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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Plaintiff-Appellee,

v.

JEFFREY JINDAWONG LIZAMA,
Defendant-Appellant.

Supreme Court No. 2016-SCC-0012-CRM

Superior Court No. 13-0018

SLIP OPINION

Cite as: 2017 MP 5

Decided June 16, 2017

Shannon R. Foley and Matthew C. Baisley, Assistant Attorneys General, Office of the Attorney General, Saipan, MP, for Plaintiff-Appellee.

David G. Banes, Saipan, MP, for Defendant-Appellant.

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

MANGLONA, J.:

¶ 1 Defendant-Appellant Jeffrey Lizama ("Lizama") appeals the trial court's sentencing decision. He seeks to vacate his sentence, arguing the trial court: (1) engaged in mechanistic sentencing; (2) failed to individualize his sentence; and (3) failed to justify the denial of parole. He also argues that, if vacated, the case should be assigned to a different judge for re-sentencing. For the reasons discussed below, we VACATE Lizama's sentence and REMAND this case to the presiding judge of the Superior Court with instructions to assign sentencing to a different judge.

I. FACTS AND PROCEDURAL HISTORY

¶ 2 This Court heard the underlying case in 2014, and issued the opinion *Commonwealth v. Lizama*, 2015 MP 2, on April 30, 2015. There, after being charged with multiple burglary and conspiracy charges, Lizama entered into a plea agreement to plead guilty to one count of Burglary in violation of 6 CMC § 1801(b)(2)(A), punishable by ten years of imprisonment. 6 CMC § 1801(b)(2)(A). The Commonwealth of the Northern Mariana Islands ("Commonwealth") recommended Lizama be sentenced to ten years, with all suspended but five. At the change of plea hearing, and without ordering a presentence investigation report or garnering any further information from Lizama, the trial court imposed a sentence of ten years without the possibility of probation, parole, or release. This Court reversed the trial court's judgment and remanded for further proceedings because the trial court lacked adequate factual basis to accept Lizama's guilty plea,[1] and because the trial court failed to order a presentence investigation report. *Lizama*, 2015 MP 2 ¶ 24.

¶ 3 On remand, the case was assigned to the same judge. Lizama entered a guilty plea to one count of Burglary in violation of 6 CMC § 1801(a)(1), punishable by five years of imprisonment. 6 CMC § 1801(b)(1). Prior to the re-sentencing hearing, the trial court ordered and received a presentence investigation report containing specific details about Lizama's history. The parties each submitted sentencing memoranda in support of their sentencing recommendations, neither of which recommended imposing the maximum sentence.

¶ 4 At the re-sentencing hearing, Lizama and the Commonwealth addressed various mitigating factors. The mitigating factors included: Lizama's age (18 years old at the time of the offense); lack of adult criminal history; his status as the first to plead guilty among his co-defendants; his acceptance of responsibility for his actions; his apology and expression of remorse; and his

[1] Specifically, the issue turned on the lack of evidence Lizama had burgled a "dwelling" as required by 6 CMC § 1801(b)(2)(A).

fulfilled agreement to cooperate with the Commonwealth in the prosecutions of his co-defendants. Both Lizama and the Commonwealth agreed a sentence lesser than the maximum was appropriate under the specific circumstances of the case. Despite parties' recommendations, the trial court sentenced Lizama to the maximum sentence of five years, and denied Lizama the option of parole eligibility. *Commonwealth v. Lizama*, No. 13–0018 (NMI Super. Ct. Mar. 2, 2016) (Sentencing and Commitment Order at 5–7) (hereinafter "Sentencing Order").

¶ 5 Lizama now appeals his sentence and asks that the case be assigned to a different judge on remand.

II. JURISDICTION

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

III. STANDARDS OF REVIEW

¶ 7 We review a trial court's sentencing discretion for abuse of discretion. *Commonwealth v. Zhen*, 2002 MP 4 ¶ 13. All three issues Lizama raises, mechanistic sentencing policy, lack of individualized sentence, and denial of parole eligibility, are reviewed under this standard. *Commonwealth v. Jin Song Lin*, 2016 MP 11 ¶ 6 (Slip Op., Sept. 12, 2016).

¶ 8 When considering whether a case on remand should be directed to a different judge, we weigh three principal 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.

Commonwealth v. Hocog, 2015 MP 19 ¶ 34 (citation omitted).

