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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Plaintiff-Appellee,

v.

DONALD A. HOCOG,
Defendant-Appellant.

Supreme Court No. 2017-SCC-0019-CRM
Superior Court No. 13-0076

OPINION

Cite as: 2019 MP 5

Decided August 2, 2019

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

Nancy A. Dominski (argued) and Stephanie Boutsicaris, Assistant Public Defender,Office of the Public Defender, Saipan, MP, for Defendant-Appellant.

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

CASTRO, C.J.:

¶ 1 Defendant-Appellant Donald A. Hocog ("Hocog") challenges and seeks to vacate his sentence on this second appeal, arguing (1) the court failed to individualize his sentence; (2) the court improperly restricted his parole eligibility; (3) the court did not have sufficient evidence to render its findings; and (4) his case should be remanded to a different judge for resentencing. For the following reasons, we AFFIRM in part Hocog's thirty-year sentence, VACATE the parole restriction, and REMAND with specific instructions for the trial court to strike the parole restriction from the Sentencing and Commitment Order.

I. FACTS AND PROCEDURAL HISTORY

¶ 2 In 2013, a jury found Hocog guilty of sexual abuse of a minor in the first degree in violation of 6 CMC § 1306(a)(2),[1] incest in violation of 6 CMC § 1311(a)(1), and assault and battery in violation of 6 CMC § 1202(a). *Commonwealth v. Hocog*, 2015 MP 19 ¶ 7 ("*Hocog I*"). Hocog was convicted of sexually abusing the victim multiple times between 2006 and 2011. *Id.* ¶ 5. During this period, he threatened the victim "with a belt if she 'made sounds' or told anyone about the assaults." *Id.* The victim's younger brother witnessed the sexual abuse. *Id.* Hocog was sentenced to the maximum thirty years of imprisonment for sexual abuse of a minor in the first degree, and the maximum five years of imprisonment for incest. *Id.* ¶ 8. He received one year of imprisonment for assault and battery. *Id.* All sentences ran concurrently, without the possibility of parole. *Id.*

¶ 3 On appeal, we vacated all his convictions. With respect to the sexual abuse conviction, we found the court's denial to order a presentence investigation report affected its ability "to craft a careful and individualized sentence." *Id.* ¶ 32. Because we vacated the sentence on these and other grounds, we did not reach whether the court abused its sentencing discretion. *Id.* ¶ 33. We further remanded the case to the same judge for resentencing.

¶ 4 On resentencing, Hocog received the maximum thirty years of imprisonment for sexual abuse, without the possibility of parole, probation, early release, work or weekend release, or any other similar program. He did not receive an additional sentence for assault and battery, because the "charge [was] already included in [the sexual abuse charge]." *Commonwealth v. Hocog*, 13-0076 (NMI Super. Ct. July 12, 2017) (Sentencing and Commitment Order at 6)

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[1] 6 CMC § 1306(a)(2) states: "An offender commits the crime of sexual abuse of a minor in the first degree if being 18 years of age or older, the offender engages in sexual penetration with a person who is under 18 years of age, and the offender is the victim's natural parent, stepparent, adopted parent, or legal guardian[.]" 6 CMC § 1306(b) indicates that sexual abuse of a minor in the first degree "is punishable by imprisonment for not more than 30 years."

("Order").

¶ 5 The court discerned no significant mitigating factor from either the presentence investigation report or the parties' arguments. There was no evidence of "cooperat[ion] with law enforcement to apprehend and convict other criminals in other cases," and no evidence his age could be a mitigating factor since he was 44 years old at the time of the incident. Additionally, Hocog did not appear to suffer from any "mental issues, disease and illness." Order at 4–5. The court discussed several aggravating factors including the victim's suffering and "mental anguish," Hocog's criminal record and the number of temporary restraining orders against him, and the "deviant" and "disturbing" behavior "to have sex with the very young," particularly with someone who "is an immediate blood relative." Order at 5.

¶ 6 Hocog was denied any possibility of parole because he "use[d] his position as a biological father at the time he committed this crime." Order at 7. Allowing Hocog to be eligible for parole "would not serve the interest of justice," and "would allow [Hocog] to be release[d] earlier than 30 years." *Id*. The court found the parole restriction appropriate in order "to allow the young victim and her mother to have some peace of mind and a chance to have a normal life without the threat of [Hocog's] abuse." *Id*.

