IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM
Plaintiff/Appellant/Cross-Appellee

vs.

DONICIO M. SAN NICOLAS
Defendant/Appellee/Cross-Appellant

OPINION

Supreme Court Case No. **CRA98-004**
Superior Court Case No. **CF0471-97**

Filed: June 21, 1999

Cite as: 1999 Guam 19

Appeal from the Superior Court of Guam
Argued and Submitted on October 14, 1998
Hagåtña, Guam

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BEFORE: PETER C. SIGUENZA, Chief Justice[1]; JANET HEALY WEEKS[2] and BENJAMIN J. F. CRUZ Associate Justices.

SIGUENZA, C.J.:

[1] This appeal arises after a jury convicted the Defendant/Appellee/Cross-Appellant, Donicio M. San Nicolas (hereinafter "San Nicolas"), of two counts of child abuse as third degree felonies. The jury, however, was deadlocked on the charges of aggravated murder as well as the lesser included offenses of aggravated murder and aggravated assault.

[2] The People appeal the trial court's subsequent decision, granting San Nicolas' Motion to Dismiss the Indictment as to the second count of the aggravated murder charge on which the jury could not return a verdict, based on the doctrine of collateral estoppel. San Nicolas answers the People's appeal by asserting that, not only was the court correct in barring prosecution based upon collateral estoppel, but that the doctrine of implied acquittal and statutory preclusion also require dismissal. In his cross-appeal, San Nicolas also appeals the denial of the dismissal of the lesser included offenses to aggravated murder and aggravated assault. The court hereby affirms the trial court's ruling.

FACTUAL AND PROCEDURAL BACKGROUND

[3] On July 27, 1997, San Nicolas went to the Lonfit River, accompanied by the two alleged

[1]The signatures in this opinion reflect the titles of the Justices at the time this matter was considered and determined.

[2]Justice Janet Healy Weeks resigned from the court after hearing oral arguments in this matter.

child-victims, (hereinafter "Victim One" and "Victim Two") and other children. The children were swimming in the river when the weather changed causing the river to begin to rise and the water to become rough. Subsequent to the change in weather, San Nicolas hooked up a chain which the children could hold onto for their safety while in the river. San Nicolas was watching the children from the banks of the river where he was also barbecuing and drinking beer. At some point, Victim One and Victim Two began to have trouble holding on to the chain and San Nicolas proceeded into the river in an attempt to help them. The girls struggled and, although Victim Two managed to get back to land, Victim One lost hold of the chain and was swept down river and drowned. Victim Two made representations, at the subsequent trial, that San Nicolas was trying to hold her head and Victim One's head under the water, instead of trying to save them. Victim Two later produced letters which she represented were written by Victim One regarding abuse by San Nicolas.[3] As a result of this incident, San Nicolas was subsequently indicted on October 29, 1997 on five charges, including murder, assault and child abuse.

[4] The case proceeded to trial early in 1998. At the conclusion of the trial, the jury was provided with Lesser Included Offenses (hereinafter "LIOs"), not charged out in the indictment, to consider in its deliberations. The jury was instructed to consider each charge separately and that its verdict on one charge should not control its decision on another. The jury initially returned with verdicts on the Second, Third and Fifth Charges. The trial court sent the jury back to deliberate several more times. The jury eventually returned with verdicts on various other charges, but could not reach a decision on the remainder. The jury's verdicts were as follows:

[3] It was later determined, however, through the aid of a handwriting expert, that the letters were fabricated by Victim Two.

1. First Charge— Aggravated Murder VICTIM ONE

a.	**First Count— Aggravated Murder : Premeditation**	NOT GUILTY
(1)	LIO— Murder	NOT GUILTY
(2)	LIO— Manslaughter	NOT GUILTY
(3)	LIO— Negligent Homicide	NOT GUILTY
(4)	LIO— Aggravated Assault	HUNG JURY
(5)	LIO— Misdemeanor Assault	HUNG JURY
b.	**Second Count— Aggravated Murder**	HUNG JURY

2.	**Second Charge— Murder, VICTIM ONE**	NOT GUILTY
a.	LIO— Aggravated Assault (as a 2nd Degree Felony)	NOT GUILTY

3.	**Third Charge— Attempted Murder, VICTIM TWO**	NOT GUILTY
b.	LIO— Attempted Aggravated Assault	NOT GUILTY
c.	LIO— Attempted Misdemeanor Assault	NOT GUILTY

4.	**Fourth Charge— Aggravated Assault (as a 2 nd Degree Felony), VICTIM TWO**	NOT GUILTY
a.	LIO— Aggravated Assault (as a 3rd Degree Felony)	HUNG JURY
b.	LIO— Misdemeanor Assault	HUNG JURY

5.	**Fifth Charge— Child Abuse (as a 3rd Degree Felony)**	
a.	**First Count- VICTIM ONE**	GUILTY
b.	**Second Count- VICTIM TWO**	GUILTY

After the verdicts were returned, the trial court did not enter a judgment. San Nicolas made a Motion to Dismiss the Indictment as to the charges on which the jury was unable to reach verdicts. The trial court heard argument and later issued a written decision and order on March 25, 1998, wherein it determined the First Charge, Count Two (hereinafter "Agg. Murder, Count 2") should be dismissed on the basis of collateral estoppel. At the same time, the trial court rejected San Nicolas' arguments of implied acquittal and a statutory bar against double jeopardy. As to the LIOs of the First Charge, First Count and the Fourth Charge, the trial court found that neither double jeopardy nor collateral estoppel barred the government from retrying San Nicolas. No final judgment followed. The People

filed a timely Notice of Appeal on March 27, 1998 and San Nicolas, in turn, filed a timely Notice of Cross-Appeal on April 7, 1998.

ANALYSIS

I. JURISDICTION

A. The People's Appeal

[5] The trial court has neither entered a judgment of conviction nor declared a mistrial on the remaining counts of the indictment in this case.[4] The People assert that the court has jurisdiction over this appeal pursuant to its ability to review interlocutory matters based upon section 3108(b) of Title 7 of the Guam Code Annotated. The statute provides as follows:

> **Appealable judgments and orders.**
>
> (b) Interlocutory review. Orders other than final judgments shall be available to immediate appellate review as provided by law and in other cases only at the discretion of the Supreme Court where it determines that resolution of the questions of law on which the order is based will:
>
> (1) Materially advance the termination of the litigation or clarify further proceedings therein;
> (2) Protect a party from substantial and irreparable injury; or
> (3) Clarify issues of general importance in the administration of justice

7 GCA § 3108(b) (1994). Although they cite the proper provision for interlocutory review, the People fail to present argument as to why this court should exercise discretion to hear this matter. The only support the People provide is a reference to *People v. Quenga*, 1997 Guam 6, wherein the court acknowledged that it has the power to review interlocutory appeals pursuant to section 3108(b).

[4]The trial court, in its Decision and Order, expressly indicates that no final judgment has been entered, seemingly intentionally. *See* Plaintiff-Appellant's Excerpts of Record at 12. Such absence of a judgment can act to defeat jurisdiction of this court.

