IN THE

Supreme Court

OF THE

Commonwealth of the Northern Mariana Islands

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Plaintiff-Appellee,

v.

SYLVESTRE ROGOPES SABLAN,
Defendant-Appellant.

Supreme Court No. 2018-SCC-0016-CRM

ORDER GRANTING APPELLEE'S MOTION TO DISMISS

Cite as: 2020 MP 11

Decided May 18, 2020

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CHIEF JUSTICE ALEXANDRO C. CASTRO
ASSOCIATE JUSTICE JOHN A. MANGLOÑA
ASSOCIATE JUSTICE PERRY B. INOS

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Superior Court Criminal Action No. 16-0170
Associate Judge Teresa K. Kim-Tenorio, Presiding

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CASTRO, C.J.:

¶ 1 Plaintiff-Appellee Commonwealth of the Northern Mariana Islands ("Commonwealth") moves to dismiss Defendant-Appellant Sylvestre Rogopes Sablan's ("Sablan") appeal, contending that Sablan waived the right to appeal in his plea agreement.[1] For the following reasons, we DISMISS the appeal.

I. FACTS AND PROCEDURAL HISTORY

¶ 2 Sablan pleaded guilty to a count of Second Degree Murder, 6 CMC § 1101(b), for killing his wife. He had been using methamphetamine around the time of the murder. Under the plea bargain, the parties agreed that Sablan would be sentenced to thirty years' imprisonment with five years suspended. He also agreed to a sentencing hearing to determine parole eligibility and probation conditions, if any. The plea bargain set forth in the Global Plea Agreement ("Agreement") included a provision that Sablan waived a number of procedural rights, including the right to appeal his sentence and disposition. A Pre-Sentence Investigation Report ("PSI") and sentencing memoranda were prepared. At the change of plea hearing, the court queried Sablan as to his understanding of the Agreement and determined that he was changing his plea voluntarily. The court indicated that Sablan would also be waiving his appellate rights. The court denied any possibility of parole and sentenced Sablan to ten years' probation after release. Sablan appeals the disposition as to parole and probation but the Commonwealth maintains that the waiver in the Agreement bars the appeal.

II. JURISDICTION

¶ 3 The Supreme Court has jurisdiction over final judgments and orders of the Commonwealth Superior Court. NMI CONST. art. IV, § 3.

III. DISCUSSION

¶ 4 Sablan argues that the waiver should not be enforced, either because the issues on appeal are outside the scope of the waiver, or because enforcing it would constitute a miscarriage of justice. Under the miscarriage of justice framework we adopted in *Commonwealth v. Jin Song Lin*, 2014 MP 19 ¶ 16 ("*Lin I*") (citing *United States v. Teeter*, 257 F.3d 14, 25 (1st Cir. 2001)), we must preliminarily evaluate the merits of the appellant's claims to determine whether the presumptive validity of the waiver is overcome. Sablan contends that the trial court engaged in mechanical sentencing and failed to properly individualize the sentence. He also argues that his case should be remanded to a different judge for resentencing. We inquire first whether the waiver is valid and whether its scope encompasses parole and probation, then whether enforcing it would be a miscarriage of justice. While Sablan points to some concerning procedural

[1] The Commonwealth made a first motion to dismiss before the record had been certified and before the appeal had been briefed. The Court denied this first motion because evaluating the enforceability of the waiver requires examining both the transcript of the sentencing hearing and the text of the Agreement. These are now available.

irregularities at the sentencing hearing, we find that these do not rise to the level of a miscarriage of justice and enforce the waiver.

