IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Plaintiff-Appellee,

v.

ANTHONY P. RIOS,
Defendant-Appellant.

Supreme Court No. 2013-SCC-0014-CRM

Superior Court Nos. 97-0294; 03-0030; 03-0031; 12-0007; and 12-0110

OPINION

Cite as: 2015 MP 12

Decided December 11, 2015

Braddock J. Huesman, Saipan, MP, for Defendant-Appellant.

Gilbert Birnbrich, Interim Attorney General,[1] and Chester Hinds, Assistant Attorney General, Office of the Attorney General, Saipan, MP, for Plaintiff-Appellee.

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[1] Gilbert Birnbrich was Attorney General during the briefing stage.

BEFORE: ALEXANDRO C. CASTRO, Chief Justice; JOHN A. MANGLONA, Associate Justice; PERRY B. INOS, Associate Justice.

INOS, J.:

¶ 1 Defendant Anthony P. Rios ("Rios") appeals his convictions, sentences, and revocation of probation, asserting the trial judge erred by (1) partially recusing himself from sentencing in Rios's 2013 conviction for Disturbing the Peace and Assault and Battery, (2) refusing to order a presentence investigation report at the 2012 probation revocation hearing, and (3) miscalculating the sentence at the probation revocation hearing. For the reasons discussed below, we AFFIRM Rios's convictions, sentences, and probation revocation.

I. FACTS AND PROCEDURAL HISTORY

¶ 2 In 1997, Rios pled guilty to three counts of Sexual Abuse of a Child, two counts of Oral Copulation, and one count of Rape. He was sentenced to five years imprisonment for one count of Sexual Abuse of a Child and forty years for the remaining five counts, all forty of which were suspended. *Commonwealth v. Rios*, No. 97-294D (NMI Super. Ct. Oct. 29, 1997) (Judgment and Commitment Order at 2–3) [hereinafter 1997 Commitment Order]. The suspended sentence was conditioned upon forty-five years of probation, which required Rios "obey all laws of the Commonwealth and United States, minor traffic offenses excepted." *Id.* at 3.

¶ 3 In 2003, Rios was released from prison. He reoffended within five months of release and pled guilty to Sexual Assault in the Second Degree. He was sentenced to ten years imprisonment, all but five years suspended. *Commonwealth v. Rios*, Nos. 03-0031A/03-0030E (NMI Super. Ct. Dec. 31, 2003) (Judgment and Commitment Order at 2). His sentence included five years of probation upon release, which required that he obey CNMI and U.S. laws. Meanwhile, his probation in the 1997 case remained in place.

¶ 4 After serving five years for his Sexual Assault in the Second Degree conviction, Rios was released from prison and placed on probation. In 2012, he reoffended and was charged with two counts of Sexual Assault in the Second Degree, two counts of Assault and Battery, and two counts of Disturbing the Peace. *Commonwealth v. Rios*, Nos. 97-0294/03-0030/03-0031 (NMI Super. Ct. Sept. 24, 2012) (Revocation of Probation and Commitment Order at 1) [hereinafter Revocation Order]. Based upon those charges, the Commonwealth filed a petition to revoke Rios's probation in the 1997 and 2003 cases.

¶ 5 A different judge presided over the revocation hearing than did the 1997 and 2003 cases. At the hearing Rios requested that a presentence investigation report be ordered. After hearing argument on the issue, the court denied his request, noting that the 1997 and 2003 sentences were contemplated at the time the plea agreements were entered. *Commonwealth v. Rios*, Nos. 97-294/03-0030/03-0031 (NMI Super. Ct. Mar. 21, 2014) (Transcript at 77). The court then revoked Rios's probation after finding by a preponderance of the evidence

that he violated its terms.[2] For the 1997 case, the court sentenced Rios to the maximum forty-year sentence. As to the 2003 case, the court sentenced Rios to five years, to be served consecutively with his forty-year sentence. His total sentence was forty-five years, without the possibility of parole or early release. Revocation Order at 2–3.

