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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Plaintiff-Appellee,

v.

ANTHONY BORJA,
Defendant-Appellant.

Supreme Court No. 2013-SCC-0024-CRM

Superior Court No. 12-0203T

OPINION

Cite as: 2015 MP 8

Decided November 18, 2015

Gilbert Birnbrich, Attorney General, and Barbara P. Cepeda, Assistant Attorney General; Edward Manibusan, Attorney General, and Brian Flaherty, Assistant Attorney General, Office of the Attorney General, Saipan, MP, for Plaintiff-Appellee.[1]

Benjamin K. Petersburg and Michael A. Sato, Assistant Public Defenders, Office of the Public Defender, Saipan, MP, for Defendant-Appellant.[2]

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[1] Birnbrich is no longer the Attorney General, and Brian Flaherty is no longer an Assistant Attorney General.

[2] Petersburg is no longer an Assistant Public Defender.

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

INOS, J.:

¶ 1 Defendant-Appellant Anthony Borja ("Borja") appeals his sentence, asserting the trial court erred by (1) denying his request for a sentencing hearing on Tinian, (2) failing to provide him his right of allocution, (3) failing to order a presentence investigation report ("PSI") prior to sentencing, and (4) failing to consider mitigating factors before sentencing. For the reasons discussed below, we VACATE Borja's sentence and REMAND for resentencing.

I. FACTS AND PROCEDURAL HISTORY

¶ 2 The Commonwealth charged Borja in an amended information with one count of Sexual Abuse of a Minor in the First Degree, one count of Indecent Exposure in the First Degree, and two counts of Disturbing the Peace. The trial court set the case for jury trial at the Tinian Courthouse and ordered all pretrial matters be heard on Saipan.

¶ 3 At the pretrial conference in Saipan, the court considered Borja's First Amended Plea Agreement. The agreement, pursuant to NMI Rule of Criminal Procedure Rule 11(e)(1)(C),[3] sought, amongst other punishment, imprisonment for a term of ten years, all suspended except between zero and eight years, as to be determined by the court. The trial court rejected the plea, noting the seriousness of the crime, the age of the victim, and the subsequent reoccurrence of a similar offense involving the same victim. Furthermore, in rejecting the plea, the court stated that a sentence of zero to eight years imprisonment was misaligned with the standards of the community and the court, because that sentence would account for "about twenty two percent of the possible exposure . . . if [Borja] were to go to trial and be convicted on all the counts and be sentenced consecutively." Tr. 5.

¶ 4 Subsequently, the Commonwealth filed its Second Amended Plea Agreement, also pursuant to Rule 11(e)(1)(C), reducing Borja's charges to one count of Sexual Abuse of a Minor in the Second Degree and two counts of Disturbing the Peace. That plea agreement sought, amongst other punishment, imprisonment for a term of ten years, all suspended except seven years.

¶ 5 At the beginning of the change of plea hearing, the court rejected the Second Amended Plea Agreement because, like the First Amended Plea Agreement, the court found the proposed length of imprisonment came short of the court's and the community's standard. After the court rejected the plea agreement, the parties requested a short break to discuss the ruling and find

[3] If a court accepts a Rule 11(e)(1)(C) plea, the court must enter the sentence agreed to unless exceptional circumstances compel otherwise. *Commonwealth v. Castro*, 2002 MP 13 ¶ 22 (citing *United States v. Fernandez*, 960 F.2d 771, 773 (9th Cir. 1992)).

potential alternate resolutions. A few minutes later, the parties informed the court that Borja will plead guilty to the same charges pursuant to NMI Rule of Criminal Procedure 11(e)(1)(B),[4] as opposed to Rule 11(e)(1)(C). The court accepted the modification,[5] and Borja pled guilty to the offense of Sexual Abuse of a Minor in the Second Degree, in violation of 6 CMC § 1307(a)(2).