A. Knowing and Voluntary Waiver

¶ 5 A threshold question is whether Sablan agreed to the waiver "knowingly and voluntarily"; if not, the waiver is invalid. *Id.* ¶ 8; *see also United States v. Hahn*, 359 F.3d 1315, 1325 (10th Cir. 2004) (evaluating language of plea bargain and colloquy to determine whether defendant agreed to waiver knowingly and voluntarily). This requirement follows from the contractual basis for plea bargains. "[B]ecause each side may obtain advantages when a guilty plea is exchanged for sentencing concessions, the agreement is no less voluntary than any other bargained-for exchange." *Mabry v. Johnson*, 467 U.S. 504, 508 (1984). Sablan does not dispute that he knowingly and voluntarily agreed to the waiver, as the Agreement is unambiguous on this point. It states that "[t]he Defendant represents and warrants that the Defendant is voluntarily, knowingly, and intelligently entering into this Plea Agreement without any type of coercion or threats, and that no promises or representations, other than those set forth in this agreement, have been made to the Defendant." *Commonwealth v. Sablan*, 16-0170 CR (NMI Super. Ct. Dec. 20, 2017) (Global Plea Agreement at 4) ("Agreement"). The Agreement's waiver provision states that "the Defendant agrees and understands that by admitting the charge[] as set forth in this plea agreement, he is giving up . . . rights [including 'the right to appeal, if found guilty following a trial'] and the right to challenge the sentence and disposition." *Id*. Counsel also represented and warranted that Sablan was fully informed of the consequences of the Agreement. *Id.* At the change of plea hearing, the court asked him whether he understood the consequences of waiving rights in the Agreement and whether his attorney provided adequate legal assistance. It also asked, "Do you understand that if this case went to trial and you were convicted you have a right to appeal and the court can appoint an attorney to assist you in your appeal?" Sablan answered in the affirmative and pleaded guilty. He agreed to the waiver knowingly and voluntarily and this is no barrier to the waiver's validity.[2]

B. Scope of Waiver

¶ 6 The second question is whether the waiver of the right to appeal the "sentence and disposition" encompasses the court's imposition of parole and probation terms at sentencing. Sablan consented in the Agreement "[i]n consideration for the plea of guilty" to "a term of imprisonment of thirty (30) years, five of which will be suspended." Agreement at 2. Further, the parties stipulated that "[u]pon completion of a Pre-Sentence Investigation Report and Sentencing Hearing, the Court shall determine the length of time and conditions

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[2] The appellate record did not provide us with a transcript of Sablan's change of plea hearing, and we found it necessary to consult the audio recording of his colloquy regarding waiver. *See* NMI SUP. CT. R. 2 ("the Court may—to expedite its decision or for other good cause—suspend any provision of these rules in a particular case and order proceedings as it directs").

of probation to be imposed upon Defendant. The Court shall also determine whether Defendant shall be eligible for parole, work release, and furlough." *Id.*

¶ 7 Plea agreements are governed by contract principles. *Lin I*, 2014 MP 19 ¶ 9; *see also, e.g.*, *United States v. Ready*, 82 F.3d 551, 556 (2d Cir. 1996); *United States v. Salcido-Contreras*, 990 F.2d 51, 52 (2d Cir. 1993), *cert. denied*, 509 U.S. 931 (1993). Pursuant to contract principles, Sablan accepted the burden of the bargain, forfeiting the right to challenge his "sentence and disposition," in exchange for the benefit of the bargain. Namely, the prosecution dropped two additional charges and capped his sentence at thirty years with five suspended, short of the statutory maximum of life imprisonment. *See* 6 CMC § 1101(c)(2). The "sentence and disposition" that Sablan agreed not to appeal included accepting in advance the Court's subsequent determination of probation and parole. In the end, the court entirely denied parole and ordered ten years' supervised probation following release. *Commonwealth v. Sablan*, 16-0170 CR (NMI Super. Ct. Aug. 23, 2018) (Sentence and Commitment Order at 10) ("Order").

¶ 8 Sablan's agreeing to a subsequent determination of probation and parole as part of the sentence and disposition is materially equivalent to agreeing in a plea bargain to a sentencing range with the exact length to be determined later. Federal courts have enforced waivers against scope challenges in which plea agreements provided for a range of sentencing, with the exact length determined afterwards. *See, e.g.*, *United States v. Morales-Arroyo*, 854 F.3d 118, 120 (1st Cir. 2017); *United States v. Chambers*, 646 F. App'x 213, 215 (3d Cir. 2016); *United States v. Arroyo-Blas*, 783 F.3d 361, 365–67 (1st Cir. 2015). In *United States v. Edelen*, 539 F.3d 83, 86 (1st Cir. 2008), the court upheld a plea agreement that did not even specify a precise range; it merely provided that the judge would determine the guideline range and decide within that range. Under the plain language of the Agreement, Sablan agreed to the disposition that the court would determine "the length of time and conditions of probation" and whether he would be "eligible for parole." We find that the parole and probation determinations fall within the scope of the waiver.

