IN THE SUPREME COURT OF GUAM

THE PEOPLE OF GUAM,
Plaintiff-Appellant,

v.

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

Supreme Court Case No. CRA10-007
Superior Court Case No. CF0401-05

OPINION

Cite as: 2011 Guam 6

Appeal from the Superior Court of Guam
Argued and submitted November 4, 2010
Hagåtña, Guam

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BEFORE: ROBERT J. TORRES, Chief Justice; MIGUEL S. DEMAPAN, Justice *Pro Tempore*; JOHN A. MANGLONA, Justice *Pro Tempore*.[1]

TORRES, C. J.:

[1] The trial court issued two pre-trial orders, collectively dismissing all charges against Defendants-Appellees Carl T.C. Gutierrez ("Gutierrez") and John A. Rios ("Rios").[2] The People of Guam ("People") appeal, arguing that the orders incorrectly applied the "law of the case" doctrine and that the trial court committed clear error in its earlier decisions which established the "law of the case." Gutierrez argues, additionally, that the People failed to bring a timely appeal of the dismissal of the charges against him. For the reasons set forth below we affirm the orders of the trial court, and remand the case for further proceedings.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] This is the second time the Guam Supreme Court has considered this case. The factual and procedural history of the case up to December 17, 2008 was set down by the court in *People v. Rios*, 2008 Guam 22 ("*Rios I*") and will be reproduced here:

> 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 [filed July 20, 2005,] 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 "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." After considering both parties' motions for reconsideration, the court issued a Decision and Order [on July 25, 2005,] dismissing the remaining four charges against the Defendants without prejudice.
>
> 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.

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

[2] Collectively, Gutierrez and Rios will be denominated "the Appellees."

> Subsequently, the People moved to voluntarily dismiss its appeal, which this court granted.
>
> 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.

Rios I, 2008 Guam 22 ¶¶ 2-4 (citation and emphasis omitted).

[3] The *Rios I* court ruled that dismissal of the second indictment was error and that the bar to re-indictment found in 8 GCA § 130.20(b) was inapplicable. *Id.* ¶ 30. The *Rios I* court stated specifically that "[b]ecause the Superior Court has not yet ruled on the merits of the second indictment, we decline to do so here." *Id.* The case was remanded to the trial court. The Appellees' petition for rehearing was later denied by this court.

[4] Summons issued for both Appellees, who were arraigned in March of 2010. Gutierrez asserted his speedy trial rights and trial was scheduled for May of 2010.

[5] Rios filed a pre-trial motion to dismiss the second indictment, incorporating by reference the orders dismissing the original indictment against the Appellees entered by the trial court on July 20, 2005 and July 25, 2005. Gutierrez joined in the motion. The People filed an opposition, and Rios filed a Reply. Gutierrez joined in the Reply filed by Rios and also filed his own Reply. The trial court issued an order on May 8, 2010 ("May 2010 Dec. & Order"), dismissing counts one, two, six, seven, nine, ten, eleven, fifteen, sixteen, seventeen, and twenty-one of the second indictment.

[6] The parties all filed motions for reconsideration. The People requested alternatively that they be allowed to amend the indictment. Each Appellee opposed the People's motion for

reconsideration. On June 7, 2010, the trial court issued a second order confirming its May 2010 Dec. & Order and also dismissing all the remaining charges of the second indictment. The trial court determined that:

> Because the [first] CF0216-04 Indictment and the [second] CF0401-05 Superseding Indictment involve the same issues and facts, the CF0401-05 Superseding Indictment is subject to the law of the case rendered in the original CF0216-04 Indictment.
>
> . . . .
>
> Without reconsidering the July 20, 2005 and July 25, 2005 Orders, the Court, under the law of the case doctrine, is precluded from reconsidering its determination that the People could not prove that Defendant Gutierrez was not entitled to infringe upon the property of the Fund.

ER at 36-37 (Second Amended Dec. & Order, June 7, 2010 ("June 2010 Dec. & Order")). The People filed a notice of appeal on June 18, 2010.

II. JURISDICTION

[7] This is an appeal from an order filed by the trial court on June 7, 2010, dismissing all charges against the Appellees. The June 2010 Dec. & Order discusses a prior order entered by the trial court on May 8, 2010. This court has jurisdiction over this appeal under 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 111-382 (2011)); 7 GCA §§ 3107 and 3108 (2005); and 8 GCA § 130.20(a)(5) (2005). Title 8 GCA § 130.20(a)(5) allows the government to take an appeal from "[a]n order or judgment dismissing or otherwise terminating the action before the defendant has been placed in jeopardy . . . ." 8 GCA § 130.20(a)(5).