¶ 7 Hocog timely appeals his sentence.

II. JURISDICTION

¶ 8 We have jurisdiction over final judgments and orders of the Commonwealth Superior Court. NMI CONST. art. IV, § 3.

III. STANDARDS OF REVIEW

¶ 9 There are four issues on appeal. We determine whether the sentence was properly individualized by first reviewing any procedural deficiency for plain error where Hocog did not raise an objection. *Commonwealth v. Babauta*, 2018 MP 14 ¶ 12. To the extent the appeal challenges the sentence's substantive reasonableness, we review for an abuse of discretion, regardless of a failure to object. *Id*. Second, we review the parole restriction for plain error or abuse of discretion, depending on whether the challenge is based on a procedural defect or the restriction's substantive reasonableness. *Id*. ¶ 24. Third, we review for clear error whether sufficient and reliable facts support the sentence. *Reyes v. Reyes*, 2001 MP 13 ¶ 2 (reviewing findings of fact by the trial court for clear error); *see also United States v. Garcia-Sanchez*, 189 F.3d 1143, 1148–49 (9th Cir. 1999) (holding "facts used in sentencing usually need to be established only by a preponderance of evidence" and reviewing trial court factual determinations for clear error). Finally, in determining whether to remand the case to a different judge, we consider any difficulties the court may have at remaining objective, whether reassignment would preserve the appearance of justice, and whether the wasteful and duplicative efforts would outweigh the gains in preserving justice. *Hocog I*, 2015 MP 19 ¶ 34.

IV. DISCUSSION

A. Individualized Sentencing

¶ 10 Hocog asserts the trial court failed to individualize his sentence when it improperly considered elements of the crime as aggravating factors. He maintains the court failed to consider available mitigating factors and properly balance those factors against the available aggravating factors. In light of these circumstances, Hocog concludes his sentence was not individualized and cannot stand.

¶ 11 We first review procedural defects for plain error where Hocog did not object. *Babauta*, 2018 MP 14 ¶ 12. Plain error review requires ascertaining whether (1) there was error, (2) the error was plain, and (3) the error affected the appellant's substantial rights. *Id*. ¶ 16 (citing *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 . . . . [I]f the effect of the error is uncertain so that we do not know which, if either side it helped, the [appellant] loses." *Id*. (internal citations and quotation marks omitted). Put differently, we find no error "[w]here the effect of an alleged error is so uncertain, a defendant cannot meet his burden of showing that the error actually affected his substantial rights." *Jones v. United States*, 527 U.S. 373, 394–95 (1999). But even if prongs one through three are met, "[r]eversal is proper only if it is necessary to safeguard the integrity and reputation of the judicial process or to forestall a miscarriage of justice." *Commonwealth v. Hossain*, 2010 MP 21 ¶ 29 (internal quotation marks omitted).

¶ 12 We then review the substantive reasonableness of a sentence for an abuse of discretion, regardless of the failure to object. *Babauta*, 2018 MP 14 ¶ 12. Under this standard, we defer to the sentencing court's decision, and reverse "only if no reasonable person would have imposed the same sentence." *Commonwealth v. Lin*, 2016 MP 11 ¶ 15; *Commonwealth v. Palacios*, 2014 MP 16 ¶ 12.

i. Procedural Defects

¶ 13 We set out to develop the distinction between the procedural errors in sentencing and the substantive reasonableness of a sentence. *Babauta*, 2018 MP 14 ¶ 13. Looking to federal courts for guidance, we find persuasive the significant body of law cultivated since *Gall v. United States*, 552 U.S. 38 (2007), which set out a two-step process in reviewing sentencing decisions. *See id.* at 51. Ordinarily, we first review the sentence for any procedural error; we then review the sentence for its substantive reasonableness. For the reasons below, we hold a sentencing court's failure to adequately and sufficiently justify a sentence constitutes a procedural defect and is subject to plain error review if no objection was preserved. The same holds true for courts using impermissible factors in justifying a sentence. We analyze each finding in turn.