However, in that case, we declined jurisdiction and also indicated a strong predilection against interlocutory appeals in criminal matters. *Id.* Likewise, San Nicolas asserts that the court has jurisdiction over the People's appeal, generally, pursuant to 8 GCA §§ 130.20(a)(b)(1993) and 130.60(1993).[5] However, San Nicolas makes no reference to this court's ability to hear this case as an interlocutory matter. With no real guidance from the parties, this court must decide whether it has jurisdiction over this appeal as expressly permitted by statute or whether the court should assume jurisdiction of this case as an interlocutory matter.

[6] The relevant provisions of section 130.20 pertaining to this case are as follows:

> **§130.20. Appeals Allowed by Government.** (a) An appeal may be taken by the government from any of the following:
>
> (5) An order or judgment dismissing or otherwise terminating the action before the defendant has been placed in jeopardy or where the defendant has waived jeopardy.
>
> (b) When an appeal is taken pursuant to Paragraph (5) of Subsection (a), the prosecuting attorney shall be prohibited from refiling the action which was appealed.

8 GCA § 130.20(a)(5)(1993). The language of the statute requires: (1) An order or judgment dismissing the action; and (2) That such order or judgment must issue before jeopardy has attached or jeopardy must have been waived. *Id.*

[7] As previously examined in *People v. Pak*, 1998 Guam 27, ¶ 6, dismissal of one charge in a complaint or indictment which contains multiple charges constitutes a dismissal of an "action" under section 130.20(a)(5). The trial court's decision and order dismissing Agg. Murder Count 2, based upon collateral estoppel, satisfies the first requirement of section 130.20.

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[5] **§130.60. Actions Permitted of Appellate Court.** The appellate court may reverse, affirm or modify a judgment or order appealed from, or reduce the degree of the offense or the punishment imposed, and may set aside, affirm or modify any or all of the proceedings subsequent to, or dependent upon, such judgment or order, and may, if proper, order a new trial and may, if proper, remand the cause to the trial court for such further proceedings as may be just under the circumstances.

[8] A determination of the second requirement of the statute, whether jeopardy has attached, is a more involved process. Although the trial court dismissed based on collateral estoppel grounds alone, the claims based on this doctrine have been recognized by several courts to be incorporated into the Fifth Amendment Double Jeopardy Clause. Under these circumstances, an appellate court determines whether it has jurisdiction by first looking to the merits of the claim.

> But of course the government's ability to retry [the defendant] is precisely what is at issue here. At worst then, we lack jurisdiction and must dismiss only if (the district court's) ruling is correct, and conversely, if the order below is in error, we have jurisdiction and must reverse. In short, the question of our jurisdiction is bound up with the merits, and it is to these that we now turn.

United States v. Castellanos, 478 F.2d 749, 751 (2nd Cir. 1973). In *People v. Allen*, 41 Cal. App. 3d 821, 116 Cal. Rptr. 493 (1974), the California Supreme Court addressed a similar jurisdictional question pursuant to a statute, Penal Code section 1238(a)(8), mirroring Guam's.[6] In *Allen*, the defendant was charged with attempted murder and assault with a deadly weapon. The jury acquitted the defendant on the attempted murder charge and found that he did not use a firearm in conjunction with the attempted murder. *Id.* at 823, 116 Cal. Rptr. at 495. The defendant entered a plea of having once been in jeopardy as to the assault charge and the trial court ruled in favor of the defendant on the former jeopardy plea. *Id.*, 116 Cal. Rptr. at 495. The People filed an appeal pursuant to

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[6]Section 1238, although recently amended, similarly provides as follows:

> §1238. Appeal by people
> (a) An appeal may be taken by the people from any of the following:
> (8) An order or judgment dismissing or otherwise terminating all or any portion of the action including such an order or judgment after a verdict or finding of guilty or an order or judgment entered before the defendant has been placed in jeopardy or where the defendant has waived jeopardy.

CAL PEN. CODE § 1238(a)(8) (West 1993).

California Penal Code section 1238(a)(5). *Id.* at 824, 116 Cal. Rptr. at 495.

> Obviously, where the question presented on such an appeal is whether or not the defendant has been placed in jeopardy, an affirmative answer disposes not only of the merits of the appeal, but compels a holding that we cannot reach them. Conversely, a negative answer permits us to resolve the merits, without pausing to consider the jurisdictional question . . . . We therefore turn to the merits.

Id. at 824-5, 116 Cal. Rptr. 495-6.

[9] In order for this court to determine whether it has jurisdiction over this appeal, it must determine whether jeopardy has attached; therefore, the court must turn to the merits of the People's appeal. A finding that jeopardy has attached or collateral estoppel applies means that the court lacks jurisdiction and further prosecution of the case as to that count must cease.

B. San Nicolas' Appeal

[10] Section 130.15 of Title 8 of the Guam Code Annotated outlines those matters from which a criminal defendant may appeal.[7] As a general rule, a criminal defendant may only appeal from a final judgment. 8 GCA § 130.15 (1993); *see also* CAL PEN. CODE § 1466(a)(2)(B) (West 1998); and FED. R. APP. P. 4(b)(3)(A), 28 U.S.C.A. (1998). The federal courts have adhered to a strict policy

[7] **§ 130.15. Appeals Allowed by Defendant.**

An appeal may be taken by the defendant:

(a) From a final judgment of conviction. The commitment of a defendant by reason of mental illness, disease or defect shall be deemed to be a final judgment of conviction within the meaning of this Section.
(b) From an order denying a motion for a new trial.
(c) From any order made after judgment, affecting the substantial rights of the defendant.
(d) Pursuant to § 40.80.
(e) From a judgment of conviction upon a plea of guilty or nolo contendere, where the defendant has filed with the trial court a written statement, executed under oath of penalty of perjury showing reasonable constitutional, jurisdictional or other grounds going to the legality of any proceedings held in this case under § 65.15(c) of this Code and the trial court has executed and filed a certificate of probable cause for such appeal with the District Court.

of requiring finality of judgment "as a predicate for federal appellate jurisdiction." *Abney v. United States*, 431 U.S. 651, 656, 97, S.Ct. 2034, 2038 (1977). Further espousing the strict policy, the United States Supreme Court noted in *Abney*:

> Adherence to this rule of finality has been particularly stringent in criminal prosecutions because "the delays and disruptions attendant upon intermediate appeal," which the rule is designed to avoid, "are especially inimical to the effective and fair administration of the criminal law."

Id. (citation omitted); *see also Merchant v. Nanyo*, 1997 Guam 16, ¶ 12.

[11] The fact that the trial court has intentionally withheld entering a judgment of conviction acts to preclude San Nicolas' ability to appeal matters in this case.[8] San Nicolas has set forth no arguments to persuade this court to consider this matter as an interlocutory appeal. It has also been the court's policy to strictly limit the exercise of interlocutory review. *See People v. Quenga*, 1997 Guam 6. Therefore, the court declines jurisdiction over San Nicolas' cross-appeal.

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II. COLLATERAL ESTOPPEL

[12] The United States Supreme Court has recognized the application of collateral estoppel to criminal cases as an embodiment of the Fifth Amendment Double Jeopardy Clause. *Ashe v. Swenson*, 397 U.S. 436, 445, 90 S.Ct. 1189, 1195 (1970).[9] The Court has defined collateral estoppel

[8]San Nicolas recognizes the absence of a final judgment and its necessity when stating in his opening brief that he cannot appeal his conviction on the Child Abuse charge without a final judgment or sentencing.

