FILED

SUPREME COURT

IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellant,

v.

JOHN A. RIOS AND CARL T. C. GUTIERREZ,
Defendants-Appellees.

Supreme Court Case No.: CRA07-003
Superior Court Case No.: CF0401-05

OPINION

Cite as: 2008 Guam 22

Appeal from the Superior Court of Guam
Argued and submitted on July 3, 2007
Hagåtña, Guam

Appearing for Plaintiff-Appellant:
William Bischoff, *Esq.*
Office of the Attorney General
General Crimes Division
287 W O'Brien Dr.
Hagåtña, GU 96910

Appearing for Defendants-Appellees:
F. Randall Cunliffe, *Esq.*
Cunliffe & Cook
210 Archbishop Flores St.
Hagåtña, GU 96910

Michael F. Phillips, *Esq.*
Phillips & Bordallo
410 W O'Brien Dr
Suite 102
Hagåtña, GU 96910

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BEFORE: ROBERT J. TORRES, Presiding Justice;[1] ROBERT G.P. CRUZ, Justice *Pro Tempore*; EDWARD MANIBUSAN, Justice *Pro Tempore*.

TORRES, J.:

[1] Plaintiff-Appellant People of Guam ("the People") appeal from the trial court's decision to dismiss a criminal indictment against Defendants-Appellees John A. Rios and Carl T.C. Gutierrez ("Defendants"). Prior to the dismissal, an earlier criminal indictment had also been dismissed, and the People had appealed to this court. Soon after, the People voluntarily dismissed their appeal and decided instead to file a revised complaint against Defendants. A second indictment ensued. The trial court interpreted 8 GCA § 130.20(b) to mean that a criminal action, once dismissed and subsequently appealed, cannot then be refiled against a defendant. We interpret 8 GCA § 130.20(b) more narrowly and conclude that the bar against refiling an action applies only when the government has appealed from a statutory *nolle prosequi* dismissal or similar order terminating the action. Because the original indictment in the present case was simply dismissed for failing to allege that a crime had occurred, and because such dismissals are not appealable under 8 GCA § 130.20(a)(5), refiling of a new indictment after appeal would not be barred by 8 GCA § 130.20(b). The dismissal is therefore reversed.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] A grand jury returned a sealed indictment ("first indictment") charging Defendants with nine related theft offenses involving the Government of Guam Retirement Fund. A few weeks later, the trial court issued a Decision and Order which dismissed without prejudice five charges of the first indictment. The court found that, as a matter of law, the People could not show that

[1] Justice Torres assumed the title of Chief Justice prior to the issuance of this Opinion.

"Defendant Gutierrez received property to which he was not privileged to infringe," which resulted in the omission of "a necessary element of the *Defined Contributions* charges." Appellant's Excerpts of Record for CRA05-008 ("CRA05-008 ER"), tab 35 at 4 (Dec. & Order, July 20, 2005) (emphasis in original). After considering both parties' motions for reconsideration, the court issued a Decision and Order dismissing the remaining four charges against the Defendants without prejudice.

[3] The People then filed an appeal to this court. A few days later, the trial court entered a Judgment confirming its earlier Decision and Order. Subsequently, the People moved to voluntarily dismiss its appeal, which this court granted.

[4] Two months later, the People revised their complaint and refiled the charges against Defendants. A grand jury eventually returned a superseding indictment ("second indictment"), charging Defendants with twenty-one related theft offenses involving the Government of Guam Retirement Fund. Defendants moved to dismiss pursuant to 8 GCA § 130.20(b), arguing that because an appeal had been taken, the charges could not be refiled against Defendants. On February 10, 2006, the trial court agreed and dismissed all but two of the charges in the second indictment. The People filed a motion for reconsideration on February 15, 2006, which was denied on March 12, 2007.

[5] The People filed a Notice of Appeal on March 16, 2007.

II. JURISDICTION

[6] This court has jurisdiction to hear appeals from the Superior Court of Guam pursuant to 48 U.S.C. § 1424-1(a)(2) (Westlaw 2008) and 7 GCA § 3107(a). The parties assume that the People are authorized to bring this appeal under 8 GCA § 130.20(a), which provides that "[a]n appeal may be taken by the government from . . . [a]n order or judgment dismissing or otherwise

terminating the action before the defendant has been placed in jeopardy or where the defendant has waived jeopardy." 8 GCA § 130.20(a) (2005). However, as this opinion will explain in more detail below, the present appeal is authorized under 48 U.S.C. § 1493(a) rather than 8 GCA § 130.20(a)(5). Title 48 U.S.C. § 1493(a) allows the government to appeal from "a decision, judgment, or order of a trial court dismissing an indictment or information as to any one or more counts, except that no review shall lie where the constitutional prohibition against double jeopardy would further prosecution." 48 U.S.C. § 1492(a). Because the Defendants' case is still at the indictment stage, jeopardy has not yet attached. *See People v. Manila*, 2005 Guam 6 ¶ 6 n.4 (reciting the rule that jeopardy does not attach until the jury is empanelled in a jury trial or the first witness is sworn in a bench trial). We therefore find that this court has jurisdiction to hear the present appeal.