C. Miscarriage of Justice

¶ 9 But even if the waiver was made knowingly and voluntarily and its scope encompasses parole and probation, we may still decline to enforce it if it works a miscarriage of justice. *United States v. Teeter* states that "plea-agreement waivers of the right to appeal from imposed sentences are presumptively valid (if knowing and voluntary), but are subject to a general exception under which the court of appeals retains inherent power to relieve the defendant of the waiver . . . where a miscarriage of justice occurs." 257 F.3d at 25–26. Since a waiver made knowingly and willingly is presumptively valid, the appellant has the burden of proof to overcome this presumption to survive a motion to dismiss. This exception is to be "applied sparingly and without generosity." *Id.* at 26. Factors considered in evaluating whether an error constituted a miscarriage of justice include:

> the clarity of the error, its gravity, its character (e.g., whether it concerns a fact issue, a sentencing guideline, or a statutory maximum), the impact of the error on the defendant, the impact of correcting the error on the government, and the extent to which the defendant acquiesced in the result.

Lin I, 2014 MP 19 ¶ 16 (quoting *Teeter*, 257 F.3d at 26). We apply the miscarriage of justice analysis to each of Sablan's claims to evaluate whether the waiver should be enforced as to that claim. *Id*. Ultimately, Sablan does not make the requisite showing as to any of the claims and thereby fails to demonstrate a miscarriage of justice.

i. Mechanical Sentencing

¶ 10 We stated in *Lin I* that "[a]pplying an appeal waiver to a *substantiated*, but not yet proven, mechanical-sentencing claim would be a miscarriage of justice." *Id*. ¶ 20 (emphasis added). Sablan interprets this language to mean that he need do little more than allege error to overcome a motion to dismiss. But that is not what we said in *Lin I*, nor is that the framework of the First and Third Circuits which we adopted there. The appellant in *Lin I* furnished "thirty-two sentencing orders from his sentencing judge covering a range of crimes, defendants, and circumstances where the maximum sentence was imposed without the possibility of probation, parole, early release, work release, weekend release, or a similar program." *Id*. ¶ 3. This substantiated a miscarriage of justice claim as to mechanical sentencing. Here, by contrast, Sablan furnished no such record showing a sentencing pattern by the judge. To the contrary, the sentencing judge provided extensive reasoning for fitting the sentence to the offense.

¶ 11 We apply factors from *Woosley v. United States*, 478 F.2d 139 (8th Cir. 1973), in evaluating whether a sentence was imposed mechanically. These factors include: "1) the judge's prior record of imposing the maximum imprisonment term for a specific offense; 2) the judge's comments indicating a predetermined policy of issuing the statutory maximum for a particular crime; and 3) the lack of reasons for the severity of punishment other than the judge's reflexive attitude." *Commonwealth v. Jin Song Lin*, 2016 MP 11 ¶ 10 ("*Lin II*"); *see also Commonwealth v. Lizama*, 2017 MP 5 ¶ 9.

¶ 12 The sentencing court here did not impose the statutory maximum, which is life imprisonment. *See* 6 CMC § 1101(c)(2). The first *Woosley* factor is therefore not met. The Agreement provided for a sentence of thirty years, with five suspended. On its face, this does not meet the second factor. While it is true that the court denied any possibility of parole, it did not give any indication of a general policy of denying parole for all instances of Second Degree Murder. On the contrary, the court emphasized specific details of the crime, including the brutality of the murder, the victim's suffering, and the context of domestic violence. Hr'g Tr. 38. The third *Woosley* factor is not met; the court provided extensive reasons for the severity of the punishment, including harm to the broader community. *Id*. Moreover, the punishment was not maximally harsh.