¶ 6 While serving his probation revocation sentence, Rios was charged with one count of Disturbing the Peace for an incident unrelated to the conduct for which his probation was revoked. With the same judge presiding, the court found Rios guilty and sentenced him to six months imprisonment to run concurrently with his forty-five year probation revocation sentence. *Commonwealth v. Rios*, No. 12-0007 (NMI Super. Ct. Feb. 1, 2013) (Judgment of Conviction and Sentencing Order). After sentencing, the judge stated:

> Mr. Rios, I know that this is a relatively low level offense, and I'm gonna sentence you so that you can serve this sentence, okay, consecutively—I'm sorry. Take that back. Concurrently with the sentence you're serving. But be mindful that if there are future offenses that you're convicted on, the court may entertain . . . making you serve those sentences . . . consecutively, okay?

Commonwealth v. Rios, No. 12-0007 (NMI Super. Ct. Mar. 21, 2014) (Transcript at 80) [hereinafter Transcript A].[3]

¶ 7 More than a month later, Rios wrote a letter to the judge requesting his recusal in the final pending case, which he was also presiding over. In the letter, Rios asserted the judge's comments at sentencing on the earlier Disturbing the Peace conviction demonstrated bias and partiality. The court did not immediately recuse, and the case went to trial six days later. Rios was acquitted of all charges, except for one count of Assault and Battery and one count of Disturbing the Peace. *Commonwealth v. Rios*, No. 12-0110 (NMI Super. Ct. Mar. 28, 2013) (Judgment of Conviction at 1). After reading the verdict, the judge acknowledged his receipt of Rios's letter and addressed the comment he made at the earlier sentencing hearing:

> During the sentencing hearing at - in case number 12-007, I said to

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[2] Probation revocation proceedings are civil in nature. 6 CMC § 4105(c). Probation can be revoked under preponderance of the evidence standard. *Id.* § 4105(h).

[3] The judge continued:

> Mr. Rios, you're gonna serve the sentence, this sentence . . . concurrently with your current sentence. So there's no additional sentence on top of the 45 years that you're currently serving. But . . . be mindful that the court is gonna take notice that any future convictions, if there are any, you know, . . . the court may entertain a different kind of . . . sentence which may include sentencing you consecutively.

Transcript A at 81.

> Mr. Rios, I'm gonna sentence you so that you can serve this [concurrently]. . . . But be mindful if there are future offenses that you're convicted on, the court may entertain making you serve those sentences consecutively. Although I had no intention of prejudicing the sentencing in this matter, I can see how a reasonable person might question my impartiality based on that comment.

Commonwealth v. Rios, No. 12-0110 (NMI Super. Ct. Mar. 21, 2014) (Transcript at 408) [hereinafter Transcript B]. The judge then recused himself from sentencing. Rios now appeals.

II. JURISDICTION

¶ 8 We have jurisdiction over final judgments and orders issued by the Superior Court. NMI CONST. art. IV, § 3; 1 CMC § 3102(a). Rios timely appealed the Superior Court's final judgment. Accordingly, we have jurisdiction.

III. STANDARDS OF REVIEW

¶ 9 Rios raises three issues on appeal. First, he argues the judge erred by partially recusing himself from sentencing without vacating existing orders. A judge's decision whether to recuse himself is reviewed for abuse of discretion. *Commonwealth v. Camacho*, 2002 MP 22 ¶ 2. Second, Rios alleges the trial court erred by refusing to order a presentence investigation report ("PSI") after his probation revocation hearing. Whether the court erred by refusing to order a PSI is reviewed for abuse of discretion. *Commonwealth v. Fu Zhu Lin*, 2014 MP 6 ¶ 31. Third, he asserts the trial court erred in its calculation of the maximum sentence at the probation revocation hearing. A court's sentencing decision is reviewed for abuse of discretion. *Commonwealth v. Yi Xiou Zhen*, 2002 MP 4 ¶ 13.