[7] The Notice of Appeal was filed on March 16, 2007, more than ten days after the order dismissing the second indictment, which was entered into the docket on February 10, 2006. *See* Guam R. App. Proc. ("GRAP") 4(b)(1)(A) (notice of appeal in criminal cases must be filed within ten days of the order or judgment appealed). However, the People did move for reconsideration on February 15, 2006, which, under the rule for *civil* appeals, would have tolled the time for appeal until the motion was decided on March 12, 2007. *See* GRAP 4(a)(4)(A). The federal courts, interpreting the substantially similar federal rules, have found this practice to be acceptable. "Although a motion for reconsideration of a district court order in a criminal action is not expressly authorized by the Federal Rules of Criminal Procedure, the Supreme Court has held that the timely filing of such a motion in a criminal action tolls the time for filing a notice of appeal and the time begins to run anew following disposition of the motion." *United States v.*

Vicaria, 963 F.2d 1412, 1413-14 (11th Cir. 1992). Applying the same reasoning to our own rules, we find that the People timely filed their Notice of Appeal on March 16, 2007.

III. STANDARD OF REVIEW

[8] We review *de novo* the Superior Court's legal conclusions. *People v. Farata*, 2007 Guam 8 ¶ 14. "Generally, a reviewing court considers a trial court's ultimate ruling on a motion to dismiss charges under an abuse-of-discretion standard, but where the issues present purely legal questions, the standard of review is *de novo*." *People v. King*, 852 N.E.2d 559, 560 (Ill. App. Ct. 2006). Because the Superior Court's dismissal was based on the legal determination that 8 GCA § 130.20(b) prevented the second indictment, we will conduct a *de novo* review. *See United States v. La Cock*, 366 F.3d 883, 888 (10th Cir. 2004) ("[I]f . . . the court dismisses the indictment based on its interpretation of the governing statutes, that is a legal determination we review de novo.").

IV. DISCUSSION

[9] Title 8 GCA § 130.20 grants the government the right to appeal certain orders that arise during criminal prosecutions. 8 GCA § 130.20 (2005). Defendants argue that the appeal taken by the government in the present case is from "[a]n order or judgment dismissing or otherwise terminating the action before the defendant has been placed in jeopardy or where the defendant has waived jeopardy." 8 GCA § 130.20(a)(5). Title 8 GCA § 130.20(b) states that when such an appeal is "taken" pursuant to 8 GCA § 130.20(a)(5), the prosecutor "shall be prohibited from refiling the action which was appealed." 8 GCA § 130.20(b). Here, the government appealed an order dismissing the first indictment, but voluntarily dismissed the appeal several months later and filed a second, but similar, complaint against Defendants. The question before this court is whether the filing of the second complaint is barred by 8 GCA § 130.20(b).

[10] The government argues that subsection 130.20(b) would not apply because the appeal was voluntarily dismissed and therefore not "taken" pursuant to the language of 8 GCA § 130.20(b). The government also argues that the second indictment is sufficiently different from the first to constitute a separate "action" not subject to subsection 130.20(b). Defendants argue that the appeal was "taken" when it was filed and that the second indictment was similar enough to the first to be considered the same "action" for purposes of subsection 130.20(b). We do not find it necessary to reach the merits of these arguments. Instead, we conclude that dismissal of the first indictment was not appealable at all under 8 GCA § 130.20(a)(5), and therefore the proscription against refiling in 8 GCA § 130.20(b) does not apply.

[11] In reaching this conclusion, we must first examine the nature of the dismissal of the first indictment. The dismissal was apparently the result of the prosecution's failure to show that Gutierrez violated the law. *See* CRA05-008 ER, tab 35 at 4 (Dec. & Order). More specifically, the court found that the indictment and subsequent memoranda failed to show that Gutierrez was not "privileged to infringe" on retirement account funds by retroactively enrolling in the Defined Contributions Plan. *Id.*; *see also* 9 GCA § 43.10(e) (2005). Although nothing in the record indicates what statutory authority the court relied upon in dismissing the indictment, the dismissal most likely falls under 8 GCA § 45.80:

> **§ 45.80. Procedure Where Probable Cause Shown; Not Shown**
>
> . . . .
>
> (b) *If from the evidence it appears that there is no probable cause to believe that an offense has been committed* or that the defendant committed it, the court shall dismiss the complaint and discharge the defendant. *Such discharge shall not preclude the government from instituting a subsequent prosecution for the same offense.*

8 GCA § 45.80 (2005) (emphasis added).[2] Alternatively, the court may have simply decided as a matter of law that no crime was committed, similar to a demurrer under California law. The court's reference to a "privilege to infringe" suggests that it did not consider the Defendants' activities to be criminal as a matter of law. *See* ER, tab 6 at 1 (Dec. & Order, July 25, 2005). The dismissal of the first indictment is therefore accurately described as an order setting aside an indictment or granting Defendants summary judgment on an indictment. The question is whether a dismissal of this type is appealable under 8 GCA § 130.20(a)(5).