¶ 6 During the proceeding, the court informed Borja that, under Rule 11(e)(1)(B), the sentence "is totally up to this court to decide, up to the maximum of ten years instead of the seven years that was in the second plea agreement." Tr. 12. After Borja stated that he was still willing to move forward with the change of plea, the court proceeded with the colloquy and informed Borja that, as a result of pleading guilty, he was waiving certain rights.

¶ 7 The court accepted Borja's guilty plea and proceeded immediately to sentencing. Before imposing its sentence, the court asked Borja whether there was anything he would like to tell the court. In response, Borja's attorney requested that a sentencing hearing be held on Tinian. After denying that request, the court asked the parties for their recommended sentences. The government recommended, and Borja's attorney agreed, that seven years imprisonment and three years probation would be an appropriate sentence. In support of that sentence, Borja's attorney argued that Borja was "still very young" and "a good candidate for rehabilitation." *Id.* at 18. Borja's attorney also recommended probation with conditions to include counseling and community service.

¶ 8 The court then sentenced Borja to the maximum penalty of ten years imprisonment, noting that the maximum sentence was appropriate because the victim was ten years old at the time of the incident. The court rejected the recommended sentence of seven years imprisonment because it viewed that sentence as too lenient. The court issued the Judgment and Commitment Order on May 3, 2013, and on June 4, 2013, Borja appealed his sentence.

¶ 9 At oral argument, the Commonwealth contested the timeliness of the appeal for the first time. Following argument, we ordered the parties to

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[4] If a court accepts a Rule 11(e)(1)(B) plea, the court may, but does not have to, enter the sentence recommended in the plea:

> The attorney for the government and the attorney for the defendant . . . may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty . . . to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following . . . make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court . . . .

NMI R. CRIM. P. 11(e)(1)(B).

[5] The court referred to the modified Second Amended Plea Agreement as the Third Amended Plea Agreement. Tr. 12.

supplement their briefs to address the timeliness of the appeal.

II. JURISDICTION

¶ 10 We have jurisdiction over final judgments and orders of the Commonwealth Superior Court. NMI CONST. art. IV, § 3. "In a criminal case, a defendant's notice of appeal must be filed in the Superior Court within 30 days after the later of . . . [t]he entry of either the judgment or the order being appealed . . . ." NMI SUP. CT. R. 4(b)(1)(A)(i).

¶ 11 Here, the judgment and commitment order was issued on May 3, 2013, and the defendant's notice of appeal was filed on June 4, 2013, two days past the deadline. Because the notice of appeal was not filed within thirty days, the Commonwealth contends this appeal is time-barred and must be dismissed.

¶ 12 "Whether jurisdiction can be exercised is a question of law subject to a de novo review." *Friends of Marpi v. Commonwealth*, 2012 MP 9 ¶ 4 (internal quotation marks omitted). We must first resolve issues related to appellate jurisdiction before we consider the merits of an appeal. *Id*. Accordingly, we now turn to this threshold issue.

A. Issue Raised for the First Time on Appeal

¶ 13 We have no obligation to hear issues raised for the first time on appeal; however, we have previously considered challenges to jurisdiction initially raised at oral argument. *Lucky Dev. Co. v. Tokai, U.S.A., Inc.*, 3 NMI 79, 84–85 (1992). In *Lucky Development Co.*, the parties, at oral argument, presented an issue not contained within their briefs—whether the appeal was filed in a timely manner. *Id*. There, we addressed the issue because it concerned the Court's jurisdiction. *Id*. at 85. Here, the Commonwealth, at oral argument, raised for the first time the issue of whether the appeal was filed in a timely manner. Therefore, we now consider whether Borja's untimely filing requires dismissal of his appeal.

