement about the applicant's prior criminal record; (7) brief remarks about the applicant's character, habits,

dant whose case was reviewed, giving him some reason to think the judges considered his case.[95]

Many defendants who apply for sentence review never have their cases considered by the SRD. For example, only half of the applicants in 1972 eventually had their cases reviewed on the merits by the SRD.[96] The SRD rejected some applications as untimely or as ineligible for review.[97] Some defendants chose to delay their SRD hearings and never had a hearing rescheduled.[98] The SRD delayed the hearings of other defendants who were appealing their convictions.[99] However the bulk of applicants whose cases were not re-

---

and social adjustment; (8) a conclusion that the sentence is fair and should stand or is excessive under the circumstances. Defense and prosecuting attorneys interviewed said the opinions were so cursory as to be of little or no value in explaining the SRD's decision to affirm or modify. Seldom do the opinions cite either prior SRD cases or other legal authorities.

95. For several reasons, SRD judges are reluctant to have their opinions published. One is that preparing opinions for publication means more work for the SRD judges. More importantly, the judges are reluctant to publish because they do not want to create precedent unless it is likely to lessen the burden they bear as reviewing judges. To publish all or most of their modification decisions might lead defendants and their lawyers to apply with greater frequency, an occurrence the SRD judges want to discourage. Precedent can become burdensome to the SRD judges who fear they will have to distinguish away every case an offender might cite in which a lesser sentence for a similar offense had been imposed by the sentencing court and affirmed by the SRD. The SRD's distaste for precedent was evident in one 1972 case, State v. Watson (Conn. SRD June 28, 1972). Emphasizing the unique nature of the case at hand, the SRD said: "The Division cannot conceive that this situation will ever come up again. Therefore, it will not consider its ruling in this case as precedent." *Id.* Since the SRD did not authorize publication for this opinion, there was little chance of it becoming precedent even if the SRD had not added the qualification.

96. That is, 164 of 327 applicants in 1972. Fifty-seven percent (21 of 37) of the 1962 applicants and 60% (79 of the 132) of the 1967 applicants had their cases reviewed on the merits.

97. Of the 327 applicants during 1972, 32 (10%) had their applications rejected for these reasons.

98. A defendant can delay his hearing as long as he wishes. Reasons for delaying the SRD hearing include awaiting the outcome of a parole hearing, the defendant's commitment to a mental hospital, and looking for a new attorney to argue before the SRD. Eleven of the 1972 cases (3%) were delayed and never rescheduled.

99. Before the decision in Carrona v. Manson, Civil No. H-75-2 (D. Conn. June 16, 1974), which held that the pardon board could not deny the right to a pardon hearing while a prisoner's appeal was pending, the SRD had a policy of not hearing a sentence appeal while an appeal on the underlying conviction was pending. In order to comply with the spirit of the *Carrona* decision, the SRD decided in early 1975 to schedule hearings for all applicants whose sentence reviews had been delayed because of appeals. This included 28 applicants from 1972. Because their cases had not been heard by the time the data collection for this research was finished, their sentence review outcomes are not included in the analysis of the SRD's review of the 1972 cases.

viewed by the SRD had withdrawn their sentence appeals.[100] Withdrawals tended to be made by defendants with minimum terms of two years or less.[101] One reason that applicants with relatively short sentences withdraw may be that their parole hearings are held or scheduled before the SRD hearing: if applicants are confident that they will be released at the parole hearing, they may withdraw because the risk of sentence increase, however small, seems too big a gamble to take on the verge of parole release.[102] In interviews with prisoners it was learned that fear of a sentence increase was a powerful factor in the decision to withdraw,[103] and that this fear was often kindled by discouraging remarks by the applicant's attorney.[104]

---

100. Ninety-two SRD applicants who filed during 1972 withdrew their sentence appeals. This represents 28% of all applicants that year and 31% of all those eligible for review. The withdrawal rate among eligible applicants was 40% of the 1962 cases and 35% of the 1967 cases. Appendix B of this article profiles how 1972 withdrawal cases compare with 1972 cases in which defendants continued with their sentence appeals.

101. *See* Appendix B, Table 1 *infra*.

102. Five SRD applicants from the 1972 sample were paroled before their sentence review hearings and never appeared before the SRD. One 1974 applicant known to the author had a one to three year sentence. She was paroled just before her SRD hearing. Although she considered her maximum term too long, she withdrew her sentence appeal because she was afraid the SRD would return her to prison.

103. In the spring of 1975 the author obtained clearance to speak to 20 prisoners in the Connecticut Correctional Institute at Somers who had recently withdrawn their sentence appeals. Of the 20 prisoners for whom she obtained clearance, 11 were interviewed; the other nine were away for the day or had been paroled. Several of the inmates interviewed about their withdrawals said that fear of a sentence increase had been a major factor in their decision to withdraw. One said that he had not known that the SRD could increase sentences, and when a friend told him about it, he decided to withdraw. The following excerpt from a letter in the SRD files expresses the reason why one defendant withdrew: "I have just found out that the Review Division reviews felony sentence [*sic*] and can increase as well as decrease sentences. . . . The review does not appeal to my sporting blood so, I shall like [*sic*] to change my mind about the review and not gamble with my time." Letter from Larry Stewart to SRD (1967). One of the inmates interviewed said he withdrew at the SRD hearing because of the threatening manner in which one of the SRD judges announced that the SRD could increase his sentence. Two of the 11 prisoners reported hearing that SRD had recently increased sentences although at the time no sentence had been increased by the SRD since 1963.

104. One tactic attorneys use to discourage clients from proceeding with sentence review is to emphasize the risk of a sentence increase. A letter from one attorney to his client found in SRD files contained a statement that the attorney recommended withdrawal "because you are running a serious risk of an increase in the sentence you received." 1972 Letter from public defender to Philip Tagani, concerning State v. Tagani (Conn. SRD), *appeal subsequently withdrawn*. One of the prisoners interviewed said that his attorney advised him to withdraw because the sentence had been imposed in accordance with an agreed recommendation and thus there was little chance the sentence would be reduced. Although this defendant had wanted to go ahead with the review, he withdrew because he believed that his attorney would not do a good job.

B. *The SRD's Theory of Sentence Review*[105]

Complaints of sentence disparity made by SRD applicants are of four major varieties: (1) The applicant knows of other defendants convicted of similar offenses who received lesser sentences;[106] (2) one or more codefendants received lesser sentences than the applicant; (3) the applicant had been offered a substantially lesser sentence prior to trial;[107] and (4) equitable considerations make the sentence imposed on the applicant more severe than is warranted under the circumstances.[108] It is important to compare these applicant perceptions of sentence disparity with the theories of sentence disparity applied by the SRD.

The central theory of sentence review adopted by the SRD seems to be an isolated consideration of the fairness or reasonableness

---

One of the reasons sentence review is unpopular among defense attorneys is that it is inconvenient and time-consuming. Having to attend a SRD hearing means spending a day commuting to and from Somers and often waiting several hours for the case to be called. From a professional point of view, defense lawyers reported that appearing before the SRD was an unsatisfying experience because no matter how just the cause or eloquent the plea, the SRD would be immovable.

105. Much of the information in this section was obtained through interviews and conversations with six judges who had served on the SRD in the past or were serving while the research was being conducted. The author and her coworker also observed two days of sentence review hearings and had an opportunity to talk to the SRD judges about these cases. Some of the statements in this section are derived from an analysis of the sentence review opinions in the sample cases.

106. An incarcerated defendant sometimes meets another prisoner with a lesser sentence than his for the same or a worse crime. One 1972 applicant convicted of manslaughter asserted before the SRD that he knew of other inmates convicted of manslaughter who were sentenced to less than the seven to 14 year term he had received. Another 1974 applicant who had been sentenced to 10 to 20 years in prison for a sale of narcotics as a second offender complained that armed robbers, rapists, and killers had been sentenced to lesser terms. A defendant may also learn of disparity between his sentence and that imposed on others from public defenders who have previously handled similar cases.

107. Excerpts of sentencing remarks in SRD files do not ordinarily contain references to plea negotiations before trial. However, one file indicated that the applicant had been offered a nine month jail term as part of a plea bargain. He turned it down. His codefendant, offered the same deal, took it and was sentenced to nine months. After trial the SRD applicant was convicted of robbery with violence. The state's attorney recommended five to 15 years in prison and the judge sentenced him to three to eight years. The SRD affirmed.

108. One 1972 applicant, an aged and handicapped man convicted of pool selling and sentenced to one to three years in prison, protested his sentence because of his age and infirmity and because the state itself was operating a gambling business. Another defendant who had been working steadily and supporting his elderly parents and who had no prior record believed that the indefinite to five year reformatory term he received for sale and possession of narcotics was excessive.

of a sentence at the time it was imposed. That is, each sentence is to be judged solely in light of the circumstances of the case, and the presumption is in favor of the reasonableness of the sentence. Unless the unreasonableness of the sentence is glaringly obvious, the burden is on the defendant to present reasons why the presumption should not prevail.[109]

The SRD does not attempt to reduce or eliminate all sentence disparities. The SRD judges interviewed stated that they believe Connecticut's individualized sentencing system is intended to leave the sentencing decision to the judgment and conscience of individual judges,[110] and that therefore it is inappropriate for the SRD to substitute its own subjective analysis of a case for the judgment of the original sentencing judge.

Thus, the only type of sentence disparity that the SRD seeks to control is the patently excessive, unduly harsh, or unreasonable sentence.[111] However, judges who served on the SRD during the research period found it difficult to define what is meant by "unreasonable" sentences. One judge said that what constitutes an unreasonable sentence may be articulated in particular cases, but is not susceptible of formulation as a general principle. As best he could explain it, judges gain through experience on the bench a sense of what sentences are generally imposed for certain crimes: the range of sentences normally imposed establishes the parameters of reason-

109. The standard of review can be illustrated by excerpts from opinions in 1972 applicant cases: "There is nothing wrong with the sentences which are within the statutory limits. Nor can the Division say that the sentencing judge exceeded his discretionary authority," State v. Spring (Conn. SRD Jan. 1, 1973); "Under all the circumstances the Division cannot say that the sentence was unduly harsh," State v. Dudla (Conn. SRD, Aug. 18, 1972); "[The sentence was] not so harsh as to be deemed unreasonable," State v. Smith (Conn. SRD June 23, 1972); "We cannot say that the sentence imposed is out of line," State v. Vasquez (Conn. SRD June 2, 1972).

110. Connecticut has chosen to give its judges very broad discretion in determining the type and length of sentence to be imposed on felony offenders and little direction concerning how that discretion ought to be exercised. Apart from the general guidelines to be used by the judge in deciding whether to grant probation or conditional discharge, *see* CONN. GEN. STAT. § 53a-29 (1977), and the statutory maximum for each offense, the legislature has not attempted to define the criteria that are appropriate for determining either the type of sentence that should be imposed, or the length of sentence.

111. The standard of review seems to have changed very little since the first few years of the SRD's existence. *See Connecticut Case Study*, *supra* note 7, at 1453, for a discussion of the SRD's standard and policies of review in the first few years of its existence. This Note reported that SRD judges and other superior court judges perceived the function of SRD to be limited to serving "as a restraint on palpably unreasonable sentencing decisions." *Id.* at 1476.

ableness and sentences outside these parameters are unreasonable and should be modified to bring them back within the acceptable range. Another approach to determining the reasonableness of a sentence which was mentioned by an SRD judge is to ask whether the sentencing judge had acted unreasonably in imposing that particular sentence. Where the difference between what the sentencing judge gave and what the reviewing judge would have given was relatively small (a difference of one or two years), the interviewed SRD judge did not think the sentencing judge's decision would be unreasonable.[112] This judge said he would vote to modify the sentence only if convinced the sentencing judge had acted unreasonably. Whatever mental process a judge uses to decide whether a sentence is unfair or unreasonable, all SRD judges interviewed agreed that patently excessive sentences are rare.

