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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Plaintiff-Appellee,

v.

SONNY BABAUTA,
Defendant-Appellant.

Supreme Court No. 2017-SCC-0005-CRM
Superior Court No. 13-0018

OPINION

Cite as: 2018 MP 14

Decided December 19, 2018

Robert Charles Lee, Assistant Attorney General, Office of the Attorney General, Saipan, MP, for Plaintiff-Appellee.

Mark Hanson, Saipan, MP, for Defendant-Appellant.

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

CASTRO, C.J.:

¶ 1 Defendant-Appellant Sonny Babauta ("Babauta") contests and seeks to vacate his sentence, arguing: (1) the court failed to individualize his sentence; (2) the court impermissibly restricted his parole eligibility; and (3) his case should be remanded to a different judge for resentencing. For the following reasons, we VACATE Babauta's sentence and REMAND to a different judge for resentencing.

I. FACTS AND PROCEDURAL HISTORY

¶ 2 In 2012, Babauta and three others unlawfully entered a warehouse and took property worth $4,230. At trial, the jury convicted Babauta of two counts of Burglary in violation of 6 CMC § 1801(a), two counts of Conspiracy to Commit Burglary in violation of 6 CMC § 303(a), two counts of Theft in violation of 6 CMC § 1601(a), and two counts of Conspiracy to Commit Theft in violation of 6 CMC § 303(a).[1] Babauta was sentenced to the maximum term of imprisonment for each count, all running concurrently, and without any possibility of parole. This resulted in ten years' imprisonment, based on the premise that the burglarized warehouse was a dwelling. Pending his appeal, we issued our decision in *Commonwealth v. Salasiban*, 2014 MP 17 ¶ 24, where we held a warehouse is an unoccupied structure and not a dwelling, and therefore a conviction under 6 CMC § 1801(a) for burglary of a warehouse is subject to a maximum term of five years' imprisonment.

¶ 3 Subsequently, we granted Babauta's motion to stay his appeal to allow the trial court to correct his sentence pursuant to our holding in *Salasiban*. We dismissed the appeal because the motion to correct the ten-year sentence was accepted. For the resentencing, Babauta requested a sentence of three years' time served. The Commonwealth of the Northern Mariana Islands ("Commonwealth") recommended a sentence of five years. Despite the recommendations, Babauta was resentenced to a twenty-one year sentence, sixteen years suspended, without the possibility of parole. Babauta was further placed on ten years' probation. Specifically, Babauta was sentenced to ten years for both counts of Burglary, six years for both counts of Theft, and an additional five years for each count of Conspiracy to run concurrently. With the exception of the Conspiracy counts, all sentences were to run consecutively, resulting in a twenty-one year sentence. If Babauta violates any CNMI or federal law, or any

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[1] Burglary is made punishable by 6 CMC §§ 1801(b)(1)–(2)(A), which renders a maximum imprisonment term of five years, or ten years if "the dwelling is entered during the period between 30 minutes past sunset and 30 minutes before sunrise." Theft is made punishable by 6 CMC § 1601(b)(2), rendering a maximum five-year imprisonment term. Conspiracy is made punishable by 6 CMC § 304(b), which requires a term of imprisonment "by not more than the same penalty provided for the underlying offense."

of the Rules of Adult Probation during the ten-year probation period, the suspended sixteen years "may be impose [sic] in whole or in part." *Commonwealth v. Babauta*, Crim. No. 13-0018 (NMI Super. Ct. Feb. 17, 2017) (Sentencing & Commitment Order at 7) (hereinafter "Sentencing Order"). This appeal followed.

II. JURISDICTION

¶ 4 We have jurisdiction over all final judgments and orders issued by the Superior Court. NMI CONST. art. IV, § 3.