B. Mandatory and Jurisdictional Court Rules

¶ 14 In *Tudela v. Marianas Pub. Land Corp*., we held that the timely filing of a notice of appeal is both "mandatory and jurisdictional." 1 NMI 179, 187 (1990). There, we considered the federal courts' interpretation of Federal Rule of Appellate Procedure 4(a)—that "the 30-day time limit in which to file a notice of appeal in a civil case is mandatory and jurisdictional"—as highly persuasive in denying an appellant's request for an extension to file under what is now NMI Supreme Court Rule 4(a)(5). *Id*. at 185, 187. Moreover, the "mandatory and jurisdictional" language in *Tudela* has provided support for the dismissal of not only civil appeals but also a criminal appeal. *Commonwealth v. Arriola*, 2002 MP 8 ¶ 11. Our precedent therefore indicates that a violation of Rule 4(b)(1) would require us to dismiss this appeal. However, in light of recent United States Supreme Court decisions regarding the jurisdictional impact of filing deadlines,[6] we revisit whether a timely filing of a notice of

[6] *Bowles v. Russell*, 551 U.S. 205 (2007); *Eberhart v. United States*, 546 U.S. 12 (2005); *Kontrick v. Ryan*, 540 U.S. 443, 453 (2004).

appeal is mandatory and jurisdictional.[7]

¶ 15 "Court-prescribed rules of practice and procedure, as opposed to statutory limits, 'do not create or withdraw . . . jurisdiction.'" *United States v. Watson*, 623 F.3d 542, 545 (8th Cir. 2010) (quoting *Kontrick v. Ryan*, 540 U.S. 443, 453 (2004)). In *Bowles v. Russell*, 551 U.S. 205 (2007), the United States Supreme Court clarified the distinction between "claim-processing" and "jurisdictional" rules. The Court held that Federal Rules of Appellate Procedure that prescribe a time limit are "jurisdictional" if the time limitation is also set forth by statute.[8] *Id.* at 210–13. In contrast, the *Kontrick* Court found that the time requirement in Federal Rule of Bankruptcy Procedure 4004 was claim-processing because that rule did not derive from statute.[9] 540 U.S. at 448, 453–54. Following that rationale, the circuit courts have held that Rule 4(b) is not jurisdictional. *Watson*, 623 F.3d at 545–46; *accord, e.g.*, *Gov't of the V.I. v. Martinez*, 620 F.3d 321, 328 (3d Cir. 2010); *United States v. Sadler*, 480 F.3d 932, 939–40 (9th Cir. 2007).

¶ 16 To demonstrate the "jurisdictional distinction between court-promulgated

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[7] "[W]hen our rules are patterned after the federal rules it is appropriate to look to federal interpretation for guidance." *Ishimatsu v. Royal Crown Ins. Corp.*, 2010 MP 8 ¶ 60 (citing *Ishimatsu v. Royal Crown Ins. Corp.*, 2006 MP 9 ¶ 7 n.3). Here, NMI Supreme Court Rule 4(b)(1)(A) is patterned after Federal Rule of Appellate Procedure 4(b)(1)(A); therefore, it is appropriate to consult federal courts' treatment of those rules for guidance. *Compare* NMI SUP. CT. R. 4(b)(1)(A) ("In a criminal case, a defendant's notice of appeal must be filed in the Superior Court within 30 days after the later of . . . [t]he entry of either the judgment or the order being appealed . . . ."), *with* FED. R. APP. P. 4(b)(1)(A) ("In a criminal case, a defendant's notice of appeal must be filed in the district court within 14 days after the later of . . . the entry of either the judgment or the order being appealed . . . .").

[8] For example, Federal Rule of Appellate Procedure 4(a) provides "[i]n a civil case . . . the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from." This time limitation is also set forth in 28 U.S.C. § 2107(a):

> Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

28 U.S.C. § 2107(a).

[9] To illustrate the jurisdictional significance of a statute that imposes a time limitation, the *Bowles* Court discusses that critical to its analysis in *Kontrick* "was the fact that '[n]o statute . . . specifies a time limit for filing a complaint objecting to the debtor's discharge.' Rather, the filing deadlines in the Bankruptcy Rules are 'procedural rules adopted by the Court for the orderly transaction of its business' that are 'not jurisdictional.'" 551 U.S. at 210–11 (citations omitted).