Because SRD judges perceive their function as determining the fairness of a sentence at the time it was imposed, there are certain types of arguments that the SRD will reject as inappropriately raised at sentence review. First, the guilt or innocence of the defendant or other defects in the conviction are inappropriate to raise before the SRD because the SRD concerns itself only with claims of unjust sentence.[113] Second, rehabilitation of the defendant subsequent to the sentencing will not be considered by the SRD because it regards rehabilitation as a matter for the Parole Board's consideration. Information on rehabilitation is considered irrelevant to the issue of whether the sentence was fair when imposed.[114] Third, the SRD will

112. This judge told me that it was unnecessary to agree with the reasons the sentencing judge seemed to have for the sentence. In fact, the sentencing judge's reasons might be unreasonable and yet the sentence be reasonable on other grounds to the SRD judge. This judge gave as examples of relatively small differences in sentences two situations: (1) Where the sentencing judge gave three to six years in prison and he as sentencing judge would probably have given two to four years, and (2) where the sentencing judge gave two to four years in prison and the SRD judge would have given probation.

113. *See, e.g.*, State v. Arrington, 25 Conn. Supp. 246, 202 A.2d 156 (SRD May 1, 1964) (defendant claimed amnesia at time of offense); State v. Pullen, 25 Conn. Supp. 141, 198 A.2d 218 (SRD Nov. 21, 1963). Opinions in two 1972 cases indicated that the applicants had raised claims of innocence: State v. Burden (Conn. SRD Aug. 18, 1972); State v. Winot (Conn. SRD June 10, 1972).

114. The SRD has long distinguished its function from that of the parole board. *See* State v. Branigan, 22 Conn. Supp. 170, 164 A.2d 300 (SRD May 3, 1960); State v. Harris, 21 Conn. Supp. 448, 159 A.2d 188 (SRD Sept. 25, 1958). The 1972 cases in which this policy was recited included State v. Gresko (Conn. SRD Feb. 26, 1973); State v. Shaw (Conn. SRD Nov. 15, 1972) and State v. St. John (Conn. SRD Nov. 15, 1972). However,

reject any other information not before the sentencing judge, such as the defendant's subsequent "cooperation" with law enforcement authorities.[115] Fourth, appeals for clemency will also be rejected by the SRD as not bearing on the reasonableness of the sentence at the time it was imposed: such appeals should be addressed to the Board of Pardons, not to the SRD.[116] Fifth, SRD regards complaints of con-

---

this policy has not prevented the SRD from considering rehabilitation. *See* State v. Wolff, 25 Conn. Supp. 456, 207 A.2d 274 (SRD Jan. 4, 1965), where the SRD stated in a decision announcing reduction, that the applicant's "record at the reformatory has been excellent." *Id.* at 458, 207 A.2d at 276. Another such case was State v. Clark (Conn. SRD Feb. 26, 1973). Clark asked the SRD to suspend his sentence because he was receiving drug treatment at the reformatory and wished to be released when the treatment was concluded. Rather than reject the argument as improperly raised, the SRD said: "It is too early for the Division to pass on his request. The matter is continued until such time as it has been determined that he has completed the program successfully." *Id.* Although the case was not reheard, it demonstrates that the SRD does not always reject arguments of rehabilitation.

115. *See, e.g.*, State v. Sola (Conn. SRD Dec. 4, 1972). The United States Attorney wrote to the SRD asking that Sola's seven to 20 year sentence for sale of narcotics be reduced because he had cooperated with the grand jury on other narcotics cases. The SRD affirmed the sentence, rejecting the United States Attorney's request. However, the SRD considers matters not before the sentencing judge when it so desires. In State v. Bourbeau, 25 Conn. Supp. 499, 209 A.2d 190 (SRD Jan. 26, 1965), the SRD modified the applicant's sentence for statutory rape when presented with affidavits representing that the victim was not inexperienced in such affairs, affidavits which were not before the sentencing judge. *See also* State v. Wallick, 27 Conn. Supp. 387, 239 A.2d 544 (SRD Jan. 25, 1968).

116. Urging the SRD to reduce a sentence on equitable grounds may lead the SRD to invoke the doctrine that it has no powers of clemency. This doctrine was first discussed in State v. McCann, 21 Conn. Supp. 463, 158 A.2d 753 (SRD Oct. 17, 1958). McCann, who was 70 years old, was sentenced to 10 to 12 years for use of narcotics. He argued to the SRD that this sentence was tantamount to a life sentence. The SRD responded:

> As much as you may feel sympathetic in such a situation, sympathy cannot properly serve as a basis for a modification of a sentence by this division, as otherwise changes of sentences could be granted to some and not to others in the discretion of the division, showing favor only where it chose.

Id. at 467, 158 A.2d at 756. Several 1972 applicants made arguments which the SRD interpreted as appeals for mercy. The SRD affirmed the sentences and stated that it has "no discretionary jurisdiction" to grant clemency, State v. Townsend (Conn. SRD June 21, 1972), or "has no legal authority to act in a lenient fashion," State v. Croom (Conn. SRD Oct. 14, 1972). However, SRD judges have shown, on occasion, that they are not immune to sympathetic appeals. One example is State v. Daley, 27 Conn. Supp. 232, 234 A.2d 451 (SRD Oct. 23, 1967). The SRD suspended Daley's sentence for misconduct by a motor vehicle operator which arose out of his having caused an accident which resulted in the death of a passenger in the other vehicle. At sentencing, many laudatory character letters were submitted and character witnesses appeared to attest to the applicant's good character. The SRD noted that Daley had "an excellent relationship with his parents, his church, and his school," and concluded that "it will best serve

stitutional defects in the sentence or sentencing procedure as inappropriate.[117] Finally, the SRD generally rejects an applicant's attempt to compare his sentence with those of other defendants.[118]

The SRD occasionally departs from its normal standard of review in reviewing the sentence of one of a number of codefendants. In considering whether the defendant's sentence was excessive in light of the penalty imposed on the codefendant, the SRD often ignores four of its stated policies in that: (1) The sentence need not be "unduly harsh" or "patently excessive" to merit modification; (2) the sentence need not have been unreasonable at the time it was imposed, and may have become unreasonable simply because of the co-

---

society's interest to return the defendant to their [his parents'] care." *Id.* at 234, 234 A.2d at 452. The *Chvirko* and *Malolepszy* modifications, *see* text *infra* at 58-59, are also examples.

117. Several defendants have tried unsuccessfully to obtain SRD rulings on the unconstitutionality of reformatory commitments in excess of the statutory maximum specified in CONN. GEN. STAT. §§ 18-17 and 18-75 (1977). One 1972 applicant raised this issue before both the SRD and the federal district court. *See* Marple v. Manson, 373 F. Supp. 757 (D. Conn. 1974). The SRD believes that all constitutional attacks on the sentence or sentencing procedure should be made to other tribunals. An example of an attack on the sentencing procedure is found in State v. Graham (Conn. SRD Jan. 9, 1968). Graham complained that he was not allowed representation at his sentencing hearing. In affirming Graham's sentence, the SRD said: "Although the defendant had been assigned counsel, he was not represented at the time of sentencing. This is unfortunate, but it is not within the province of this Division to protect the collateral constitutional rights of a defendant." *See also* State v. Meleganich, 25 Conn. Supp. 3, 195 A.2d 439 (SRD July 31, 1963) (complaint of inadequacy of representation by counsel). There is nothing in the SRD's statutory mandate to preclude it from acting as guardian of a defendant's constitutional rights at sentencing.

118. The SRD rejects specific comparisons of sentences. The first decision announcing this policy was State v. Vibert, 21 Conn. Supp. 434, 158 A.2d 596 (SRD Sept. 25, 1958). Vibert claimed that his sentence was excessive both in itself and in comparison to sentences of other defendants with worse criminal records than his. The SRD responded:

> This basis of comparison does not take into account pertinent factors personal to an offender which must be considered in adjusting a sentence to his need and which could result in a proper variation in sentences. . . . The process of sentencing is not an arithmetical or mechanical one depending merely upon the number of previous convictions, which are factors of varying weight and significance, among other pertinent considerations, depending on surrounding circumstances.

Id. at 436, 158 A.2d at 597. At the February 1975 SRD hearing attended by the author, the SRD rejected a defense attorney's offer of proof concerning sentences imposed on other defendants who had been convicted of the same offense as his client. The SRD's rejection of specific sentence comparisons demonstrates both a commitment to the individualized sentencing system and a reluctance to begin developing a system of objective criteria against which sentences could be evaluated.

defendant's sentence; (3) the SRD will consider matters not before the sentencing judge, *i.e.*, the codefendant's sentence, and (4) the SRD will allow the defendant to compare his sentence with that of another. These deviations are justified by the SRD on two grounds. First, codefendants with different sentences may be sources of institutional unrest. The recipient of the harsher sentence is more likely to resent the lesser sentence of the codefendant than the lesser sentences of other inmates. The SRD can remove this source of potential unrest by equalizing treatment of codefendants. Second, equitable considerations require that those defendants who commit the same and not merely similar crimes, be treated equally. Unequal sentences imposed on similar codefendants are examples of blatant sentence disparity which are more visible than most disparities created by the unstructured, individualized sentencing system. Presented with a case of a codefendant treated differently, the SRD will generally either try to justify the difference by reference to the defendant's background or will modify the sentence to bring it into reasonable conformity with the treatment of the codefendant.[119]

One cannot understand the SRD's review process without understanding its attitude toward plea bargaining. SRD judges are well aware that the vast majority of criminal cases in Connecticut are disposed of through plea bargaining,[120] and plea bargains are often the focus of discussion in the review proceedings.[121] Most importantly, the SRD has officially recognized plea bargaining as an expeditious

119. Recognition of sentence disparity among codefendants is a recent development; codefendant cases used to be subject to the same review policies as all other cases. *See* State v. Hayden, 27 Conn. Supp. 237, 234 A.2d 639 (SRD June 15, 1967); State v. Burns, 26 Conn. Supp. 76, 213 A.2d 454 (SRD June 30, 1965); State v. O'Connor, 21 Conn. Supp. 474, 159 A.2d 185 (SRD Oct. 17, 1958); State v. Gonski, 21 Conn. Supp. 468, 159 A.2d 182 (SRD Oct. 17, 1958). For a discussion of the 1972 applicant modifications on this ground *see* text *infra* at 66-68.

120. Opinions frequently mention defendants' plea bargains. The following excerpts from 1972 applicant cases are illustrative: "[The defendant was] originally charged . . . with robbery in the first degree. As a result of bargaining the charges were reduced . . . and the State agreed to recommend the sentence . . . ultimately imposed." State v. McLane (Conn. SRD Apr. 9, 1973); "The sentencing judge pointed out that the recommended sentence was lenient, but that he would accept it in light of the fact that it was part of a negotiated plea. The Division acquiesces." State v. Gwyn (Conn. SRD Mar. 30, 1973); "The defendant received consideration when he was permitted to plead to the crime of manslaughter 1st degree, a lesser offense [than murder, the original charge]." State v. Shepard (Conn. SRD Jan. 1, 1973).

121. SRD judges frequently ask such questions as "Was this an agreed recommendation?," or "What kind of plea bargain was this?," or "Didn't you get a charge reduction?"

method of facilitating resolution of criminal cases,[122] and where a sentence has been imposed in accordance with a plea-bargained recommendation, the SRD will not normally interfere with the agreement.