¶ 14 Procedural errors cover a non-exhaustive list of possibilities. Of these possibilities include the failure to consider factors enumerated in 18 U.S.C. § 3553(a) ("Section 3553(a)") such as the nature and circumstance of the offense,

as well as the history and characteristics of the defendant. *Gall*, 552 U.S. at 51; *see United States v. Hai Waknine*, 543 F.3d 546, 554–55 (9th Cir. 2008) (vacating and remanding for resentencing where a court procedurally and plainly erred in failing to consider Section 3553(a) factors). In addition to failing to consider Section 3553(a) factors, procedural error also includes "selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence . . . ." *Gall*, 552 U.S. at 52. Where a court utterly fails to provide any justification for issuing a sentence, the reviewing court is compelled to find a procedurally defective sentence. *See United States v. Gibbs*, 897 F.3d 199, 206 (4th Cir. 2018) (recognizing procedural error where court fails to adequately explain defendant's sentence). Reliance on impermissible factors is also a procedural consideration. Where trial courts rely on an impermissible factor, this "goes more to the process by which the district court arrived at the given sentence than to the substantive aspect of the sentence." *United States v. Cabrera*, 811 F.3d 801, 808–09 (6th Cir. 2016).

¶ 15 There are two critical reasons for ensuring a procedurally sound sentencing decision. First, thoughtful and proper consideration of a sentence provides appellate courts the ability to meaningfully review the sentence. *Gall*, 552 U.S. at 50 ("After settling on the appropriate sentence, [the court] must adequately explain the chosen sentence for meaningful appellate review . . . ."). But second, defendants are more likely to receive an individualized assessment and punishment fit for the crime when a sentence comports with the procedures ensuring individualization. Indeed, *Gall* acknowledges that traditionally, sentencing judges "consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." *Id*. at 52 (internal quotation marks omitted). Where courts properly consider a defendant's individual circumstances, the likelihood of discerning procedural error diminishes; where courts provide scant or wholly improper justification for a sentence, procedural error becomes even more glaring.

¶ 16 We agree with this line of reasoning and see no reason to deviate from the long-standing principle that each defendant's circumstances are unique, thereby requiring courts to comply with the procedural mandates of sentencing. This includes adequately justifying a sentence, properly considering mitigating and aggravating factors similar to those in Section 3553(a), and ensuring those factors are not impermissible. Our analogous mandates have never been explicitly identified as procedure; however, the parameters establishing an individualized sentence are properly considered procedural steps courts must adhere to. Thus, for instance, we held in *Commonwealth v. Kapileo* that failing to consider information within a presentence investigation report, and failing to acknowledge any mitigating factors rendered an insufficiently individualized sentence. 2016 MP 1 ¶ 24. We reasoned that "a reasonable person would not attempt to sentence a defendant to the maximum sentence without the requisite information for individualizing a sentence." *Id*. In contrast, we found the court in *Commonwealth v. Palacios* as having properly considered various aggravating and mitigating

factors and upheld the defendant-appellant's sentence. 2014 MP 16 ¶ 13. Had the court completely failed to consider the various aggravating and mitigating factors, it would have failed the procedural mandates we require.

¶ 17 Of particular procedural significance is our repeated recognition that reliance on impermissible aggravating factors, such as an element of the crime, may render an insufficiently individualized sentence. We first announced this proposition in *Kapileo* holding "an individualized sentence should not include essential elements of the crime as aggravating factors." 2016 MP 1 ¶ 25. "[O]therwise, every offense arguably would implicate aggravating factors merely by its commission, thereby eroding the basis for the gradation of offenses and the distinction between elements and aggravating circumstances." *Id*. (internal quotation marks omitted). Thus, in *Lin*, we found an insufficiently individualized sentence because the court "imposed the maximum sentence based on the crime committed." 2016 MP 11 ¶ 17. Merely reiterating the elements of the crime, rather than considering a defendant's individual circumstances, does not leave room for a properly individualized sentence. *Id*.; *see also Commonwealth v. Lizama*, 2017 MP 5 ¶ 18 (focusing on the act of the crime contributes to an insufficiently individualized sentence). Where a court articulates an impermissible factor in a sentence, we will find that sentence procedurally flawed.