III. DISCUSSION

A. Mechanistic Sentencing

¶ 9 In *Jing Song Lin* we adopted the Eighth Circuit's three-factor *Woosley* test to determine whether a trial court was practicing a prohibited mechanistic sentencing policy. 2016 MP 11 ¶ 10 (citing *Woosley v. United States*, 478 F.2d 139, 140–43 (8th Cir. 1973)). The *Woosley* factors are:

> 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.

Id. (citations omitted). When analyzing the *Woosley* factors, we must look at

the sentencing process in its entirety. *Id.*

> The existence of any one of *Woosely* factors may be dispositive in finding a mechanistic sentence if the sentencing process is based on a rigid policy. . . . However, the existence of *Woosley* factors do not mandate finding a mechanical sentence if the trial court abides by the policy of individualizing the sentence.

Id. (citations omitted).

¶ 10 In *Jin Song Lin* we found that because the trial court's prior record, as submitted by the defendant, only indicated intermittent maximum sentencing practices, and because the trial court reviewed the defendant's mitigating and aggravating factors before imposing the maximum, none of the *Woosley* factors were met. 2016 MP 11 ¶ 12–14. With regard to the first factor, we face the same lack of substantiated record here as in *Jin Song Lin*. Rather than submitting any new evidence, Lizama points only to the same thirty-two sentencing orders we considered in *Jin Song Lin*. Of the thirty-two orders, only four were for the crime of burglary, and were issued intermittently as in *Jin Song Lin*. Thus, Lizama fails to meet the first *Woosley* factor.

¶ 11 Under the second factor, Lizama argues recent judicial retention election interviews and campaign materials submitted by the trial court reflect a predetermined policy of issuing the statutory maximum for a particular crime. As evidence, Lizama pointed to articles in the Saipan Tribune[2] and a letter from the trial court to the Executive Director of the Commonwealth Election Commission regarding the 2016 retention election. Lizama points to the claim in the letter that the trial court is "[t]ougehest [sic] on [r]epeat [o]ffenders." Reply Br. 3. However, the letter goes on to state "when a *defendant's criminal history, facts and factors of the case* call for a lengthy jail term, [the trial court] imposed on repeat offenders the full maximum sentence." Reply Br. 3–4 (emphasis added). While we agree that these materials reflect the trial court's intent to use its sentencing power to deter criminal acts, we do not find they reflect a predetermined policy of issuing the statutory maximum for the crime of burglary. On the contrary, the letter indicates a desire to tailor punishments to meet the facts and factors of each specific case. Thus, Lizama fails to meet the second *Woosley* factor.

¶ 12 Lizama argues he meets the third factor because no other rationale exists for giving Lizama the maximum sentence other than the trial court's own reflexive attitude of imposing the maximum sentence. The Commonwealth argues the trial court indicated the sentence was based on the presentencing investigation report, the parties' submissions, and Lizama's statements, all of

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[2] Lizama points to two articles in his briefs, a 2013 profile of the judge and a 2016 article regarding the judge's retention election. Both articles reference the judge's reputation as tough on serious and habitual criminal offenders. Opening Br. 12, Reply Br. 3.

which indicate the trial court gave at least some thought in the imposition of the punishment. The third *Woosley* factor cannot be met "[w]hen the record reflects that the trial court '[gave] some thought' in the imposition of punishment." *Jin Song Lin*, 2016 MP 11 ¶ 13 (quoting *Island v. United States*, 946 F.2d 1335, 1338 (8th Cir. 1991)). The record does indicate, at the very least, the trial court contemplated Lizama's individual factors before issuing the sentence. The trial court mentioned aggravating and mitigating factors, and offered justification for why the maximum sentence was appropriate, considering Lizama's age, previous criminal history, and role in assisting in the apprehension and conviction of other criminals in related cases. Sentencing Order at 4–7). Thus, the third *Woosley* factor is not met.

¶ 13 Because none of the *Woosley* factors are met, we conclude the trial court did not engage in mechanistic sentencing policy in sentencing Lizama.

B. Individualized Sentencing

¶ 14 While we review sentencing for abuse of discretion, *Zhen*, 2002 MP 4 ¶ 13, we give great deference to the trial court's sentencing decision, *Commonwealth v. Palacios*, 2014 MP 16 ¶ 12. 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." *Commonwealth v. Borja*, 2015 MP 8 ¶ 39. In *Borja*, we held a sentence lacks sufficient individualization if the imposition of the maximum punishment is based on the act of the crime alone. *Id.* ¶ 40. We reiterated this holding in *Jin Song Lin*, finding "[the defendant's] sentence lacks sufficient individualization because the trial court imposed the maximum sentence based on the crime committed." 2016 MP 11 ¶ 17. In *Jin Song Lin*, we determined the trial court's statement at sentencing, "as this case involves sexual abuse in the third degree of 13-year-old female touching of sexual areas, the court imposes the full maximum sentence of five years and without the possibility of parole. . . ." allowed us to infer that the sentence was based on the elements of the crime—sexual offense against a minor—rather than on the defendant's individual circumstances. *Id.* (internal quotation marks omitted).