Implicit in the SRD's treatment of plea-bargained dispositions is the premise that, because the applicant accepted the bargain and pleaded guilty knowing what sentence recommendation the state would make, the sentence must be reasonable.[123] Adherence to this premise is especially firm where the plea bargain involves an agreed recommendation.[124] In a rare published opinion, *State v. Cato*,[125] the SRD announced its policy regarding cases in which the agreed upon sentence is imposed. The SRD examined Cato's "bargain" and found that "the agreement was fairly secured, the plea was voluntary and knowing, and the prosecution kept its bargain with the accused."[126] Under these circumstances the SRD affirmed Cato's sentence as fair and reasonable. Following the *Cato* decision, the SRD routinely affirms cases in which agreed recommendation sentences have been imposed.[127]

---

122. *See* State v. Cato, 29 Conn. Supp. 442, 443, 290 A.2d 901 (SRD Apr. 25, 1972), *citing* the United States Supreme Court opinion, Santabello v. New York, 404 U.S. 257 (1971), which discussed the desirability of plea bargaining in the criminal justice process.

123. Defendants do not seem to agree, for they continue to apply for review despite their plea bargains. In affirming such sentences, the SRD frequently comments in this fashion: "These sentences [were] a result of plea bargaining and were agreed to by the defendant and his counsel. A request for a lesser sentence is not in order." State v. Chialastri (Conn. SRD Oct. 10, 1972); "The sentences imposed were agreed upon as part of the plea bargaining process. The defendant knew what the sentence was to be when she pleaded guilty. She cannot be heard to complain now." State v. Johnson (Conn. SRD Oct. 10, 1972); "The defendant got what he bargained for." State v. Knight (Conn. SRD June 21, 1972).

124. An "agreed recommendation" is an agreement between the defense attorney and the state's attorney that they will both urge the judge to accept the state's recommended sentence. One of the SRD judges characterized an agreed recommendation as a contract between the defendant and the state which the applicant repudiates at his peril.

125. 29 Conn. Supp. 443, 290 A.2d 901 (SRD Apr. 25, 1972).

126. *Id.* at 444, 290 A.2d at 902. Cato's lawyer told me that he had argued for a sentence reduction on the ground that the SRD had affirmed a lesser sentence for a similar offender who had committed a similar offense. This argument was not mentioned in the SRD opinion.

127. Ten of the 1972 applicants' sentences were affirmed because they had received agreed recommendation sentences. *See* State v. Crumpton (Conn. SRD Jan. 23, 1973); State v. Mase (Conn. SRD Jan. 1, 1973); State v. Bussiere (Conn. SRD Nov. 15, 1972); State v. Chialstri (Conn. SRD Oct. 10, 1972); State v. Golasz (Conn. SRD Oct. 10, 1972); State v. Shaird (Conn. SRD Oct. 10, 1972); State v. Eburg (Conn. SRD Aug. 18, 1972); State v. Sherman (Conn. SRD Aug. 18, 1972); State v. Knight (Conn. SRD June 21, 1972); State v. Blount (Conn. SRD May 30, 1972).

Despite its deference to agreed recommendations when the defendant is sentenced in accordance with the agreed recommendation, the SRD will not ordinarily enforce an agreed recommendation when the sentencing judge has imposed a heavier sentence. In none of the five 1972 cases in which an agreed recommendation had been thwarted by the sentencing judge did the SRD modify the sentences to conform with the bargain.[128] In one decision involving a trio of cases the SRD stated that, "A sentencing judge is not required to rubber stamp a recommendation even if it is an agreed recommendation. He has the discretion to sentence the accused as he sees fit."[129] These three cases had been handled by one lawyer who had obtained the same agreed recommendation for four defendants charged with sale of narcotics. One defendant, sentenced separately, had the agreed recommendation accepted by the court. A different judge sentenced the three other codefendants (the eventual SRD applicants) to a sentence substantially longer than the agreed sentence.[130] At the sentence review hearing, the SRD declined to modify the sentences imposed on these three codefendants. This decision underscores the one-sided nature of the SRD's policy on agreed recommendation sentences: to enforce the bargain strictly when the defendant seeks to challenge it, but not to enforce it when the defendant seeks to have it enforced.

C. *Sentence Reductions*

An abstract discussion of the SRD's standards of sentence review gives little insight into the kinds of cases the SRD modifies. This

An agreed recommendation sentence creates a problem for the defense lawyer. How can he argue before the SRD that the defendant's sentence is unreasonable or unduly harsh when he recommended that the defendant accept the recommendation and argued at sentencing that that sentence should be imposed? Some New Haven lawyers have claimed that they should be disqualified from arguing for modification of agreed recommendation sentences because of conflict of interest. The SRD apparently does not believe it a sufficient conflict of interest so as to disqualify the lawyer from representing the client at the SRD hearing. At the February 1975 SRD hearing, the SRD threatened to hold one attorney in contempt of court if she persisted in her claim that she could not represent an applicant before the SRD because of this conflict of interest.

128. The five cases were: State v. Johnson (Conn. SRD Jan. 31, 1973); State v. Milton (Conn. SRD Nov. 15, 1972); State v. Irizarry (Conn. SRD Oct. 10, 1972); State v. Quintana (Conn. SRD Oct. 10, 1972); State v. Soto (Conn. SRD Oct. 10, 1972).

129. State v. Soto (Conn. SRD Oct. 10, 1972); State v. Quintana (Conn. SRD Oct. 10, 1972); State v. Irizarry (Conn. SRD Oct. 10, 1972).

130. Soto and Quintana were sentenced to six to 10 years in prison and Irizarry to five to nine years in prison. The agreed recommendation they had negotiated, and which the fourth defendant received, was two to five years in prison. State v. Soto, State v. Quintana, and State v. Irzarry, *supra* note 129.

section will discuss the twenty-three cases in which the SRD ordered a sentence reduction in three sample years: Two cases appealed to the SRD during 1962, six cases appealed during 1967, and fifteen from cases appealed during 1972. An examination of these cases reveals that in many instances the SRD diverges significantly from its stated standards.

1. *1962 Reductions*

In reviewing the sentences of the applicants in 1962, the SRD acted more like a pardon board than a tribunal to rectify sentence disparity. Of the twenty-one applicants whose cases it heard, the SRD modified the sentences of two because of their favorable personal background characteristics.[131]

In *State v. Chvirko*,[132] the applicant had been convicted of breaking and entering and had been sentenced to one and one-half to three years in prison. The SRD reduced the sentence to one year in jail to be suspended after six months. In its opinion the SRD noted that the applicant had a good record at work and at school, and that he was a member of a church. Although shocked by the crime which was described as "an utterly senseless and violent example of destructive vandalism,"[133] the SRD thought the sentence should be modified. The opinion briefly mentioned that other codefendants had received suspended terms and reformatory sentences.

In *State v. Malolepszy*,[134] the applicant had been convicted of two counts of robbery and had been sentenced to five to ten years in

131. The two applicants whose sentences were reduced had these characteristics in common: (1) Both were white males; (2) both were young (20 and 23 years of age); (3) neither had a prior criminal record of any significance (one had no prior record; the other had one conviction for breach of the peace); and (4) both had stable employment histories.

By having these favorable characteristics, these two defendants were sharply distinguishable from their fellow applicants. All 21 applicants whose cases were heard on the merits were men, most (80%) were white, but most (66%) were twenty-six years old or older. They had committed a variety of offenses—primarily serious felonies including four cases of robbery with violence and four cases of possession of narcotics, which at that time carried a mandatory minimum of five years in prison. Sixty-seven percent were facing at sentencing maximum penalty exposure of more than 15 years; over half had minimum terms of five years or more. Two-thirds had four or more prior criminal convictions; three-quarters had one or more prior felony convictions; 62% had been incarcerated after conviction for a previous offense.

132. 23 Conn. Supp. 355, 183 A.2d 629 (SRD May 29, 1962).

133. *Id.* at 356, 183 A.2d at 630.

134. 24 Conn. Supp. 304, 190 A.2d 231 (SRD Feb. 28, 1963).

prison. In its opinion announcing a reduction of his sentence to two to five years, the SRD described his life story as a "history of hardship, valor, and brilliant achievement,"[135] except for the two-week spree during which he held up two motels with a toy pistol. The judges noted that he was so polite to his victims that he was called the "Ivy League bandit."[136] The applicant had been in a concentration camp in Germany as a child, had an excellent scholastic record, was a skilled engineer who had been steadily employed, and was also deeply religious. In reducing the sentence, the SRD said: "His prior record is the only basis for the decision of the Board that his sentence should be modified."[137]

Both Chvirko and Malolepszy obtained their sentence reductions because of equitable factors making lesser punishments desirable and not because of sentence disparity. In neither case is there any indication that the SRD had developed a theoretical framework for sentence review or that such a framework would include the concept of sentence disparity. Indeed, in *State v. Chvirko*, the SRD briefly noted that the applicant's codefendants had received substantially lesser sentences, but completely ignored the issue of sentence disparity in its reduction of the applicant's sentence.

2. *1967 Reductions*

The SRD reduced six of the seventy-nine sentences appealed to it during 1967.[138] While the rationales for these reductions differed somewhat from those offered for the 1962 reductions, the decisions in the 1967 cases were similar in that they lacked any discussion of sentence disparity. The judges again seem to have been moved primarily by equitable considerations in modifying the sentences in the particular cases. This lack of theoretical discussion is particularly glaring because several of the cases present clear examples of sentence disparity.

Four of the modifications involved reformatory sentences.[139] The

135. *Id.* at 305, 190 A.2d at 231.

136. *Id.*

137. *Id.* at 306-07, 190 A.2d at 232.

138. The six 1967 applicants who received sentence reductions had personal characteristics similar to those of the 1962 applicants who received reductions: (1) All were under 25 years of age; (2) all were male; (3) none had prior felony convictions and three had no prior convictions; (4) none had a prior conviction for the same offense; and (5) all but one had never been incarcerated before. *See* note 131 *supra*.

139. Reformatory sentences first became reviewable in 1963. *See* 1963 Conn. Pub.

grounds for these four modifications seemed to be that neither the circumstances of the offenses nor the personal characteristics of the defendants warranted reformatory sentences.

Three of these cases[140] involved minor offenses which, if committed by adults, would have been punishable by a maximum sentence of six months or less.[141] Yet, each of these defendants had been sentenced to the reformatory for a maximum of two years. SRD responded by suspending the remainder of each of these defendant's sentences.[142]

In two of these cases the SRD appears to have overlooked patent examples of sentence disparity in granting sentence reductions. In *State v. Cole*,[143] Cole's codefendant had received a suspended sentence in contrast to Cole's two-year reformatory sentence, but the SRD's primary reason for granting a sentence reduction was that the initial two-year sentence was inappropriate for the crime committed. Similarly, in *State v. Wallick*,[144] although a codefendant had received

---

Acts 584. Many defendants sentenced to the reformatory took advantage of the opportunity to apply for sentence review in 1967. Thirty-seven of the 70 (or 53%) cases filed in 1967 and heard on the merits by the SRD were reformatory sentence cases. Because reformatory commitments generally have minimum terms of less than two years, the inclusion of reformatory cases in the sample altered the distribution of sentences within the pool. In contrast to the 1962 cases, in which only 29% of the defendants had minimum sentences of two years or less, 51% of the 1967 cases involved sentences of two years or less; in 1962, 52% had minimum terms of five years or more, while only 24% of the defendants in 1967 had minimum terms of five years or more. Thirty percent of the applicants in 1967 were facing a maximum penalty exposure in excess of 15 years, as compared with 67% of the 1962 applicants.

140. *See* State v. Cole, 27 Conn. Supp. 398, 240 A.2d 98 (SRD Jan. 21, 1968); State v. Wallick, 27 Conn. Supp. 387, 239 A.2d 544 (SRD Jan. 25, 1968); State v. Lytwyn, 27 Conn. Supp. 78, 230 A.2d 40 (SRD Jan. 19, 1967).