[12] In answering this question, we begin by examining the plain meaning of 8 GCA § 130.20(a)(5), which allows government appeals from "[a]n order or judgment dismissing or otherwise terminating the action." 8 GCA § 130.20(a)(5). *See Sumitomo Constr. Co. v. Gov't of Guam*, 2001 Guam 23 ¶ 17 ("Absent clear legislative intent to the contrary, the plain meaning prevails."). Although the first indictment was dismissed, one cannot say that the dismissal terminated the action. The phrase "or otherwise terminating the action" creates an ambiguity in that "action" might refer to a complete criminal cause of action or only to the subset of charges actually dismissed. For example, only some of the charges in the first indictment were originally

[2] Compare Cal. Penal Code § 995 (Westlaw 2008):

> **§ 995. Grounds; motion to set aside; delay in final ruling**
>
> (a) Subject to subdivision (b) of Section 995a, the indictment or information shall be set aside by the court in which the defendant is arraigned, upon his or her motion, in either of the following cases:
>
> (1) If it is an indictment:
>
> (A) Where it is not found, endorsed, and presented as prescribed in this code.
>
> (B) That the defendant has been indicted without reasonable or probable cause.
>
> (2) If it is an information:
>
> (A) That before the filing thereof the defendant had not been legally committed by a magistrate.
>
> (B) That the defendant had been committed without reasonable or probable cause.
>
> (b) In cases in which the procedure set out in subdivision (b) of Section 995a is utilized, the court shall reserve a final ruling on the motion until those procedures have been completed.

dismissed, and there is a genuine question as to whether 8 GCA § 130.20(a)(5) was intended to provide an avenue of appeal from such partial dismissals. This is because a dismissal of only some of the charges in a criminal complaint does not terminate the action, at least with respect to the remaining charges. *See Anthony v. Super. Ct*, 167 Cal. Rptr. 246, 252 (Ct. App. 1980). In fact, it is not even clear that 8 GCA § 130.20(a)(5) was intended to allow appeals during the pleading or indictment stage at all, since an action might not be considered terminated if the prosecutor can revive it simply by filing an amended complaint. *See* 8 GCA § 45.80 (failure to show probable cause in the complaint does not bar subsequent prosecutions for the same offense).

[13] The fact that the statute is ambiguous requires us to "employ other methods of statutory interpretation" besides simply examining the plain meaning. *Long-Term Credit Bank of Japan v. Super. Ct.*, 2003 Guam 10 ¶ 36. In particular, "our duty is to interpret statutes in light of their terms and legislative intent." *Carlson v. Guam Tel. Auth.*, 2002 Guam 15 ¶ 46 n. 7 (quoting *People v. Flores*, 2004 Guam 18 ¶ 8). We therefore examine the circumstances surrounding enactment of 8 GCA § 130.20, any related or identical statutes in other jurisdictions, and any other relevant documentation for evidence of legislative intent.

A. The Origin of 8 GCA § 130.20

[14] According to the compiler's comments, "[s]ection 130 provides certain basic provisions relating to appeals which have been conformed generally to their federal or California counterparts." 8 GCA § 130.10 (2005), NOTE. The California counterpart to 8 GCA § 130.20 is section 1238 of the California Penal Code. *See* Cal. Penal Code § 1238 (Westlaw 2008). Because of the strong similarities between Cal. Penal Code § 1238 and 8 GCA § 130.20, the Guam statute almost certainly derives from the California one, which makes California case law

useful in its interpretation. *Cf. Zurich Ins. (Guam), Inc. v. Santos*, 2007 Guam 23 ¶ 7 ("California case law is persuasive when there is no compelling reason to deviate from California's interpretation.").

[15] In 1933, section 1238 of the Guam Penal Code set forth when appeals may be taken by the naval government in criminal cases.[3] In 1953, section 1238 was enacted into law by the Guam Legislature unchanged, except for a reference to "government" rather than "naval government." Guam Penal Code § 1238 (1953) (no changes through at least the 1960 Supplement). Guam's 1953 version of section 1238 is nearly identical to the version that existed in California between 1905 and 1935.[4] The only significant difference is that the word "indictment," which appears in subsections 1238(1) and (2), is absent from the former Guam version. *Compare* Guam Penal Code § 1238 (1953), *with* Cal. Penal Code § 1238 (1905).