[9]*See also State v. Vassos*, 579 N.W.2d 35 (Wis. 1998) (recognizing collateral estoppel bars retrial under the guise of the 5th Amendment Double Jeopardy Clause and that although double jeopardy was not found, as under the *Blockburger* "same-elements" test, collateral estoppel may exist as a bar to further prosecution. As such the case was

as follows:

> "Collateral Estoppel" is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.

Id. at 443, 90 S.Ct. at 1194.

[13] The task before this court is to examine the record of the proceedings below and determine whether an ultimate fact was previously determined and whether it was found against the government. The same fact must be essential, requiring it to be proven beyond a reasonable doubt to convict in a second trial. *Nesbitt v. Hopkins*, 86 F.3d 118, 120 (8th Cir. 1996).

> Where a previous judgment of acquittal was based upon a general verdict, as is usually the case [a court is required] to examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.

Ashe, 397 U.S. at 444, 90 S.Ct. at 1194 (citation omitted). Based upon the Supreme Court definition of collateral estoppel, the Ninth Circuit Court of Appeals has established a three-part test for determining whether collateral estoppel applies.

> (1) An identification of the issues in the two actions for the purpose of determining whether the issues are sufficiently similar and sufficiently material in both actions to justify invoking the doctrine; (2) an examination of the record of the prior case to decide whether the issue was "litigated" in the first case; and (3) an examination of the record of the prior proceeding to ascertain whether the issue was necessarily decided in the first case.

United States v. Hernandez, 572 F.2d 218, 220 (9th Cir. 1978); *United States v. McLaurin*, 57 F.3d 823, 826 (9th Cir. 1995) *quoting Pettaway v. Plummer*, 943 F.2d 1041, 1043-44 (9th Cir. 1991)

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reversed and remanded to make a determination whether collateral estoppel would apply.).

overruled Santamaria v. Horsley, 133 F.3d 1242 (9th Cir. 1998); *United States v. Romeo*, 114 F.3d 141, 143 (9th Cir. 1997). The burden of proof is on the defendant to establish that "the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding." *Dowling v. United States*, 493 U.S. 342, 350,110 S.Ct. 668, 673 (1990).

[14] Whether an issue of ultimate fact has been decided and collateral estoppel may be invoked is a highly fact-specific determination which varies in conjunction with the evidence presented, the charges posed and a careful reading of the elements of those statutes under which the charges were brought. Therefore, case law varies on the application of collateral estoppel. However, the above Ninth Circuit test and U.S. Supreme Court and other case law examining collateral estoppel simply need be applied to the situation before us to determine the propriety of the lower court's ruling. The court has at its disposal a multitude of cases to compare in determining the law on Guam.

[15] In *Ashe*, six men who were playing poker were robbed and Ashe was tried for the robbery of one of the six men. 397 U.S. at 437, 90 S.Ct. at 1191. Ashe's identity as one of the three or four armed robbers was the only disputed issue at trial. He was acquitted, but then subsequently tried and convicted for robbing one of the other poker players. Under a strict application of the double jeopardy clause, based on the "same-elements" or "same offence" test as set forth in the case of *United States v. Blockburger*,[10] the robbery of one victim would be considered to be a distinct offense from the robbery of another. *See Brown v. Ohio*, 432 U.S. 161, 167, n. 6, 97 S.Ct. 2221,

[10] The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not.

284 U.S. 299, 304, 52 S.Ct. 180, 182 (1932).

2226, n. 6 (1977). However, the Court, in Ashe, held that the successive trial still violated the Fifth Amendment Double Jeopardy clause in that the second trial was barred by collateral estoppel, which is "embodied in the Fifth Amendment guarantee against double jeopardy." *Ashe*, 397 U.S. 445, 90 S.Ct. at 1195; *see also People v. Santamaria*, 8 Cal. 4th 903, 912, 884 P.2d 81, 84, 35 Cal. Rptr. 2d 624, 627 (1994).[11]

[16] In another case which bears factual similarity to the case at hand, *State v. Lovejoy*, 683 N.E.2d 1112 (Ohio 1997), the defendant was charged with, *inter alia*, aggravated murder with prior calculation and design and aggravated murder committed during the course of a felony, pursuant to OHIO REV. CODE ANN. § 2903.01(A) and (B)(1999). At the first trial, the defendant was acquitted of aggravated murder with prior calculation and its LIOs of murder and involuntary manslaughter. *Id.* at 1114. The jury was unable to reach a verdict as to the felony murder, the aggravated robbery (as the underlying felony) and the kidnaping charge. *Id.* The court declared a mistrial and the defendant made a motion to dismiss on the felony murder charge based on collateral estoppel and double jeopardy which the court denied. *Id.* The appellate court reversed the denial and the case was appealed to the state's Supreme Court.

[17] The *Lovejoy* court went through a lengthy analysis of case authority which it believed established a policy rejecting double jeopardy arguments in cases involving inconsistent verdicts and hung juries. *Id.* at 1115, *citing Dunn v. United States*, 284 U.S. 390, 393, 52 S.Ct. 189, 190 (1932).

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[11] At footnote 3, the court, interpreting the *Ashe* case opined:

> Collateral estoppel, which applies to relitigation of factual issues, is analytically distinct from double jeopardy, which applies to retrial of offenses. Thus, collateral estoppel is conceptually separate from double jeopardy, but, under *Ashe*, *supra*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469, when applicable, it is a component of the double jeopardy clause of the Fifth Amendment.

The case was reversed with the court holding that collateral estoppel and double jeopardy do not apply "where the inconsistency in the responses arises out of inconsistent responses to different counts, not out of inconsistent responses to the same count." *Lovejoy*, 683 N.E.2d at 1119. The court reasoned that the case involved a two-track situation whereby the jury was to consider different theories of aggravated murder and their lesser included offenses. *Id.* at 1118.

> To find that collateral estoppel applies because the wording of the lesser included offenses of "murder" was the same in each count is to ignore the simple realities of the way the case went to the jury. Once the jury decided that prior calculation and design was not proven by the state, it could be considered logical for the jury to acquit the defendant of all charges in the track of Count one as the flow of the verdict forms guided in that direction. The jury consistently hung on all charged offenses in the track of Count Two, which involved the issue of robbery and its lesser included offenses. However, speculation as to why the jury failed to reach a verdict on the felony murder count only demonstrates the difficulty with trying to analyze a jury's decision . . . . [I]t is best to just "accept the jury's collective judgment" so as to preserve the sanctity of the jury process . . . ..

Id. at 1118 (citation omitted).

[18] The *Lovejoy* court was split with three Justices dissenting. The dissent criticized the majority's distinction that collateral estoppel does not apply to separate counts and noted that case law does not support the majority's opinion. *Id.* at 1121-22 (Cook, J., dissenting). Recognizing prior Ohio Supreme Court decisions, the dissent also noted the court's adoption of "collateral estoppel [as] applicable to bar retrial of mistried counts in criminal cases involving partial verdicts of acquittal." *Id.* at 1122.

> [A]llowing a second jury to reconsider the very issue upon which the defendant has prevailed serves no valuable function. To the contrary, it implicates concerns about the injustice of exposing a defendant to repeated risks of conviction for the same conduct, and to the ordeal of multiple trials, that lie at the heart of the double jeopardy clause.