III. STANDARD OF REVIEW

[8] Courts review dismissals of indictments on purely legal grounds under a *de novo* standard. *See Rios I*, 2008 Guam 22 ¶ 8.

IV. ANALYSIS

A. Timeliness of the People's Appeal

[9] As a threshold issue, Gutierrez argues that the Notice of Appeal filed by the People was not timely as to the trial court's dismissal of certain charges against him. Appellee Gutierrez's Br. ("Gutierrez Br.") at 7-8 (Sept. 28, 2010) ("Not having requested the court to reconsider certain of the charges, an appeal of those matters is outside the time for filing a Notice of Appeal . . . therefore, the appeal from these matters contained in the first dismissal, except the First Charge should be rejected."). This argument is based on the grounds that the People did not seek reconsideration of the portions of the May 2010 Dec. & Order which dismissed certain charges against Gutierrez.[3] Specifically, the motion to reconsider did not address (1) the dismissals of some of the charges against Gutierrez, or (2) one of the trial court's legal grounds for the dismissals of the charges against Gutierrez. *Id.* at 6-7.

[10] The People respond that "the People's appeal from the trial court's decision of June 7, 2010, constitutes an appeal of the dismissal of all the charges in indictment." Appellant's Reply Br. at 11 (Oct. 27, 2010). In support of this argument, the People rely on the observation that the June 2010 Dec. & Order (ruling on the various motions for reconsideration in the case) "explicitly revisited" the trial court's previous justifications for dismissing each of the charges disposed of in the May 2010 Dec. & Order. Reply Br. at 10-11. The People also argue that the trial court erred by failing to "read the indictment as a whole" as required under our previous decision in *People v. Jones*, 2006 Guam 13 ¶ 12. Reply Br. at 6.

[3] The trial court's May 2010 Dec. & Order dismissed counts one, two, six, seven, nine, ten, eleven, fifteen, sixteen, seventeen, and twenty-one of the second Indictment; however, in the trial court's June 2010 Dec. & Order, the court noted that the People only sought reconsideration of the dismissal of count one and "did not move for reconsideration of the dismissal of the other Charges dismissed in the May 8, 2010 Order." ER at 33 (June 2010 Dec. & Order).

[11] We have previously recognized that a defective notice of appeal may deprive this court of jurisdiction to hear an appeal. *See Sananap v. Cyfred, Ltd.*, 2008 Guam 10 ¶ 10 ("Thus, if [a] defective Notice of Appeal rises to the level of a jurisdictional[4] defect, dismissal is mandatory."). It is therefore prudent for the court to resolve this potentially dispositive issue (at least for the charges against Gutierrez) prior to considering the other arguments made by the parties in this case.

[12] The People argue that their motion to reconsider the May 2010 Dec. & Order "tolled" the timing requirements for the filing of a Notice of Appeal as to all the charges dismissed by that order, and that the June 18, 2010 Notice of Appeal was effective as to all the charges which were dismissed. "Thus, the People's appeal from the trial court's decision of June 7, 2010, constitutes an appeal of the dismissal of all the charges in the indictment." Reply Br. at 11.

[13] The timing requirement for the filing of a Notice of Appeal by the People in a criminal case is found within Guam Rules of Appellate Procedure Rule 4(b)(1)(B), which reads: "When the government is entitled to appeal, its notice of appeal must be filed in the Superior Court within 30 days after the later of: (i) the entry of the judgment or order being appealed; or (ii) the filing of a notice of appeal by any defendant." Guam R. App. P. ("GRAP") 4(b)(1)(B).[5] Under

[4] The United States Supreme Court in *Kontrick v. Ryan*, 540 U.S. 443 (2004), challenged the previously held belief that a timely notice of appeal from a judgment or order in a criminal case was virtually *per se* jurisdictional, explaining that the term "jurisdictional" had been misused in previous cases. 540 U.S. at 454; *see generally United States v. Garduno*, 506 F.3d 1287 (10th Cir. 2007). The Supreme Court has since clarified that procedural rules which are explicitly grounded in statutory language are truly "jurisdictional rules," while other rules may be termed "claims-processing rules." *See Bowles v. Russell*, 551 U.S. 205, 207-13 (2007). The primary difference between the two categories is that objections concerning "claim processing rules" may be forfeited if not properly raised. *Kontrick*, 540 U.S. at 456. While the question of whether or not Federal Rules of Appellate Procedure ("FRAP") Rule 4(b)(1)(B) is truly jurisdictional has not been *clearly* resolved by the federal courts, since neither party has suggested forfeiture might be appropriate here, the distinction is irrelevant in the determination of this case. *See In re Grand Jury Proceedings*, 616 F.3d 1186, 1194 (10th Cir. 2010) (timing requirements of FRAP 4(b)(1)(B) appear to be based on language of 18 U.S.C. § 3731).