III. STANDARDS OF REVIEW

A. Scope of the Plain Error Rule

¶ 5 As an initial matter, we must determine the appropriate standard of review for sentencing decisions. The Commonwealth urges us to employ the plain error standard in reviewing whether Babauta's sentence was individualized. It argues that Babauta failed to avail himself of two opportunities to preserve objections to the issues now before us: first at the sentencing hearing, and second by filing a motion to correct an illegal sentence under NMI Rule of Criminal Procedure 35 ("Rule 35").[2] In response, Babauta claims the Commonwealth's position misconstrues our authority regarding the standard of review as it applies to sentencing decisions. He argues our prior decisions review sentencing decisions for an abuse of discretion, setting that standard as controlling.

¶ 6 Although we have regularly applied the abuse of discretion standard in reviewing sentencing decisions, we have not had occasion to consider the reach of the plain error rule encompassed in NMI Rule of Criminal Procedure 52(b) ("Rule 52(b)") to sentencing decisions. As will be discussed below, in reviewing the plain error rule and federal cases construing the analogous rule, we hold the plain error standard is the general rule for all unpreserved objections. However, we further hold an exception to this general rule exists when the parties challenge the substantive reasonableness of a sentencing decision. In those cases, abuse of discretion is the proper standard of review, even for unpreserved objections.

¶ 7 We have consistently applied an abuse of discretion standard of review to sentencing decisions. *E.g.*, *Commonwealth v. Lizama*, 2017 MP 5 (individualization); *Commonwealth v. Lin*, 2016 MP 11 (same); *Commonwealth v. Kapileo*, 2016 MP 1 (same); *Commonwealth v. Borja*, 2015 MP 8 (same); *Commonwealth v. Palacios*, 2014 MP 15 (sentencing). Our limited precedent, however, is not dispositive as to the appropriate standard of review. That prior parties may not have invoked plain error review where no objection was raised to a sentencing decision does not preclude our use of the plain error rule henceforth. Rather, considering the scope of Rule 52(b) as applied to sentencing decisions is an issue of first impression, and therefore, we are now tasked to

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[2] The pertinent provision states: "[t]he court may correct an illegal sentence at any time, and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence." NMI R. CRIM. P. 35(a).

determine its scope as it applies to sentencing decisions more generally. We turn first to the text of the rule and our jurisprudence interpreting it.

¶ 8 Rule 52(b) states: "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."[3] The effect of this rule is to apply a heightened standard of review for any objection asserted on appeal "not brought to the attention" of the trial court—described alternatively as an "unpreserved" error or objection. *Kapileo*, 2016 MP 1 ¶ 13. Indeed, our precedent has applied the plain error rule where no objection was raised in the lower court on multiple occasions for a variety of issues. *See, e.g.*, *Commonwealth v. Monkeya*, 2017 MP 7 (jury instructions); *Commonwealth v. Togawa*, 2016 MP 13 (evidentiary issues); *Borja*, 2015 MP 8 (denial of allocution); *Palacios*, 2014 MP 16 (federal due process rights). Even in the sentencing context, application of the plain error rule has been particularly well established in cases presenting unpreserved issues over pre-sentence investigation ("PSI") reports. *See, e.g.*, *Kapileo*, 2016 MP 1; *Borja*, 2015 MP 8; *Salasiban*, 2014 MP 17; *Lin*, 2014 MP 6. Aside from PSI issues, however, we have not had the opportunity to consider what standard of review to apply to sentencing decisions more generally for unpreserved error. We thus turn to other courts for guidance in determining whether plain error can and does apply to sentencing decisions where no objections were raised.