rules and limits enacted by Congress[,]" the Supreme Court, in *Bowles*, examined its treatment of its certiorari jurisdiction. 551 U.S. at 211–12. The Court stated that, in both civil and criminal cases, its rules require a petition for a writ of certiorari be filed "within 90 days of the entry of the judgment sought to be reviewed." *Id*. at 212. Although the rule requires that petitions be filed within ninety days, untimely petitions received under the statute-based filing period for civil cases are jurisdictional and are treated differently than those received under the rule-based time limit for criminal cases. *Id.* ("[W]e have treated the rule-based time limit for criminal cases differently, stating that it may be waived because '[t]he procedural rules adopted by the Court for the orderly transaction of its business are not jurisdictional and can be relaxed by the Court in the exercise of its discretion . . . .'" (second alteration in original) (quoting *Schacht v. United States*, 398 U.S. 58, 64 (1970))).

¶ 17 The rationale for the Court's jurisdictional treatment of statutory time limits comports with Congress' constitutional power to limit federal courts' jurisdiction. "Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider. Because Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them." *Bowles*, 551 U.S. at 212–13 (citation omitted); *see* U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."); *see also* U.S. CONST. art. III, § 2 ("In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."). "Rules provisions governing timeliness that do not implement congressionally mandated 'built-in time constraints' are therefore properly considered nonjurisdictional limitations, subject to forfeiture." *Sadler*, 480 F.3d at 937 (quoting *Kontrick*, 540 U.S. at 453).

¶ 18 In contrast, the CNMI Legislature lacks the constitutional authority to limit this Court's jurisdiction because the judicial power of the Commonwealth, including the power to regulate the procedure of hearing appeals, is vested "in a judiciary of the Northern Mariana Islands which shall include one supreme court and one superior court and such inferior courts as may be established by law." NMI CONST. art. IV, § 1; *see Reyes v. Reyes*, 2004 MP 1 ¶ 100 (concluding that legislation requiring the Judiciary to issue decisions within one year "is a statutory imposition of a procedural rule that is clearly inconsistent with the independence of a constitutional court and unduly interferes with the CNMI Judiciary's decision-making function in violation of the separation of powers doctrine."). In interpreting Article IV of the NMI Constitution, we have reiterated our independence as a constitutional court, stating that "control over court administration and procedure remains vested in the judicial branch by the Constitution," and "the legislature may approve or disprove of the rules proposed by the Chief Justice but it may not modify or enact rules for the judiciary." *Reyes*, 2004 MP 1 ¶ 97 (citation omitted). Because this Court is

established by the Constitution and not the Legislature, the Legislature is without the constitutional authority to limit this Court's jurisdiction. *See Bowles*, 551 U.S. at 212–13 ("Because Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them."). Moreover, because this Court's jurisdiction cannot be limited by statute, Rule 4(b)(1)(a) is necessarily a claim-processing rule. Therefore, this Court is not required to dismiss the appeal.

¶ 19 Although Rule 4(b)(1)(a) is not jurisdictional in nature, the rule remains mandatory if properly invoked by a party. *See Watson*, 623 F.3d at 545–46 ("Although we retain jurisdiction over an untimely appeal from a criminal judgment, Rule 4(b)'s timeliness requirements remain inflexible and 'assure relief to a party properly raising them.'" (quoting *Eberhart v. United States*, 546 U.S. 12, 19 (2005))); *see also Sadler*, 480 F.3d at 934 ("*Kontrick* and *Eberhart* . . . clarified that procedural rules formerly referred to as 'mandatory and jurisdictional' may be, instead, simply 'inflexible claim-processing rule[s],' mandatory if invoked by a party but forfeitable if not invoked." (citations omitted)). To invoke the rule, a party must "object to timeliness at any point up to and including in its merits brief." *United States v. Muhammud*, 701 F.3d 109, 111 (3d Cir. 2012);[10] *see Commonwealth v. Castro*, 2008 MP 18 ¶ 26 ("[W]e refuse to 'reward quick-thinking counsel by entertaining grounds brought to [the court's] attention for the first time at oral arguments.'" (second alteration in original) (quoting *Vaughn v. Lawrenceburg Power Sys.*, 269 F.3d 703, 714 (6th Cir. 2001))). Here, the Commonwealth improperly invoked Rule 4(b) because it raised the untimely notice of appeal for the first time at oral argument. Accordingly, we turn to the merits.