¶ 15 Similar to *Borja* and *Lin*, the trial court here, rather than focusing on Lizama, instead focused on the crime itself and the entire crew who committed the crime. Sentencing Order at 5–7. Additionally, the trial court attributed actions of the entire crew to Lizama, stating:

> Defendant Lizama is being punished because he is a convicted thief and burglar who joined other known criminals to burglarize and steal other people's property. Some members of the burglary crew are so experienced that they use alias [sic] to change their names when arrested in order to try to hide their past convictions. In this particular criminal case, the burglary crew met and discussed what place to burglarize for that night. . . .The burglary crew was experienced and knew how to approach the

> warehouse on foot undetected. . . .The burglary crew then proceeded to a secluded location. The burglary crew had the experience to quickly strip and cut the copper wires, and knew exactly where to pawn the power tools and sell the copper wires.

Id. at 5–6. Rather than devising an individualized sentence for Lizama, this gives the appearance the trial court instead was imposing a sentence on Lizama intended to punish the actions of the entire "crew."

¶ 16 The trial court also noted "The people of the CNMI cry out for justice against the epidemic of thefts, burglaries, and robberies. There can be no justice without the appropriate punishment." *Id*. at 6 (emphasis in original). The trial court determined the maximum sentence was appropriate because Lizama "is an adult, who admitted to committing the crime." *Id*. at 7. While general deterrence is an appropriate objective in sentencing, the trial court's imposition of sentence may not be "motivated by the desire for general deterrence to the exclusion of adequate consideration of individual factors . . . ." *United States v. Barker*, 771 F.2d 1362, 1369 (9th Cir. 1985). As the Commonwealth notes, the trial court's "rational[e] groups all adult offenders in the Commonwealth into the same category thus deserving a maximum sentence." Resp. Br. 10. The end result of this rationale would be to impose the maximum penalty on every person convicted of burglary, regardless of circumstance. To permit such practice would result in the termination of individualized sentencing.[3]

¶ 17 Moreover, while the trial court mentioned Lizama's age and past history, Sentencing Order at 5, the trial court did not, as *Borja* requires, "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 wrongdoing." 2015 MP 8 ¶ 39 (citation omitted). It is not enough to merely mention mitigating factors in passing. Rather, the trial court must "examine and measure" those mitigating factors to the sentence it issues. *Id*.; *see also Jin Song Lin*, 2016 MP 11 ¶ 20 ("[The trial court] must explain on record how mitigating and aggravating factors are weighed in the imposition of its sentence.").

¶ 18 Because the sentence was based on the act of the crime, the act of the entire "crew" rather than Lizama's contribution, and the impact of theft on the CNMI community, rather than the examination and measure of Lizama's individual circumstances, we find the trial court's sentencing decision was an abuse of discretion.

C. Denial of Parole Eligibility

¶ 19 In *Jin Song Lin*, we held "[w]hen a trial court restricts a defendant's parole eligibility greater than the statutory minimum, it must state why the extended restriction is warranted for the defendant." 2016 MP 11 ¶ 23 (citations

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[3] Indeed, Lizama and the Commonwealth agree Lizama's sentence should be vacated for lack of individualization.

omitted). Specifically, a "trial court must explain on the record why the parole eligibility term prescribed by statute would be insufficient to protect the public and insure the defendant's reformation." *Id*. (internal quotation marks and citation omitted).

¶ 20 Lizama pled guilty to one count of Burglary under 6 CMC § 1801(a)(1), a felony offense. Section 1801 does not carry a mandatory minimum sentence before parole eligibility triggers. Pursuant to 6 CMC § 4252, "The Board of Parole . . . shall have the power to grant parole to any person convicted of felony offense. . . after the person has completed at least one-third of the unsuspended term of imprisonment sentenced by the court." Therefore, had the trial court not restricted Lizama's parole eligibility, he would have been eligible for parole after serving one year and eight months of his five year term. Because the trial court restricted Lin's parole eligibility beyond the statutory minimum, the court was required to state why the extended restriction is warranted for this particular defendant. The only justification offered by the trial court was

> No parole is appropriate because Defendant has already gotten the benefit per the Plea Agreement when all other charges were dismissed by the Attorney General's Office amounting to a possible jail sentence of over 30 years. For Defendant to be eligible for parole would make it possible to lower his sentence and would not serve the interest of justice.