¶ 18 Although the use of an impermissible aggravating factor creates a procedurally flawed sentence, we do not necessarily find plain error and require automatic vacatur. In fact, we clarified in *Commonwealth v. Calvo*, 2018 MP 9, and in *Commonwealth v. Taitano*, 2018 MP 12, that vacating a sentence based on an impermissible factor may be unnecessary if the court sufficiently relied on other permissible aggravating factors. In *Calvo*, we found that relying solely on elements of the offense in deciding a sentence would create an improper and insufficiently individualized sentence. 2018 MP 9 ¶ 9. However, we reasoned: "a sentencing judge should not have to navigate a minefield to avoid even the mere mention of an element." *Id.* Therefore, when the court focused on the "*nature* and *severity* of the crime," it did not contravene our instructions to avoid impermissible aggravating factors. *Id*. ¶ 10. We did not find an insufficiently individualized sentence and affirmed the court's decision. Then, in *Taitano*, we found that although the court used an element of the crime as an aggravating factor, "it did not rely solely on th[at] impermissible factor." 2018 MP 12 ¶ 45. Taitano's sentence could thus not be vacated on the basis of a lone impermissible factor among the "mélange" of other permissible aggravating factors such as the victim's pregnancy. *Id*. ¶ 46.

¶ 19 Despite our reluctance to find an insufficiently individualized sentence where a court does not rely solely on an impermissible factor, we hold procedural error may exist even when other permissible aggravating factors are present. *Id*. ¶ 44; *see also United States v. Sicken*, 223 F.3d 1169, 1177 (10th Cir. 2000) ("Where a sentencing court has relied on both impermissible and permissible factors for a departure, we are not required to remand if we are satisfied that the

district court would impose the same sentence without relying on the improper factor[s]."). Where a court procedurally errs in using an impermissible factor to justify a sentence, we must carefully examine whether such procedural error constitutes plain error. Determining whether there is a reasonable probability the sentence would have been different if the court had not relied on the impermissible factors is of particular import. We now turn to the particular circumstances of this case.

¶ 20 Hocog asserts the court erred by impermissibly referencing the victim's age as an aggravating factor. The court noted: "[i]t is a deviant behavior and most definitely a criminal act to have sex with the very young." Order at 5. We find, in context, that describing the victim as "very young" does not constitute an impermissible use of an element of the crime. Hocog's crime carries with it the element of sexually abusing someone under the age of eighteen, *see* 6 CMC § 1306(a)(2). However, the court did not simply state that because the victim was under eighteen, this constituted an aggravating factor. Rather, the court went further and found the victim was particularly young, thereby describing the severity of the circumstances. Certainly, sexual abuse at any age is heinous. But the particular youthfulness of a victim can render more severe the circumstances in such a way that does not violate the prohibition of impermissible aggravating factors. Thus, describing the victim's youthfulness does not constitute a procedural defect.

¶ 21 Albeit the court's description of the victim as "very young" does not constitute an impermissible aggravating factor, we do find the identification of Hocog as a biological relative an impermissible use of an element of the crime: "It is even more disturbing when the deviant behavior is inflicted upon an immediate blood relative." Order at 5. Sexual abuse of a minor in the first degree outlines the victim must have suffered abuse by a parent. 6 CMC § 1306(a)(2). Hocog is the victim's biological father. This is thus a straightforward instance of using an element of the crime as an aggravating factor, which constitutes procedural error, and plain in light of our precedent.

¶ 22 As we just explained, however, we must ascertain the reasonable probability that Hocog's sentence would have been different had the court not relied on the impermissible factor. Although the court did use an element of the crime as an aggravating factor, it did not rely solely on this element. And despite finding these factors of a "particular concern," and thereby giving them "much weight," the court relied on a number of other aggravating circumstances such as the victim's suffering and the psychological ramifications of the sexual abuse. Order at 5–6. It also pointed out Hocog's criminal record and the number of temporary restraining orders imposed against him. We emphasized these aggravating factors in *Hocog I:* "the sexual penetration was full and extensive, [Hocog] threatened the victim to keep silent, and he is a repeat criminal offender." 2015 MP 19 ¶ 35. Like *Taitano*, we cannot say the court solely relied on a single impermissible aggravating factor. Rather, it outlined, considered, and used a number of other factors to justify the sentence. Evaluating the court's

justifications in its entirety, we cannot say Hocog's sentence would clearly have been different and "that the error actually affected his substantial rights." *Jones*, 527 U.S. at 395. Thus, while the court did procedurally err, there was no plain error.