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[3] In 1933, section 1238 of the Guam Penal Code stated:

> **§ 1238. In what cases by the government.** An appeal may be taken by the naval government:
> 1. From an order setting aside the information;
> 2. From a judgment for defendant on a demurrer to the accusation or information;
> 3. From an order granting a new trial;
> 4. From an order arresting judgment;
> 5. From an order made after judgment, affecting the substantial rights of the naval government.

Guam Penal Code § 1238 (1933), *accord* Guam Penal Code § 1238 (1947).

[4] In 1905, section 1238 of the California Penal Code stated:

> **§ 1238.** An appeal may be taken by the people:
> 1. From an order setting aside the indictment or information;
> 2. From a judgment for the defendant on a demurrer to the indictment, accusation, or information;
> 3. From an order granting a new trial;
> 4. From an order arresting judgment;
> 5. From an order made after judgment, affecting the substantial rights of the people.

Cal. Penal Code § 1238 (1905).

[16] The first major revision was the result of work done by the Guam Law Revision Commission, and in 1977 section 1238 was substantially modified and enacted as 8 GCA § 130.20.[5] *See* Charles H. Troutman, Introduction, *The Criminal Procedure Code and Public Law 12-187* (1977). Most of the changes made by the Law Review Commission in 1977 and 1980 can be traced back to section 1238 of the California Penal Code as it existed in 1970.[6] California

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[5] In 1977, 8 GCA § 130.20 read as follows:

> **§ 130.20. Appeals Allowed by the Government**
>
> (a) An appeal may be taken by the government from any of the following:
> (1) An order granting a new trial.
> (2) An order arresting judgment.
> (3) An order made after judgment, affecting the substantial rights of the government.
> (4) An order modifying the verdict on [sic] finding by reducing the degree of the offense or the punishment imposed.
> (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 (1977).

[6] In 1970, section 1238 of the California Penal Code stated:

> **§ 1238.** (a) An appeal may be taken by the people from any of the following:
> (1) An order setting aside the indictment, information, or complaint.
> (2) An order sustaining a demurrer to the indictment, accusation, or information.
> (3) An order granting a new trial.
> (4) An order arresting judgment.
> (5) An order made after judgment, affecting the substantial rights of the people.
> (6) An order modifying the verdict or finding by reducing the degree of the offense or the punishment imposed.
> (7) An order dismissing a case prior to trial made upon motion of the court pursuant to Section 1385 whenever such order is based upon an order granting the defendant's motion to return or suppress property or evidence made at a special hearing as provided in this code.
> (8) 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) If, pursuant to paragraph (8) of subdivision (a), the people prosecute an appeal to decision, or any review of such decision, it shall be binding upon them and they shall be prohibited from refiling the case which was appealed.

Penal Code subsections 1238(a)(3), (4), (5), (6), and (8) are nearly identical to 8 GCA subsections 130.20(a)(1), (2), (3), (4), and (5) respectively. Significantly, the Guam Legislature did not adopt subsections 1238(a)(1) and (2), which allow appeal from an order setting aside an indictment or granting a defendant summary judgment on an indictment.[7]

[17] Besides the omission of subsections 1238(a)(1) and (2) from the Guam statute, the only other significant difference between Guam's statute and the 1970 California version is the wording of 8 GCA § 130.20(b), which states that "[w]hen an appeal is taken pursuant to [8 GCA § 130.20(a)(5)], the prosecuting attorney shall be prohibited from refiling that action which was appealed." 8 GCA § 130.20(b). Title 8 GCA § 130.20(b) is different from subsection 1238(b) of the California Penal Code in that the latter is triggered only when the government "prosecute[s] an appeal to decision, or any review of such decision . . . ." Cal. Penal Code 1238(b) (Westlaw 2008). Guam's statute simply mentions an appeal being "taken." 8 GCA § 130.20(b). Because 130.20(b) does not apply to the present case, we do not find it necessary to determine the meaning of "taken" or the reasons for the difference in language between the California and Guam statutes.

Cont'd.

> (c) When an appeal is taken pursuant to paragraph (7) of subdivision (a), the court may review the order granting the defendant's motion to return or suppress property or evidence made at a special hearing as provided in this code.

Cal. Penal Code § 1238 (1970).