¶ 13 Under *Teeter*, "if denying a right of appeal would work a miscarriage of justice, the appellate court, in its sound discretion, may refuse to honor the waiver." 257 F.3d at 25. The miscarriage of justice exception to enforceability of an otherwise valid appellate waiver is discretionary and disfavored; as to the mechanical sentencing claim, the *Woosley* factors are not met. We find no miscarriage of justice on the ground of mechanical sentencing.

ii. Individualized Sentencing

¶ 14 Sablan next claims that his sentence was insufficiently individualized. His arguments revolve around the lack of discussion of mitigating factors and alleged use of impermissible aggravating factors, particularly improper victim impact evidence and statements by the prosecution. "Individualizing a sentence requires the trial court to consider "both the crime and the offender—it must examine and measure the relevant facts, the deterrent value of the sentence, the rehabilitation and reformation of the offender, the protection of society, and the disciplining of the wrongdoer." *Lin II*, 2016 MP 11 ¶ 16 (quoting *Commonwealth v. Borja*, 2015 MP 8 ¶ 39). Unlike the trial court in *Lin*, the court here extensively discussed specific findings under 6 CMC § 4115.[3] These included the brutality of the victim's death; she was beaten with a paddle and a sledgehammer and her body was fed upon by dogs before being found. Order at 4–9.

¶ 15 Use of an impermissible aggravating factor is a procedural defect in an individualized sentencing analysis. *See Commonwealth v. Hocog*, 2019 MP 5 ¶ 15 ("[D]efendants are more likely to receive an individualized assessment and punishment fit for the crime when a sentence comports with the procedures ensuring individualization."). Sablan objects to the admission of allegedly prejudicial victim impact statements, including statements read by individuals other than their authors and a video slideshow set to emotional music, as well as to statements by the prosecutor that assumed facts not in evidence. The prosecution brought forward several victim impact statements at the sentencing hearing that had not been previously disclosed to the defense or the court. These included unsigned texts and a letter attributed to a minor relative of the victim but signed by the author's mother. App. 80–84. These statements were read aloud by people other than their authors. Tr. 7–11. Sablan objects that these statements were not authenticated, though he acknowledges that the Rules of Evidence do not apply at a sentencing hearing. *See* NMI R. EVID. 1101(c)(2).

¶ 16 Sablan first challenges the statements on constitutional grounds, in misplaced reliance on United States Supreme Court precedent. He cites *Bosse v. Oklahoma*, 137 S. Ct. 1 (2016), for the proposition that the Eighth Amendment prohibits victim impact statements from family members. *Bosse* is limited to capital cases and is not applicable here. That case dealt with the interpretation of *Booth v. Maryland*, which held that "the Eighth Amendment prohibits a *capital*

[3] 6 CMC § 4115 states: "The court, in imposing any felony sentence, shall enter specific findings why a sentence, fine, alternative sentence, suspension of a sentence, community service or probation, will or will not serve the interests of justice."

sentencing *jury* from considering victim impact evidence" that is not "relevant in the unique circumstance of a *capital* sentencing hearing." 482 U.S. 496, 501, 504 (1987) (emphases added). The U.S. Supreme Court revised *Booth* in *Payne v. Tennessee*, 501 U.S. 808 (1991), reversing *Booth*'s ban on victim family member testimony about the characteristics of the victim in capital cases. *Bosse* overturned a state court which had assumed that *Payne* also reversed *Booth* as to victim family member testimony about the defendant and the nature of the crime. *Bosse* did not affirm *Booth*, it only stands for the proposition that *Payne* did not explicitly overturn this aspect of *Booth*. 137 S. Ct. at 2.

¶ 17 Sablan also makes a statutory challenge under 6 CMC § 9107(b) ("Section 9107(b)"). That statute states that:

> the victim may submit a victim impact statement in one or both of the following ways:
>
> (1) By presenting an oral victim impact statement at the sentencing hearing. However, where there are multiple victims, the court may limit the number of oral victim impact statements.
>
> (2) By submitting a written statement to the probation department, which shall append such statement to the presentence report of the defendant.