¶ 23 Regarding the second claim the court improperly balanced mitigating and aggravating factors, we find this is a challenge to the substantive reasonableness of a sentence. Hocog couches the allegation as a failure to take into account other mitigating factors. Where courts evince a complete failure to consider mitigating and aggravating factors, such as in the extreme circumstance a court provides no justification whatsoever for a sentencing decision, this would constitute a procedural error. Hocog argues the court gave less weight to factors he considers important, and more weight to factors he considers unimportant. In particular, he alleges the mitigating factors should have given the court reason to sentence at the lower end of the range. This balancing act goes to the very core of whether the sentence was substantively reasonable. It is with this understanding we next turn to the sentence's substantive reasonableness.

ii. Substantive Reasonableness

¶ 24 Failure to provide fair and balanced consideration to sentencing factors, such as those enumerated in Section 3553(a), is an issue which goes to the substantive reasonableness of a sentence. *See United States v. Barnes*, 890 F.3d 910, 917 (10th Cir. 2018) (determining whether the court abused its discretion when it weighed the Section 3553(a) factors, "and thus whether the sentences [were] *substantively* reasonable."). Although required to consider Section 3553(a) factors, "the court is not required to address those factors, one by one, in some sort of rote incantation when explicating its sentencing decision. Nor is the court required to give every factor equal weight." *United States v. Suárez-González*, 760 F.3d 96, 101 (1st Cir. 2014) (internal quotation marks and citations omitted); *see also United States v. Autery*, 555 F.3d 864, 873 (9th Cir. 2009) (stating courts "need not tick off each" factor to demonstrate consideration) (internal quotation marks omitted). This balancing act or "selective triage" is exactly what sentencing courts are expected to do when presented with a variety of circumstances for each and every defendant appearing before them. *Suárez-González*, 760 F.3d at 102. Where a court fails to do this, such failures are reviewed as substantive reasonableness challenges. *Compare United States v. Saddler*, 538 F.3d 879, 890–91 (8th Cir. 2008) *with United States v. Harris*, 740 F.3d 956, 968 (5th Cir. 2014) (noting the presumption of a substantively reasonable sentence may be rebutted if sentencing factors are not balanced).

¶ 25 We agree and have said as much. Where the Legislature has provided for a range of punishments, it is expected that sentencing courts will individualize sentences. *Kapileo*, 2016 MP 1 ¶ 21. We have maintained courts "should not have to navigate a minefield" when evaluating sentencing factors. *Calvo*, 2018 MP 9 ¶ 9. Where a defendant-appellant challenges the weight a sentencing court gives to one or a group of factors over others, we review the sentence for its

substantive reasonableness. In doing so, we determine whether "a reasonable person could justify the sentence imposed by the trial court." *Palacios*, 2014 MP 16 ¶ 13 (holding "[e]ven in light of the mitigating factors . . . presented, a reasonable person could" find the maximum sentence warranted).

¶ 26 Hocog does not offer sufficient mitigating factors to convince us a reasonable person would not have imposed the same sentence. This finding becomes even more evident in light of the number of permissible aggravating factors such as the victim's mental suffering, the prolonged period of sexual abuse, the younger brother who witnessed the abuse, and the number of violations against the law. While potentially construed as harsh, the sentence is one a reasonable person would have handed down. We cannot deem the sentence substantively unreasonable, and the court did not abuse its discretion.

¶ 27 We hold Hocog's sentence was sufficiently individualized and the court neither committed plain error despite the sentence's procedural defects nor rendered a substantively unreasonable sentence.[2] We next evaluate the court's complete restriction on Hocog's eligibility for parole.