IV. DISCUSSION

¶ 10 We address each of Rios's three arguments in turn.

A. Judicial Recusal

¶ 11 Rios asserts the judge erred by recusing himself from sentencing on the 2013 conviction for Assault and Battery and Disturbing the Peace without vacating the existing convictions, sentences, and probation revocation. Rios's argument is unavailing for two reasons. First, the judge's recusal fits within the statutory language requiring a judge to recuse from a "proceeding." Second, the appearance of partiality or bias was not so pervasive as to require him to vacate all existing orders.

¶ 12 A judge's decision to recuse is reviewed for an abuse of discretion. *Camacho*, 2002 MP 22 ¶ 2 (citing *Commonwealth v. Kaipat*, 1996 MP 20 ¶ 3). An abuse of discretion occurs when a court bases "its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Fu Zhu Lin*, 2014 MP 6 ¶ 31 (quoting *Lucky Dev. Co., Ltd. v. Tokai, U.S.A., Inc.*, 3 NMI 79, 84 (1992)).

1. "Partial" Recusal

¶ 13 Rios argues the court abused its discretion because the judge only partially recused himself in violation of 1 CMC § 3308(a). He contends there is no partial recusal in this jurisdiction; if a judge is required to recuse, then the judge must do so from the entire legal action. Here, Rios asserts the judge must not only recuse from sentencing, but also must retrospectively recuse from the entire trial and vacate existing orders in Rios's other criminal cases.

¶ 14 We first examine the text of 1 CMC § 3308(a). When interpreting a statute, our primary task is to give effect to the legislature's intent. *Pac. Fin. Corp. v. Sablan*, 2011 MP 19 ¶ 9. To do so, we give the statutory text its plain meaning. *Id*. "When [the] language is clear, we will not construe it contrary to its plain meaning." *Id*.

¶ 15 Section 3308(a) requires that a judge "shall disqualify himself or herself in any proceeding in which his or her impartiality might reasonably be questioned." A proceeding "includes pretrial, trial, appellate review, or other stages of litigation." *Id*. § 3308(d)(4). A plain reading of the statutory language tells us that litigation comprises of different stages referred to as proceedings. Sentencing is a proceeding in a criminal case taking place after the trial. In this case, the judge determined that his comments during a sentencing proceeding in an entirely different case could cause a reasonable person to question his impartiality going forward. His recusal from further participation in the case fits within the plain language of 1 CMC § 3308.

¶ 16 Rios contends this was an improper partial recusal, which is prohibited under the substantially similar federal recusal statute.[4] In support, Rios cites *United States v. Feldman*, 983 F.2d 144, 145 (9th Cir. 1992).[5] In *Feldman*, the defendant was convicted of mail fraud, and ordered to pay $70 million in restitution to Bank of America. *Id*. at 144–145 & n.1. However, the trial judge owned shares in Security Pacific National Bank, which planned to merge with Bank of America. *Id*. at 145. The judge subsequently recused from the case but "only with regard to the administration of the receivership and receivership estate regarding this Court's order of restitution." *Id*. at 144. The Ninth Circuit concluded this was inappropriate: "[W]hen a judge determines that recusal is appropriate it is not within his discretion to recuse by subject matter or only as to certain issues and not others. Rather, recusal must be from a whole proceeding, an entire 'stage of litigation.'" *Id*. at 145.

¶ 17 Rios's reliance on *Feldman* is misplaced. The *Feldman* court prohibited

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[4] Because the Commonwealth's recusal statute is substantially similar to the federal statute, reference to federal case law is instructive. *Tudela v. Superior Court*, 2010 MP 6 ¶ 8. *Compare* 28 U.S.C. § 455, *with* 1 CMC § 3308.