Sentencing Order at 7.

¶ 21 In *Jin Song Lin*, we found the trial court's denial of parole eligibility based solely on the act of the crime "runs afoul of the policy of individualizing a sentence." 2016 MP 11 ¶ 24. Here, the trial court not only denied Lizama's parole eligibility based on the crime itself but went even further, considering the existence of a plea agreement which reduced Lizama's potential jail time from a hypothetical maximum of thirty years to a maximum of five years. The end result of this rationale would be to deny parole eligibility to every person who enters into a plea agreement, regardless of circumstance. Such practice violates our requirement of individualized sentencing.

¶ 22 Thus the trial court abused its discretion when it failed to offer individualized justification for the denial of parole eligibility.

D. Re-Assignment to a New Judge

¶ 23 When asked to determine whether a case should be reassigned to a different judge on remand, we consider:

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

the appearance of justice.

Hocog, 2015 MP 19 ¶ 34 (citation omitted). "Only one of the first two factors must be present, each of which are equally important." *Id.* (citation omitted). However, "the second factor may be outweighed by countervailing values of judicial efficiency and feasibility in cases where reassignment would result in waste and duplication under the third factor." *Id.* (citation and internal quotation marks omitted).

¶ 24 "A trial court must at all times maintain the appearance of impartiality and detachment." *United States v. Edwardo-Franco*, 885 F.2d 1002, 1010 (2nd Cir. 1989) (internal quotation marks and citation omitted). "The appearance of impartiality is as important to the formulation of authoritative law as is the actuality of impartiality." *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 791 n.14 (1972).

¶ 25 We found problematic the sentencing judge's declaration that "[Lizama] is not a candidate for rehabilitation." Sentencing Order at 4. On the basis of this statement, it would appear that the original sentencing judge would have an issue remaining objective on remand. At the very least, such a statement demands the case be assigned to a new judge for sentencing in order to preserve the appearance of impartiality.

¶ 26 Therefore, we grant Lizama's request to remand the case to a new judge for sentencing, and order the presiding judge to assign sentencing to a different judge on remand.

IV. CONCLUSION

¶ 27 For the reasons stated above, we VACATE Lizama's sentence. This case is REMANDED to the presiding judge with instructions to assign sentencing to a different judge.

SO ORDERED this 16th day of June, 2017.

/s/
JOHN A. MANGLONA
Associate Justice

CASTRO, C.J., concurring:

¶ 28 I concur in the judgment of the majority. However, it is my opinion Lizama's sentence was mechanistically imposed.

¶ 29 My honorable colleagues determined that the first *Woosley* factor was not met because Lizama failed to offer any additional evidence of the trial court's prior record beyond the evidence we found insufficient in *Commonwealth v. Jin Song Lin.* In *Jin Song Lin*, we reviewed the thirty-two cases submitted by Lin, but determined that only seven of those cases were sexual offense cases. We concluded this was insufficient evidence to establish mechanistic sentencing policy with regard to sexual offense cases. 2016 MP 11 ¶ 12.

¶ 30 Indeed, the evidence presented in Lin was insufficient. However, there is a significant distinguishing factor here. That is, Lizama is being sentenced for the second time following our vacation and remand of his initial sentence in *Lizama*, 2015 MP 2 ¶ 24, and we have the trial court's statement reflecting a mechanistic sentencing policy, which was absent in *Jin Song Lin*. In *United States v. Daniels*, the Sixth Circuit considered a situation in which it remanded a case for resentencing, and the defendant was given the same sentence. 446 F.2d 967 (6th. Cir. 1971). The court found the sentencing judge has been imposing the same sentence for a particular crime "almost without exception" for more than a thirty year period, regardless of defendant's individual circumstances. *Id.* at 969. The court determined "the [sentencing judge] may not wholly justify its seemingly mechanical imposition of five year sentences . . . by stating that the law violated is 'a very serious law that strikes at the very foundations and fundamentals of our whole governmental system.'" *Id*. at 971. I find the judge's language in *Daniels* to be similar to the trial court's statement here: "The people of the CNMI cry out for justice against the epidemic of thieves, thefts, burglaries and robberies and there can be no justice without the appropriate punishment." Sentencing Order at 6 (emphasis in original). The crime itself cannot be used as a justification for the sentence, and to proceed in such a manner is further evidence of mechanistic sentencing.