¶ 9 We find it particularly noteworthy that the United States Supreme Court in *Rosales-Mireles v. United States*, 138 S. Ct. 1897 (2018), very recently applied plain error review to a sentencing decision where no objection was raised. *Id.* at 1905 (determining whether a deviation from the Federal Sentencing Guidelines ("Guidelines") violated the Court's fourth prong in the plain error analysis embodied in *United States v. Olano*, 507 U.S. 725 (1993)). Additionally, U.S. Courts of Appeal have consistently acknowledged and applied plain error review to a number of alleged errors in sentencing decisions. *See, e.g., United States v. Peltier*, 505 F.3d 389 (5th Cir. 2007) (reasonableness of sentence); *United States v. Lopez-Flores*, 444 F.3d 1218, 1221 (10th Cir. 2006) (method of sentencing determination); *United States v. Knows His Gun*, 438 F.3d 913 (9th Cir. 2005) (insufficiently addressing and applying 18 U.S.C. § 3553(a) factors); *United States v. Hughes*, 401 F.3d 540 (4th Cir. 2005) (exceeding maximum sentence). Even states and territories have applied plain error review under certain circumstances. *See, e.g., State v. Pierce*, 548 S.W.3d 900, 904 (Mo. 2018) (sentencing range); *Brown v. People of the Virgin Islands*, 56 V.I. 695, 699 (V.I. 2012) (sentencing justification); *State v. Elm*, 808 P.2d 1097, 1099–1100 (Utah 1991) (pre-sentence investigation report); *but see People v. Roby*, 2017 Guam 7, 41–43 (Guam 2017) (acknowledging, but not applying, distinction between

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[3] Rule 52(b) substantively mirrors Federal Rule of Criminal Procedure 52(b), which states: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Therefore, we utilize federal case law interpreting the corresponding federal rule in our analysis.

procedural error and substantive reasonableness). Reviewing the available case law, jurisdictions have indeed considered and found plain error review applicable to sentencing decisions where no objections were raised.

¶ 10 In light of Rule 52(b)'s general application to unpreserved errors, and in light of the decisions of the United States Supreme Court and a number of other jurisdictions, we hold plain error is the general rule for all unpreserved objections, including sentencing decisions. Importantly however, we do not purport that plain error review applies in every instance of unpreserved objections to a sentence. We now turn to one particular exception to this rule.

B. Exceptions to the Plain Error Rule

¶ 11 Despite our general recognition that plain error review may apply to sentencing decisions, we recognize exceptions to this rule. In *United States v. Autery*, the Ninth Circuit pointed out:

> Neither this circuit nor the Supreme Court has squarely addressed the proper standard of review where the appellant fails to object to the sentence's substantive reasonableness at sentencing. . . . [The U.S. Supreme Court] noted that . . . appellate review of sentencing decisions is limited to determining whether they are reasonable, and that the abuse of discretion standard applies to review of all reasonableness sentencing questions. However, the Court did not indicate whether this rule applies even where a party fails to object at sentencing to the substantive reasonableness of the sentence.

555 F.3d 864, 869 (9th Cir. 2009) (internal citations omitted). In evaluating its own precedent and the United States Supreme Court's precedent, *Autery* determined that the applicable standard of review encompassed a two–step process. First, a court must assess whether significant procedural error was committed. *Id*. at 869–70 (identifying procedural errors such as "fail[ing] to calculate—or to calculate incorrectly—the Guidelines range; to treat the Guidelines as mandatory or advisory . . . [or] to fail [to] adequately to explain the sentence selected, including any deviation from the Guidelines range." (quoting *United States v. Carty*, 520 F.3d 984, 993 (9th Cir. 2008))). In reviewing for procedural errors, an appellate court is to review for plain error where no objection is raised. *Id*. at 869 (citing *Knows His Gun,* 438 F.3d at 918). After evaluating whether there is procedural error, the reviewing court must then determine whether the sentence imposed was substantively reasonable. *Id*. A substantive reasonableness challenge could manifest itself, for example, as a challenge to the "variance [of] a sentence imposed outside the Guidelines range . . . ." *Id*. at 870 (internal quotation marks omitted). And where a party challenges the substantive reasonableness of a sentence, that is to be reviewed for an abuse of discretion—even when a party fails to object. *Id*. at 871. In coming to this conclusion, *Autery* reasoned:

> [I]n a substantive reasonableness challenge, the parties have already fully argued the relevant issues (usually both in their briefs

> and in open court), and the court is already apprised of the parties' positions and what sentences the parties believe are appropriate. In such a case, requiring the parties to restate their views after sentencing would be both redundant and futile, and would not "further the sentencing process in any meaningful way."