[5] "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). That statute explicitly defines "proceeding" to include "pretrial, trial, appellate review, or other stages of litigation." 28 U.S.C. § 455(d)(1).

partial recusal "by subject matter or only as to certain issues and not others." *Id.* Here, the recusal concerned an entire stage of litigation—sentencing—rather than particular issues or subject matter.[6] Such recusal is entirely consistent with the Commonwealth statute, which requires recusal from "any proceeding in which his or her impartiality might reasonably be questioned." 1 CMC § 3308(a).[7] Accordingly, we conclude the judge's recusal from sentencing was not an abuse of discretion.

2. Vacation of Convictions, Sentences, and Probation Revocation

¶ 18 Next, we examine whether the judge's comments required recusal and vacation of all existing sentencing orders, bench trial convictions, and the probation revocation. During sentencing for the 2013 conviction for Disturbing the Peace, the judge admonished Rios, telling him that if there were any future convictions, "the court may entertain a different kind of . . . sentence which may include sentencing you consecutively." Transcript A at 81. Rios characterizes this remark as a threat and asserts that it taints not only that proceeding but all five of his criminal cases, including his other 2013 case, where the judge recused from sentencing. Rios notes that when the judge recused himself, he said that he could "see how a reasonable person might question my impartiality based on that comment." Transcript B at 408.

¶ 19 A judge "shall disqualify himself or herself in any proceeding in which his or her impartiality might reasonably be questioned."[8] 1 CMC § 3308(a). The decision to recuse oneself is evaluated using an objective standard—"whether a person with knowledge of all the circumstances would doubt the judge's impartiality." *Camacho*, 2002 MP 22 ¶ 18 (citing *Commonwealth v. Caja*, 2001 MP 6 ¶¶ 18–19).

¶ 20 Judges must also balance the responsibility to recuse against the duty to serve the public as officers of the judiciary. The objective standard under 1

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[6] Regardless, the majority view is that partial recusal is permissible. *Ellis v. United States*, 313 F.3d 636, 642 (1st Cir. 2002); *accord, e.g., Pashaian v. Eccelston Prop., Ltd.*, 88 F.3d 77, 84-85 (2d Cir. 1996) (concluding judge did not err by deciding motion for preliminary injunction before recusing); *United States v. Kimberlin*, 781 F.2d 1247, 1258-59 (7th Cir. 1985) (approving of judge's recusal on certain counts, but not others, to prevent improper influence of prejudicial information); *Decker v. G.E. Healthcare Inc.*, 770 F.3d 378, 389 (6th Cir. 2014) (approving of judge's recusal on issue of prejudgment interest, where judge's role in mediation would make him a potential witness in future litigation).

[7] From a practical standpoint, a judge can recuse from an individual proceeding because "the reasons for questioning judicial impartiality in one 'proceeding' of a case do not necessarily obtain in every 'proceeding' of that case." *Decker v. G.E. Healthcare*, 770 F.3d 378, 389 (6th Cir. 2014).

[8] There are other grounds requiring disqualification of a judge at 1 CMC § 3308(b), while Canon 3(D)(c) of the Commonwealth Code of Judicial Conduct also provides for disqualification. Here, both parties agree that the judge recused himself under 1 CMC § 3308(a), so further discussion of either is unnecessary.

CMC § 3308(a) helps "prevent [judge]-shopping and . . . ensure[s] that a [judge] does not, 'at the mere sound of controversy,' abdicate his duty to preside over cases assigned to him, including the most difficult cases." *Bank of Saipan v. Superior Court (Disqualification of Castro)*, 2002 MP 16 ¶ 29. (quoting *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 976 F. Supp. 84, 86 (D. Mass. 1997)). Judges "*must* hear cases unless some reasonable factual basis to doubt the impartiality of the tribunal is shown by some kind probative evidence." *El Fenix de Puerto Rico v. M/Y Johanny*, 36 F.3d 136, 140 (1st Cir. 1994) (quoting *Blizard v. Frechette*, 601 F.2d 1217, 1221 (1st Cir. 1979)). Thus, "[a] judge's duty to hear a case and keep the wheels of justice rotating is just as strong as his or her duty to [recuse] if a reasonable person would not believe in his or her impartiality." *Ada v. Gutierrez*, 2000 Guam 22 ¶ 15.