III. STANDARDS OF REVIEW

¶ 20 Borja argues the trial court erred by (1) denying his request for a sentencing hearing on Tinian, (2) failing to provide him his right of allocution, (3) failing to order a PSI prior to sentencing, and (4) failing to consider mitigating factors before sentencing. First, we review Borja's request for a sentencing hearing on Tinian for an abuse of discretion. *See Guerrero v. Tinian Dynasty Hotel*, 2006 MP 26 ¶ 10 (reviewing the trial court's decision to "remove the case from Saipan and to hold the jury trial on Tinian" for abuse of discretion). Second, we review Borja's alleged denial of his right of allocution

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[10] In *United States v. Muhammud*, the appellant pled guilty and waived his right of appeal and collateral attack. 701 F.3d at 110–11. Two years later, he appealed his judgment of conviction, and the government, without contesting the timeliness of the appeal, moved to enforce the appellate waiver. *Id.* at 111. The Clerk of the Court then advised the parties of the timeliness issue, and the government's motion was referred to the merits panel. *Id.*

The court held that Rule 4(b) was "rigid but not jurisdictional, and may be waived if not invoked by the government." *Id.* Further, it agreed with other appellate courts that a government objection to timeliness at "any point up to and including in its merits brief" required dismissal of the appeal. *Id.*

for plain error because no objections were made at the trial court level. *United States v. Lewis*, 10 F.3d 1086, 1092 (4th Cir. 1993). Similarly, we review the court's failure to order a PSI for plain error because Borja "neither requested a PSI nor objected to the court's failure to order one." *Commonwealth v. Salasiban*, 2014 MP 17 ¶ 9. Last, we review the trial court's sentencing process for abuse of discretion. *See United States v. Hartford*, 489 F.2d 652, 654 (5th Cir. 1974) (reviewing whether a district judge abused his discretion by imposing a mechanistic sentence); *see also Commonwealth v. Palacios*, 2014 MP 16 ¶ 12 (reviewing whether "the trial court abused its discretion by imposing the maximum sentence without considering . . . mitigating factors.").

IV. DISCUSSION

A. Sentencing Hearing on Tinian

¶ 21 "A trial court abuses its discretion 'when [its] decision is based on an erroneous conclusion of law or . . . the record contains no evidence on which the judge could have rationally based the decision.'" *Commonwealth v. Laniyo*, 2012 MP 1 ¶17 (citing *Midsea Indus. v. HK Eng'g, Ltd.*, 1998 Guam 14 ¶ 4).

¶ 22 "All trials of offenses shall be held on the island where the offense was committed if a court competent to hear the case is located or regularly sits on that island." 6 CMC § 108(a). "Except as otherwise permitted by statute or by these rules, the court shall fix the place of trial with due regard to the convenience of the defendant and the witnesses and the prompt administration of justice." NMI R. CRIM. P. 18.

¶ 23 Borja asserts the trial court violated 6 CMC § 108(a) and NMI Rule of Criminal Procedure 18 when it denied his request to a sentencing hearing on Tinian.

¶ 24 First, he argues § 108(a) requires the entire case be heard on Tinian because the offenses occurred there. In support, Borja cites *Guerrero v. Tinian Dynasty Hotel*, for the proposition "[i]f a court which is competent to hear the case is located or regularly sits on the island where the offense or a material element of the offense was committed, the case is heard on that island." 2006 MP 26 ¶ 10 n.5.