B. Parole Eligibility

¶ 28 Hocog additionally argues the court did not properly justify the parole restriction. In particular, he asserts the court impermissibly used elements of the crime as aggravating factors, and failed to justify the parole restriction. We review claims of procedural defects for plain error where there is no objection, and abuse of discretion for challenges to the substantive reasonableness of the parole restriction. *Babauta*, 2018 MP 14 ¶¶ 11, 13.[3]

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[2] Hocog raises a fourth sentencing issue, claiming the court based Hocog's sentence on insufficient evidence. While we agree that courts should not base their findings on facts unsupported by the evidence or render conclusory statements, the trial court is in the best position to issue a sentence based on its findings. There is nothing to suggest that the court based its findings on facts outside the record.

[3] Hocog's additional argument that the Judiciary's parole authority is a violation of the separation of powers doctrine is meritless. Although he correctly notes the legislature's prerogative to "determine the penological system" of the CNMI, Opening Br. at 8 (quoting *Commonwealth ex rel. Banks v. Cain*, 28 A.2d 897, 900 (Pa. 1942)), he simultaneously claims that the legislature's decision to grant the Judiciary authority to restrict parole is erroneous. Hocog's authority in this determination is based on North Carolina law, which is readily distinguishable. North Carolina courts hold that the parole power is not a responsibility of the Judiciary; however, this is a position unique to North Carolina. In the CNMI, the Legislature authorizes the Judiciary to restrict parole. *See* 6 CMC § 4252(a) (pronouncing the sentencing court's discretion to restrict parole). Other jurisdictions also permit their judicial branch from exercising such authority. *See* ALASKA STAT. § 12.55.115 ("The court may, as part of a sentence of imprisonment, further restrict the eligibility of a prisoner for discretionary parole for a term greater than that required . . . ."). Certainly, as is discussed *infra* ¶¶ 32–34, the Board of Parole ultimately determines whether the convicted may subscribe to the benefits of parole. But our determinations therein do not hinder the court's powers and

¶ 29 When fashioning a defendant's sentence, the sentencing court is statutorily mandated to justify that sentence. *See* 6 CMC § 4115 (mandating courts "enter specific findings why a sentence . . . will or will not serve the interests of justice."); *see also Gall*, 552 U.S. at 51 (including failure to adequately justify a chosen sentence as procedural error). We have further indicated courts must provide justification in restricting a defendant's parole: "when 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 (internal citation omitted). In particular, sentencing courts must explain why parole "would be insufficient to protect the public and insure the defendant's reformation." *Id*. (internal quotation marks omitted). This is a procedural step sentencing courts must adhere to; failure to do so is a defect in the sentence and must be examined as a procedural flaw, and reviewed for plain error where no objection was raised.

¶ 30 Furthermore, parole restrictions must be individually justified and not based solely on the act of the crime, or impermissible aggravating factors. *Lizama*, 2017 MP 5 ¶¶ 14, 22; *Lin*, 2016 MP 11 ¶ 24. As we just elucidated, *see supra* ¶¶ 17–19, using elements of the crime as aggravating factors constitutes a procedural flaw in a sentence. Thus, where a court solely uses such impermissible factors in justifying a parole restriction, we will scrutinize it as a procedural defect. We now turn to the justifications for restricting Hocog's parole eligibility in its entirety and ascertain any procedural deficiencies.

¶ 31 There are at least two procedural improprieties in the court's justification for restricting parole. First, the court denied Hocog any possibility of parole, explaining that no parole would be appropriate since he "use[d] his position as a biological father at the time he committed this crime." Order at 7. This was the sole aggravating factor relied on by the court, without consideration of any other mitigating or aggravating factors. This is a procedural flaw constituting plain error in light of our precedent on using elements of the crime as aggravating factors. Second, the court restricted parole eligibility on the basis that doing so would prevent him from being released earlier than his sentence. *See* Order at 7 (failing to restrict parole entirely "would allow [him] to be release[d] earlier than 30 years[.]"). However, the very definition of parole is to permit defendants to be released earlier than what their sentence calls for. *See Morrissey v. Brewer*, 408 U.S. 471, 477 (1972) ("[P]arole is an established variation on imprisonment of convicted criminals. Its purpose is to help individuals reintegrate into society as constructive individuals as soon as they are able, without being confined for the full term of the sentence imposed."). This we cannot see as a qualifying justification for restricting parole eligibility, in part or in its entirety. In this

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authority to restrict parole beyond the statutorily mandated threshold. Rather, we find that when the parole restriction is in fact improper, we may in the rare circumstance sever that portion of the sentence and leave to the Board of Parole the determination of whether the convicted may be granted parole. We therefore find Hocog's argument unfounded.

instance, the court again procedurally erred by providing an improper justification.