Id. at 871 (quoting *United States v. Castro-Juarez*, 425 F.3d 430, 434 (7th Cir. 2005)).

¶ 12 We agree with *Autery*'s distinction between the applicable standard of review. First, where a party asserts procedural error, we review for plain error where no objection is raised. Then, in evaluating claims of substantive unreasonableness, we apply an abuse of discretion standard, whether or not a party preserves an objection.

¶ 13 According to newly announced framework, the standard of review for unpreserved objections to sentencing decisions will depend on whether the alleged impropriety is categorized as procedural or substantive. The practical effect of our decision requires parties appealing the technical or procedural defects of a sentence to preserve its objection. If not preserved, we will review the party's claims of procedural defects under the more stringent plain error review. Because of this new development, neither party has had opportunity to provide briefings on whether the alleged impropriety here is procedural or substantive, and thus, whether plain error or abuse of discretion applies. We would normally request the input of the parties before undertaking such an analysis. However, we leave further analysis of the procedural and substantive distinctions for future parties to argue. This ensures future parties will have a full and fair opportunity to make their argument. Our finding further avoids the risk of issuing an opinion that may later prove "improvident or ill-advised." *Kim v. Baik*, 2016 MP 5 ¶ 30 (quoting *McBride v. Merrell Dow & Pharm., Inc.*, 800 F.2d 1208, 1211 (D.C. Cir. 1986)). Babauta, who has already been imprisoned for over four years, will thus be provided with expedited resolution as to his case. And, as will be explained shortly, we find that under either the abuse of discretion standard or plain error, the resulting outcome is the same. Accordingly, we will analyze Babauta's claims of impropriety under the more stringent plain error review.

C. Standard for Remaining Issue

¶ 14 We also consider whether remand to a different sentencing judge would be appropriate "when reassignment is advisable to preserve the appearance of justice and would not entail waste and duplication of effort out of proportion to any gain in preserving the appearance of justice." *Commonwealth v. Hocog*, 2015 MP 19 ¶ 11 (internal citations and quotation marks omitted). We weigh three principal factors in determining whether to remand to a different judge:

> (1) the difficulties, if any, that the [ ] court would have at being objective upon remand because of prior information received; (2) whether reassignment is advisable to preserve the appearance of

> justice; and (3) whether reassignment would entail waste and duplication of effort out of proportion to any gain in preserving the appearance of justice.

Id. ¶ 34.

IV. DISCUSSION

A. Sentencing

¶ 15 Babauta asserts the court failed to properly individualize his sentence. He argues the court impermissibly used elements of the crime as aggravating factors, failed to properly weigh Babauta's mitigating factors against the aggravating factors, and based the sentence on the actions of the "crew," rather than his individual circumstances. He concludes the court failed to conform to our precedent on sentencing, and therefore failed to individualize his sentence.

¶ 16 As iterated previously, *supra* paragraph 13, we will review Babauta's sentence under the more stringent plain error standard. Should a sentencing decision fail under plain error review, it necessarily fails under abuse of discretion review. Under plain error review, "we examine whether (1) there was error; (2) the error was plain or obvious; [and] (3) the error affected the appellant's substantial rights." *Commonwealth v. Reyes*, 2016 MP 3 ¶ 11. On the third requirement, there must be "a 'reasonable probability' the error affected the outcome of the proceeding." *Salasiban*, 2014 MP 17 ¶ 11 (quoting *United States v. Marcus*, 560 U.S. 258, 262 (2010)). "[I]f it is equally plausible that the error worked in favor of the [appellant], the [appellant] loses; if the effect of the error is uncertain so that we do not know which, if either side it helped, the [appellant] loses." *Kapileo*, 2016 MP 1 ¶ 13 (internal quotation marks omitted).