[5] In interpreting the Guam Rules of Appellate Procedure, we look to federal case law interpreting the substantially similar Federal Rules of Appellate Procedure. *See McGhee v. McGhee*, 2008 Guam 17 ¶ 12 (citing

this 30-day limitation, *if* the People's motion for reconsideration *did not* toll the timing requirement for filing a Notice of Appeal concerning the dismissal of certain charges against Gutierrez, *then* the Notice of Appeal (filed on June 18, 2010, approximately 40 days after the issuance of the May 8, 2010 order) would be untimely.

[14] The Guam Rules of Appellate Procedure concerning which types of motions *by the People* may or may not toll the general timing requirements of GRAP 4(b)(1) are largely silent. *Compare* GRAP 4(b)(1)(B) *with* GRAP 4(b)(3) (identifying several specific motions which, if made by a criminal defendant, will "toll" the timing rules); *see also United States v. Healy*, 376 U.S. 75, 79 (1964) (noting similar lack of rules or statutes governing motions for rehearing by the Government in the federal courts). However, several United States Supreme Court cases support the People's suggestion that a timely motion for reconsideration should toll the 30-day filing requirement of GRAP 4(b)(1)(B) for the entirety of the May 2010 Dec. & Order, regardless of whether the motion for reconsideration addressed every legal conclusion found therein.

[15] In *Healy* the Court considered "whether . . . a timely petition for rehearing by the Government . . . renders the judgment not final for purposes of appeal until the court disposes of the petition – in other words whether in such circumstances the 30-day period prescribed by Rule 11(2)[6] begins to run from the date of entry of judgment or the denial of the petition for rehearing." 376 U.S. at 77-78. The *Healy* court expressed its approval of the practice of seeking

Sananap, 2008 Guam 10 ¶ 8 n.2). The commentary for the GRAP indicates the source for GRAP 4(b)(1)(B) is the textually identical FRAP 4(b)(1)(B). *See* GRAP 4 ("SOURCE: FRAP 4 as modified.").

[6] Although *Healy* considered the Supreme Court's interpretation of Supreme Court Rule 11(2), it has since been recognized that the reasoning of *Healy* and its progeny are also applicable to interpretation of FRAP 4(b). *See United States v. Bulgier*, 618 F.2d 472, 475 (7th Cir. 1980).

rehearing at the District Court level, and eventually held that a motion for rehearing would toll the 30-day period, reasoning that:

> Of course speedy disposition of criminal cases is desirable, but to deprive the Government of the opportunity to petition a lower court for the correction of errors might, in some circumstances, actually prolong the process of litigation – since plenary consideration of a question of law here ordinarily consumes more time than disposition of a petition for rehearing – and could, in some cases, impose an added and unnecessary burden of adjudication upon this Court. It would be senseless for this Court to pass on an issue while a motion for rehearing is pending below, and no significant saving of time would be achieved by altering the ordinary rule to the extent of compelling a notice of appeal to be filed while the petition for rehearing is under consideration.

Id. at 80. These policy considerations seem sound, and are equally applicable to our interpretation of GRAP 4(b)(1)(B) as they were in *Healy*'s interpretation of Supreme Court Rule 11(2).

[16] The reasoning of *Healy* has subsequently been affirmed and expanded upon in two more recent United States Supreme Court *per curiam* cases: *United States v. Dieter*, 429 U.S. 6 (1976), and *United States v. Ibarra*, 502 U.S. 1 (1991). In *Ibarra*, the Government moved for reconsideration of the granting of a suppression motion solely on legal grounds which they had previously advanced, but later abandoned. 501 U.S. at 3. The Supreme Court vacated the judgment of the Court of Appeals, reasoning that:

> Undoubtedly some motions for reconsideration are so totally lacking in merit that the virtues of the rule established in *Healy* are not realized by delaying the 30-day period. If it were possible to pick them out in advance, it would be better if litigants pursuing such motions were made to go sooner, rather than later, on their fruitless way to the appellate court. *But there is no certain way of deciding in advance which motions for reconsideration have the requisite degree of merit, and which do not.* Given this, it is far better that all such motions be subsumed under one general rule – the rule laid down in *Healy*. Without a clear general rule litigants would be required to guess at their peril the date on which the time to appeal commences to run. Prudent attorneys would be encouraged to file notices of appeal from orders of the district court, even though the latter court is in the course of considering a motion for rehearing of the order. Less prudent attorneys would find themselves litigating in the courts of appeals whether a

> motion for reconsideration filed in the district court had sufficient potential merit to justify the litigant's delay in pursuing appellate review. Neither development would be desirable.