¶ 25 Borja's argument is unavailing because § 108 refers specifically to the location of trials. The footnote Borja cites contrasts the lack of "a specific statutory provision that determines venue in a civil action" against the presence of a statutory provision that determines venue in criminal actions.[11] *Guerrero*,

[11] The full text of footnote 5 in *Guerrero* reads as follows:

> The Commonwealth does not have a specific statutory provision that determines venue in a civil action. While Rule 12(b)(3) of the Commonwealth Rules of Civil Procedure provides for dismissal if venue is improper, there is no definition of what is proper. Section 108 of Title 6 provides venue determination in criminal matters. If a court which is competent to hear the case is located or regularly sits on the island where the offense or a material element of the offense was

2006 MP 26 ¶ 10 n.5. It does not expand the scope of § 108 to include other stages of litigation, such as pre-trial and post-trial proceedings or sentencing.

¶ 26 Next, Borja argues Federal Rule of Criminal Procedure 18, which states that "the government must prosecute an offense in a district where the offense was committed," suggests that NMI Rule of Criminal Procedure 18 requires all stages of litigation be held on the island where the criminal actions occurred.

¶ 27 We find this argument unpersuasive because the Advisory Committee's notes to Federal Rule 18 affirm that "the rule requires that only the trial be held in the division in which the offense was committed and permits other proceedings to be had elsewhere in the same district." Based on the advisory notes, Federal Rule 18 distinguishes trials from other proceedings. Thus, the trial court did not abuse its discretion when it denied Borja's request for a sentencing hearing on Tinian.

B. Right of Allocution

¶ 28 "The right of allocution affords a criminal defendant the opportunity to make a final plea to the judge on his own behalf prior to sentencing." *United States v. De Alba Pagan*, 33 F.3d 125, 129 (1st Cir. 1994) (citation omitted). Before imposing its sentence, the court must "address the defendant personally and ask him/her if he/she wishes to make a statement in his/her own behalf and to present any information in mitigation of punishment." NMI R. CRIM. P. 32(a)(1)(C).

¶ 29 An appellant's allegation of a denial to the right of allocution is reviewed for plain error if no objections were made in the lower court. *Lewis*, 10 F.3d at 1092. "Under the plain error standard, an appellant must show that: (1) there was error; (2) the error was 'plain' or 'obvious'; [and] (3) the error affected the appellant's 'substantial rights,' or put differently, affected the outcome of the proceeding." *Commonwealth v. Hossain*, 2010 MP 21 ¶ 29 (citing *United States v. Olano*, 507 U.S. 725, 732–34 (1993)).

¶ 30 Borja asserts that he was denied his right of allocution because he did not have an opportunity to make a statement on his own behalf. However, the record shows that the trial court addressed him:

> Thank you very much Mr. Borja, you can sit down for now. Okay, base[d] on your statement to this court, the representation of the prosecutor, you said that you are satisfied with the services of your Attorney, you understand your rights, and you are waiving them, the court will accept your guilty plea and enter that into the record, okay. Is there anything you would like to tell this court before the

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> committed, the case is heard on that island. The defendant or the Commonwealth, however, may petition the court for a change of location for good cause shown.

2006 MP 26 ¶ 10 n.5 (internal citations omitted).

court imposes a sentence on you?

Tr. 17. Here, the court gave him an opportunity to make a statement on his own behalf, but he chose not to respond. Instead, his attorney requested a sentencing hearing on Tinian.

¶ 31 Additionally, Borja contends the court erred when it denied his attorney's request because the denial deprived him of the opportunity to present mitigating information in the form of witnesses. However, "[Rule 32] does not give defendants the right to call witnesses in their behalf at sentencing. The rule only requires the court to allow the defendant and his attorney to speak."[12] *United States v. Cruzado-Laureano*, 527 F.3d 231, 238 (1st Cir. 2008) (citing FED. R. CRIM. P. 32(i)(4)(A)(i)–(ii)); *United States v. Jackson*, 700 F.2d 181, 191 (5th Cir. 1983). Thus, under Rule 32, it is inconsequential that the court's refusal to hold the hearing on Tinian led to a lack of witnesses who would have vouched for Borja's good character.