¶ 17 We have already addressed issues concerning permissible and impermissible aggravating and mitigating factors arising from the same warehouse burglary in *Lizama*, 2017 MP 5. There, we found rather than focusing on the defendant's individual circumstances, the sentencing decision impermissibly focused on the actions of the "crew" and the elements of the crime itself. *See Lizama*, 2017 MP 5 ¶¶ 8–10; *see also Lin*, 2016 MP 11 ¶¶ 19–25 (impermissibly using elements of the crime as aggravating factors); *Kapileo*, 2016 MP 1 ¶¶ 16–17 (same). In addition, we determined the court did not properly "examine and measure" the defendant's available mitigating factors. *Lizama*, 2017 MP 5 ¶ 17 (citing *Borja*, 2015 MP 8 ¶ 39) (internal quotation marks omitted). It was "not enough to merely mention mitigating factors in passing. Rather, the trial court must 'examine and measure' those mitigating factors to the sentence it issues." *Id.* ¶ 18. Ultimately, we vacated the defendant's sentence because the court used impermissible aggravating factors and failed to analyze available mitigating factors.

¶ 18]The same improper justification for rendering Babauta's sentence as in *Lizama* was used here. 2017 MP 5 ¶ 15. Specifically, the court focused on the crime itself and the actions of the entire crew, rather than Babauta's individual circumstances:

> In this particular criminal case, the burglary crew met and discussed what place to burglarize for that night. Without hesitation, everyone agreed to commit the crime. The burglary crew was experience and knew how to approach the warehouse on foot undetected. Working as a team, the burglary crew quickly moved the cooper [sic] wire, power tools and other items to a temporary stash area. The burglary crew had the experience and confidence to return for a second hit on the warehouse the same night.

Sentencing Order at 5.[4] In other words, the court generally restated what Babauta was convicted of: Burglary, Theft, and Conspiracy. Such statements—to the exclusion of other possible aggravating factors—impermissibly uses elements of the crime, and "[r]ather than devising an individualized sentence for [Babauta], give[s] the appearance the trial court instead was imposing a sentence on [Babauta] intended to punish the actions of the entire 'crew.'" *Lizama*, 2017 MP 5 ¶ 15.

¶ 19 Furthermore, just as in *Lizama*, we find the court did not examine and measure Babauta's individual circumstances. The record indicates several available mitigating factors. Babauta (1) has no criminal history prior to the crime; (2) was relatively young at the time of the offense (approximately 20 years old); (3) expressed genuine remorsefulness; (4) had people speak and write on his behalf to attest to his character; and (5) carries significant responsibility for his family's well-being.[5] Instead of considering these mitigating factors, the court scrutinized the crime and the actions of the entire crew. The portion of the sentencing order analyzing Babauta's available mitigating factors is confined to the following:

> [T]he Court did take into consideration and weight as a mitigating factor Defendant's youth or age. Defendant was 20 years old at the time of the offense. (Defense was an adult years at the time of the

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[4] The court used identical language in Babauta and Lizama's sentencing orders:

> In this particular criminal case, the burglary crew met and discussed what place to burglarize for that night . . . . The burglary crew was experience and knew how to approach the warehouse on foot undetected . . . . The burglary crew then proceeded to a secluded location. The burglary crew had experience to quickly strip and cut the copper wires, and knew exactly where to pawn the power tools and sell the copper wires.

Lizama, 2017 MP 5 ¶ 15.

[5] Another concern is the treatment of Babauta's lack of a criminal record. The court transformed what by all accounts should be a mitigating factor into an aggravating factor. Specifically, it noted that although Babauta had no criminal history, this somehow justified imposing a "much longer sentence." Sentencing Order at 4. Rather than treating the lack of criminal history as mitigating, the court treated it as aggravating.

> offense and associate with convicted felons); the Court gives some mitigating weight to Defendant's age and youth in context with Defendant having no prior criminal cases.

Sentencing Order at 5. While this acknowledgment is not inconsequential, it is just that—an acknowledgment. It gave little attention to Babauta's individual circumstances and emphasized the crime and the actions of the crew, evincing a failure to individualize Babauta's sentence.