¶ 21 Because the text of 1 CMC § 3308 is nearly identical to that of the federal statute, 28 U.S.C. § 455, federal case law provides guidance. *Tudela*, 2010 MP 6 ¶ 8. This Court has previously looked to *Liteky v. United States*, 510 U.S. 540 (1994), for guidance in analyzing when a judge's remarks create the appearance of partiality:

> [J]udicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.

In re Estate of Malite, 2010 MP 20 ¶ 21 (quoting *Liteky*, 510 U.S. at 555).

¶ 22 It is not extraordinary for a judge to form an adverse opinion of a criminal defendant based upon information provided in court, and such an opinion does not require recusal because it is properly acquired during the proceedings. *Liteky*, 510 U.S. at 550–51. Likewise, opinions formed by a judge in earlier proceedings will not support a claim of bias or prejudice.[9] *Id.* at 551.

¶ 23 Rios argues the judge's remark was a threat to revisit and lengthen the 1997 and 2003 sentences as a consequence of future convictions. Thus, he contends the appearance of partiality permeates all five of his criminal cases. Citing to *Blaisdell v. City of Rochester*, 609 A.2d 388 (N.H. 1992), Rios asserts all existing orders must therefore be vacated. In *Blaisdell*, the trial judge was related to a partner in a law firm that represented a party-in-interest. 609 A.2d at 389. The trial judge recused but refused to vacate existing orders in that case and in two related cases. *Id.* On appeal, the court vacated all of the orders, including those in the related cases, because of "the pervasive appearance of

[9] These principles are equally applicable to recusal for the appearance of partiality as they are to recusal for bias or prejudice. *Liteky*, 510 U.S. at 554.

partiality in the original case, combined with the impact [those] rulings had on the two subsequent [related] cases." *Id.* at 391.

¶ 24 However, this is not a case like *Blaisdell*, where the reason to question the judge's partiality—the judge's familial relationship with a partner of the party's law firm—existed throughout the proceedings. Rather, the asserted reason to doubt the judge's impartiality arises out of a remark he made at sentencing for the 2013 Disturbing the Peace conviction. Rios's convictions and sentences from 1997 and 2003 are not brought into question because different judges entered those orders. The assertion that these orders must be vacated because of a remark made several years later by a judge who was not involved in those matters does not bear scrutiny.

¶ 25 Likewise, the judge's comment at sentencing for the Disturbing the Peace conviction did not require recusal from Rios's subsequent trial. Although Rios requested the judge's recusal six days prior to the commencement of trial, the judge did not recuse until sentencing. However, the comment did not suggest the judge would be biased or partial at trial; instead it suggested that future sentencing decisions might be affected by the judge's knowledge of Rios's prior crimes.

¶ 26 Rios's characterization of the judge's remark as a threat is implausible in light of the context. A far more reasonable reading of the remark is that the court would consider giving Rios a consecutive sentence, rather than a concurrent one, when sentencing him for any future convictions. The judge first explained his rationale for giving a relatively lenient sentence: "I know that this is a relatively low level offense, and I'm gonna sentence you so that you can serve this sentence . . . . [c]oncurrently with the sentence you're serving." Transcript A at 80. He then cautioned Rios: "[B]e mindful that if there are future offenses that you're convicted on, the court may entertain . . . making you serve *those* sentences . . . consecutively." *Id.* (emphasis added).