[7] Later, the Guam Legislature joined California in allowing government appeals from orders to suppress evidence. 8 GCA § 130.20(a)(6) (enacted by Guam Pub. L. 14-147:13 (Dec. 31, 1980)), *compare* Cal. Penal Code § 1238(a)(7) and (c) (1970). The motivation for adding subsection 130.20(a)(6) had nothing to do with conforming to California practice, however. *See People v. D. Ct. (James)*, 641 F.2d 816, 817-20 (9th Cir. 1980). Apparently, defendants in Guam had developed a habit of delaying trial by petitioning the District Court for writs of mandamus when evidence was not suppressed. *Id.* In effect, the availability of the writ had become an appeal of right. In response, the Legislature repealed former 8 GCA § 65.17 (which authorized any "party" to apply for a writ of mandamus) and enacted subsection 130.20(a)(6) to allow only the government to make such "appeals." *Id.* While the District Court initially declared the repeal invalid, the Ninth Circuit affirmed that the Guam Legislature had acted within its powers in restricting the District Court's appellate jurisdiction. *Id.*

B. California's Interpretation of Section 1238

[18] Next, we look to the case law interpreting section 1238 of the California Penal Code. "Generally, when a legislature adopts a statute which is identical or similar to one in effect in another jurisdiction, it is presumed that the adopting jurisdiction applies the construction placed on the statute by the originating jurisdiction." *Sumitomo Constr. Co. v. Zhong Ye, Inc.*, 1997 Guam 8 ¶ 9 (quoting *Sutherland's Stat. Const.* § 52.01 (5th ed.)); *see also Torres v. Torres*, 2005 Guam 22 ¶ 33; *People v. Super. Ct. (Laxamana)*, 2001 Guam 26 ¶ 8. One must assume that the Guam Legislature understood the case law interpreting subsections 1238(a)(3), (4), (5), (6), and (8) of the California Penal Code and therefore approved of California's interpretation when adopting them as subsections 130.20(a)(1) through (5) of Title 8. However, California's interpretation is "only persuasive and does not bind or control" our analysis. *Sumitomo Constr. Co.*, 1997 Guam 8 ¶ 7 (quoting *Sutherland's Stat. Const.* § 52.01 (5th ed.)).

[19] In California, the government has long had the right to appeal an order setting aside an indictment, information, or complaint. Cal. Penal Code § 1238(a)(1) (enacted 1872). There is a similar long history of allowing appeals from demurrers to the indictment or information. Cal. Penal Code § 1238(a)(2) (enacted 1897). What is relatively new is subsection 1238(a)(8), which has allowed appeals from "an order or judgment dismissing or otherwise terminating the action" before jeopardy attaches. Cal. Penal Code § 1238(a)(8) (enacted 1968). One question is why the California Legislature felt it necessary to add this additional subsection to the statute.

[20] According to *Anthony v. Superior Court*, the California Legislature enacted subsection 1238(a)(8) in response to earlier cases denying government appeals from certain types of orders dismissing a criminal case. 167 Cal. Rptr. 246, 252 (Ct. App. 1980). One such case is *People v. Valenti*, where the California Supreme Court considered an appeal of a criminal case that was

dismissed because of an "illegal arrest." 316 P.2d 633, 635 (Cal. 1957), *disapproved on other grounds in People v. Sidener*, 375 P.2d 641, 642 (Cal. 1962). The court of *Valenti* characterized the dismissal at issue as one made pursuant to Cal. Penal Code § 1385, which allows dismissals by the judge's own motion or by application of the prosecuting attorney "in furtherance of justice." *Id.* at 636. At the time that *Valenti* was decided, subsection 1238(a)(8) had not yet been enacted. The court reasoned that the government had no right of appeal because a dismissal made pursuant to section 1385[8] was not one of the avenues of appeal enumerated in former section 1238. *Id.*

[21] The power to dismiss under section 1385 is like the common law power of *nolle prosequi* but vested in the court rather than in the prosecuting attorney. *See People v. Bordeaux*, 273 Cal. Rptr. 717, 721 (Ct. App. 1990). *Nolle prosequi*, which translates into "unwilling to prosecute," was a power given to prosecutors which allowed them discretion to dismiss a criminal case. *People v. Gutierrez*, 2005 Guam 19 ¶ 28 n.3. Before the enactment of subsection 1238(a)(8) in 1968, dismissals made under the statutory *nolle prosequi* power of section 1385 could not be appealed in California. *Valenti*, 316 P.2d at 636.

[22] Later, "paragraph (8) was added to subdivision (a) to permit the People to appeal from section 1385 dismissals and the like by the trial court . . . ." *Anthony*, 167 Cal. Rptr. at 252. In

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[8] The relevant part of section 1385 of the California Penal Code reads as follows:

> **§ 1385. Dismissal on judge or magistrate's own motion or application of prosecuting attorney; statement of reasons; ground of demurrer; authority to strike prior conviction of serious felony for purposes of enhancement of sentence.**
>
> (a) The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons for the dismissal must be set forth in an order entered upon the minutes. No dismissal shall be made for any cause which would be ground of demurrer to the accusatory pleading.

Cal. Penal Code § 1385(a) (Westlaw 2008).