¶ 20 Because the court contravened our mandates in prior sentencing cases, we find it committed error. We further conclude the error was plain because our available and expansive precedent clearly outlines the requirements for sentencing. *See, e.g.*, *Lizama*, 2017 MP 5; *Lin*, 2016 MP 11; *Kapileo*, 2016 MP 1; *Palacios*, 2014 MP 16.

¶ 21 Finally, we must determine whether this plain error affected the defendant's substantial rights. We hold it does. Had Babauta's mitigating factors been considered in full and the impermissible aggravating factors omitted in accordance with our prior rulings, there is a reasonable probability the sentence would be different. Even more persuasive in finding that Babauta's substantial rights were affected is the court's shift in imposing a ten-year sentence to a twenty-one year sentence. Here, when Babauta's Rule 35 Motion to Correct an Illegal Sentence was granted, it would have been reasonable to expect that the ten-year sentence originally imposed be reduced in accordance with the reduced nature of the crime. Indeed, both Babauta and the Commonwealth appear to have recommended sentences, three and five years respectively, in line with this expectation. However, the revised sentence defied this expectation, more than doubling the original concurrent ten-year sentence to a consecutive twenty-one year sentence without any justification. We hold that Babauta's substantial rights were affected and there is a reasonable probability the errors affected Babauta's sentence.

¶ 22 We find the court did not properly consider available mitigating factors and did not balance these factors against other permissible aggravating factors. As such, there was plain error and Babauta's substantial rights were affected.

B. Parole Eligibility

¶ 23 Babauta also argues the court failed to articulate a proper justification for restricting his parole eligibility. He contends it restricted his parole eligibility by "removing it entirely," Opening Br. 8, and its statement "offers [no] meaningful explanation on why the parole restriction is warranted." Opening Br. 9. The Commonwealth asserts the court was clearly justifying restricting Babauta's parole on the basis of associating himself with known criminals, and thus, there was no impropriety.

¶ 24 Again, we find it necessary to review Babauta's sentence under the more stringent plain error standard of review. Should the parole eligibility restriction fail under plain error review, it also necessarily fails under an abuse of discretion

review. Thus, we will review the parole restriction under the more stringent plain error standard. Plain error requires there is (1) error, that is (2) plain, and (3) affects the defendant's substantial rights. *Reyes*, 2016 MP 3 ¶ 11.

¶ 25 "[W]hen a trial court restricts a defendant's parole eligibility greater than the statutory minimum, it must state why the extended restriction is warranted for the defendant." *Lin*, 2016 MP 11 ¶ 23. It must provide "individualized justification," *Lizama*, 2017 MP 5 ¶ 22, and not deny parole eligibility based solely on the act of the crime. *See Lin*, 2016 MP 11 ¶ 24 (sexual abuse of a minor); *see also Lizama*, 2017 MP 5 ¶ 21 (burglary). None of the offenses Babauta was convicted of carry a mandatory minimum sentence. *See Salasiban*, 2014 MP 17 (five year maximum sentence for burglary of unoccupied dwellings); 6 CMC § 1601(b)(2) (five year maximum sentence for theft); 6 CMC § 304(b) (requiring imprisonment for conspiracy "by not more than the same penalty provided for the underlying offense"). Thus, pursuant to 6 CMC § 4252, which allows for parole after completion of one third of the unsuspended term of imprisonment, Babauta would be eligible for parole after a year and eight months of his imprisonment.

¶ 26 We find the court committed error by insufficiently individualizing Babauta's sentence with respect to his parole eligibility. Here, it denied parole on the following basis:

> No parole is appropriate because for Defendant to be eligible for parole would make it possible to lower his sentence and would not serve the interest of justice. . . . Defendant joined and conspired with known criminals. The loot was divided equally among the conspirators and each member going into a poker parlor to spend their ill-gotten gain.

Sentencing Order at 8. In other words, it denied parole based on the act of the crime, i.e., conspiring with other criminals, without any discussion of the available mitigating factors. Because the parole restriction was based entirely on the act of the crime, it ran afoul of our mandate to individualize Babauta's sentence. *Lin*, 2016 MP 11 ¶ 24.