¶ 27 A judge may warn the defendant of the potential consequences of future unlawful conduct. In *United States v. Martin*, Danial Martin violated the terms of his supervised release and the state moved to revoke. 757 F.3d 776, 777 (8th Cir. 2014). At his revocation hearing, the judge sentenced Martin to ten months of custody and warned him that future violations would result in a thirty-six month sentence. *Id.* at 777–78. When Martin found himself before the same judge for the revocation of his second term of supervised release, he sought the judge's recusal. *Id*. at 778. In affirming the judge's denial of the recusal motion, the appellate court concluded the remark did not indicate a "deep-seated antagonism that would make fair judgment impossible," noting, "[a] court may caution a defendant about the consequences of future violations." *Id.* at 778–79; *accord United States v. Bond*, 847 F.2d 1233, 1240–41 (7th Cir. 1988) (affirming trial judge's refusal to recuse when the judge had previously sentenced defendant three times and remarked that defendant's first sentence may have been too lenient) *overruled on other grounds by Rutledge v. United States*, 517 U.S. 292, 307 (1996). We find the reasoning in *Martin* persuasive.

¶ 28 Like the warning in *Martin*, the judge here cautioned Rios that future convictions would not result in similarly lenient treatment. As an admonishment based upon the judge's knowledge of Rios's repeated criminal acts, the remark does not reflect any preexisting animosity. Judges may often find making such remarks from the bench useful in facilitating the judicial process. *In re Estate of Malite*, 2010 MP 20 ¶ 20. However, "[j]udges must be vigilant . . . to ensure that their remarks are evenhanded. When comments cause additional litigation, they undermine the very ideals of judicial efficiency they are intended to promote." *Id.* Although making the remark in this case may not have been prudent, no objective observer would conclude that it indicated any previous or current decisions were clouded by partiality. We therefore conclude the judge did not err by recusing from sentencing on Rios's Disturbing the Peace and Assault and Battery convictions without also vacating prior convictions and sentences in the related cases.

B. Presentence Investigation

¶ 29 Rios argues the trial court erred by refusing to order a PSI at his probation revocation hearing. We review a court's refusal to order a PSI for abuse of discretion. *Fu Zhu Lin*, 2014 MP 6 ¶ 31. A court abuses its discretion when it bases "its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Id.* (quoting *Lucky Dev. Co., Ltd. v. Tokai, U.S.A., Inc.*, 3 NMI 79, 84 (1992)). We conclude the trial court did not abuse its discretion because neither Rule of Criminal Procedure 32 nor Rule 32.1 requires the court to order a PSI following the revocation of probation.

¶ 30 A PSI is required "before the imposition of sentence or the granting of probation." NMI R. CRIM. P. 32(c)(1). Rule 32.1 is silent with regard to PSIs and nothing in the plain language of the rule explicitly requires the procedures set forth in Rule 32 to apply to reinstating a sentence after probation revocation proceedings. NMI R. CRIM. P. 32.1. Here, Rios contends sentencing upon probation revocation qualifies as an "imposition of sentence" and thereby triggering the PSI requirement of Rule 32(c)(1).

¶ 31 Reference to federal case law interpreting the federal counterpart rules indicates that the execution of a suspended sentence upon probation revocation is not an "imposition of sentence" under Rule 32.[10] Both Federal Rule 32 and

[10] The provisions for revocation or modification of probation under NMI R. CRIM. P. 32.1 are substantially similar to those in FED R. CRIM. P. 32.1 prior to the federal rule's amendment in 2005. *Compare* NMI R. CRIM. P. 32.1(a)(2), *with* FED R. CRIM. P. 32.1(a)(2) (2004). When the Commonwealth Rules of Criminal Procedure are patterned after the Federal Rules, this Court can look to federal case law for guidance. *See Fu Zhu Lin*, 2014 MP 6 ¶ 33 & n.4 (interpreting NMI R. CRIM. P. 32(c) and referencing FED R. CRIM. P. 32(c) for guidance). Accordingly, federal case law offers persuasive authority on how to read NMI R. CRIM. P. 32(c) and NMI R. CRIM. P. 32.1 together.