¶ 31 Moreover, rather than considering our instructions on remand, the sentencing judge instead overlooked our concerns, offered a list of factors relating to Lizama's individual circumstances, but proceeded to issue a sentence that essentially failed to consider Lizama's individual circumstances. "The purpose of the rule requiring the exercise of sound discretion is not to invite the [trial court] to engage in a 'hollow ritual.'" *United States v. Lopez-Gonzales*, 688 F.2d 1275, 1277 (9th Cir. 1982) (citation omitted). Merely listing mitigating and aggravating circumstances, then imposing the maximum sentence, is clear evidence of a mechanistic sentencing policy. Therefore, I would find Lizama has met the first *Woosley* factor and the trial court engaged in mechanistic sentencing policy.

¶ 32 In this respect, I agree with my colleagues that Lizama's sentence should

be vacated and remanded to a new judge. However, I would also find mechanistic sentencing policy.

/s/
ALEXANDRO C. CASTRO
Chief Justice

INOS, J., concurring:

¶ 33 I concur in the judgment to vacate Lizama's sentence due to the denial of parole and to assign sentencing to a new judge on remand. However, it is my opinion the trial court properly individualized Lizama's sentence.

¶ 34 The trial court has broad discretion to determine the appropriate sentence. "[W]e give great deference to the trial court's sentencing decision." *Jin Song Lin*, 2016 MP 11 ¶ 15. "Our review begins with the basic proposition that the trial court enjoy[s] nearly unfettered discretion in determining what sentence to impose." *Palacios*, 2014 MP 16 ¶ 12 (citation and internal quotation marks omitted). "When reviewing a sentence for abuse of discretion, reversal is appropriate only if no reasonable person would have imposed the same sentence." *Id.* (citations omitted). Reading the sentencing order as a whole in this deferential light, I find the court met the standard we established in *Borja*, which requires the court to "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." 2015 MP 8 ¶ 39 (citation omitted).

¶ 35 The sentencing order discussed both Lizama as the offender and the crime he committed. The trial court went in length to discuss the seriousness of burglary, Lizama's role in the burglary crew, and the impact his actions had on the victim. However, unlike *Borja*, where the court imposed the maximum sentence solely on the act of the crime, here the court also discussed Lizama's individual circumstances including his age, the effects of his cooperation with the government, his education and employment opportunities, and his participation in the crime, among other individual factors. Sentencing Order at 4–7.

¶ 36 Of particular significance was the trial court's consideration of Lizama's two prior offenses as a juvenile. The trial court noted Lizama's prior sentences "contain[ed] some [detention]— but mostly suspended sentences fail[ed] to rehabilitate the Defendant" and "fail[ed] to be a significant deterrence." Sentencing Order at 4. Lizama's first juvenile adjudication was trafficking marijuana. He was sentenced to one year in detention, all suspended except for one day, and he was placed on probation. Less than a year later and while still on probation for his first adjudication, he committed a second juvenile offense for minor consuming alcohol and resisting arrest, for which he was sentenced to one year in detention, all suspended except for twenty-one days, and was again placed on probation. While on probation in the second juvenile case, he committed the crime in this case, which served as a basis for revoking his probation in the second juvenile case, resulting in Lizama serving the remainder of his eleven months and nine days suspended sentence. Commonwealth's Sentencing Mem. at 3.

¶ 37 Ultimately, after considering various mitigating and aggravating factors, the trial court determined Lizama's individual circumstances, including his prior juvenile record and lack of reformation following less severe sentences, supported issuing the maximum sentence of five years. Sentencing Order at 7. Based on the elements the trial court discussed, I would find that, while harsh, a reasonable person could impose the same maximum sentence of five years based on the individual factors the trial court considered.

¶ 38 However, I agree with my colleagues: Lizama's sentence should be vacated because the trial court failed to justify the denial of parole. The trial court failed to explain, as we require, "why the parole eligibility term prescribed by statute would be insufficient to protect the public and insure the defendant's reformation."[4] *Jin Song Lin*, 2016 MP 11 ¶ 23 (citation and internal quotation marks omitted). Moreover, I agree that on remand, sentencing should be assigned to a different judge, as language in the sentencing order raises concerns about the appearance of impartiality should sentencing be sent to the same trial court for a third time.

/s/
PERRY B. INOS
Associate Justice

[4] At the time of sentencing on March 2, 2016, Lizama had served over three years in jail as a result of his participation in the burglary. Pursuant to 6 CMC § 4254 Lizama would have been immediately eligible for parole had the trial court not restricted his eligibility.