141. In State v. Cole, 27 Conn. Supp. 398, 240 A.2d 98 (SRD Jan. 21, 1968), the applicant had helped a friend steal some tires for the friend's car; the tires were recovered and the applicant turned himself in. In State v. Wallick, 27 Conn. Supp. 387, 239 A.2d 544 (SRD Jan. 25, 1968), the applicant had been accused by his landlord of willfully damaging the furniture in the apartment the applicant shared with two others; the total damage claimed was $125 and the applicant had made $70 in restitution payments. In State v. Lytwyn, 27 Conn. Supp. 78, 230 A.2d 40 (SRD Jan. 19, 1967), the applicant had looted several "7-Up" machines in gas stations with some companions one night; no more than $25 had been taken in any of these larcenies.

142. Connecticut generally had allowed judges to make reformatory commitments exceeding the adult statutory maximum. CONN. GEN. STAT. §§ 18-73 and 18-75 (1970). However, the law was amended in 1975 to prohibit sending defendants between the ages of 16 and 22 to the reformatory for longer than the statutory adult maximum. 1974 Conn. Pub. Acts 74-183, § 222. For another case involving this type of modification, *see* State v. Falconteri (Conn. SRD Oct. 18, 1972), discussed in text *infra* at 62.

143. 27 Conn. Supp. 398, 240 A.2d 98 (SRD Jan. 31, 1968).

144. 27 Conn. Supp. 387, 239 A.2d 544 (SRD Jan. 25, 1968).

only a ten-day suspended sentence, SRD's theoretical justification for the applicant's sentence reduction was the disproportionality between the crime committed and the penalty imposed:

> The events constituting the offense available before the Division prove to be more in the nature of hard usage and unsanitary housekeeping, the most serious damage being a cut in the upholstery of a divan. If these facts had been brought to the attention of the court, it seems reasonably probable that it would not have considered the sentence it imposed, as such a penalty is disproportionate to the injury sustained.[145]

The fourth reformatory modification did not involve a minor offense, but the SRD decided that under the circumstances a reformatory sentence was not necessary. The applicant, a sixteen-year-old youth who had been drinking and driving recklessly, had struck a car, killing one of its passengers. He was convicted of misconduct by a motor vehicle operator and received a nine month reformatory sentence, to be suspended after six months, plus one year of probation. The defendant had a very favorable background and the SRD believed it would be in society's best interest to return the youth to his parents.[146] There was no mention of sentence disparity in this opinion.

The other two 1967 cases in which the SRD ordered a sentence reduction involved applicants with lengthy sentences for manslaughter. Neither of these reductions was made on the ground that the sentences were disproportionately heavy considering the sentences imposed on others for the same or similar crimes. On the contrary, the SRD appears to have made these reductions solely on the basis of equitable considerations unrelated to the appropriateness of a particular sentence for a given offense. In one case, the applicant had shot and killed a pimp who had both coerced the applicant's estranged wife into prostitution and brutally beaten her. Recognizing that the offense was committed "during a period of smoldering agony and seething turmoil over the treatment his wife had received at the hands of the decedent," the SRD reduced his sentence from eight to fifteen years in prison to five to fifteen years in prison.[147] The other

145. *Id.* at 388, 239 A.2d at 545.
146. State v. Daley, 27 Conn. Supp. 232, 234 A.2d 451 (SRD Oct. 23, 1967).
147. State v. Richardson (Conn. SRD Mar. 20, 1968).

manslaughter sentence reduced involved the shooting of a woman who had been living with the applicant and who had threatened to leave him. They argued and he shot her. A major factor in this modification seems to have been the fact that the defendant had aided in quelling a riot at the prison. The sentence was reduced from ten to fourteen years to eight to twelve years in prison.[148]

3. *1972 Reductions*

Of the 164 sentence appeals which the SRD heard on the merits in 1972, fifteen were ordered reduced and 149 were affirmed. The cases in which the SRD modified sentences during 1972 were more diverse than those in which sentences had been modified in 1962 and 1967.[149]

One of the 1972 cases modified resembled the reformatory modifications in 1967. In *State v. Falconteri*,[150] the applicant had been convicted of breach of the peace, which carried a six month maximum penalty for adult offenders. The prosecutor had recommended a three month suspended sentence, but the judge had imposed an indefinite to two year reformatory term. The "crime" in the case had been an abusive argument with the police. While not stating that as general policy judges should avoid sentencing young people to indefinite terms beyond the statutory maximum, the SRD indicated that such a sentence was not warranted in this case, and reduced the sentence to time served (five months).[151]

Judging by the size of the sentence reductions,[152] only four of the fifteen sentences reduced in 1972 would have qualified as pat-

148. State v. Wiggins (Conn. SRD Mar. 20, 1968).

149. For a description of the 1972 cases, *see* Appendix C and compare notes 131 and 138 *supra*.

150. (Conn. SRD Oct. 18, 1972).

151. *Id.*

152. Of the 15 modifications, two involved modifications of minimum term only (one by one year, another by two years); two involved a reduction in the maximum term only (one by 15 years and the other by 28 years); and 11 involved a modification of both minimum and maximum terms. In 85% of the cases in which the SRD reduced minimum terms it did so by one or two years, which by its review standard—that the sentence imposed must be grossly excessive to justify reduction—would not seem substantial enough to modify. Similarly, the SRD reduced maximum terms by only one or two years in 54% of the cases in which the maximum term was reduced. Four cases were selected during this study as examples of patently excessive sentences which the SRD substantially reduced. These four cases included two substantial reductions in minimum term (by three and by five years) and three substantial reductions in maximum term (by 10, 15, and 28 years).

ently excessive or unreasonable sentences and met the SRD standard.[153] Two of these cases involved reductions of the maximum term only. An applicant named Barrett had his ten to sixty-five year prison term for a series of armed burglaries, armed robberies, and rapes reduced to ten to thirty-seven years. In ordering this maximum term reduced, the SRD stated:

> Although he is a dangerous offender who has committed serious crimes, the 65 year maximum is too long and severe to accomplish the purpose and objectives of sentencing . . . . Such a long maximum term not only serves to destroy the spirit of hope but also undermines and substantially interferes with any impetus on the part of the defendant to respond to rehabilitation and psychiatric treatment.[154]

Another applicant named Trimble had a six to twenty-five year prison term for four counts of sale of narcotics reduced to six to ten years. Trimble had been addicted to narcotics at the time of the offenses, and there was no evidence that he had been a major seller of heroin. The SRD noted in its opinion that the maximum penalty was "too severe when compared [to those given] other offenders with similar offenses and histories."[155] Although Trimble's minimum term was well above the 2.5 year average minimum term of the ninety-three defendants in the applicant/nonapplicant sample convicted of sale of narcotics, and the 2.6 year average minimum of the fifty-six defendants with prior felony convictions who had been convicted of that offense,[156] the SRD left untouched Trimble's minimum term.

Unlike applicants Barrett and Trimble, applicant Laden obtained a very substantial reduction in both minimum and maximum terms. Laden had been sentenced to ten to twenty years in prison for eight counts of burglary third, two counts of being a persistent offender, and one count of larceny second. He had twenty-one prior criminal convictions, seven of them felonies and several of them prior burglaries. The sentence was cut in half by the SRD in accordance with the wishes of the sentencing judge, who had just retired as a SRD judge. That judge wrote to the SRD: "In thinking about the sentence

153. *See* notes 105-08 *supra* and accompanying text.

154. State v. Barrett (Conn. SRD Jan. 31, 1973).

155. State v. Trimble (Conn. SRD Mar. 30, 1973).

156. *See* Table 5 *supra* at 20. These averages combine both applicant and nonapplicant sentences for these offenses.

afterwards, I have come to believe that it was too severe, and that a concurrent sentence in Docket No. 18752, for an effective term of five to ten years, would be fairer under all the circumstances."[157]

The fourth case in which the SRD reduced the sentence by a substantial amount was *State v. Curry*.[158] Curry's six and one-half to nine year sentence was reduced to three and one-half to seven years by the SRD. He had been convicted of five counts of burglary third and five counts of larceny. He had six prior convictions, two of them for burglary and two of them for larceny, plus five other arrests not leading to convictions. The SRD noted that he had been a heroin user since 1969 and "apparently resorts to thefts to support his habit."[159] He was either on probation or on parole at the time of the offenses and had been previously incarcerated for more than one year. All of these aggravating factors made it surprising that Curry obtained a modification. The SRD merely stated in its decision that Curry's overall sentence was excessive.

The fact that a sentence was clearly excessive and unreasonable by the SRD's own standards did not mean that the applicant was automatically entitled to a substantial sentence reduction. In *State v. Crutcher*,[160] the applicant had been convicted after trial on four counts of sale of narcotics and had been sentenced to nine to ten years in prison. Each sale was of a small quantity of heroin. The SRD record was not clear as to whether the applicant was addicted to heroin, but she claimed to have sold the heroin so that her sister would not have to become a prostitute or a burglar to support her (the sister's) habit. Crutcher had only two prior convictions, both for shoplifting, and had been steadily employed prior to the offenses. The SRD reduced the sentence to seven to ten years, saying:

> The sentence was within the legal limits. However, it is slightly high when compared with sentences recently sustained by this division on similar matters arising in the Willimantic and Waterbury areas. The division has the obligation to bring sentences into line so that the defendants concerned will feel that they have been treated fairly. To that end the division believes that the sentence in the instant case should be modified.[161]

157. Letter from Superior Court Judge T. O'Sullivan to the SRD (Sept. 19, 1973) (concerning State v. Laden (Conn. SRD Dec. 26, 1973)).
158. (Conn. SRD May 30, 1973).
159. *Id.*
160. (Conn. SRD Mar. 30, 1973).
161. *Id.*

The original nine year minimum term was not simply "slightly high"; it was three and one-half times the 2.5 year average minimum for the ninety-three defendants in the applicant/nonapplicant sample convicted of that offense and four times the 2.3 year average for the thirty-two defendants convicted of that offense with no prior felony convictions.[162] The reduced seven year minimum term was only slightly less excessive, being three instead of four times as severe as the average sentence for defendants with no prior felonies.[163] It was not apparent from the opinion why the SRD did not reduce the sentence further. The reductions in the other ten sentences modified by the SRD were more modest. In four cases the SRD reduced the minimum term by one or two years, but precisely why the SRD modified these sentences is not clear from the opinions. They do not seem to be examples of grossly excessive sentences which need to be brought within reasonable parameters.

In *State v. Germaine*,[164] an applicant who had been sentenced to two and one-half to five years for burglary third and two counts of larceny, received a sentence reduction to one and one-half to three years. The fact that the applicant had no prior felony convictions seemed to be the major factor which made his sentence "too long considering all the circumstances."[165] In *State v. Asarisi*,[166] a sentence of four to ten years for risk of injury to a minor child and sexual contact was reduced to three to six years. Factors apparently leading to this modification were that the applicant had no prior record, he had lost his job and family during prosecution of the case, and his wife and daughters had tried to withdraw the complaint.[167] The third such case was *State v. Luddington*.[168] Luddington had escaped from jail while serving a one to three year sentence and had stolen a car, for which crimes he was sentenced to four to seven years in prison, to be served concurrently with his original one to three year sentence. He had nine prior convictions, one of which was for a felony. The SRD reduced the sentence to one to three years, but made it consecutive with the other one to three year term for an effective sentence of two to six years. The SRD merely described the sen-

162. *See* Table 5 *supra* at 20. These figures combine the averages for applicants and nonapplicants convicted of that offense.
163. *Id.*
164. (Conn. SRD May 30, 1973).
165. *Id.*
166. (Conn. SRD Jan. 18, 1973).
167. *Id.*
168. (Conn. SRD Apr. 9, 1973).

tences for escape and theft as "higher than they should be."[169] Finally in *State v. Pratt*,[170] the applicant had been sentenced to five to ten years in prison after pleading guilty to three counts of burglary second and four counts of burglary third. After his arrest inside a house he was burglarizing, he had confessed to an additional twenty-one burglaries. Pratt had five prior convictions, four of which were for felonies. The SRD found the sentence "a little high under the circumstances" and ordered the minimum term reduced to four years.[171]

Five of the reductions in 1972 involved cases in which codefendants had received lesser sentences. The primary reason the SRD modified these sentences, insofar as it can be discerned from the written opinions, was the lesser sentence of the codefendants.