Id. quoting United States v. Blailin, 977 F.2d 270, 277 (7th Cir. 1992) (citations omitted).

[19] However, after closely examining the record, the dissent determined that Lovejoy had not borne his burden of demonstrating (1) that the jury had finally determined the issue of identity—whether Lovejoy was a person involved in the robbery, or (2) intent— that he acted with purpose in committing the robbery and thus the resulting felony murder.

[20] Additionally, in *United States v. White*, 936 F.2d 1326, 1329 (D.C. Cir. 1991), the defendant was tried based upon a two-count indictment. In Count I, the defendant was alleged to have been in possession of an unlawfully issued birth certificate with the intent to defraud the government. *Id.* at 1327. In Count II, the defendant was alleged to have made false statements on a U.S. passport application. *Id.* At trial, the court instructed the jury as to the essential elements of each count as follows: (1) as to Count I, the jury had to find that the defendant was in possession of an unlawfully issued identification document, acted willfully, and intended to defraud the United States with use of the document; (2) as to Count II, the jury had to find that the defendant provided false information in his passport application, acted willfully, and intended to secure issuance of the passport. *Id.* The jury acquitted the defendant on Count I, but was unable to reach a verdict on Count II. *Id.* The trial court declared a mistrial and dismissed the case as to Count II. *Id.* The government reindicted the defendant for the same crime in Count II of the first indictment. *Id.* The defendant moved for dismissal based upon double jeopardy and collateral estoppel arguments which the trial court rejected. *Id.* The defendant then appealed. *Id.* Based upon the acquittal in Count I, the defendant argued that the jury found that the defendant did not act "wilfully," a requirement necessary to prove both counts. *Id.* However, the court held that it would have been illogical for the jury to have found that he did not act wilfully and then acquit him of only Count I. *Id.* at 1329. Thus, the court concluded that the jury must have based the acquittal upon the failure of the

government to prove another of the essential elements of Count I; therefore, relitigation under the second indictment was allowed. *Id;*[12] *See also United States v. Watts*, 518 U.S. 148, ___, 117 S.Ct. 633, 637 (per curiam), *quoting United States v. Putra*, 78 F.3d 1386, 1394 (9th Cir. 1996)(Wallace, J., dissenting) (holding that "[a]n acquittal is not a finding of fact. An acquittal can only be an acknowledgment that the government failed to prove an essential element of the offense beyond a reasonable doubt. Without specific jury findings, no one can logically or realistically draw any factual finding inferences....").

[21] The People begin their arguments by alleging the issue which the defendant seeks to foreclose from consideration is not the same issue upon which the jury's verdict was grounded. The People assert that the jury could have grappled with two separate factual scenarios in deciding the aggravated murder charge— (1) that San Nicolas allowed or encouraged Victim One to enter a flooding river thereby recklessly and negligently causing her death (and that such act also constitutes felony child abuse); or (2) that San Nicolas entered the river and held Victim One's head beneath the surface causing her death. It is the People's contention the jury rejected the theory that San Nicolas had either with premeditation, knowingly, recklessly or negligently held her head under the water thereby causing her death, but were unable to reach a decision as to whether he recklessly or negligently caused her death by allowing or encouraging her to go into the water.

[22] San Nicolas alternatively argues the ultimate fact determined at trial was that Victim One's death was not caused by San Nicolas. He asserts the fact that the jury found San Nicolas not guilty

[12] *See also United States v. Larkin*, 605 F.2d 1360 (5th Cir. 1979) (holding that no rational jury could have acquitted a defendant on a count of vicarious liability to a conspiracy and then be hung on the conspiracy count itself). The courts in these cases seem to make a presumption in favor of the prosecution as to the jury's inability to rationally render verdicts. Underlying this presumption is a hesitation to interpret a jury's actions, but instead to let them stand as they are, consistent or not.

of a criminal homicide precludes a second prosecution on the felony murder charge because in the first prosecution the issue was fully litigated and decided. Citing *Ashe*, it is San Nicolas' contention that the principles underlying the double jeopardy clause dictate that the possibility for conviction in the second trial, thereby manifesting contrary conclusions reached in the first trial, is abhorrent to such principles.[13]

[23] The People argue that this case presents this court with the same situation that the *Lovejoy* court faced with a dual-track case. The trial court, however, found that the ultimate issue of fact which must have been decided was San Nicolas' mental state. Having determined that San Nicolas was not guilty of any form of criminal homicide, the trial court concluded that he had met his burden of proving the issue was necessarily decided by the jury.

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[13]In *Ashe*, the court stated that the jury in the first trial was faced with only one issue in dispute, based upon the record, which was whether Ashe was one of the robbers. *Ashe*, 397 U.S. at 445, 90 S.Ct. at 1195. The first jury determined he was not and; therefore, to be convicted in a second trial, the second jury had to reach a conclusion directly contrary to that of the first jury which was a violation of Ashe's Fifth Amendment rights. *See generally, Id.*

A. Issues Sufficiently Similar and Material

[24] Applying the facts of this case to the Ninth Circuit test for collateral estoppel, the first determination to be made is whether the issue which the People seek to relitigate is sufficiently similar and material to the issue in the first trial. Even if the court accepts the People's contention that the jury was faced with two possible scenarios to decide San Nicolas' responsibility in Victim One's death, the ultimate issue of fact is still San Nicolas' *mens rea*. San Nicolas was charged with two counts of Aggravated Murder—(1) Aggravated Murder through his intentional or premeditated act of causing the death of Victim One, and (2) Aggravated Murder by committing a criminal homicide in the commission of an enumerated felony. *See* 9 GCA § 16.30 (1993). At the conclusion of the trial, the jury was also instructed to consider several LIOs to the First Count of Aggravated Murder which included, Murder, Manslaughter, and Negligent Homicide. Each LIO contained a separate and different *mens rea* element, including intentionally and with premeditation, intentionally and knowingly, recklessly, or criminal negligence. *See* 9 GCA § 16.20 (1993). Additionally, for the Second Charge, Murder, the jury was instructed on another separate *mens rea*— recklessly, under circumstances manifesting extreme indifference to the value of human life. *See* 9 GCA § 16.40 (1993).

[25] Agg. Murder, Count 2 contained two elements which the People were required to prove beyond a reasonable doubt— that San Nicolas committed a criminal homicide in the commission of the child abuse of Victim One. *See* 9 GCA § 16.20. Victim One was found dead, that is a fact which is not at issue. Furthermore, San Nicolas was found guilty of the Child Abuse charge which referred to Victim One. Therefore, the only remaining issue which can be examined is the issue of San Nicolas' *mens rea* in causing the death of Victim One. Not only is this issue sufficiently similar

to the issue in the first trial, under the First Charge, First Count and the Second Charge, but it is in fact precisely the same issue. The issue of *mens rea* was also material, even crucial, to the first trial as it would be in a retrial of the Agg. Murder, Count 2 charge.

B. Issue Previously Litigated

[26] In determining whether the issue of San Nicolas' mental state was previously litigated, it is incumbent upon this court to closely examine the record, including all evidence presented and testimony provided, in order to determine whether the People adequately litigated the issue on both theories of Aggravated Murder. Several witnesses testified for the People, each offering testimony to establish some aspect of the People's case. We will now look to the testimony of each witness to determine whether the *mens rea* necessary for Agg. Murder, Count 2, was previously litigated.