Anthony, the court considered the defendant's argument that subsection 1238(b) also prohibits refiling of complaints appealed under subsection 1238(a)(1), which allows appeals from orders setting aside an indictment, information, or complaint. *Id.* The defendant argued that by enacting subsections 1238(a)(8) and (b) the California Legislature intended to make *all* types of dismissals subject to the ban against refiling complaints after appeal. *Id.* The court disagreed, and instead concluded that "there is a material difference between an order setting aside an information or indictment and an order dismissing or otherwise terminating a criminal action." *Id.*; *see also People v. Watson*, 193 Cal. Rptr. 849, 851 (Ct. App. 1983). The court observed that an order setting aside an information does not necessarily "terminate" an action because, for example, other charges may be left standing. *Anthony*, 167 Cal. Rptr. at 252. In contrast, a successful motion based on section 1385 effectively dismisses the action. *Id.* "These distinctions provide a rational basis for the difference in treatment accorded 1238(a)(1) and 1238(a)(8) appeals . . . ." *Id.* The difference in treatment between a subsection 1238(a)(1) appeal and a subsection 1238(a)(8) appeal is that the former does not prevent the refiling of charges after appeal. Cal. Penal Code § 1238(b). As a result, the court decided that an appeal of an order setting aside an indictment did not prevent the prosecutor from later refiling a substantially similar complaint. *Id.* at 248, 253.

[23] Thus, it appears that subsection 1238(a)(8) was enacted for the limited purpose of allowing the government to appeal from *nolle prosequi* dismissals or similar orders terminating the action. This conclusion also helps to explain the rationale for not allowing the charges to be refiled after appeal. On the one hand, a dismissal *nolle prosequi* is "a judicial determination in favor of accused and against his conviction, but it is not an acquittal, nor is it equivalent to a pardon." 22A C.J.S. *Criminal Law* § 419, at 1 (1989). Thus a *nolle prosequi* dismissal is *not*

equivalent to an acquittal, *Gutierrez*, 2005 Guam 19 ¶ 22, which would automatically prevent refiling of the complaint under the Fifth Amendment prohibition against double jeopardy. U.S. Const. amend. V; 48 U.S.C. § 1421b(d) (Westlaw 2008). On the other hand, a section 1385 dismissal shares many similarities with an acquittal in that the court has determined that the defendant cannot be convicted given the state of the case.[9] By enacting subsection 1238(b), the California Legislature ensured that a *nolle prosequi* dismissal followed by an unsuccessful appeal is *effectively identical* to an acquittal because the prosecutor is then barred from refiling the charges. *See* Cal. Penal Code § 1238(b). This appears to be the rationale for subsection 1238(b)—a *nolle prosequi* dismissal followed by an unsuccessful appeal indicates that the prosecution has no viable case, even after that case has been fully laid out before the court. In contrast, a dismissal setting aside an indictment or granting a defendant summary judgment on an indictment only indicates that the prosecution has made an insufficient showing at the pleadings stage. "These distinctions provide a rational basis for the difference in treatment accorded 1238(a)(1) and 1238(a)(8) appeals . . . ." *Id. Anthony*, 167 Cal. Rptr. at 252.

C. Application of the California Interpretation to 8 GCA § 130.20

[24] Assuming the Guam Legislature intended to adopt the California interpretation of California Penal Code subsections 1238(a)(8) and (b), it must have contemplated that its substantially similar statute, 8 GCA § 130.20(a)(5) and (b), would only apply to permit appeals

[9] Some examples of section 1385 dismissals will help to illustrate the type of cases where this statutory *nolle prosequi* power has been invoked. In *People v. Chacon* the prosecution admitted that it could not proceed against the novel defense of "entrapment by estoppel" asserted by defendant. 150 P.3d 755, 760 (Cal. 2007). The result was a section 1385 dismissal followed by a subsection 1238(a)(8) appeal. *Id.* In *People v. Gazali*, the government appealed a ruling on the inadmissibility of a confession which effectively ended the prosecution and resulted in a section 1385 dismissal. 279 Cal. Rptr. 547, 549 (Ct. App. 1991). Similarly, the court of *People v. Yarbrough* heard an appeal of a section 1385 dismissal resulting from the trial court's unwillingness to allow an in-court witness identification. 278 Cal. Rptr. 703, 703-04 (Ct. App. 1991). The common theme of all these cases is that the section 1385 dismissal is essentially an admission that the defendant could not be successfully prosecuted given the admissible evidence in the case.