6 CMC § 9107(b). Here, the victim impact statements were admitted outside the parameters envisioned by this statute. They were neither presented orally by their authors nor submitted in writing to be attached to the PSI report in advance of the hearing. This in itself might not be fatal; our caselaw counsels flexibility here. We held in *Commonwealth v. Fu Zhu Lin* that a pre-sentence investigation and report was not required but "the information that an investigation and report would contain" was. 2014 MP 6 ¶ 36. The information a PSI report would contain includes a victim-impact statement. *Id*. ¶ 35 (citing *Commonwealth v. Ahn*, 3 CR 35, 41 (Dist. Ct. App. Div. 1987)). Additionally, the statute defines "victim" broadly for purposes of victim impact evidence:

> "Victim" means a person, other than a perpetrator, who has suffered direct physical, emotional or economic harm as a result of the commission of a crime; including, but not limited to:
>
> (1) The actual victim of the crime;
>
> (2) The immediate surviving family of the actual victim;
>
> (3) In the case of a victim who is . . . deceased, any of the following: . . . [a]nother family member; or . . . [a]nother person designated by the court.

6 CMC § 9101(a). This is intended to reflect the broad impact of the crime on the community and mitigates the concern that the statements were not read by their authors. More fundamentally problematic is that the statements were not

submitted in advance to the court and to the defense so as to provide an opportunity to respond. *See Salazar v. State*, 90 S.W.3d 330, 337 (Tex. Crim. App. 2002) ("[A]ppellant's attorney could not make a[n] objection until after the jury had already seen the . . . tape, nor could the judge make any discretionary ruling . . . until after the jury had viewed the exhibit.").

¶ 18 The court appeared to reference parts of these statements in the oral pronouncement of the sentence. The court characterized the victim as "a woman described by many as a flower, music and dance" engaged in "the education of culture from this indigenous community." Tr. 38. Several of the statements noted that the victim was a cultural dance performer and teacher. As these statements were admitted in violation of Section 9107(b), it was irregular to reference them in pronouncing the sentence. The written Sentence and Commitment Order does not reference the victim impact statements.

¶ 19 Under the *Teeter* factors, admitting these statements was erroneous. The gravity of error is moderate; the court referenced the statements in the hearing but not in the written order. As to whether the defendant acquiesced in the result, there was no contemporaneous objection to the fact that people other than the statements' authors read them. The impact on the defendant is moderate, since there were enough aggravating factors outside these statements to justify denying parole and imposing probation. These included "the egregious nature of Defendant's crimes, the extent of the victim's injuries, the overkill, and the risk posed by the Defendant due to his criminal history . . . ." Order at 7. The judge's passing mention at the hearing of the victim's role in the community, though it appeared to reference the statements, is not an indication that any impermissible aggravating factors altered the disposition.

¶ 20 The prosecution also showed a video slide show with emotional music, without providing the video to the court or the defense in advance. The slide show contained images of the victim set to the song "She Gave Us Love" by a local band. Opening Br. 29. This video is on somewhat shaky statutory ground as victim impact evidence. A video slide show is neither an oral presentation made by a victim under Section 9107(b)(1), nor a written statement appended to the pre-sentence investigation report by the Victim Witness Advocacy Unit under Section 9107(b)(2). This was not a victim impact statement as envisioned by the statutes. Admitting the video was not however a constitutional violation. Though a minority of courts find such videos impermissibly prejudicial in capital cases, *see United States v. Sampson*, 335 F. Supp. 2d 166, 193 (D. Mass. 2004) (showing video to jury at sentencing phase was unduly prejudicial); *Salazar*, 90 S.W.3d at 337–39 (admitting video at punishment phase was prejudicial and case remanded for harmless error analysis), such videos do not per se violate due process. *People v. Kelly*, 171 P.3d 548, 570 (Cal. 2007), *cert. denied*, *Kelly v. California*, 555 U.S. 1020 (2008); *but see Kelly v. California*, 555 U.S. at 1025 (Souter, J., dissenting) ("The videos added nothing relevant to the jury's deliberations and invited a verdict based on sentiment, rather than reasoned judgment."). Since some courts urge caution regarding victim impact videos

with the potential to sway the emotions, we weigh this risk against due consideration for the impact of the crime on the community. Evaluating the propriety of admitting the video at the hearing requires balancing its potential for improperly influencing the judge's emotions with the rights of victims.