[27] First to testify for the People was Francisco Camacho, San Nicolas' brother-in-law, who arrived at the Lonfit River after Victim One had already been missing. Transcript, vol. II, p. 53, 56 (Jury Trial, Jan. 28, 1998). He testified to San Nicolas' demeanor at the time of the incident, that he did not appear to be overly concerned about the situation and that Camacho could not say whether he believed there was any foul play involved in Victim One's disappearance and eventual death. Transcript, vol. II, p. 59, 62, 74 (Jury Trial, Jan. 28, 1998).

[28] Firefighter Johnny M. Taitague was part of a rescue team that arrived on the scene at the Lonfit River, although initially there in response to another call to rescue stranded hikers. Transcript, vol. II, p. 82, 97, 99 (Jury Trial, Jan. 28, 1998). When Taitague arrived, he came across San Nicolas and others and was told that Victim One had been swept down the river. Transcript, vol. II, p. 97 (Jury Trial, Jan. 28, 1998). Taitague testified to San Nicolas' demeanor as well, indicating that he did not act as a concerned parent, he just sat on the bridge and made no attempt to go into the river to look for Victim One. Transcript, vol. II, p. 105-106 (Jury Trial, Jan. 28, 1998). Taitague also indicated that he believed that San Nicolas was only, at the time, pretending to cry. Transcript, vol. II, p. 105 (Jury Trial, Jan. 28, 1998).

[29] Officer Nicolas Wellein was not present at the time of the incident; however, he later visited the scene. Transcript, vol. II, p. 139-140 (Jury Trial, Jan. 28, 1998). Wellein testified, referring to pictures of the scene, as to the existence of the chain, attached under the bridge, the area where San Nicolas was barbecuing and the general layout of the surrounding area. Transcript, vol. II, p. 140-152 (Jury Trial, Jan. 28, 1998). Through his testimony, the People attempted to show that San Nicholas placed the children in a dangerous situation and that he had attached a chain to the area under the bridge creating another dangerous condition.

[30] Next admitted into evidence was a videotape of the Lonfit River, depicting the area in which the incident occurred, presented by Anthony W. Blas, an employee of the Prosecution Division of the Office of the Attorney General. Transcript, vol. III, p. 5-16 (Jury Trial, Jan. 29, 1998).

[31] Victim Two testified to the full course of events which occurred on the date of the incident. She testified that San Nicolas took her, Victim One and the other children to the river, stopped to purchase beer on the way there and drank beer while at the beach, before proceeding to the river. Transcript, vol. III, p. 34, 40-48 (Jury Trial, Jan. 29, 1998). Victim Two indicated that while swimming with Victim One and another child, the current began to get stronger and it began to rain; however, the children were able to make their way to safety holding onto a bamboo branch. Transcript, vol. III, p. 69-72 (Jury Trial, Jan. 29, 1998). Victim Two then testified that San Nicolas retrieved a chain which he attached under the bridge area. Transcript, vol. III, p. 73-83 (Jury Trial, Jan. 29, 1998). He then told the children "[w]hoever is gonna not swim . . . swim." Transcript, vol. III, p. 83 (Jury Trial, Jan. 29, 1998). *Id.* at 83. Victim One wanted Victim Two to swim with her. Transcript, vol. III, p. 83-84 (Jury Trial, Jan. 29, 1998). Victim Two did not want to because she was afraid of the water at that time; however, Victim Two stated that Victim One told her she would not be her friend otherwise. Transcript, vol. III, p. 83-84 (Jury Trial, Jan. 29, 1998). Victim Two then stated that the two victims went into the water, held onto the chain, which swung them from left to right, and then the chain "snapped" or in some manner broke off. Transcript, vol. III, p. 84-85 (Jury Trial, Jan. 29, 1998). The two victims called for San Nicolas, who entered the river, got between the two victims and proceeded to place his hand on Victim Two's head and hold it under the water. Transcript, vol. III, p. 85-96 (Jury Trial, Jan. 29, 1998). Victim Two was able to get to safety; however, in doing so, Victim Two stated that she felt San Nicolas' hand on Victim One's head also holding her head under the water. Transcript, vol. III, p. 95-97 (Jury Trial, Jan. 29, 1998).

[32] Victim Two next saw Victim One being carried away down river, with only her ponytail visible. Transcript, vol. III, p. 97 (Jury Trial, Jan. 29, 1998). Victim Two claims that she told San Nicolas that Victim One "was down there", referring to downstream in the river, when he asked her of Victim One's whereabouts. Transcript, vol. III, p. 98-99 (Jury Trial, Jan. 29, 1998).

[33] Victim Two testified that although she told San Nicolas to go after Victim One, he did nothing. Transcript, vol. III, p. 98-104 (Jury Trial, Jan. 29, 1998). Victim Two and San Nicolas started making their way back to the bridge when one of the other children called to him asking where the two victims were and San Nicolas stated "[t]hey're right here." Transcript, vol. III, p. 163 (Jury Trial, Jan. 29, 1998). Victim Two additionally testified that San Nicolas later approached her at a rosary and told her not to tell anybody about what had happened at the river. Transcript, vol. III, p. 174 (Jury Trial, Jan. 29, 1998). Victim Two's testimony was presented as evidence of San Nicolas' *mens rea* at the time of the incident, on the theory that he acted intentionally, or recklessly, in causing Victim One's death.

[34] The People then called John J. Concepcion, who works for Guam Fire Rescue. Transcript, vol. IV, p. 76 (Jury Trial, Feb. 2, 1998). Concepcion testified that he arrived on the scene at approximately 8:30 p.m. and his team was tasked with searching along the river. Transcript, vol. IV, p. 77 (Jury Trial, Feb. 2, 1998). Concepcion also testified to the dangerous condition of the river on that day, as well as the surroundings on both sides of the river. Transcript, vol. IV, p. 78 (Jury Trial, Feb. 2, 1998). Concepcion stated they began another search along the river at approximately 5:30 am and he discovered Victim One's body in about two to three feet of water sometime after 6:00 a.m. Transcript, vol. IV, p. 83 (Jury Trial, Feb. 2, 1998). Her body was approximately a quarter of a mile down the river from the bridge and she did not appear to show any signs of bruising or

scratches. Transcript, vol. IV, p. 82-83 (Jury Trial, Feb. 2, 1998). Concepcion also indicated that rigor mortis had already set in. Transcript, vol. IV, p. 84 (Jury Trial, Feb. 2, 1998). The Rescue team transported Victim One's body back to the bridge where San Nicolas thanked Concepcion for finding her and shook Concepcion's hand and hugged him. Transcript, vol. IV, p. 84 (Jury Trial, Feb. 2, 1998). Concepcion testified that San Nicolas appeared to look very sad. Transcript, vol. IV, p. 84 (Jury Trial, Feb. 2, 1998).