The SRD's receptivity to rectifying disparity among similar codefendants is illustrated by *State v. Watson*.[172] Watson and her codefendant were convicted of obtaining money under false pretenses. Both had similar prior criminal records and both originally had been sentenced to serve one to three years in prison. However, some time after the sentencing, the codefendant's lawyer moved that the court modify her sentence,[173] and the judge granted the motion by suspending the codefendant's sentence. The judge later learned that he did not have the authority to modify that sentence under the applicable statutory provision.[174] Recognizing his lack of authority, he refused to modify Watson's sentence when her lawyer made a similar motion. In its opinion announcing suspension of Watson's sentence, the SRD stated:

> The defendant does not complain that the sentences given were unduly harsh. Rather she claims that her co-arrestee has been treated differently. . . . Speaking very generally, the function of the Division is to secure equality of treatment for offenders. Therefore, the Division believes justice can only be done by giving the defendant the same treatment as that afforded to Miss O'Rourke.[175]

---

169. *Id.*

170. (Conn. SRD Jan. 23, 1973).

171. *Id.*

172. (Conn. SRD July 24, 1972).

173. The attorney made a motion for sentence modification pursuant to CONN. GEN. STAT. § 53a-39 (1977).

174. Indeterminate sentences such as a one to three year prison term are not eligible for modification pursuant to CONN. GEN. STAT. § 53a-39 (1977).

175. State v. Watson (Conn. SRD July 24, 1972).

In two of these cases, the SRD appeared receptive to the plight of the applicant despite the fact that only a minor reduction in sentence was necessary to bring the applicant's sentence in line with that of his codefendant. In *State v. Telesco*,[176] the applicant, who had been sentenced to serve nine to eighteen years in prison for a bank robbery, argued for a sentence reduction on the ground that one of his codefendants had received a sentence of eight to sixteen years. The state's attorney and the SRD agreed with him, and the sentence was ordered reduced to eight to sixteen years in prison.[177] In *State v. Bliven*,[178] the applicant had been sentenced to a six month suspended term for issuing a bad check in the amount of $89 and to two to five years in prison for burglary third. In the burglary case he had two codefendants, one of whom had a prior criminal record similar to Bliven's and who had been sentenced to one year in jail. The SRD found the two to five year sentence to be "so disproportionate to that of the similarly situated co-defendant as to be unduly harsh. Consequently, it must be reduced."[179] The SRD reduced the applicant's sentence to one to two years in prison, the equivalent of the similar codefendant's sentence.

However, not every applicant who received a reduction on the grounds that a codefendant received a lesser sentence was placed in a situation of strict parity with that codefendant. For example, applicant Kezer had his indefinite to three year reformatory sentence reduced to an indefinite to two year term because his sentence was harsher than that of his codefendants, both of whom had received suspended sentences and probation.[180] Kezer had pleaded guilty to eleven counts of burglary third. According to Kezer, he and his codefendants committed the burglaries to get some money to help one codefendant pay for his car. Kezer originally had been sentenced to the reformatory instead of receiving a suspended sentence because he did not have the stable family environment that his codefendants did.[181] He had no prior criminal record. The SRD did not explain

176. (Conn. SRD Mar. 9, 1973).

177. *Id.* This modification was surprising not only because the sentence was reduced by very little, *see* note 76 *supra*, but also because the nine to 18 year term had been imposed in accordance with an agreed recommendation. *See* notes 123-129 *supra* and accompanying text.

178. (Conn. SRD Mar. 30, 1973).

179. *Id.*

180. State v. Kezer (Conn. SRD Mar. 1, 1973).

181. This information is based on remarks at sentencing included in Kezer's file at the SRD.

why the sentence was not suspended to match those of the codefendants. In another rather bizarre case, *State v. Vereen*,[182] the SRD modified a sentence of four to eight years in prison for robbery with violence and breaking and entering to three to six years because the codefendants were not prosecuted or punished for this offense. Charges against two of the three codefendants were nolled because they were serving time for other crimes and the third codefendant absconded. Given these circumstances and the fact that this was Vereen's first felony offense, the SRD called the four to eight year sentence "a little high" and ordered it reduced.[183]

These cases in which applicants obtained sentence reductions on the grounds that a codefendant had received a lesser sentence were not, however, evidence that SRD had firmly embraced a policy of correcting comparative disproportionality among codefendants. On the contrary, eighteen of the twenty-three applicants in 1972 whose codefendants had received lesser sentences did not receive any sentence modifications from the SRD. Factors the SRD used to justify different treatment of codefendants included an extensive prior criminal record, judicial leniency in the past, poor performance by the defendant on probation, leadership in the commission of the offense, age of the codefendants, different treatment needs of the offenders, and the defendant's cooperation with the police and prosecutors. Typical of the commentary on dissimilar codefendants is this excerpt from one 1972 case:

> [N]one of the co-defendants had a previous poor record with respect to probation. They were thus entitled to claim an opportunity to show that they could benefit from a suspended sentence and probation. The defendant, on the other hand, had previously had the same opportunity with a prior offense but had not made anything of that opportunity. The co-defendants were entitled to the same chance that she had had, and the reason for giving them that chance was no longer applicable to her.[184]

D. *Sentence Increases*

The power to increase sentences was granted to the SRD in order to discourage frivolous appeals and to further the aim of reduc-

182. (Conn. SRD May 30, 1973).
183. *Id.*
184. State v. Gresko (Conn. SRD Feb. 26, 1973).

ing sentence disparity.[185] Because very lenient sentences are a source of prisoner grievances, the SRD needed the power to level off sentences in an upward as well as a downward direction. The only obstacle to reduction of disparity by increasing lenient sentences was that the SRD had jurisdiction over unduly lenient sentences only on the rare occasions when the defendants who had received such sentences were foolish enough to complain that the sentences were too harsh.

In the twenty years of its existence, the SRD has only increased nine sentences: Two in 1958, one in 1959, one in 1960, three in 1961, one in 1963, and one in 1977.[186] Particularly because the power has recently been exercised after fourteen years of dormancy, sentence increase cases are of great interest.

The eight sentence increase cases from the distant past can be classified into two categories: those cases involving insufficiently low penalties for multiple offenders and those cases involving very violent crimes. Typical of the former category is *State v. Davis*.[187] The applicant was convicted of attempting to obtain money under false pretenses and received a one to three year sentence. From 1937 to 1958 Davis had been convicted of eighteen crimes. He had previously been convicted of the same crime and had been sentenced to one and one-half to three years in prison. The SRD increased the one to three year term to two to five years, stating that the penalty for a second offense must be harsher than the penalty for the first offense.[188]

---

185. *See* PRISON STUDY REPORT, *supra* note 2, for a discussion of the reasons for which the Prison Study Committee thought the power to increase sentence was necessary. The Appendix to the PRISON STUDY REPORT dealt with the question of whether there was any constitutional prohibition on giving the SRD the power to increase sentences and concluded that there was no such prohibition. In a recent case the Court of Appeals for the First Circuit ruled on the constitutionality of the Massachusetts sentence review tribunal's power to increase sentences, and concluded that there was no constitutional violation. *See* Walsh v. Picard, 446 F.2d 1209 (1st Cir. 1971).

186. The nine cases are: State v. Rivera (Conn. SRD May 24, 1977); State v. Levac, 25 Conn. Supp. 68, 196 A.2d 603 (1963) (SRD Nov. 21, 1963); State v. Rodgers, 23 Conn. Supp. 83, 176 A.2d 600 (SRD Nov. 28, 1961); State v. Langley, 22 Conn. Supp. 492, 174 A.2d 689 (SRD June 14, 1961); State v. Kohlfuss, 22 Conn. Supp. 278, 169 A.2d 659 (SRD Mar. 15, 1961); State v. Consiglio (Conn. SRD Oct. 30, 1959); State v. Davis, 21 Conn. Supp. 480, 158 A.2d 601 (SRD Feb. 16, 1959); State v. Doak (Conn. SRD May 14, 1958); State v. Heyward (Conn. SRD May 13, 1958).

187. 21 Conn. Supp. 480, 158 A.2d 601 (SRD Feb. 16, 1959).

188. *Id.* at 481, 158 A.2d at 602. The other two cases involving insufficiently low penalties for multiple offenders were State v. Consiglio (Conn. SRD Oct. 30, 1959) and State v. Heyward (Conn. SRD May 13, 1958). Consiglio had been convicted of 26 counts of burglary and was sentenced to nine to 30 years in prison. He had previously been convicted of burglary. The SRD increased his sentence to 11 to 30 years because of his

The violent crimes committed by the five applicants whose sentences were increased included robbery, rape, and assault with intent to murder.[189] All involved the use or threatened use of weapons.[190] Several of the incidents involved serious injury to the victims. Four of the five applicants had at least one prior felony conviction. In several opinions, the SRD described the attacks as vicious. The very violent nature of the crimes was clearly the determinative factor in the SRD's decision to increase the sentences of these five defendants.[191]

At the time this research was conducted, more than one SRD judge stated off the record that the SRD was waiting for a proper case in which to order an increase in penalty. The judges previously

---

poor prior record. Heyward had been convicted of possession of heroin and was sentenced to five to seven years in prison. The SRD ordered an increase in his sentence to five to 10 years because of his prior criminal record and because he was a suspected dope pusher.

189. Applicants Kohlfuss, Langley, and Levac had committed armed robbery; applicants Doak and Langley had committed rapes; applicant Rodgers had committed assault with intent to murder.

190. Two of Doak's four rape attacks were at knife-point; Kohlfuss had used a tire iron to beat his victim; Langley had threatened use of a gun; Rodgers used a gun in his assault; Levac had carried a knife during two of the three robberies.

191. Four of the eight applicants whose sentences the SRD ordered increased challenged either the constitutionality of the increases or the procedures which led to them; all four were successful in their efforts to have the increased sentences set aside. Applicant Kohlfuss was unsuccessful in his first challenge to the sentence increase when he argued that an increase in penalty and the resentencing put him twice in jeopardy for the same crime. The Connecticut Supreme Court of Errors rejected this argument on the ground that the sentence increase was the result of the defendant's voluntary initiation of the sentence review proceedings and not the result of independent action of the trial court. Kohlfuss v. Warden, 149 Conn. 692, 183 A.2d 626 (1962). Kohlfuss later petitioned for a writ of habeas corpus alleging that he had been denied his sixth and fourteenth amendment rights to representation by counsel. The federal court which granted the writ noted in its opinion that none of the defendants whose sentences had been increased had been represented by counsel. United States *ex rel.* Kohlfuss v. Reincke, 254 F. Supp. 440, 444 (D. Conn. 1965). After the *Kohlfuss* case, two other prisoners whose sentences had been increased made the same claim to Connecticut courts and had their sentence increases set aside. Consiglio v. Warden, 153 Conn. 673, 220 A.2d 269 (1966); State v. Langley, (Super. Ct., June 1, 1967), discussed in State v. Langley, 156 Conn. 598, 244 A.2d 366 (1968). Another successful attack on a sentence increase was mounted by defendant Heyward whose sentence had been ordered increased from five to seven to five to 10 years in prison. Because Heyward was not actually resentenced to the five to 10 year term until the five to seven year sentence expired, the Connecticut Supreme Court granted Heyward's petition for a writ of habeas corpus and ordered his immediate release on the ground that his constitutional rights to due process and against double jeopardy had been violated. State v. Heyward, 152 Conn. 426, 207 A.2d 730 (1965).

had been reluctant to increase a sentence because of the anticipated negative effect it would have on the institutional adjustment and rehabilitation of the defendant whose sentence was so modified. However, the judges now wished to increase a sentence to cut down the application rate and as a result, the caseload they would have to bear. The criterion expressed for a proper case was that the sentence be very lenient, as sometimes occurs where there is an agreed recommendation.