Id. at 6-7 (emphasis added) (internal citation omitted). This reasoning is also applicable in this case. The People could have simultaneously sought both reconsideration of the May 2010 Dec. & Order *and* a Notice of Appeal for the same decision and order, but this course of action would have run the risk of exposing the People to two contrary mandates, and would have assuredly affected the speedy disposition of this case. The People claim that their challenge to the dismissal of the first charge against Rios necessarily signified a challenge to the dismissal of all the other charges dismissed in the May 2010 Dec. & Order. *See* Reply Br. at 6. Although the trial court stated in its June 2010 Dec. & Order resolving the motions for reconsideration that "the People did not move for reconsideration of the dismissal of the other Charges dismissed in the [May 2010 Dec. & Order]," it would be unfair to hinge our determination of the propriety of the People's Notice of Appeal on the trial court's conclusion of the issue.[7] ER at 33 (June 2010 Dec. & Order). There is also no indication that the People's filing on June 18, 2010, was purposefully dilatory or otherwise improper in any way. *See, e.g.*, *United States v. Walker*, 601 F.2d 1051, 1058-59 (9th Cir. 1979); *United States v. St. Laurent*, 521 F.2d 506, 512 (1st Cir. 1975).

[17] In light of these cases, we adopt the rule of the federal courts that where the People appeal a decision of a trial court in a criminal case, any timely motion for rehearing or

[7] Unsurprisingly, Gutierrez emphasizes the fact that the People did seek reconsideration of the "failure to plead" legal theory in their motion for reconsideration of the May 2010 Dec. & Order. *See* Gutierrez Br. at 7; *see also* ER at 33 (June 2010 Dec. & Order). However, an examination of the June 2010 Dec. & Order reveals that the trial court did not dismiss the charges against Gutierrez *solely* on the "failure to plead" grounds advanced by Gutierrez in his brief, but *also* upon the "law of the case" grounds which *were* appealed by the People. *See* ER at 37 (June 2010 Dec. & Order) ("The Second Charge was dismissed *both* because the People failed to allege that Defendant Gutierrez *took the property of another which he was not entitled to infringe upon* and because the People 'fail[ed] to identify the statutory elements of the offense charged, Guilt Established by Complicity.'" (emphases added)).

reconsideration tolls the running of the time for appeal. *See Nilson Van & Storage Co. v. Marsh*, 755 F.2d 362, 364 (4th Cir. 1985) (citing *Dieter*, 429 U.S. 6; *Healy*, 376 U.S. 75). Applying this general rule, we hold that the People's Notice of Appeal in the instant case was timely as to all the charges which were dismissed, both in the May 2010 Dec. & Order and in the June 2010 Dec. & Order.

[18] This holding should not be taken as a ruling on the legal accuracy of the trial court's dismissal of the various charges against Gutierrez under *Hamling v. United States*, 418 U.S. 87 (1974), and *Russell v. United States*, 369 U.S. 749 (1962), an issue discussed by Gutierrez elsewhere in his brief, but simply for the proposition that the Notice of Appeal filed by the People was not untimely. Gutierrez Br. at 4-6.

[19] We next review the merits of the trial court's orders dismissing the charges against the Appellees. The People argue that the trial court should not have relied on the "law of the case" doctrine to preclude its reconsideration of the 2005 Orders because the Indictments in CF0216-04 and CF0401-05 were sufficiently different. Moreover, even if the use of the "law of the case" doctrine by the trial court was proper, the People claim the trial court's application of the doctrine was erroneous because there was a sufficient basis to depart from the doctrine to correct clear error and prevent manifest injustice.[8]

B. Reliance on the "Law of the Case" Doctrine

[20] The People assert that the trial court erred in relying upon its 2005 Orders as continuing authority in this case. The People argue that the "law of the case" doctrine was not properly

[8] In their opening brief, the People further argued that collateral estoppel and *res judicata* did not bar the subsequent Indictment and that the court's order should have been overturned on those grounds. *See* Appellant's Br. at 13-14. However, at oral argument, the People admitted that these collateral estoppel and *res judicata* arguments were made in anticipation of what the People guessed the Appellees would argue. As the Appellees made no mention of these doctrines, nor did the trial court ever purport to rely upon them, these arguments by the People are irrelevant to our determination of this case.

evoked by the trial court as the "law" which was relied upon by the trial court ("the 2005 Orders") concerned an indictment brought under CF0216-04, and that the indictment here, filed under CF0401-05, was sufficiently "different" to render any reliance on the 2005 Orders inappropriate. The People contend that "the law of the case doctrine does not apply here because this case and the earlier case are not identical . . . . First, the indictments contain different charges . . . . Second, the quality of the indictments differs." Appellant's Br. at 9-10 (Aug. 1, 2010).