[35] Filomeno Peter Chamberlain, of the Guam Fire Department, the Suppression Bureau, who arrived on the scene early in response to the call about the stranded hikers, testified as to San Nicolas' state of mind that evening. Transcript, vol. IV, p. 90 (Jury Trial, Feb. 2, 1998). Chamberlain stated that San Nicolas never approached him, that San Nicolas' behavior was not that which he would have normally expected of a father who's child was missing or hurt, and that San Nicolas did not attempt to help the firemen. Transcript, vol. IV, p. 100-101 (Jury Trial, Feb. 2, 1998). He also testified that no one seemed to have reported the incident and, therefore, by the time they arrived, it was too dark to rescue her in time. Transcript, vol. IV, p. 101 (Jury Trial, Feb. 2, 1998).

[36] Also testifying was Jimmy K. Borja, Fire Specialist, who was part of one of the rescue teams on the scene that evening. Transcript, vol. V, p. 29 (Jury Trial, Feb. 3, 1998). Borja testified that he spoke with San Nicolas who told hm that he was helping the rest of the family up to the bridge when he heard a splash behind him and turned to see Victim One going down the river. Transcript, vol. V, p. 32 (Jury Trial, Feb. 3, 1998). Borja stated that San Nicolas said he then tried to go alongside of the river to see if he could catch her or help her, but the debris was too thick and the water too deep for him to help. Transcript, vol. V, p. 31-33 (Jury Trial, Feb. 3, 1998). When the

rescue team attempted to look for Victim One, following San Nicolas' story, some family members joined them, but not San Nicolas. Transcript, vol. V, p. 33-34 (Jury Trial, Feb. 3, 1998). The team searched until three in the morning, when it took a break until sunlight. Transcript, vol. V, p. 35-36 (Jury Trial, Feb. 3, 1998). At sunlight, they resumed the search, once again without San Nicolas' help. Transcript, vol. V, p. 37 (Jury Trial, Feb. 3, 1998).

[37] Officer Joseph S. Carbullido interviewed San Nicolas regarding the incident on September 3, 1997, after two previously unsuccessful attempts. Transcript, vol. V, p. 48 (Jury Trial, Feb. 3, 1998). The People used Officer Carbullido's testimony to show the inconsistencies in the stories which San Nicolas relayed to the different witnesses. Carbullido's testimony revealed that San Nicolas' account of the events was different from that which was conveyed to Fireman Borja. San Nicolas told Carbullido that the two victims had gone back into the river while the rest were getting ready to leave, at approximately 6:00 p.m. Transcript, vol. V, p. 49 (Jury Trial, Feb. 3, 1998). At some point after they went back to swim, San Nicolas said that he heard the two victims screaming for his help. Transcript, vol. V, p. 49 (Jury Trial, Feb. 3, 1998). He went to them under the bridge, and a big wave came up causing the river to rise. Transcript, vol. V, p. 49 (Jury Trial, Feb. 3, 1998). He saw the victims holding onto the chain, then begin to lose their grip and drift into the middle of the river. Transcript, vol. V, p. 50 (Jury Trial, Feb. 3, 1998). At that point, he jumped into the river, grabbed the two victims, tried to push them off to the side of the river, but they panicked and started kicking and pushing him down under the water. Transcript, vol. V, p. 50 (Jury Trial, Feb. 3, 1998). Carbullido then testified that San Nicolas stated that he managed to push Victim Two off to the side where she was able to grab onto something to pull herself out to safety. Transcript, vol. V, p. 50 (Jury Trial, Feb. 3, 1998). At the same time, he somehow lost Victim One and did not know where

she had gone; therefore, being tired himself, he got out of the river with Victim Two in order to get some help. Transcript, vol. V, p. 51 (Jury Trial, Feb. 3, 1998). Carbullido indicated that San Nicolas believed the death to be an accidental drowning, also stating that the water that day was approximately ten to fifteen feet in depth. Transcript, vol. V, p. 51 (Jury Trial, Feb. 3, 1998).

[38] Also testifying was Officer Mark A. B. Torre, from whom testimony was elicited to demonstrate more inconsistencies between San Nicolas' accounts of the day of the incident. Transcript, vol. V, p. 73 (Jury Trial, Feb. 3, 1998). Torre testified that San Nicolas stated he was walking up back to the car when he noticed the two victims were not with the group. Transcript, vol. V, p. 75 (Jury Trial, Feb. 3, 1998). He saw them in the river, holding onto a chain when a big wave came up and he shouted for them to come out of the water. Transcript, vol. V, p. 75 (Jury Trial, Feb. 3, 1998). He told Torre that he jumped in to try to save them, grabbed portions of their shirts and arms, but they were pulled under the water for about a minute. Transcript, vol. V, p. 76 (Jury Trial, Feb. 3, 1998). San Nicolas shouted out the victim's names and told them to grab onto anything because he said when he resurfaced he could not see them. Transcript, vol. V, p. 76-77 (Jury Trial, Feb. 3, 1998). San Nicolas then told Torre that he was able stand on a rock and grab onto a branch, with the water being up to his chin. Transcript, vol. V, p. 77 (Jury Trial, Feb. 3, 1998). San Nicolas saw Victim Two and told her to paddle over to him and he had her hold on to the branch and him. Transcript, vol. V, p. 77 (Jury Trial, Feb. 3, 1998). He asked Victim Two where Victim One was, but she said she had not seen her. Transcript, vol. V, p. 78 (Jury Trial, Feb. 3, 1998). San Nicolas then told Torre that he swam downstream searching for Victim One, then grabbed on to another branch about ten feet away. Transcript, vol. V, p. 78 (Jury Trial, Feb. 3, 1998). Torre testified that San Nicolas then believed it to be too dark and swam back to Victim Two and they made their way

to the river bank. Transcript, vol. V, p. 79 (Jury Trial, Feb. 3, 1998). When he and Victim Two returned to the other children, he told them to make their way to the car. He then stated that he encountered Camacho, whom he told to call 911. Transcript, vol. V, p. 80 (Jury Trial, Feb. 3, 1998).

[39] Also testifying for the People was Officer Raul Q. Atento, who testified that he had arrived at the Lonfit River at approximately 9:15 p.m. on the evening of the incident. Transcript, vol. V, p. 106 (Jury Trial, Feb. 3, 1998). He spoke with San Nicolas to find out what had happened to Victim One. Transcript, vol. V, p. 107 (Jury Trial, Feb. 3, 1998). San Nicolas once again stated that the two victims went back into the water, at some point he noticed them and yelled for them to get out of the water. Transcript, vol. V, p. 108 (Jury Trial, Feb. 3, 1998). A big wave then came up, he jumped into the river to save them; however, in the victim's panic, San Nicolas could only get one victim up, then the other would go down or he would get pulled under. Transcript, vol. V, p. 108-109 (Jury Trial, Feb. 3, 1998). He yelled to the victims to grab onto something and he and Victim Two were able to grab on to some bamboo. Transcript, vol. V, p. 109 (Jury Trial, Feb. 3, 1998). San Nicolas then told Atento that he searched down the river for Victim One, but was unsuccessful and returned to the bridge where he was informed by family members that rescue units had already been notified. Transcript, vol. V, p. 109 (Jury Trial, Feb. 3, 1998). Additionally, San Nicolas reiterated that, although Victim One knew how to swim, she was not a very good swimmer. Transcript, vol. V, p. 110 (Jury Trial, Feb. 3, 1998). This testimony was presented to demonstrate more inconsistencies in San Nicolas' account of the events which occurred and his knowledge as to Victim One's skills as a swimmer, which may lead to the inference that he placed her in a dangerous situation, also going to his mental state.