from statutory *nolle prosequi* dismissals or similar orders terminating the action. *See Anthony*, 167 Cal. Rptr. at 252. In Guam, the statutory *nolle prosequi* power was formerly found in section 1385 of the Guam Penal Code, which was adopted directly from California. *Compare* Guam Penal Code § 1385 (1953) *with* Cal. Penal Code § 1385. The *nolle prosequi* power now appears in 8 GCA § 80.70, which "continues the substance of a portion of . . . former § 1385." 8 GCA § 80.70, NOTE; *see also Gutierrez*, 2005 Guam 19 ¶ 28 n.3 (interpreting section 80.70 as a statutory *nolle prosequi* power). The relevant text of 8 GCA § 80.70 is as follows:

> **§ 80.70. When Prosecutor, Defendant, Court May Dismiss.**
>
> (a) The prosecuting attorney may with leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant. The prosecuting attorney shall file a statement of his reasons for seeking dismissal when he applies for leave to file a dismissal and where leave is granted the court's order shall set forth the reasons for granting such leave.

8 GCA § 80.70(a) (2005). Once a case is dismissed pursuant to 8 GCA § 80.70, the prosecutor cannot refile charges once an appeal has been "taken." 8 GCA § 130.20(b). Because we conclude that 8 GCA § 130.20(a)(5) does not apply to the present appeal, we need not decide whether an appeal that is voluntarily dismissed has been "taken" under 8 GCA § 130.20(b).

[25] Even if the Superior Court has not always explicitly invoked its power to dismiss under 8 GCA § 80.70, an examination of our case law reveals that 8 GCA 130.20(a)(5) appeals almost always involve dismissals that completely terminate the government's ability to prosecute the criminal action. For example, in *People v. Gutierrez*, the government appealed a dismissal with prejudice for failure to provide exculpatory evidence and to provide a speedy trial. 2005 Guam 19 ¶¶ 7-11. In *People v. Manila* the government appealed a dismissal based on a determination that a DUI charge amounted to double jeopardy. 2005 Guam 6 ¶¶ 5-6. In *People v. Guerrero*, the government appealed a dismissal after the Superior Court found that the defendant's right to

free exercise of his Rastafarian religion was infringed by statutes forbidding importation of marijuana. 2000 Guam 26 ¶¶ 2-5, *reversed by Guam v. Guerrero*, 290 F.3d 1210 (9th Cir. 2002). And in *People v. Quinata*, the Appellate Division of the District Court allowed a government appeal from a dismissal for lack of jurisdiction where the defendant was in juvenile court and was eighteen years old at the time of his first appearance. 1982 WL 30546, at *1 (D. Guam App. Div. 1982). The common theme of all these cases is that the dismissal appealed from effectively terminated the criminal action.

[26] An exception to this rule is *People v. Pak*, where this court found jurisdiction to hear a government appeal from a dismissal of one of two charges in a criminal complaint. 1998 Guam 27 ¶¶ 3-6. However, the court of *Pak* relied on California case law stating that "[s]ection 1238, subdivision (a)(1) [of the California Penal Code], has been interpreted as authorizing the People's appeal from an order dismissing some but not all counts of a multi-count information." *Id.* ¶ 6 (quoting *People v. Davis*, 156 Cal. Rptr. 395, 398 (Ct. App. 1979)). Because 8 GCA § 130.20 does not include a subsection analogous to subsection 1238(a)(1) of the California Penal Code, our previous reliance on California case law was not justified. Insofar as *Pak* stands for the proposition that 8 GCA § 130.20(a)(5) authorizes government appeals from every dismissal of an indictment or complaint, we disagree and now clarify our prior decision.

[27] "[S]ection 130.20 is a jurisdictional statute which will be strictly construed." *People v. Super. Ct. (Bruneman)*, 1998 Guam 24 ¶ 9. The deliberate omission of California Penal Code subsections 1238(a)(1) and (a)(2) from 8 GCA § 130.20 means that section 130.20 does not authorize government appeals from orders setting aside and indictment or granting a defendant summary judgment on an indictment. *See also* Guam Pen. Code §§ 1238(a)(1) & (2) (1953). In the absence of additional statutory authority, a complaint, indictment, or information dismissed

at the pleading stage would not be appealable at all under 8 GCA § 130.20(a)(5) unless all charges are dismissed pursuant to a statutory *nolle prosequi* order or a similar order terminating the action. As we will see, however, the United States Congress has provided through 48 U.S.C. § 1493 that the government may appeal "a decision, judgment, or order of a trial court dismissing an indictment or information as to any one or more counts," despite the fact that the Guam Legislature has provided the government with a narrower right of appeal. 48 U.S.C. § 1493(a) (Westlaw 2008).

D. The Effect of 48 U.S.C. § 1493 on Guam Government Appeals

[28] In 1984, the Organic Act was amended to add 18 U.S.C. § 1493,[10] which gives the government a right to appeal under certain circumstances:

> **§ 1493. Prosecution; authorization to seek review; local or Federal appellate courts; decisions, judgments or orders.**
>
> The prosecution in a territory or Commonwealth is authorized-- *unless precluded by local law*--to seek review or other suitable relief *in the appropriate local* or Federal *appellate court*, or, where applicable, in the Supreme Court of the United States from--
>
> > (a) a decision, judgment, or order of a trial court dismissing an indictment or information as to any one or more counts, except that no review shall lie where the constitutional prohibition against double jeopardy would further prosecution;
> >
> > . . . .