[21] In support, the People emphasize the following language from *People v. Hualde*: "Under the 'law of the case' doctrine, a court is generally precluded from reconsidering an issue that has already been decided by the same court, or a higher court *in the identical case*." 1999 Guam 3 ¶ 13 (emphasis added) (citation omitted). Several other persuasive authorities supplied by the People appear, by their language, to support this "identical" language, which is the crux of the People's argument. *See* Appellant's Br. at 9 (quoting *People v. Orallo*, 2006 Guam 8 ¶ 5 ("[The law of the case] should continue to govern the same issues in subsequent stages of *the same case*." (emphasis added)); *State v. Whelan*, 91 P.3d 1011, 1014 (Ariz. Ct. App. 2004) ("[T]he doctrine applies in the context of *the same case* throughout its entire duration . . . ." (emphasis added))). Tellingly, the People supply no persuasive authority where *legal analysis* supports the proposition that two cases must be "identical" in order for the use of the law of the case doctrine to be appropriate; the argument is supported only by citation to plain language.

[22] The law of the case doctrine generally acts as a channel of a trial court's discretion rather than as a limit on a trial court's power; however, the doctrine is more compelling on remand, where an appellate court's prior ruling controls further proceedings in the trial court. *See Messinger v. Anderson*, 225 U.S. 436, 443-44 (1912); *United States v. Quintieri*, 306 F.3d 1217,

1225 (2d Cir. 2002); *United States v. Melendez-Carrion*, 820 F.2d 56, 60 n.1 (2d Cir. 1987). Although the People's framing of the doctrine is correct, the People's implicit argument (that issues presented to a trial court must be in every respect "identical" to issues previously considered in order for reliance on "law of the case" to be proper) is contradicted by federal case law.

[23] The "distinctness" of the second indictment in this case (characterized either as "superseding" or as "new"[9]) was an issue argued at length by the parties in *Rios I*, although the *Rios I* court did not reach the issue in its opinion. *Rios I*, 2008 Guam 22 ¶ 10. Regardless, in similar situations federal courts have held that the law of the case doctrine *is* applicable to arguments which are similar to those made previously: "[E]ven if the court called the second indictment the 'new' indictment instead of the 'superseding' indictment[10] . . . . the defendants are collaterally estopped (or prohibited by the 'law of the case' doctrine) from relitigating these issues absent new information not previously before the court." *United States v. O'Neill*, 52 F. Supp. 2d 954, 959 (E.D. Wis. 1994) (citing *United States v. Rosenberger*, 872 F.2d 240, 242 (8th Cir. 1989) (collateral estoppel); *Smith v. United States*, 406 A.2d 1262, 1263-64 (D.C. 1979) (law of the case doctrine); *United States v. Thoresen*, 428 F.2d 654, 666-67 (9th Cir. 1970) (no relitigation by virtue of superseding indictment); *United States v. Yung*, 786 F. Supp. 1561, 1564-65 (D. Kan. 1992)).

[9] The Guam Code does not provide any specific procedure for the issuance of "superseding" indictments, nor does it define how such indictments are to interact with original indictments. *See, e.g., United States v. Hickey*, 580 F.3d 922, 932-33 (9th Cir. 2009) (Reinhardt, J., specially concurring) (examining terminology used to discuss "new" indictments).

[10] A section of *O'Neill* not reproduced here discusses characterizations of "superseding" and "new" indictments under federal law, but ultimately finds the distinction immaterial. 52 F. Supp. 2d at 958-59.

[24] The *Thoresen* case directly addressed legal contentions equivalent to the "different charges" argument presented by the People here: "[The Thoresens[11]] advance here [that] . . . they are entitled to a new hearing and new determination even though no new evidence will be produced . . . . In our opinion, the circumstances that Thoresen's suppression hearing was under a superseded indictment does not entitle him to relitigate the issues there decided." *Thoresen*, 428 F.2d at 667. This holding in *Thoresen* undercuts the People's argument that the trial court's use of the law of the case doctrine was *per se* erroneous because there was a superseding indictment.

[25] The People's assertion that the trial court's use of the law of the case doctrine was erroneous because the "quality" of the Indictments differs is likewise misplaced. The People appear to argue that since the 2005 Orders were premised on "sufficiency of the indictment" grounds, and the trial court in its June 2010 Dec. & Order found that the first charge of the new indictment was adequately pleaded, it was therefore incorrect to rely on the 2005 Orders as law of the case. ER at 35 (June 2010 Dec. & Order). This seems to be a reasonable argument; that the law of the case on one issue does not and should not control the same court's rulings on a separate issue. However, the record does not support this characterization.