¶ 27 We further find the court's error plain in light of our precedent. As to whether it affected Babauta's substantial rights—had it properly justified denying parole eligibility in conjunction with individualizing Babauta's sentence, it is reasonable to expect parole would not have been denied entirely. Thus, the court committed plain error.

C. Remand to a Different Judge for Resentencing

¶ 28 Finally, Babauta asserts that his case should be remanded to a different judge for resentencing. Babauta notes the same judge sentenced him to the maximum sentence in both sentencing orders without properly considering individualized sentencing requirements. Furthermore, he argues the sentencing judge's remarks that he is "not a suitable candidate for rehabilitation,"

Sentencing Order at 4, requires us to find the judge cannot be impartial. The Commonwealth argues remand to a different judge is unnecessary because there is nothing in the record demonstrating the current judge would have difficulty being objective. It contends reassignment would create a duplication of efforts since the judge in this case is in the best position to sentence Babauta.

¶ 29 Remanding Babauta's case to a different judge for resentencing requires us to determine whether doing so would "preserve the appearance of justice." *Hocog*, 2015 MP 19 ¶ 11. "[U]nless there are 'unusual circumstances,' resentencing is done by the original sentencing judge." *Commonwealth v. Lee*, 2005 MP 19 ¶ 26 (citing *United States v. Alverson*, 666 F.2d 341, 349 (9th Cir. 1982)). In determining whether to depart from this default rule and re-assign the case to a different judge, we may consider:

> (1) the difficulties, if any, that the [ ] court would have at being objective upon remand because of prior information received; (2) whether reassignment is advisable to preserve the appearance of justice; and (3) whether reassignment would entail waste and duplication of effort out of proportion to any gain in preserving the appearance of justice.

Hocog, 2015 MP 19 ¶ 34. We have previously found remand to a different judge appropriate where the judge stated "[Defendant] is not a candidate for rehabilitation," noting such a statement demonstrated an inability to remain objective. *Lizama*, 2017 MP 5 ¶ 25 (explaining "[a]t the very least, such a statement demands the case be assigned to a new judge for sentencing in order to preserve the appearance of impartiality").

¶ 30 Here, the trial judge issued the same statement about Babauta, who was involved in the same crime as the defendant in *Lizama*: "Defendant is not a candidate for rehabilitation." Sentencing Order at 4. The court went even further in Babauta's Sentencing Order: "Defendant is not a candidate for rehabilitation in the sense that he will be release [sic] immediately per the request of Defense Counsel. Though Defendant has no prior convictions, Defendant requires a much longer sentence to insure that Defendant fully understands his actions . . . ." *Id.* Instead of mitigating Babauta's sentence because of a lack of a criminal record, the sentencing judge punished Babauta for this mitigating circumstance. This demonstrates the unlikelihood of the judge's impartiality and inability to remain objective even more strongly than in *Lizama*. We thus grant Babauta's request to remand the case to a new judge for sentencing. We further order the presiding judge to assign sentencing to a different judge on remand.

V. CONCLUSION

¶ 31 For the foregoing reasons, we VACATE Babauta's sentence and REMAND to a different judge for resentencing.

SO ORDERED this 19th day of December, 2018.

/s/

ALEXANDRO C. CASTRO
Chief Justice

/s/

JOHN A. MANGLONA
Associate Justice

/s/

PERRY B. INOS
Associate Justice

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Supreme Court No. 2017-SCC-0005-CRM
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JUDGMENT

Defendant-Appellant Sonny Babauta appeals his sentence, arguing (1) the court failed to individualize his sentence; and (3) the court impermissibly restricted his parole eligibility. He also argues that, if vacated, the case should be assigned to a different judge for resentencing. For the reasons discussed below, we VACATE Babauta's sentence and REMAND this case to the presiding judge of the Superior Court with instructions to assign sentencing to a different judge.

ENTERED this 19th day of December, 2018.

/s/
NORA V. BORJA
Acting Clerk of the Supreme Court