In the case of Jorge Rivera, the SRD apparently found the appropriate sentence to increase.[192] Rivera's sentence of three to eight years in prison was ordered increased to five to ten years in prison. The charges arose out of four unrelated offenses: An armed robbery, an armed burglary, an unarmed burglary, and theft of a car. Rivera had pleaded guilty to robbery second (one count), burglary third (two counts), and larceny second (one count). Although no one was injured in any of these incidents, the SRD opinion noted that Rivera had fired shots in the direction of the police in a getaway from the robbery and that Rivera's codefendant had held a knife to a woman's throat during one of the burglaries. The opinion mentioned that Rivera had "a prior record of some consequence"[193] although it did not indicate of what sort it was. The rationale for the increase appeared to be two-fold: (1) The violent nature of the crimes and (2) the leniency of the sentence in comparison to sentences given to other defendants for similar crimes. The SRD stated:

> These present offenses are flagrant in nature and are marked by violence and danger to the public and to law officers as well as to private citizens in their homes. . . . In view of this, it is concluded that the sentences administered are much more lenient than those customarily given for comparable crimes, and it is further concluded that they should be increased.[194]

This opinion is particularly interesting because it does attempt abstract comparison with sentences imposed on others. Whether this case presages a rash of sentence increases or a move in the direction of making sentence comparisons the basis for sentence review decisions remains to be seen.

192. State v. Rivera (Conn. SRD May 24, 1977). The SRD has approved this case for publication, but as yet it has not been published.

193. *Id.*

194. *Id.*

E. *Conclusion*

An examination of sample sentence reductions and increases indicates that the SRD generally fails to treat sentence disparity as a problem of the comparative disproportionality of penalties for similar offenders and similar offenses. The SRD has established two primary criteria for sentence reduction: (1) The sentence must have been unreasonable at the time it was imposed and (2) the sentence must be patently excessive.[195] Yet, it is these very criteria that prevent the comparative analysis and sensitivity to minor sentence disparities that are necessary for the conceptual development and practical implementation of a theory of comparative disproportionality. As a result, the SRD conservatively wields its power to modify sentences, leaving intact more than ninety percent of the sentences it reviews and almost never increasing sentences.

This is not to say that the SRD is entirely insensitive to the problem of sentence disparity. The five reductions of sentences in 1972 in cases where a codefendant of the applicant had received a lesser sentence[196] illustrate that the SRD can be receptive to arguments of sentence disparity presented in a concrete context. However, the significance of these cases should not be overstated: for the five applicants who received reductions there were eighteen other similarly situated applicants who received no sentence modifications. Furthermore, it is impossible to discern from the opinions in these cases the basis on which the SRD granted or denied sentence reductions to particular applicants. This underscores the central shortcoming of the SRD to date, namely, the failure to develop objective standards of sentence disparity and uniform criteria of sentence modification.[197] As a result, the SRD has remained unable to develop or implement an abstract theory of sentence disparity that is sensitive

---

195. *See* notes 111 and 112 *supra* and accompanying text.

196. *See* notes 172-184 *supra* and accompanying text.

197. The failure to develop objective standards has been a continuing problem of the SRD. The only other study of the SRD, conducted 17 years ago, only two years after the SRD's inception, concluded that:

> To date, the most serious drawback to the Division's effectiveness has been the idea that its primary function is to prevent "horrible sentencing examples." By seldom attempting to supply generally applicable sentencing criteria, the Division has overlooked its most significant potentialities and has lost the interest of other participants and decision-makers of the criminal process. Unless it assumes the role of an affirmative policy maker, *ad hoc* instinctive decisions will continue to impede development in the field of sentencing.

Connecticut Case Study, *supra* note 7, at 1477.

to the comparative disproportionality of penalties for similar offenders and similar offenses.

III. An Evaluation of the Sentence Review Division

A. *Why the SRD Has Not Done More to Recognize and Reduce Sentence Disparity*

The SRD has adopted as its definition of sentence disparity the grossly excessive or unreasonable sentence. This definition limits the scope of its inquiry and leads to few sentence modifications. Among the reasons why SRD has not taken a more expansive view of sentence disparity are: (1) The institutional disincentives which operate to make vigorous sentence review a low priority for the judges serving on the SRD; (2) the lack of information on sentencing patterns throughout the state; (3) the great difficulties of effecting comprehensive changes in sentencing patterns through a review tribunal; and (4) the disinclination of SRD judges to challenge the sentencing practices of fellow judges.

Given the time SRD judges presently are allotted to perform their sentence review duties and the marginal resources at their disposal, it would be unrealistic to expect them to devote more than minimal effort to sentence review. SRD judges must carry full and normal caseloads as superior court judges in addition to their sentence review responsibilities; they are relieved of their regular duties only one day a month, that reserved for the sentence review hearings. All preparation for and work consequent to the SRD hearings must be done on a judge's own time.[198] SRD judges receive no additional compensation for these added duties, and they have no law clerks or supportive staff to assist them in researching legal issues or drafting opinions.[199] Due to the rather large number of cases heard in recent years,[200] SRD judges feel burdened by the work even this narrow interpretation of their function imposes on them.

198. Judges serving on the SRD at the time of this study estimated that it takes at least three hours to read through the synopses of the cases to be heard, plus the full files on one-third of the cases, and a minimum of eight hours to draft and correct the opinions. Any research takes additional time.

199. The Executive Secretary of the SRD, who has a private law practice as well as this part-time job with the SRD, prepares the synopses, schedules hearings, checks to see that all defendants are represented by counsel, and distributes opinions. The Executive Secretary does not do any research for the judges.

200. The SRD judges interviewed estimated that about 150 cases a year are heard by the SRD.

SRD judges say they have a general sense of what sentences other judges impose on offenders. However, they do not have access to systematic information on the distribution of sentences for specific offenses according to characteristics of offenders. Such information is necessary if the SRD is to take a more expansive view of its role and adopt as its definition of disparity the comparative disproportionality of penalties imposed on similar offenders for similar offenses. One of the reasons SRD has been more sensitive to comparative disproportionality in the codefendant situation is that these cases present an easily accessible basis for comparison. While SRD occasionally makes abstract comparisons of one defendant's sentence to sentences imposed on other offenders, at present it has only an intuitional and not a factual basis for making such sentence comparisons.

The capacity of SRD judges to reduce or eliminate sentence disparity is necessarily limited because the SRD has jurisdiction only over those sentences appealed to it.[201] The SRD cannot rectify disparity on the lenient side which serves as a source of grievance to prisoners sentenced more harshly. Even if the SRD decided to adopt an affirmative policy-making role, it would only be able to enforce its policies if defendants whose sentences were not in accord with those policies applied for review. If, for example, SRD announced that henceforth any first offender who robbed a business establishment with a gun or knife should be sentenced to the mandatory minimum of five years, any sentencing judge who disagreed with the policy could ignore it and sentence such defendants to probation, one year in jail, or two to five years in prison. The defendants so sentenced would probably not apply for review, and so the policy SRD enunciated would not be enforced. There is also a limit on what can be achieved through a case-by-case development of sentencing policy: a much more efficient system for the evaluation of sentence disparities would be the development of objective standards against which the sentence of any particular defendant could be measured.

A significant obstacle to a more expansive view of the SRD's role is the judges' own disinclination to expand that role. SRD judges say that they do not want to infringe on what they regard as appropriate judicial independence in the exercise of sentencing powers, and by its very standard of review, SRD defers heavily to the judgment of

201. The SRD's capacity to reduce sentence disparity is also restricted by the manner in which the prosecutor has exercised his discretion in plea bargaining and by legislative actions, such as the setting of mandatory minimum sentences for certain offenses.

judicial colleagues. The presumption thus runs strongly in favor of the reasonableness or fairness of a sentence. While opinions affirming a defendant's sentence comment that "the sentence was not unreasonable" or "the sentencing judge did not abuse his discretion," opinions ordering a reduction of sentence never assert that the sentence was unreasonable or that the sentencing judge abused his discretion. Rather, they typically declare that the sentence was "a little too high" or "somewhat excessive" under the circumstances.[202] The fact that the SRD judges interviewed never recalled asking a sentencing judge for his reasons for imposing a particular sentence is another sign that SRD judges are reluctant to make demands on fellow judges. In short, SRD judges do not want to put themselves in a position of telling other judges how they should sentence or what plea bargains to accept. But only if SRD judges are willing to begin curtailing judicial independence in sentencing can they begin to reduce the substantial sentence disparity that exists in Connecticut.

All of these factors have created institutional pressures which lead SRD judges to take a narrow view of sentence disparity and of the SRD's function. In order for SRD to take a more expansive view, the institutional barriers—lack of time, lack of staff, lack of information—must be removed. But in addition the intellectual climate among judges must change to one of greater receptivity to sentence comparisons and to criticism of the current sentencing structure. As yet there has been no sense of urgency about sentence disparities and sentence reform among Connecticut judges. Until a sense of urgency is awakened in them, no expansion of the SRD's role and no sentencing reform are likely.

B. *Why the SRD Should Adopt Comparative Disproportionality as Its Theory of Sentence Disparity*

There are two reasons why the SRD should break out of the restrictive mold of sentence review in which it has so long been operating. First, the problem of sentence disparity in the sense of the comparative disporportionality of penalties for similar offenders[203] is too prevalent in Connecticut's criminal justice system to be ignored any longer. Second, sentence differences of one or two years or

202. *See* Part II, Section C *supra*.

203. Throughout Part III the term "similar offenders" will be used to refer to persons who have committed similar offenses and who have similar prior criminal histories and similar personal background characteristics.

more, to which SRD judges are only occasionally sensitive, are, in fact, significant differences.

Part I presented evidence which suggests that sentence disparity in the sense of comparative disproportionality is both a widespread and substantial phenomenon in Connecticut. The sentences imposed on applicants for sentence review were, on the average, substantially harsher than those imposed on nonapplicants and the harsher sentences of applicants could not be explained by less favorable personal characteristics, worse prior criminal histories, or more serious crimes. The SRD ordered sentence reductions in only a few of these cases,[204] and thus did not address itself to the issue of pervasive disparity.

Except when occasionally swayed by a sense of equity, SRD judges have tended to think that sentences which differed by one or two years were not sufficiently disparate to necessitate sentence modifications. However, because the great majority of sentences have minimum terms of five years or less,[205] disparities in sentences of one or two years or more *are* substantial disparities. Assume that defendant A has been sentenced to a minimum term of three years for robbery second, that similar defendant B has been sentenced to two years for the same type of crime, and that similar defendant C has been sentenced to one year for the same type of crime. Although the overall differences in minimum sentence between these similar defendants are only one and two years, A's sentence is two times as severe as B's and three times that of C. Unless there is some objective aggravating factor about A or his crime which is absent in the other cases, A can only trace his harsher sentence to the arbitrariness of the sentencing system.

Treating sentence disparity as the comparative disproportionality of penalties for similar offenders convicted of similar crimes means moving away from the individualized sentencing system in which Connecticut judges have been operating. In particular, it means no longer accepting uncritically the notion that widely different sentences for similar offenders are justified on the grounds of individual judges' sense of particular defendants' amenability to rehabilitation. Such an approach results in unfairness because it leads to widely dif-

204. Of the 157 defendants in the applicant pool discussed in Part I, only nine eventually obtained sentence reductions from SRD and in two of those nine cases only the maximum term was reduced.