[40] Important testimony was also provided by Security Officer Sharon C. B. Brumit who received

a call from Mr. Palacios, her employer at Palacios Security, reporting a missing child at the Lonfit River. Transcript, vol. V, p. 126 (Jury Trial, Feb. 3, 1998). Brumit testified that upon her arrival, she spoke with Camacho but did not initially speak with San Nicolas because he appeared to be very upset. Transcript, vol. V, p. 128-129 (Jury Trial, Feb. 3, 1998). Camacho suggested that they needed to call for help, which Brumit stated she so did. Transcript, vol. V, p. 131 (Jury Trial, Feb. 3, 1998). After calling for help, as Brumit was speaking with Camacho, San Nicolas became more upset and began swinging his arms around. Transcript, vol. V, p. 131 (Jury Trial, Feb. 3, 1998). He eventually approached her and stated "[y]es, I did it. I killed her. Arrest me." Transcript, vol. V, p. 131 (Jury Trial, Feb. 3, 1998). Brumit also testified that she tried to calm him down and determine whether he had intentionally or accidentally killed his daughter or just neglected her, causing her death. Transcript, vol. V, p. 132 (Jury Trial, Feb. 3, 1998). Brumit stated that San Nicolas, however, interrupted her and then said again "[y]es, I did it. I killed her." and, after pausing a moment, then stated, "[n]o, the current took her." Transcript, vol. V, p. 132 (Jury Trial, Feb. 3, 1998).

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[41] Brumit then stated that she continued to try to calm San Nicolas down, but he still appeared to be very emotionally upset and stated that it was taking too long. Transcript, vol. V, p. 134 (Jury Trial, Feb. 3, 1998). Brumit then testified that San Nicolas again stated "I killed her. I did it. Do you hear what I'm saying? Do you understand? I said I did it. I killed her." Transcript, vol. V, p. 134 (Jury Trial, Feb. 3, 1998). San Nicolas also told Brumit that the "kids" were in the water and he was concerned because of the current. Transcript, vol. V, p. 135 (Jury Trial, Feb. 3, 1998). Victim One was a little over arm's length away from him and believing she was still close by, he was watching for the other kids getting out of the water; however, when he turned back to Victim One, she was missing. Transcript, vol. V, p. 135-138 (Jury Trial, Feb. 3, 1998). Finally, Brumit testified as to her impression of San Nicolas' statement that he was looking around at the kids, in the jungle, out of the water, and still noticed Victim One was missing and he said it was bothering him. Transcript, vol. V, p. 139 (Jury Trial, Feb. 3, 1998). At that point, San Nicolas began to mention to Brumit something about how Victim One liked to play around, and he wasn't sure if she was playing a trick on him. Transcript, vol. V, p. 140 (Jury Trial, Feb. 3, 1998). After the group was unable to find Victim One, although it was unclear, someone went to get help, which is how Brumit states she responded to the call for help. Transcript, vol. V, p. 141 (Jury Trial, Feb. 3, 1998). Brumit finally testified that San Nicolas appeared to be anxious when he was explaining what had happened. Transcript, vol. V, p. 148 (Jury Trial, Feb. 3, 1998).

[42] The People's final witness was Dr. Aurelio Espinola, the Medical Examiner who performed the autopsy on Victim One's body. Transcript, vol. VI, p. 6 (Jury Trial, Feb. 4, 1998). Dr. Espinola testified that he had determined the death was a homicide caused by asphyxiation from drowning. Transcript, vol. VI, p. 6 (Jury Trial, Feb. 4, 1998). Based upon the physical evidence and other

investigation, including speaking to San Nicolas, visiting the scene of the incident, and being informed of Victim Two's account of the events which occurred, Dr. Espinola stated that he determined that the death was a homicide. Transcript, vol. VI, p. 10-12 (Jury Trial, Feb. 4, 1998). Dr. Espinola's medical opinion was that Victim One had died the night before she was found. Transcript, vol. VI, p. 13 (Jury Trial, Feb. 4, 1998). Additionally, Dr. Espinola stated that there were no scratches and bruises on her body, aside from fish bite marks on her forehead, and explained that after death scratches will not appear on a dead body. Transcript, vol. VI, p. 14-15 (Jury Trial, Feb. 4, 1998).

[43] During Dr. Espinola's conversation with San Nicolas and his wife, he noticed that San Nicolas would raise his voice and cut off the wife from speaking. Transcript, vol. VI, p. 16-17 (Jury Trial, Feb. 4, 1998). Also, San Nicolas had told him he was trying to save the children from drowning, which Dr. Espinola believed to mean more than two children. Transcript, vol. VI, p. 17 (Jury Trial, Feb. 4, 1998). Dr. Espinola noted that, having performed other autopsies on drowned victims, he noticed Victim One did not exhibit anything on her hands which is unusual as most victims of drowning try to stay alive and grab onto anything they can grasp. Transcript, vol. VI, p. 19-20 (Jury Trial, Feb. 4, 1998).

[44] Next, referring to a diagram of the river, Dr. Espinola stated that Victim One must have died before she reached a large debris pile, because had she hit that debris pile, which spanned the entire river, while she was still alive, she would have displayed scratches from the protruding bamboo. Transcript, vol. VI, p. 22 (Jury Trial, Feb. 4, 1998). Previous testimony had established that it would take approximately seven to ten seconds to pass the debris pile, and Dr. Espinola indicated that it would not be possible for a struggling child to drown in that amount of time. Transcript, vol. VI,

p. 21-23 (Jury Trial, Feb. 4, 1998). Dr. Espinola also testified that he discovered a tiny hemorrhage underneath the skull, subgaleal petechiae, and that such could be caused from hair pulling. Transcript, vol. VI, p. 24-25 (Jury Trial, Feb. 4, 1998). He stated this was consistent with both an accidental and forced drowning. Transcript, vol. VI, p. 24-27 (Jury Trial, Feb. 4, 1998). Furthermore, Dr. Espinola indicated that the condition of Victim One's body and the surroundings as to where she was discovered did not present the possibility that Victim One had died from an accident of falling in the water or slipping and hitting her head and then falling into the river. Transcript, vol. VI, p. 28 (Jury Trial, Feb. 4, 1998).

[45] Based on the above summary of the testimony, it is clear that the People fully presented their case as to each theory of homicide. Much of the same testimony and evidence which the People presented applied to Murder, both theories of Agg. Murder and the case for child abuse. The fact that there was no clear bifurcation of the theories, but that the same evidence went to prove that San Nicolas acted with a criminal mental state strengthens the support for the finding that the issue had been fully litigated in the first trial.