NMI Rule 32 require the PSI be made before the sentence is imposed.[11] Probation is part of the punishment imposed in the original sentence, "and 'it is the original sentence that is executed when the defendant is returned to prison after a violation of the terms' of his release." *United States v. Soto-Olivas*, 44 F.3d 788, 790 (9th Cir. 1995) (quoting *United States v. Paskow*, 11 F.3d 873, 881 (9th Cir. 1993));[12] *see also United States v. Carper*, 24 F.3d 1157, 1161 (9th Cir. 1994) ("In cases . . . where the sentence is imposed but its execution is deferred, the defendant is not necessarily entitled to address the court again in a subsequent hearing for a valid reason: the subsequent hearing is an occasion to lift suspension of a predetermined, but deferred, punishment."). Thus, Rios's assertion that the execution of his suspended sentence upon revocation constituted the "imposition of sentence" is unavailing.

¶ 32 Moreover, the Federal Courts of Appeals have routinely noted that the PSI requirement from Federal Rule 32 does not apply to sentencing upon revocation of probation or supervised release under Federal Rule 32.1. *See, e.g.*, *United States v. Urrutia-Contreras*, 782 F.3d 1110, 1114 (9th Cir. 2015) (comparing revocation proceedings under Rule 32.1 and sentencing proceedings under Rule 32 and noting: "revocation proceedings do not include extensive presentence investigation reports and rarely have the benefit of extensive briefing or written sentencing positions submitted before the revocation proceeding itself"); *United States v. Pelensky*, 129 F.3d 63, 68–69 (2nd Cir. 1997) (concluding FED. R. CRIM. P. 32(b) does not require new PSI before defendant is sentenced for violation of terms of supervised release); *United States v. Frazier*, 283 F.3d 1242, 1245 (11th Cir. 2002) (declining to extend right of allocution from Rule 32 to supervised release revocation hearing, and noting "the sentencing court . . . would have to require [PSI] reports along with all the other demands of [Rule 32,]" thereby "render[ing] Rule 32.1 superfluous").

¶ 33 Rios also asserts other jurisdictions require PSIs after probation revocation. In support, he cites a single Illinois case, *People v. Harris*, 473 N.E.2d 1291 (Ill. 1985). However, the Illinois Supreme Court's analysis in *Harris* is based upon a state statutory procedure distinct from the Commonwealth's own procedure.[13] Illinois case law interpreting its

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[11] *Compare* FED. R. CRIM. P. 32(c)(1)(A) ("must conduct a presentence investigation and submit a report to the court before it imposes sentence"), *with* NMI R. CRIM. P. 32(c)(1) ("shall make a presentence investigation and report to the court before the imposition of sentence").

[12] Probation revocation and revocation of supervised release are both governed by FED. R. CRIM. P. 32.1 and are analyzed similarly by the federal courts. *United States v. Leonard*, 483 F.3d 635, 638–39 (9th Cir. 2007).

[13] Under Illinois statute, "[a] defendant shall not be sentenced for a felony before a written [PSI] is presented to and considered by the court." Ill. Rev. Stat. 1981, ch. 38, par. 1005-3-1. Resentencing upon probation violation "shall be under article 4[,]" Ill.

distinguishable state statutory procedure is unpersuasive in light of federal case law interpreting rules substantially similar to the Commonwealth rules.

¶ 34 Based upon the plain language of NMI Rules 32 and 32.1 and reference to federal case law interpreting substantially similar federal rules, we conclude a court need not order a PSI upon the execution of a suspended sentence following probation revocation. Thus, the trial court did not abuse its discretion by refusing to order a PSI after it revoked Rios's probation.

C. Calculation of Sentence

¶ 35 Rios argues his sentence was calculated incorrectly at his probation revocation. A court's sentencing determination is reviewed for abuse of discretion. *Yi Xiou Zhen*, 2002 MP 4 ¶ 13.

¶ 36 Upon revocation, Rios was sentenced to forty years imprisonment for the 1997 case and five years for the 2003 case, for a total of forty-five years. Revocation Order at 2–3. Rios asserts the court erred by imposing forty years imprisonment from the 1997 case because "the sentence in Counts I and IV should have been concurrent with the remaining Counts, VI, IX, XI, and XXII, being consecutive." Opening Br. at 9.