205. In the applicant/nonapplicant sample, 89% of the 382 sentences had minimum terms of five years or less.

ferent sentences for similar offenders and because it punishes defendants on the basis of their psychological condition and not on the basis of the crimes committed.[206] While it would not be desirable to eliminate entirely judicial discretion in sentencing,[207] there must be a structure to such discretion.[208]

One approach which offers a significant opportunity for ameliorating the evils of individualized sentencing is setting "presumptive sentences" for specific crimes, using the severity of the crime and the seriousness of an offender's prior criminal record as the primary determinants of the presumptive sentence.[209] If a judge believes it necessary to give either a less or a more severe sentence, he can do so as long as he gives reasons justifying the deviation.[210]

The open-ended, unstructured nature of judicial sentencing discretion is certainly a major source of comparative disproportionality, but it is not the only source. Because the power of the state's attorneys

---

206. Many critics have attacked the individualized sentencing structure as the source of inequitable sentence disparities. Prominent among these critics is United States District Judge Marvin Frankel: "The evidence is conclusive that judges of widely varying attitudes on sentencing, administering statutes that confer huge measures of discretion, mete out widely divergent sentences where the divergences are explainable only by the variations among judges, not by material differences in the defendants or their crimes." *See* FRANKEL, CRIMINAL SENTENCES, *supra* note 8, at 21. *See also* SENTENCING, *supra* note 8, at 386.

207. Critics of individualized sentencing recognize that entirely eliminating judicial discretion would lead to inequities:

> [I]t is extremely unlikely that either "flat-time" or "mandatory" sentencing will emerge as an acceptable general solution to the sentencing dilemma. Flat-time sentencing is simply too extreme a remedy; by eliminating all flexibility and requiring judges to impose the identical sentence on every single defendant convicted under the same statute, flat-time sentencing threatens to create a system so automatic that it will produce major injustices of its own. It is simply impossible to come up with a single just sentence for all armed robbers, for all burglars, for all first-degree murderers. Some degree of flexibility, both at the sentencing and parole stage, has to remain in order for the system to maintain credibility.

Dershowitz, *supra* note 70, at 26-27.

208. *See* K. DAVIS, DISCRETIONARY JUSTICE 133-41 (1971); M. FRANKEL, CRIMINAL SENTENCES, *supra* note 8, at 113-14; SENTENCING , *supra* note 8, at 387.

209. This proposal has been endorsed by the Committee for the Study of Incarceration, *see* A. VON HIRSCH, DOING JUSTICE, *supra* note 8, at 132-40, and by Senators Edward Kennedy and John McClellan, the sponsors of the legislation to revise the federal criminal code, *see* S. 181, 95th Cong., 1st Sess. (1977).

210. Those who have endorsed presumptive sentencing have recognized the need to retain some sentencing discretion to respond to special circumstances. But they also would delineate what sorts of circumstances are "special" enough to justify deviation from the presumptive sentence. *See* A. VON HIRSCH, DOING JUSTICE, *supra* note 8, at 131.

over charge concessions and sentence recommendations is so strong and has such an impact on the sentence that is eventually imposed, it may be difficult to reduce sentence disparity significantly without also structuring or limiting prosecutorial discretion in making charge concessions or sentence recommendation promises. Indeed, to attempt to reform the sentencing system merely by structuring judicial discretion and without confronting the extent to which prosecutors affect sentences in plea bargaining would be futile. If anything, it would tend to *increase* the prosecutor's power over sentencing. If judicial discretion in sentencing was structured while prosecutorial discretion remained unstructured, the prosecutor's charge concessions and sentence recommendations would become all the more significant in determining sentences.[211]

C. *Recommendations*

The evidence of sentence disparity in Connecticut is sufficiently persuasive that it presents a challenge which can be met only by more research on statewide sentencing patterns for felony offenders. It is therefore recommended that Connecticut's Judicial Department undertake a more systematic and thorough study of superior court sentencings. This research would serve three purposes. First, it would enable the Judicial Department to determine whether sentence disparity in the sense of comparative disproportionality is as prevalent and substantial as the data presented in this article suggest.[212] Second, if substantial comparative disproportionalities were found to exist, the research would aid in educating judges and lawyers in the criminal justice system about the importance of taking

211. For discussions of how the plea bargaining process might be structured, *see* K. DAVIS, DISCRETIONARY JUSTICE, *supra* note 208, at 224-25. *See also* White, *A Proposal For Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 439 (1971).

212. A conceptual framework would have to be developed before the research could commence. The Judicial Department would have to adopt a definition of sentence disparity, to select the variables to be measured, and to decide how to analyze the effect of plea bargaining. At a minimum the research should include: (1) All original charges against the defendant; (2) all conviction charges; (3) basic demographic data such as age, sex, race, and employment status; (4) prior criminal history; (5) basic facts concerning the offense (what was the value of the items taken; was a weapon carried during the offense; was the victim injured); (6) the prosecutor's sentence recommendation and the type of sentence recommendation agreement eventually reached; (7) the sentence actually imposed. Most of this information is available either from the presentence report or the court records. The only items not available from these sources are the prosecutor's sentence recommendation and the type of sentence recommendation agreement.

steps to reduce sentence disparities.[213] Third, the research would serve as a basis for the development of sentencing standards or guidelines and other proposals for change in the sentencing system.[214]

The SRD could take a more expansive view of its function and, utilizing the data from such research, could begin to do the following: (1) Recognize comparative disproportionalities as sentence disparities and use the concept of disproportionality in reviewing cases; (2) describe the ranges of sentences that have been imposed on offenders similar to the defendant whose sentence is being reviewed for similar crimes; (3) set guidelines for appropriate penalties for particular offenses and for the types of circumstances that are sufficiently unusual as to warrant deviation from the guidelines; (4) articulate and publish a coherent rationale for the appropriateness of applying or deviating from the guidelines in a particular case; and (5) monitor the plea bargaining practices of state's attorneys in reviewing cases.

However, if the SRD is to take this more expansive, more intellectually challenging interpretation of its function, the obstacles which tend to restrict its role must be removed. The problem of judicial disinclination[215] would seem best resolved by making a strong interest in investigating sentence disparity and developing proposals for sentencing guidelines the major criterion for selecting judges to serve on the SRD. To enable SRD judges to develop the expertise necessary to make the most informed and comprehensive proposals for sentencing reform, the composition of the SRD should be held stable for a period of several years. During this period SRD judges should be

---

213. At present, most judges and prosecutors are opposed to the idea of structuring sentencing and plea bargaining discretion. All of the judges interviewed for this study resisted the idea that structuring discretion is necessary to reduce disparities. However, part of the reason may be that they do not know how much disparity the unstructured system of discretion has created. The research data presented in this article should create a strong doubt about the fairness of the present sentencing system, but it will take more conclusive research to persuade those who firmly believe in the individualized sentencing system.

Development of sentencing guidelines has also been recommended in the *Report to the Legislature* issued by the Legislative Commission to Study Alternate Methods of Sentencing Criminals (Oct. 1977).

214. *See also Sentencing Councils*, *supra* note 8, at 148: "Already used in many courts, computers could provide the judges with the distribution of sentences, together with their means and medians for any combination of crime and offender. Eventually, such data could form the foundation for meaningful sentencing guidelines. . . ." *See also* SENTENCING, *supra* note 8, at 392-94, for a discussion of the usefulness of computers in development of a more rational sentencing system.

215. *See* text at 74-75 *supra*.

given the latitude to decide what additional staff and what additional time they need to perform their expanded tasks. Information on sentencing patterns for specific offenses could easily be made accessible to the SRD by having a computer terminal located in a central SRD office with access to the data base developed by Judicial Department research.[216] In addition, SRD judges should request, as a matter of routine policy, a statement of reasons from the sentencing judge for each sentence appealed. Having information on the sentencing patterns for similar offenders and the judge's reasons for the sentence, the SRD would be in a position to determine whether the sentence for a particular applicant is comparatively disproportionate and whether there are circumstances which justify an otherwise disproportionate penalty. By explaining in each case reviewed why the defendant's sentence is or is not appropriate in light of penalties imposed on similar offenders, the SRD could begin the development of sentencing guidelines. In conferences with fellow judges, SRD judges could report on its progress in these efforts and obtain feedback from the other judges on the acceptability of the SRD proposals.

One element vital to the success of a more expansive role for the SRD will be the receptivity of judges to criticism of individualized sentencing in the abstract and to criticism of their own sentencing decisions. SRD judges cannot investigate sentence disparities and propose sentencing reforms in an atmosphere of hostility and suspicion toward their efforts. To create an environment in which constructive criticism is welcome will not be easy, but the importance of developing a more equitable sentencing system makes it necessary to try.

---

216. *See* note 212 *supra*.

APPENDIX A

Additional Tables on Applicant/Nonapplicant Sample

TABLE 1

*Minimum Sentences of Applicants & Nonapplicants (Guilty Pleas Only)**

	APPLICANTS		NONAPPLICANTS	
Years	*Percent*	*Number*	*Percent*	*Number*
1	10%	(12)	19%	(41)
2	26	(32)	57	(125)
3	19	(23)	14	(30)
4	10	(12)	4	(8)
5	17	(21)	5	(10)
More than 5	18	(22)	3	(6)
Total	100%	(122)	102%	(220)

* Sentences rounded up to nearest year; two sentences of nonincarceration excluded.

TABLE 2

*Applicant Status by Minimum Term (Guilty Pleas Only)**

	Number of Years						
Group	*1*	*2*	*3*	*4*	*5*	*More than 5*	*Overall*
App.	23%	20%	43%	60%	68%	79%	36%
Nonapp.	77%	80%	57%	40%	32%	21%	64%
Total	100%	100%	100%	100%	100%	100%	100%
(Number)	(53)	(157)	(53)	(20)	(31)	(28)	(342)

* Sentences rounded up to nearest year; two sentences of nonincarceration excluded.

TABLE 3

Average Maximum Sentence by Conviction Offense, Application Status, and Prior Felony Convictions

Conviction Offense	Status/ Disparity	Overall		Prior Felony Convictions			
				No		Yes	
		Avg.	Number	Avg.	Number	Avg.	Number
Sale	App.	7.1	(31)	5.5	(14)	7.1	(16)
Narcotics	Nonapp.	4.9	(62)	4.8	(18)	5.0	(40)
	Disp.	2.2		0.7		2.1	
Possession	App.	8.7	(7)	4.0	(4)	15.0	(3)
Narcotics	Nonapp.	3.9	(17)	4.0	(4)	3.9	(12)
	Disp.	4.8		.0		11.1	
Robbery	App.	11.2	(23)	9.9	(14)	13.2	(9)
1st	Nonapp.	7.8	(19)	8.0	(3)	7.8	(16)
	Disp.	3.4		1.9		5.4	
Robbery	App.	7.1	(14)	5.4	(7)	8.9	(7)
2nd	Nonapp.	5.6	(17)	5.0	(7)	6.4	(8)
	Disp.	1.5		0.4		2.5	
Robbery	App.	4.8	(5)	5.0	(2)	4.7	(3)
3rd	Nonapp.	4.7	(21)	4.7	(10)	4.8	(11)
	Disp.	0.1		0.3		−0.1	
Burglary	App.	6.7	(9)	4.0	(3)	8.0	(6)
3rd	Nonapp.	3.8	(15)	1.8	(4)	4.3	(10)
	Disp.	2.9		2.2		3.7	
Manslaughter	App.	14.9	(10)	13.8	(5)	16.0	(5)
1st	Nonapp.	8.5	(14)	8.9	(8)	7.2	(5)
	Disp.	6.4		4.9		8.8	

TABLE 4

*Average Maximum Sentence by Original Charge, Application Status, and Prior Felony Convictions**

Conviction Offense	Status/ Disparity	Overall		Prior Felony Convictions: No		Prior Felony Convictions: Yes	
		Avg.	Number	Avg.	Number	Avg.	Number
Sale Narcotics	App.	7.0	(36)	5.2	(18)	7.6	(17)
	Nonapp.	4.7	(75)	4.8	(20)	4.8	(50)
	Disp.	2.3		0.4		2.8	
Robbery 1st	App.	9.6	(40)	8.4	(22)	11.1	(18)
	Nonapp.	5.8	(55)	5.5	(19)	6.1	(3)
	Disp.	3.8		2.9		5.0	
Assault 1st	App.	7.0	(8)	7.3	(7)	5.0	(1)
	Nonapp.	5.0	(13)	4.5	(6)	5.2	(6)
	Disp.	2.0		2.8		−0.2	
Burglary 1st & 2nd	App.	15.6	(7)	20.8	(4)	10.3	(3)
	Nonapp.	4.2	(13)	3.5	(6)	4.9	(7)
	Disp.	11.6		17.3		5.4	
Burglary 3rd	App.	6.4	(9)	4.3	(4)	8.2	(5)
	Nonapp.	4.3	(8)	2.0	(1)	4.6	(7)
	Disp.	2.3		2.3		3.6	
Murder	App.	29.0	(8)*	27.3	(3)	38.3	(5)
	Nonapp.	9.9	(9)	10.5	(4)	9.4	(5)
	Disp.	19.1		16.8		28.9	
Manslaughter 1st	App.	12.3	(6)	12.3	(4)	12.5	(2)
	Nonapp.	6.9	(8)	6.3	(6)	5.0	(1)
	Disp.	5.4		6.0		7.5	

* Life sentences averaged as having a maximum term of 50 years.