C. Issue Previously Determined

[46] Having found that the issue from the first trial was litigated and would be the same as that sought to be re-determined in a second trial, we turn to the third factor in the test— whether the issue was necessarily determined in the first action. In order to make this determination, we must look to the jury's findings. The jury hung on Agg. Murder, Count 2, the essential elements of which are set forth in the statute as follows: "(a) Criminal homicide constitutes aggravated murder when: (2) it is committed during the commission or attempt to commit any felony defined in Chapters 22, 25, 31,

34, 37, 40 or 58 of Title." 9 GCA § 16.30. Therefore it must be determined whether San Nicolas (1) committed felony child abuse, and; (2) committed a criminal homicide which resulted in the death of Victim One. A criminal homicide is defined in the following statute:

> **§ 16.20. Criminal Homicide Defined**.
>
> (a) A person is guilty of criminal homicide if he causes the death of another human being:
> (1) intentionally and with premeditation; or
> (2) intentionally; or
> (3) knowingly; or
> (4) recklessly; or
> (5) by criminal negligence.
>
> (b) Criminal homicide is aggravated murder, murder, manslaughter or negligent homicide.

9 GCA § 16.20.

[47] The second element, child abuse as a felony, was litigated, based largely upon the same facts which the People sought to use to prove a criminal homicide in its theory that San Nicolas reckless caused the death of Victim One by encouraging her into the water. The jury returned a guilty verdict as to the child abuse. As to the first element of the criminal homicide, a separate *mens rea* is necessary to make the death the result of a criminal act. In the First Charge, First Count, San Nicolas was charged with Aggravated Murder, alleging that he intentionally and with premeditation caused the death of Victim One. At the conclusion of the trial, the jury was instructed to consider several LIOs to Aggravated Murder which included Murder, Manslaughter, and Negligent Homicide. In the Second Charge, San Nicolas was charged with Murder. The trial court read the following instructions on the above crimes to the jury.

> The first charge, there's two counts. So the essential elements of the first charge of the first count of aggravated murder, the people [sic] must prove beyond a reasonable

> doubt that the defendant, Donicio M. San Nicolas, ***intentionally and with premeditation caused the death of another human being***, that is, [Victim One] on or about the 27th day of July, 1997, within Guam.
>
> Essential elements of the lesser included offenses to the first charge, first count, of murder is murder. Okay? So you have the aggravated murder, first count, first charge, and then the lesser included offenses. We'll start on the lesser included. The lesser included offense of aggravated murder is murder. The people must prove beyond a reasonable doubt that the defendant, Donicio M. San Nicolas, ***intentionally or knowingly caused the death of another human being***, that is, [Victim One] on or about 27 July, 1997, within Guam.
>
> During . . . the next instruction is the essential elements of the lesser included offense to the first charge, first count, manslaughter, okay? So we're going down the line. The people must prove beyond a reasonable doubt that the defendant, Donicio M. San Nicolas, ***recklessly caused the death of another human being***, that is [Victim One] on or about the 27th day of July, 1997, within Guam.
>
> The lesser included offense . . . the next lesser included offense is the essential element of negligent homicide. Reads as follows.
>
> The people must prove beyond a reasonable doubt that the defendant, Donicio M. San Nicolas, ***by criminal negligence, caused the death of another human being***, that is [Victim One] on or about the 27th day of July, 1997, within Guam.
>
> . . . .
>
> The second charge: On or about the 27th day of July, 1997, the defendant, Donicio M. San Nicolas, ***recklessly caused, under circumstances manifesting extreme indifference to the value of human life, the death of another human being***, that is [Victim One], within Guam.

Transcripts, vol. VIII, p. 3-6 (Closing Instructions - Deliberations, February 6, 1998) (emphasis added).

[48] Between the crimes charged in the First charge, First count and the LIOs involving homicide and the Second Charge of Murder, every type of criminal homicide was at issue with the jury finding the defendant not guilty on all of the aforementioned charges and LIOs. The issue of intent to commit a criminal homicide was decided when the jury acquitted San Nicolas on the above charges.

[49] In *White,* the jury was faced with more than one element which it could have determined that the prosecution did not prove beyond a reasonable doubt. 936 F.2d at 1329. The fact that one element was the same in two separate counts was not enough to bar prosecution based upon collateral estoppel. *Id.* In this case, two elements needed to be proven, a criminal homicide during a felony, both were previously litigated and determined in the first trial.

[50] Furthermore, the court finds unconvincing the People's arguments as to the dual-track theory. The jury was free to consider both scenarios when determining whether San Nicolas was guilty of homicide in the First Charge, First Count as well as the Second count; however, it found San Nicolas not guilty of all types of criminal homicide. Although the *Lovejoy* court chose to distinguish situations where inconsistencies lay between different counts and not within the same count, this court does not embrace the same philosophy. Unlike the law of this jurisdiction, Ohio's felony murder statute provides that the intent to commit the underlying felony, as prescribed by statute, provides the inference or supplies the intent for the resulting murder, occurring either during or as a result of the felony. *Lovejoy,* 683 N.E.2d at 455. The jury was instructed, under Guam law, that in order to find aggravated murder under Count 2, it must also find that San Nicolas possessed the requisite intent to commit felony child abuse and a criminal homicide, almost as if they were two separate crimes or charges.[14] 9 GCA § 16.30.

[14]Although illogical, the interpretation is based upon an ill-conceived statutory scheme. *See generally People v. Mikel*, Crim. No. 92-00114A, 1993 WL 470410 (D. Guam App. Div. Oct. 12, 1993); *People v. Angoco,* Crim. No. CR95-00094A, 1996 WL 875777 (D. Guam App. Div. Oct. 16, 1996).

[51] The fact of the matter is that the People often charge out offenses, some of which are already subsumed within others. The People attempt to zealously represent the people of Guam, and in doing so will prosecute defendants for any and all crimes which they believe the evidence supports. In turn, the court has some obligation to ensure LIOs are presented to the jury only if the evidence also supports their inclusion. The effect can cause a defendant to be tried and convicted more than once for essentially the same crime; however, the practical effect of such "duplicative" convictions is either nullified in sentencing or sentencing is enhanced in some manner, depending upon the situation. Ultimately, "we do not believe that the Government should also have the opportunity to hone its presentation on those issues which have already been decided against it. We fear that 'the Government, with its vastly superior resources, might wear down the defendant, so that even though innocent he may be found guilty.'" *Blailin* 977 F.2d at 277-78. (citations omitted). Although it is not this court's place to speculate as to the jury's thoughts or rationale, in some situations, such as this, it is clear that the jury has already spoken. In this case, the issue which the defendant seeks to foreclose from prosecution is one that has been previously litigated and decided in the first trial and are thereby barred from being reprosecuted based upon the doctrine of collateral estoppel.

III. IMPLIED ACQUITTAL

[52] To provide additional support for the bar from prosecution of Agg. Murder, Count 2, the defendant argues that the trial court erred in not finding there was an implied acquittal or that double jeopardy exists. However, given the court's findings on the collateral estoppel issue, we need not examine San Nicolas' additional arguments at this time.

CONCLUSION

[53] The lack of a final judgment in this matter precludes this court's jurisdiction over San Nicolas' cross-appeal. Therefore, the cross-appeal is hereby dismissed.

[54] Additionally, having examined the merits of the People's appeal, the court has determined that collateral estoppel bars prosecution of Agg. Murder, Count 2. In so ruling, the court need not address San Nicolas' additional two arguments to uphold the trial court's ruling. Therefore, by affirming the trial court's ruling, this court determines that it lacks jurisdiction to hear this appeal. Accordingly, the People's appeal is also dismissed.

PETER C. SIGUENZA
Chief Justice

BENJAMIN J.F. CRUZ
Associate Justice