48 U.S.C. 1493 (Westlaw 2008) (emphasis added); *see also Natividad*, 2005 Guam 28 ¶ 11. The

[10] The history of section 1493 is described in *Virgin Island v. Mills*, 935 F.2d 591, 595-97 (3d Cir. 1991). Section 1493 was enacted to overrule the Ninth Circuit decision in *People v. Okada*, 694 F.2d 565 (9th Cir. 1982), where the court declined to assert jurisdiction over a Guam government appeal of an order dismissing an indictment. *Mills*, 935 F.2d at 596. The court of *Okada* had determined that the federal statute granting the government the right to appeal, 18 U.S.C. § 3731, "does not authorize appeals by territorial governments." 694 F.2d at 567 n.3. In response, Congress enacted section 1493 using language identical to the then-current version of section 3731. *Mills*, 935 F.2d at 595. Oddly enough, Congress also amended section 3731 seven days later to allow appeal from an order granting a new trial. *Id.* at 594-95 & n.4. That amendment does not appear in section 1493.

language authorizing appeal by the government "unless precluded by local law" suggests that the Guam Legislature is empowered to explicitly limit those avenues of government appeal enumerated under 48 U.S.C. § 1493. Although Guam law does not provide for appeals from orders setting aside an indictment or granting a defendant summary judgment on an indictment, nothing in 8 GCA § 130.20 explicitly disallows such appeals. We therefore conclude that the government may appeal in any criminal case where a court makes "a decision, judgment, or order . . . dismissing an indictment or information as to any one or more counts . . . ." 48 U.S.C. § 1493(a). Moreover, with the exception of statutory *nolle prosequi* dismissals and other orders terminating the action, there would be no bar against refiling such an indictment or information once dismissed, even if the government pursued an appeal.[11]

E. The Second Indictment was Improperly Dismissed

[29] The first indictment was dismissed by an order setting aside an indictment or granting Defendants summary judgment on an indictment. As a result, the dismissal would have been appealable under California Penal Code subsection 1238(a)(1) or (a)(2) but not under subsection 1238(a)(8). *See Anthony*, 167 Cal. Rptr. at 252. Because the Guam Legislature chose to include only 1238(a)(8) of the California Penal Code as 8 GCA § 130.20(a)(5), and to exclude subsections 1238(a)(1) and (a)(2) from our code, appeal of the dismissal of the first indictment would not be permitted under the Guam statutes. Instead, the appeal would have been allowed

[11] We are conscious of the possibility that a defendant might be forced to simultaneously defend against an appeal and an amended indictment under this rule. However, the possibility of harassment is foreclosed by the rule of *Anderson v. Superior Court*, which states that:

> [T]he People should elect as soon as feasible between maintaining the appeal or proceeding under the new accusatory pleading. At the latest, this election should occur either when the new accusatory pleading withstands a motion under section 995 [of the California Penal Code concerning dismissals for improper complaints or lack of probably cause] or at the time of arraignment for plea, whichever first occurs.

428 P.2d 290, 292 (Cal. 1967).

under 48 U.S.C. § 1493, and the statutory bar against refiling charges after appeal found in 8 GCA § 130.20(b) would not have applied. Therefore, in the present case, the government was authorized both to file an appeal and to refile the second indictment with substantially similar charges later on. As a result, the Superior Court incorrectly applied the law in dismissing the second indictment.

V. CONCLUSION

[30] We adopt California's narrow interpretation as to what constitutes an order "dismissing or otherwise terminating an action." 8 GCA § 130.20(a)(5). We conclude that 8 GCA § 130.20(a)(5) did not authorize government appeal from dismissal of the first indictment, which was legally equivalent to an order setting aside an indictment or granting a defendant summary judgment on an indictment. The dismissal was appealable under 48 U.S.C. § 1493(a) rather than 8 GCA § 130.20(a)(5), and the prohibition against refiling of charges found in 8 GCA § 130.20(b) does not apply. The second indictment was therefore improperly dismissed, and the Superior Court's dismissal must be **REVERSED**. Because the Superior Court has not yet ruled on the merits of the second indictment, we decline to do so here.

ROBERT G.P. CRUZ
ROBERT G.P. CRUZ
Justice, *Pro Tempore*

EDWARD MANIBUSAN
EDWARD MANIBUSAN
Justice, *Pro Tempore*

ROBERT J. TORRES
ROBERT J. TORRES
Presiding Justice