[26] The People cite a portion of *Rios I* where "[t]he court found that, as a matter of law, the People could not show that '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.'" *Rios I*, 2008 Guam 22 ¶ 2 (emphasis omitted). Although this section of the *Rios I* opinion standing alone can arguably be taken to indicate that the *Rios I* court

[11] The *Thoresen* case concerned both a Mr. Thoresen and a Mrs. Thoresen, both of whom were criminal defendants.

characterized the 2005 Orders as based on the sufficiency of the indictment, a later section of *Rios I* points to a different conclusion:

> 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. 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. 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 . . . . 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. *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).

Id. ¶ 11 (emphasis added) (citation omitted). The *Rios I* court's characterization of the 2005 Orders is further supported by the text of the May 2010 Dec. & Order:

> The People say they have remedied this problem in the current indictment by alleging more detailed acts of deception than appeared in the first indictment. However, simply alleging more detailed acts does not rise to the standard of alleging theft of the property of another. The Court dismissed the first indictment in this case because the People [were] unable to cite any authority that Defendant Gutierrez was not eligible for the *Defined Contributions* plan, or that he could not join retroactively. The People have not cured this defect.

ER at 24 (citation omitted). These excerpts from *Rios I* and from the May 2010 Dec. & Order expose two flaws with the People's second "law of the case" argument based on the "sufficiency of the indictment." First, it is evident that the May 2010 Dec. & Order was premised on legal grounds identical to those relied upon in the 2005 Orders. Second, the legal basis for the dismissal was not simply failure to plead an element of a crime or "insufficiency of the indictment," but rather that under any potential phrasing the People could not present a set of facts which would make *this* conduct *this* crime. Disregarding the larger issue of whether or not

this second "conclusion" is correct for the moment, the trial court's reliance on the law of the case doctrine was appropriate. The parties, the trial court, the alleged facts underlying the charges, and most importantly *the dispositive legal theories* used in the 2005 Orders are identical to those which are used in the May and June 2010 Decisions and Orders. Even assuming *arguendo* that the legal conclusions of the trial court in the 2005 Orders were incorrect, use of the law of the case doctrine was proper.

C. Application of the "Law of the Case" Doctrine

[27] Although the trial court's reliance on the law of the case doctrine was proper, we still must evaluate whether the court committed legal error in its application of the doctrine. The issue of whether the trial court correctly *applied* the law of the case doctrine is distinct from the threshold issue of whether it was *appropriate* to use the doctrine in this case. It is possible that even if the trial court was correct in *relying* on the doctrine, its *application* of the doctrine was incorrect, and therefore error.

[28] The People contend that the trial court committed legal error in applying the law of the case doctrine for two reasons. *See* Appellant's Br. at 14-16. First, the People argue that the trial court erred in its reasoning in issuing the 2005 Orders and impermissibly decided a factual issue reserved for the jury. *Id.* Second, the People argue that the trial court perpetuated its error by relying on the 2005 Orders in the May and June 2010 Decisions and Orders. *Id.* Although these arguments are closely related (and co-mingled by the parties in their briefing), different legal standards of review apply to each of these arguments.

1. The 2005 Orders

[29] After the issuance of the 2005 Orders the People appealed them to the Guam Supreme Court in CRA05-008[12], using similar legal arguments to those presented in this appeal. *See* Appellant's Br. (CRA05-008) filed Aug. 11, 2005 at 9 ("Fact issues are the province of the jury. No facts, either way, were ever presented to the jury . . . what the trial court did is perhaps most analogous to the improper grant of a summary judgment . . ."); *see also* Reply Br. (CRA05-008) filed Sept. 20, 2005 at 12 ("The trial court erred hugely, as a matter of law, by dismissing the case without even giving the People the opportunity to present the facts, all of which would put any legal issues in proper perspective."). Subsequent to the submission of CRA05-008 to this court, but before an opinion was rendered, the People moved for and received a voluntary dismissal of the appeal. *See* Mot. for Voluntary Dismissal (CRA05-008) filed Oct. 27, 2005; *see also* Order Granting Voluntary Dismissal (CRA05-008) ("2005 Dismissal Order") filed Nov. 8, 2005. The voluntary dismissal was via operation of GRAP 6(c)(2), which, at the time, read in pertinent part: "An Appeal may [be] dismissed on motion of the Appellant on such terms as may be agreed upon by the parties or fixed by the court." *See* 2005 Dismissal Order at 1. The 2005 Dismissal Order noted that the federal rule analogous to GRAP 6(c)(2) is FRAP 42. *Id.*

[30] Federal courts interpreting FRAP 42 have found the voluntary dismissal of an appeal by the government does not bar a subsequent indictment against the same defendant based on the