¶ 32 Last, Borja argues the court erred because it failed to readdress him after denying his counsel's request. He has cited no legal authority, nor have we found any, supporting that proposition. Accordingly, we determine that the court did not violate Borja's right of allocution.

C. Presentence Investigation Report

¶ 33 Borja analyzes the trial court's failure to order a PSI for abuse of discretion. However, because he "neither requested a PSI nor objected to the trial court's failure to order one," we review for plain error. *Salasiban*, 2014 MP 17 ¶ 9 (citation omitted). To prevail under plain error, Borja must "show [that] the court's failure to order a PSI was an error that was plain and affected his substantial rights." *Id.* ¶ 10 (citation omitted). "The error is substantial if there is a 'reasonable probability' it affected the outcome of the proceeding." *Id.* ¶ 11 (citing *United States v. Marcus*, 560 U.S. 258, 262 (2010)). Then, "[i]f each element is met, we have 'the *discretion* to remedy the error—discretion which ought to be exercised only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings.'" *Id.* ¶ 10 (quoting *Puckett v. United States*, 556 U.S. 129, 135 (2009)).

¶ 34 "A party cannot count on us to pick out, argue for, and apply a standard of review for it on our own initiative, without the benefit of the adversarial process, and without any opportunity for the adversely affected party to be heard on the question." *McKissick v. Yuen*, 618 F.3d 1179, 1189 (10th Cir. 2010). Borja explained the purpose and importance of ordering a PSI before sentencing, but he did not argue and fails to show how the absence of the PSI affected the outcome of the sentencing proceeding. Because it is unclear whether the error affected his substantial rights, Borja fails to satisfy the third

[12] NMI Rules of Criminal Procedure 32(a)(1)(C) is patterned after Federal Rules of Criminal Procedure 32(i)(4)(A)(ii); therefore, "it is appropriate to look to federal interpretation for guidance." *Ishimatsu*, 2010 MP 8 ¶ 60.

prong of plain error review.

D. Individualized Sentencing

¶ 35 We review the trial court's sentencing process for abuse of discretion. *See Hartford*, 489 F.2d at 654; *see also Palacios*, 2014 MP 16 ¶ 12.

¶ 36 Here, the trial court rejected two plea agreements before imposing its sentence. The court rejected the first plea agreement because its provisions were "not in line" with the court, the judge, and the CNMI community.[13] Specifically, the court highlighted the fact that the victim of the crime was a ten-year-old child. Later, the court rejected the second plea agreement for the same reason—because it failed to meet the standards of the court and the community. The court only accepted the plea agreement when the basis of the plea changed from a Rule 11(e)(1)(C) plea to a Rule 11(e)(1)(B). Subsequently, the court sentenced Borja to the maximum penalty of ten years incarceration without the possibility of parole or other similar program.[14]

¶ 37 Borja asserts the trial court erred by imposing an insufficiently individualized sentence. He argues the court must consider relevant sentencing factors particular to an offender prior to sentencing.

¶ 38 At the time the court issued its order, the CNMI Legislature provided that offenders of 6 CMC § 1307(a)(2) be punished between zero to ten years of incarceration. 6 CMC § 1307(b) (2002) (amended 2013). Because incarceration of § 1307(a)(2) offenders could have fallen anywhere within a ten-year span, it is clear that the Legislature intended for courts to impose lesser sentences when warranted by mitigating circumstances. *See Hartford*, 489 F.2d at 655–56 (stating that mechanical sentencing runs counter to Congress's prescription of non-mandatory maximum sentences); *see also United States v. Daniels*, 446 F.2d 967, 971–72 (6th Cir. 1971) (stating Congress's prescription of non-mandatory maximum sentences evidences a legislative will to impose lesser sentences where appropriate). Thus, the trial court has a duty to mete out individualized sentences. *See United States v. Foss*, 501 F.2d 522, 528 (1st Cir. 1974) (describing the court's duty to individualize sentences).