TABLE 5

Number of Original Charges Counts

Group	Number of Counts: 1	2	3	4-7	8 or More	Total: %	(N)
App.	38%	22%	10%	22%	8%	100%	(157)
Nonapp.	25%	27%	15%	24%	8%	99%	(225)

TABLE 6

Number of Conviction Offense Counts

	Number of Counts					Total	
Group	*1*	*2*	*3*	*4-6*	*7 or More*	*%*	*(N)*
App.	53%	22%	10%	11%	4%	100%	(157)
Nonapp.	47%	37%	8%	7%	1%	100%	(225)

TABLE 7

Average Minimum Sentence in Years by Conviction Offense, Applicant Status, and Prior Felony Convictions (Guilty Plea Cases Only)

				Prior Felony Convictions			
Conviction	*Status/*	*Overall*		*No*		*Yes*	
Offense	*Disparity*	*Avg.*	*(N)*	*Avg.*	*(N)*	*Avg.*	*(N)*
Sale	App.	3.0	(23)	2.5	(12)	3.5	(11)
Narcotics	Nonapp.	2.0	(61)	1.8	(18)	2.1	(39)
	Disp.	1.0		0.7		1.4	
Possession	App.	2.1	(5)	2.1	(4)	2.0	(1)
Narcotics	Nonapp.	1.5	(17)	1.4	(4)	1.6	(12)
	Disp.	0.6		0.7		0.4	
Robbery	App.	5.8	(16)	4.7	(10)	7.7	(6)
1st*	Nonapp.	3.2	(19)	3.1	(3)	3.2	(16)
	Disp.	2.6		1.6		4.5	
Burglary	App.	2.7	(9)	1.2	(3)	3.5	(6)
3rd	Nonapp.	1.5	(14)	0.9	(4)	1.6	(9)
	Disp.	1.2		0.3		1.9	
Manslaughter	App.	8.9	(8)	7.0	(4)	10.8	(4)
1st	Nonapp.	3.4	(13)	3.1	(7)	3.3	(5)
	Disp.	5.5		3.9		7.5	

* The Robbery 2nd and Robbery 3rd categories are unchanged because no one in the sample was convicted after trial for these offenses.

APPENDIX B

Defendants Who Withdraw Sentence Appeals

Of the 284 defendants whose 1972 applications were eligible for review, ninety-two (thirty-two percent) withdrew their sentence appeals. Because the percentage of withdrawing applicants is so large, the question arises: what kinds of offenders withdrew their sentence appeals?

As Tables 1 and 2 illustrate, an examination of the percentages of SRD applicants withdrawing according to their minimum and maximum terms reveals that, for the most part, sentences for withdrawing offenders were comparatively shorter than for continuing applicants.

TABLE 1[1]

Minimum Terms

Years	*Withdraw*	*Continue*
1	24%	9%
2	36%	25%
3	15%	25%
4	8%	6%
5	12%	13%
More than 5	6%	23%

TABLE 2

Maximum Terms

Years	*Withdraw*	*Continue*
3 or less	28%	13%
4 to 5	42%	33%
6 to 10	25%	36%
More than 10	5%	18%

Table 1 indicates that sixty percent of those defendants who withdrew had minimum terms of two years or less as compared to only thirty-four percent of those who continued their sentence appeals. Only ten percent of defendants with minimum terms of five years or more withdrew. Similarly, Table 2 indicates that seventy percent of those who withdrew had maximum sentences of less than five years; only five percent of those with sentences of more than ten years withdrew.

1. Tables 1 and 2 exclude the sentences of six defendants whose sentences were not in SRD files. Sentences are rounded up to the nearest year.

Table 3 shows that defendants who withdrew their sentence appeals not only tended to have lesser sentences, but also faced a lesser maximum exposure at sentencing.

TABLE 3

Maximum Exposure at Sentencing[2]

Years	*Withdraw*	*Continue*
5 or less	36%	20%
6 to 10	13%	21%
11 to 15	21%	13%
16 to 25	23%	27%
More than 25	7%	19%

Two-thirds of the withdrawing SRD applicants in 1972 had been convicted of five crimes: Robbery first, robbery third, burglary third, sale of narcotics, and possession of narcotics. The percentages of applicant withdrawals of all the eligible applicants convicted of these offenses are shown in Table 4.

TABLE 4

Percentage of SRD Withdrawals For Selected Offenses

Offense	*Percentage Withdrawing*	*Total Cases*
Burglary 3rd	40%	52
Sale of Narcotics	28%	39
Robbery 1st	40%	30
Poss. of Narcotics	41%	22
Robbery 3rd	50%	18

Three of these offenses—burglary third, robbery third, and possession of narcotics—are felonies that in 1972 carried five-year statutory maximum penalties.[3] Offenders convicted of these three crimes were quite likely to have relatively short minimum and maximum terms because of this statutory limitation. These three offenses alone account for forty-two percent of the 1972 withdrawal cases. This finding helps to explain why sentences of withdrawing offenders are generally shorter than those of the SRD applicants who went ahead with their sentence appeals.

2. These figures were obtained by adding together the maximum statutory penalty for all offenses of which defendants were convicted. The figures are rounded up to the nearest year.

3. *See* CONN. GEN. STAT. §§ 53a-103, 53a-136, 19-481 (1977).

Those who pleaded guilty were more likely to withdraw than those who had been convicted after trial. Ninety percent of withdrawing applicants had pleaded guilty as compared with seventy-eight percent of those who continued. Of those applicants who were known to have been sentenced in accordance with an agreed recommendation, forty-two percent withdrew.

In terms of age, sex, race, employment history, and drug history, defendants who withdrew their sentence appeals were not notably different than those who continued. A comparison of withdrawing and continuing SRD applicants in terms of prior criminal record shows no significant difference between them, as Tables 5 and 6 demonstrate.

TABLE 5

Prior Convictions[4]

Group	*None*	*1-3*	*4-6*	*7-9*	*10 or more*
Withdrew	16%	40%	21%	7%	15%
Continued	24%	30%	20%	9%	17%

TABLE 6

Prior Felony Convictions

Group	*None*	*1*	*2-3*	*4 or more*	*Number of Cases*
Withdrew	51%	19%	18%	13%	(85)
Continued	54%	13%	17%	16%	(192)

The only other significant difference between those who withdrew and those who continued their sentence appeals was found in the type of counsel representing the defendants. Defendants who had been represented by public defenders tended to withdraw more often than those who had been represented by private counsel. Sixty-two percent of those who withdrew had been represented by public defenders as compared with forty-nine of those who continued their sentence appeals.

4. Seven unknown defendants are excluded.

APPENDIX C

Characteristics of 1972 Applicant Modifications

Among the 1972 SRD applicants young offenders were more likely to obtain modifications. Eighty percent of the modifications were in cases with defendants twenty-five years or younger although such defendants constituted sixty-seven percent of the sample. Two of the six women whose cases were reviewed obtained sentence reductions; eight percent of the men whose cases were reviewed obtained reductions. Whites were more successful than nonwhites in obtaining sentence modifications. White persons constituted one-third of the sample, and eight of the forty-two of them (nineteen percent) obtained reductions. Blacks constituted one-half of the review population and Hispanics the remaining one-sixth, but only four of the eighty-four nonwhites (five percent) obtained sentence reductions. Marital status and the number of dependents a defendant had did not affect the likelihood of a sentence reduction. The more educated the defendant was, the more likely he was to get a sentence modification. Six of forty-two (fourteen percent) defendants with at least a high school diploma had their sentences modified as compared to five of eighty-six (six percent) applicants who were high school dropouts. Applicants with stable employment histories also were more likely to obtain sentence reductions: the SRD modified the sentences of four of twenty-nine (fourteen percent) applicants with stable employment histories, but modified the sentences of only seven of seventy-five (nine percent) of those applicants with unstable employment histories.

In 1962 and 1967 no applicants with prior felony convictions or prior convictions for the same offense obtained sentence reductions. However, eleven of the applicants whose cases were modified in 1972 had prior criminal records. Seven had prior felony convictions, five had prior convictions for the same offense, four had been on probation or parole at the time of the offense, and four had previously been incarcerated. Tables 1 and 2 show the percentages of modifications of cases in which defendants had the indicated prior criminal histories.

TABLE 1

Prior Convictions

	None	*1-3*	*4-6*	*7-9*	*9 or more*
Modified	10%	8%	11%	7%	10%
Affirmed	90%	92%	89%	93%	90%
(Number)	(41)	(53)	(35)	(14)	(21)

TABLE 2

Prior Felony Convictions

	None	*One*	*2-3*	*4 or more*
Modified	9%	4%	11%	10%
Affirmed	91%	96%	89%	90%
(Number)	(93)	(24)	(27)	(20)

The fifteen defendants whose sentences were modified had committed a variety of offenses. But as Table 3 indicates, those convicted of certain types of offenses were more likely to obtain sentence modifications. Defendants charged with burglary and larceny seemed to be more successful than those charged with violent offenses in obtaining sentence reductions.

TABLE 3

Conviction Offenses

	Drug	*Rob.*	*Burg.*	*Homicide*	*Sex*	*Assault*	*Larc.*	*Other*	*Overall*
Modified	5%	6%	17%	–	10%	–	33%	13%	9%
Affirmed	95%	94%	83%	100%	90%	100%	67%	87%	91%
(Number)	(39)	(36)	(36)	(12)	(10)	(9)	(6)	(16)	(164)

Thirty-six percent of the cases reviewed had minimum terms of two years or less, as compared to twenty-seven percent of the modifications; thirty-one percent of the cases reviewed had minimum terms of five years or more as compared to forty-seven percent of the modifications. Six of the fifteen applicants who obtained reductions were facing a maximum penalty exposure at sentencing of twenty-five years or more. Thus, it appears that offenders with comparatively heavier sentences are somewhat more likely to obtain sentence modifications.

The geographical distribution of modifications by court is curious. Six of the twenty-one (twenty-nine percent) sentences appealed and reviewed from the New Haven County Superior Court were modified as compared to only three of forty-nine (six percent) from the Fairfield County Superior Court and none of the fifteen (zero percent) from the Hartford County Superior Court. One of the twenty-six cases from the other superior courts was modified after review. Five of the forty cases appealed from the circuit courts (now the courts of common pleas) were reduced and another five were returned to the sentencing court for a technical modification which amounted to an affirmance of the original sentence.