[12] It is clear that this court may take notice of court records relating to prior appeals. Rule 201(b)(2) of the Guam Rules of Evidence permits judicial notice of a fact that is "not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Guam R. Evid. 201(b)(2). Further, "a court may take judicial notice of its own records in other cases . . . ." *United States v. Wilson*, 631 F.2d 118, 119 (9th Cir. 1980); *see also Kasey v. Molybdenum Corp. of Am.*, 336 F.2d 560 (9th Cir. 1964).

same facts.[13] *See United States v. Senak*, 477 F.2d 304, 306 (7th Cir. 1973). However, by the same token:

> A timely notice of appeal is essential to appellate jurisdiction. *Browder v. Dir., Dep't of Corr. of Ill.*, 434 U.S. 257 (1978). A notice of appeal filed and dismissed voluntarily is gone, no more effective in conferring jurisdiction on a court than a notice never filed. *Williams v. United States*, 553 F.2d 420 (5th Cir. 1977). Attempts to resurrect notices of appeal must be treated the same as belated notices of appeal. *The time limits for filing an appeal require the losing party to choose between accepting the judgment and pursuing appellate review. The loser may not dither. Filing and dismissing an appeal prevents appellate review, and we do not think that it should place the judgment in limbo-open to review whenever the losing side changes its mind.* The structure of the rules is set against such delay and uncertainty.

Barrow v. Falck, 977 F.2d 1100, 1103 (7th Cir. 1992) (emphasis added). Thus, while the People have not waived their right to appeal the May and June 2010 Decisions and Orders which rely on the 2005 Orders, it would be improper to treat what is essentially a second bite at the appellate apple on the 2005 Orders in the same manner as a timely appeal would have been treated. As the 2005 Orders were effectively never appealed, they should not be treated as fresh legal conclusions of the trial court to be reviewed *de novo*, but rather as law which has stood up to this point and which is not currently appealable via operation of the relevant timing rules.

2. The 2010 Orders

[31] The "law of the case"[14] is a discretionary doctrine (rather than a strict limitation on appellate review, as a jurisdictional rule would be), and there are certain circumstances where departure from the law of the case would be appropriate: (1) where the first decision was clearly erroneous; (2) where an intervening change in the law has occurred; (3) where the evidence on

[13] This statement is not universal; dismissal of an appeal *with prejudice* (either by agreement of the parties or by the language of the appellate order dismissing the appeal) would likely bar further litigation of the issues brought in the first appeal. The 2005 Dismissal Order in this case does not indicate whether the dismissal is with or without prejudice. *See* 2005 Dismissal Order at 2.

[14] In this context, "law of the case" is defined as a trial court reconsidering a decision on which it has previously ruled but upon which a controlling appellate court has not ruled.

remand is substantially different; (4) where other changed circumstances exist; or (5) where a manifest injustice would otherwise result. *Hualde*, 1999 Guam 3 ¶ 13 (citing *United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997)); *see also Arizona v. California*, 460 U.S. 605, 618 n.8 (1983).

[32] The trial court stated in its June 2010 Dec. & Order that "[w]ithout reconsidering the July 20, 2005 and July 25, 2005 Orders, the [c]ourt, under the law of the case doctrine, is precluded from reconsidering its determination that the People could not prove that Defendant Gutierrez was not entitled to infringe upon the property of the Fund." *See* ER at 37. This statement is correct if the limited exceptions listed above are not applicable in this case. On the other hand, if one of the listed exceptions is applicable in this case, then the trial court erred in applying the law of the case doctrine here.

[33] Of the three exceptions, the People rely only on the argument that the 2005 rulings were clear error and that allowing the error to continue would be a manifest injustice as it "prejudicially hinders the People's prosecution function." Reply Br. at 3-6. It bears repeating that the People must demonstrate not merely that the 2005 Orders were incorrect, but that they were *clearly* erroneous. When considering departing from the law of the case, "[i]t is not enough . . . that [a party] could now make a more persuasive argument . . . than we would have thought likely when the case was [before the court]. . . . The law of the case will be disregarded only when the court has 'a clear conviction of error' with respect to a point of law . . . ." *See Fogel v. Chestnutt*, 668 F.2d 100, 109 (2d Cir. 1981) (citing *Zdanok v. Glidden Co.*, 327 F.2d 944, 951-53 (2d Cir. 1964); *White v. Higgins*, 116 F.2d 312, 317 (1st Cir. 1940)).