¶ 39 A sentence is individualized if it considers both the crime and the offender—it must examine and measure the relevant facts, the deterrent value

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[13] In rejecting the First Amended Plea Agreement, the trial judge stated "my inclination is to reject the plea agreement base[d] on the terms that [it] is not in line with my Court, my standard and the standard of the CNMI community. . . . The Court feels that considering the seriousness of actual sexual penetration of a child about the age of ten years old, that a sentence of eight years, even if the Court were to entertain that, eight years is not in line with the standards of this community." Tr. at 5; *Commonwealth v. Borja*, No. 12-0203(T) (NMI Super. Ct. Apr. 26, 2013) (Order Rejecting First Am. Plea Agreement at 2–3).

[14] At sentencing, the court noted "that because this is a sexual abuse of a ten year old child, that this sentence is appropriate for this defendant." Tr. at 19; *Borja*, No. 12-0203(T) (NMI Super. Ct. May 3, 2013) (J. & Commitment Order at 2–3).

of the sentence, the rehabilitation and reformation of the offender, the protection of society, and the disciplining of the wrongdoer. *See Williams v. New York*, 337 U.S. 241, 247–48 (1949) (discussing the modern approach to sentencing as embracing the imposition of individualized sentences); *see also Daniels*, 446 F.2d at 972 (stating that the *Williams* Court approved of a number of factors in imposing a sentence, such as the reformation and retribution of the offender, the protection of society, and the deterrent effect of punishment on other likely offenders). "The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender." *Williams*, 337 U.S. at 247. Moreover, the United States Supreme Court highlighted the importance of having a complete description of the offender: "[h]ighly relevant—if not essential—to [the] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics." *Id.* While not all factors must point in one direction for the court to justify its sentence, "a sentencing policy which focuses solely on the crime committed ignores the rehabilitative purpose of the criminal law, since it permits no room for consideration of the defendant's individual needs." *United States v. McCoy*, 429 F.2d 739, 743 (D.C. Cir. 1970).

¶ 40 Here, Borja's sentence was insufficiently individualized because the court based its imposition of the maximum sentence solely on the act of the crime. The court's disinterest in other relevant factors is evident because it failed to acknowledge mitigating factors provided by Borja, and it sentenced the defendant without ordering or considering the contents within a PSI. Furthermore, nothing in the record indicates that the court evaluated any mitigating factors particular to Borja. Thus, the court ignored the implied legislative mandate of 6 CMC § 1307(a)(2), which requires that the court impose individualized sentences.

¶ 41 In *Commonwealth v. Palacios*, we evaluated whether a trial court abused its discretion when it imposed the maximum sentence allegedly without considering several mitigating factors. 2014 MP 16 ¶ 12. In *Palacios*, we affirmed the court's order because "a reasonable person could justify the sentence imposed by the trial court." *Id.* ¶ 13. There, we concluded that a reasonable person could justify the court's sentence because, after considering the contents of the PSI, the court noted a number of significant aggravating factors particular to the defendant that drove its decision to impose the maximum sentence. *Id.*

¶ 42 Here, the court did not order or consider information within a PSI. Further, it failed to discuss any relevant sentencing factors particular to Borja's life. Therefore, we find a reasonable person could not justify the trial court's imposition of the maximum sentence. Accordingly, we conclude that the trial court abused its discretion by sentencing Borja to the maximum penalty.

V. CONCLUSION

¶ 43 For the foregoing reasons, we VACATE the trial court's sentence and REMAND for resentencing.

SO ORDERED this 18th day of November, 2015.

/s/
ALEXANDRO C. CASTRO
Chief Justice

/s/
JOHN A. MANGLONA
Associate Justice

/s/
PERRY B. INOS
Associate Justice