¶ 37 In the 1997 criminal case, Rios was sentenced to five years imprisonment on Count I. The remainder of his sentences were suspended: five years for Count IV, ten years for Count VI, ten years for Count IX, five years for Count XI, and ten years for Count XII. 1997 Commitment Order at 2–3. The written order states: "The sentences imposed in Counts IV, VI, IX, XI and XII shall run consecutively and concurrent with the sentence imposed in Count I." *Id.* at 3.

¶ 38 When there is an ambiguity in a court's sentence, it is appropriate to consult extrinsic evidence.[14] *United States v. Villano*, 816 F.2d 1448, 1453 (10th Cir. 1987). Here, the sentence was entered pursuant to plea agreement. *See* 1997 Commitment Order at 2 ("Counsel for both parties submitted a Plea Agreement in this matter. Pursuant to the Plea Agreement, the Court hereby sentences the Defendant as follows . . . ."). The plea agreement provides:

Rev. Stat. 1981, ch. 38, par. 1005-6-4(h), which in turn requires the court "consider any presentence reports." Ill. Rev. Stat. 1981, ch 38, par. 1005-4-1(a)(2).

A prior version of Ill. Rev. Stat. 1981, ch. 38, par. 1005-3-1 required a PSI when the defendant was "convicted of a felony." *Harris*, 473 N.E.2d at 1295. Under the former statute, Illinois courts held only existing PSIs need be considered upon probation revocation. *Id.* Considering the statute's amended language, however, the *Harris* court concluded a PSI was required at resentencing upon probation revocation, even when there was no preexisting PSI. *Id.*

[14] An unambiguous oral sentencing order prevails over the written order when the terms of the two vary, except when the written order is corrected pursuant to NMI R. CRIM. P. 36. *Commonwealth v. Santos*, 4 NMI 348, 350–51 (1996). Here, the oral sentence is unavailable because Rios did not submit a transcript of the 1997 sentencing proceeding and an audio recording could not be located.

> Fifty (50) years in jail, all suspended except for the first five (5) years without the possibility of parole, with credit for time served. The sentence is computed as follows: Count I, five (5) years; Count IV, five (5) years; Count VI, ten (10) years; Count IX, ten (10) years; Count XI, five (5) years; Count XII ten (10) years. All sentences are to run consecutively.

Commonwealth v. Rios, No. 97-0294-D (NMI Super. Ct. Oct. 14, 1997) (Plea Agreement at 2). The court's written order adopted the individual sentencing recommendations for each of the six counts from the plea agreement. While the full sentence in the plea agreement was miscalculated—it should total forty-five years rather than fifty—the plea is clear that Rios should serve five years in prison with the remainder of his sentence suspended. Consequently, Rios's suspended sentence from 1997 was forty years. Together with the five year suspended sentence from his 2003 conviction, Rios was subject to a total suspended sentence of forty-five years.[15] Accordingly, we conclude the trial court did not abuse its discretion by sentencing Rios to forty-five years when it revoked his probation from the 1997 and 2003 criminal cases.

V. CONCLUSION

¶ 39 For the foregoing reasons, we AFFIRM Rios's sentences, convictions, and probation revocation.

SO ORDERED this 11th day of December, 2015.

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[15] Rios's total suspended sentence of forty-five years consists of five convictions from 1997, totaling forty years, and one conviction from 2003 of five years.

The suspended sentence from 1997 is composed of: Count IV, Sexual Abuse of a Child, five years; Count VI, Oral Copulation, ten years; Count IX, Rape, ten years; Count XI, Sexual Abuse of a Child, five years; and Count XII, Oral Copulation, ten years.

The suspended sentence from 2003 for his conviction of Sexual Assault in the Second Degree was five years.

/s/______________________________
ALEXANDRO C. CASTRO
Chief Justice

/s/______________________________
JOHN A. MANGLONA
Associate Justice

/s/______________________________
PERRY B. INOS
Associate Justice