¶ 32 Looking at the justifications in totality, the parole restriction is replete with procedural defects which taken together are plainly erroneous. We are left with one justification: to "allow the young victim and her mother to have some peace of mind and a chance to have a normal life without the threat of [Hocog's] abuse." This alone insufficiently and inadequately justifies the parole eligibility restriction. It fails to take into account individual circumstances and to explain how the restriction would protect the public and ensure the defendant's reformation. Such plain error does affect Hocog's substantial rights because he is left with essentially no justification for why he would not be eligible for parole beyond the statutorily mandated incarceration period. Insufficient and inadequate justification undermines the integrity of the sentencing process and evinces plain error.

¶ 33 In rare circumstances, proscribed and improper portions of a sentence may be severed and vacated without remand for resentencing. "Generally, in criminal cases, where an improper or illegal sentence is severable from the valid portion of the sentence, we may vacate the invalid part without disturbing the rest of the sentence." *State v. Keutla*, 798 N.W.2d 731, 735 (Iowa 2011); *see also People v. Bassford*, 343 P.3d 1003, 1009 (Colo. App. 2014) (discussing the discretion of an appellate court to sever a portion of a sentence). We acknowledge that under most circumstances, remand for resentencing is the appropriate and preferred action by a reviewing court. *See State v. Heafner*, 231 P.3d 1087, 1089 (Mont. 2010) ("Striking or vacating illegal conditions of a sentence when they could be corrected on remand could eliminate conditions that support important public policies such as protecting crime victims or rehabilitating the criminal."). Whether we refrain from remand despite vacatur will hinge on whether the proscribed and improper portion of the sentence is severable from the rest of the sentence. "When a trial court imposes one valid and one invalid sentence, or when it imposes a sentence a portion of which is illegal, the appellate court will sever the illegal portion or sentence if possible in order to give effect to the legal and valid sentence." *State v. Pando*, 921 P.2d 1285, 1288 (N.M. Ct. App. 1996). Whether we sever the proscribed and improper portion of parole will be determined on a case-by-case basis and be granted only in rare circumstances.

¶ 34 Where a court provides virtually no justification for a parole restriction more severe than the statutory minimum, this undermines the Board of Parole's ability to achieve the goals of parole itself. *See Brewer*, 408 U.S. at 477 ("The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence . . . . Under [some systems], parole is granted by the discretionary action of a board, which evaluates an array of information about a prisoner and makes a prediction whether he is ready to reintegrate into society."). On his second appeal, Hocog is already serving the thirty-year maximum term of incarceration for his crime. 6 CMC § 1306(b). By restricting his parole eligibility

entirely, Hocog is left without any recourse. Without sufficient justification—or any justification for that matter—the Board of Parole's duties become meaningless. We acknowledge the discretion granted to the courts to further restrict parole. Under these circumstances, however, we do not see remand for resentencing appropriate in light of the insufficient justification, the severity of the sentence, and the duties of the Board of Parole. We therefore hold the parole provision may be severed from the sentence without invalidating the remainder of the sentence.

V. CONCLUSION

¶ 35 For the foregoing reasons, we AFFIRM in part Hocog's thirty-year sentence, VACATE the parole restriction, and REMAND with specific instructions for the trial court to strike the parole restriction from the Sentencing and Commitment Order.

SO ORDERED this 2nd day of August, 2019.

/s/
ALEXANDRO C. CASTRO
Chief Justice

/s/
JOHN A. MANGLOÑA
Associate Justice

/s/
PERRY B. INOS
Associate Justice