¶ 21 *Lopez v. State*, 181 A.3d 810 (Md. 2018), is particularly instructive in this regard. There, the defendant was convicted of first degree murder. At the sentencing hearing, the court admitted a video with photographs of the victims set to emotional music. *Id*. at 815–16. The Maryland Court of Appeals affirmed, holding that admitting the video at sentencing did not violate the Eight Amendment or due process under the Fourteenth Amendment, following the United States Supreme Court in the *Booth*, *Payne*, and *Bosse* line of cases. Further, the Maryland Court of Appeals held that it was not an abuse of discretion that the video was outside the explicit parameters of statutorily permissible victim impact evidence. *Id*. The court acknowledged that Maryland's victim impact statement statute enumerates exactly the permissible content of such evidence and held that the slideshow served the statutorily authorized purpose of identifying the victims. *Id.* at 825. The court cited, in part, a public policy favoring victim rights, including a constitutional right to that end passed in the 1990s. *Id*. at 816–17. Article 47(a) of the Maryland Declaration of Rights provides: "A victim of crime shall be treated by agents of the State with dignity, respect, and sensitivity during all phases of the criminal justice process." Weighing consideration for the victims against the potential for undue prejudice ultimately led the court to uphold the video's admission.

¶ 22 Similar considerations counsel finding that admitting the slideshow did not work a miscarriage of justice here. The CNMI has a similar constitutional right to Maryland's. Article I, Section 11 of the NMI Constitution, passed at the Second Constitutional Convention in 1985, states, in pertinent part: "The right of the people to be secure in their persons, houses, and belongings against crime shall be recognized at sentencing." NMI CONST. art. I, § 11. The Commonwealth's victim impact statement statutes, unlike Maryland's, have no specific restrictions on content; rather, they govern the manner in which the statements are brought to the court's notice. *See supra* ¶ 17. Our *Fu Zhu Lin* decision confers a degree of flexibility in bringing the contents of presentence investigation report, which may include a victim impact statement, to the court's attention. 2014 MP 6 ¶ 36. While the specifics of Maryland's victim impact evidence statute and victim's rights law do not precisely track those of the CNMI one-to-one, the policy rationale for the court's upholding the slideshow at sentencing is also applicable here. The procedural irregularity of admitting the video does not rise to the level of reversible error.

¶ 23 Viewing the slideshow without prior notice to the defense was improper but was not "so unduly prejudicial that it renders" the proceeding "fundamentally unfair." *Payne*, 501 U.S. at 825. Unlike capital cases in which courts have rejected victim impact videos, the sentence here was imposed by judge and not jury. The gravity of error is moderate, since emotional videos have the potential

to be prejudicial, but the facts of the case suffice to render the victim highly sympathetic without reference to the slideshow. There was sufficient reason for the sentencing judge to deny parole eligibility and impose probation without the victim impact evidence. Since the defense objected, the defendant did not acquiesce in the result. Tr. 28. Finally, the impact on the defendant was ultimately minor, since there were aggravating factors unrelated to the victim impact statements. Under the *Teeter* factors this did not constitute a miscarriage of justice.

¶ 24 Sablan also objects to statements made by the prosecution that, he contends, lacked factual foundation. He argues that, though the Rules of Evidence are inapplicable to a sentencing hearing, due process nonetheless requires indicia of reliability for factual assertions by the prosecution. These included statements in the Commonwealth's sentencing memorandum that "[the] evidence supports the theory that the defendant planned to kill his wife," App. 29, and at the sentencing hearing that the defendant "isolated [the victim from family members . . . [i]solated and controlled her." Tr. 20–21. Characterizing the homicide as "planned" was improper as the conviction was for Second and not First Degree Murder. Second Degree Murder is defined as "unlawful killing of a human being by another human being with malice aforethought" but *not* "willfull, premeditated, and deliberated." 6 CMC § 1101. Stating that the defendant isolated the victim from family members may have been speculative since the record only reflected that family members no longer visited their home and not that defendant purposely excluded visitors. App. 65. However, Sablan does not provide any evidence that the court in fact considered the prosecution's speculative assertions as aggravating factors. The court did not mention any of these contested assertions at the hearing or in the sentencing order. Moreover, "prosecutors are given reasonable latitude to fashion closing arguments, and they may argue reasonable inferences drawn from the evidence . . . ." *Commonwealth v. Monkeya*, 2017 MP 7 ¶ 32. This is still more true of sentencing hearings as opposed to closing arguments at trial, since sentencing hearings are not bound by the rules of evidence.

¶ 25 Sablan raises valid procedural concerns regarding the sentencing hearing, namely that the prosecution made factual assertions that were speculative, and that victim impact statements were admitted in a manner not contemplated by Section 9107(b) and without advance notice. However, the court did not cite the improper statements by the prosecution. As to the victim impact statements, these were referenced by the trial court in the sentencing hearing but not in the written sentence and commitment order. For a close family member of the author rather than the author herself to read a victim impact statement at the hearing is stretching the boundaries of Section 9107(b). The prosecution should have submitted these statements to the court and the defense in advance. Still, there's no evidence that the statements swayed the court's disposition. As to the video slide show, it was outside the bounds of a victim impact statement as envisioned by 6 CMC § 9107. Moreover, "when victim impact evidence is enhanced with music, photographs, or video footage, the risk of unfair prejudice" may

become "overwhelming." *Kelly*, 555 U.S. at 1025 (Souter, J., dissenting). Caution is in order when reviewing such evidence. Nonetheless, these procedural errors do overcome the presumption of enforceability of the waiver. We find no miscarriage of justice as to Sablan's individualized sentencing claim.

¶ 26 In enforcing the waiver, we do not in the least minimize the gravity of unjust incarceration. Sablan's point is very well taken that the burden on the prosecution and the court of additional briefing and argument to reach the merits does not outweigh the deprivation of a defendant's liberty. If administrative burden were the only reason for waivers of the right to appeal in a plea bargain, they might well be categorically unenforceable. This is because "such waivers are anticipatory: at the time the defendant signs the plea agreement, she does not have a clue as to the nature and magnitude of the sentencing errors that may be visited upon her." *Teeter*, 257 F.3d at 21. But administrative burden on the judicial system is not the only reason for waiver. "Allowing a criminal defendant to agree to a waiver of appeal gives her an additional bargaining chip in negotiations with the prosecution; she may, for example, be able to exchange this waiver for the government's assent to the dismissal of other charges." *Id*. at 22. That is exactly what happened here. Sablan got the benefit of the bargain in that the prosecution dropped two additional charges, and the court did not sentence him to the statutory maximum for the murder charge. The Agreement reserved to the court the right to determine parole and probation conditions, and the grisly facts of the case gave the court ample reason for its disposition even without the victim impact evidence. Enforcing the waiver is therefore appropriate under these circumstances.

D. Remand to a different judge for resentencing

¶ 27 Since we enforce the waiver, we do not remand for resentencing. We note, however, that Sablan fails to meet his burden to justify reassignment in the event of remand. He alleges that the sentencing judge is biased against defendants convicted of crimes of domestic violence. Opening Br. 33. He believes that if we reverse and remand, a different judge should handle his case. In determining whether to remand a case to a different judge for resentencing, we consider three factors:

> (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.

Lizama, 2017 MP 5 ¶ 8 (quoting *Hocog*, 2015 MP 19 ¶ 34). Sablan provides no citation to the record of the sentencing hearing or to other sentencing hearings in which the judge allegedly exhibited bias against defendants in domestic violence cases. This conclusory allegation of bias does not justify reassignment.

IV. CONCLUSION

¶ 28 The waiver was made knowingly and willingly, and parole and probation fall within its scope. Under *Lin I* and *Teeter*, the appellant has the burden to substantiate his claims to survive a motion to dismiss under the miscarriage of justice framework. Sablan has not met his burden as to any of the claims. The individualized sentencing claim flags real procedural concerns, since the court permitted victim impact statements not contemplated by 6 CMC § 9107(b). However, under the *Teeter* factors, the harm of this procedural error does not rise to the level of a miscarriage of justice sufficient to render the waiver unenforceable.

¶ 29 The Commonwealth's Motion to Dismiss is GRANTED.

SO ORDERED this 18th day of May, 2020.

/s/
ALEXANDRO C. CASTRO
Chief Justice

/s/
JOHN A. MANGLOÑA
Associate Justice

/s/
PERRY B. INOS
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