[34] The first charge of the first indictment accused Rios of committing the crime of "theft by deception" citing to several Guam statutes, all of which contained the element of "property of

another." Appellee Rios' Supplemental Excerpts of Record ("SER") at 2 (Sealed Indictment, July 1, 2004). The first charge of the second indictment similarly accuses Rios of "theft by deception" and cites statutes which contain the "property of another" element. ER at 5 (Superseding Indictment, Dec. 23, 2005). In the 2005 orders, the trial court based its conclusion primarily on the language of former 9 GCA § 43.10(a)[15], which (in relevant part) defines "property of another" as "property in which any person other than the defendant has an interest which the defendant is not privileged to infringe, regardless of the fact that the defendant also has an interest in the property . . . ." *See* 9 GCA § 43.10(e) (2005). Using this definition, the trial court concluded that because "the People are unable to cite any authority that Defendant Gutierrez was not eligible for the Defined Contributions plan, or that he could not join retroactively" as a matter of law, the People could not show that Defendant Gutierrez received property to which he was "not privileged to infringe." *See* SER at 10-11 (Dec. & Order, July 20, 2005 ("July 2005 Dec. & Order 1")); 9 GCA § 43.10(e). The key question, therefore, is whether "not privileged to infringe" is a factual element of the charges in the indictment (as the People argue), or whether the trial court was justified in deciding the issue as a matter of law (an interpretation which the Appellees support).

[35] The trial court relied upon the cases of *Jenkins v. State*, 898 So. 2d 1134 (Fla. Dist. Ct. App. 2005), and *Williams v. State*, 711 So. 2d 41 (Fla. Dist. Ct. App. 1998), as persuasive authority to support its ultimate conclusion that "as a matter of law, the People cannot show that Defendant Gutierrez received property to which he was not privileged to infringe." *See* SER at 10-11 (July 2010 Dec. & Order 1). This legal conclusion was also based on the court's finding that "the People are unable to cite any authority that Defendant Gutierrez was not eligible for the

[15] Now codified at 9 GCA § 43.10(e) (2005).

Defined Contributions Plan, or that he could not join retroactively." *Id.* at 10 (emphasis omitted). Rios continues to rely almost entirely on *Jenkins* and *Williams* in support of his arguments that the trial court's 2005 Orders were proper. *See* Appellee Rios' Br. ("Rios' Br.") at 9-11. The People argue, relying on *People v. Ochoa*, 282 Cal. Rptr. 805 (Ct. App. 1991), that the "not privileged to infringe" determination is an issue of *fact* and not one of *law*.[16] *See* Appellant's Br. at 14-16. From this distinction, the People assert that the trial court usurped the function of the jury when it converted what was essentially a factual finding into a legal conclusion. *Id.*; *see also* Reply Br. at 3-6. Additionally, the People submit that reliance on *Jenkins* and *Williams* is inappropriate based on differences between Guam law and similar statutes in other jurisdictions. Reply Br. at 4-6.

[36] The People's argument that the trial court erred in relying on *Jenkins* and *Williams* based on textual differences between Guam law (descended from the Model Penal Code) and Florida law (descended from the common law) is not supported by the authorities the People cite. Reply Br. at 3-4. It does appear, from the excerpts presented by the People, that the language of 9 GCA § 43.10(e) is based on the language of section 223.0(7) of the Model Penal Code. Reply Br. at 3. However, the divergence between statutes based upon the language of the Model Penal Code and those statutes based on the common law is *not* based on the "not privileged to infringe" language which is at issue in this case. The New York case cited by the People, *People v. Zinke*, states the following in the context of the history of the New York statute:

> In 1965, the Legislature put to rest all possible doubt on this score. The Model Penal Code, completed in 1962, had rejected the common-law view by defining larceny as stealing "property of another," which was in turn defined as property "in which any person other than the actor has an interest * * * *regardless*

[16] Both the trial court and the Appellees note that this position is an apparent reversal of an earlier position taken by the People. *See* SER at 10 (July 2005 Dec. & Order 1); Rios' Br. at 11.

> *of the fact that the actor also has an interest in the property.*" (Model Penal Code § 223.0[7].) The purpose of this provision was to permit "a person ordinarily considered the owner of property * * * [to] be convicted of theft * * * Thus, a partner may be convicted of theft of partnership property." (Model Penal Code § 223.2, revised comment, at 169 [1980].)

555 N.E.2d 263, 265 (N.Y. 1990) (emphasis added). Thus the divergence that *Zinke* discusses is based not on the "not privileged to infringe" language but instead on the "regardless of the fact" language emphasized above. From this language, and the text of the July 20, 2005 order, it is misleading for the People to argue that the trial court's reasoning was based on any misapprehension of the textual differences between "Model Penal Code derived" and "common law derived" statutes. *See* SER at 10 (July 2010 Dec. & Order 1). It is more likely that the trial court recognized that although under the Guam code a defendant *could* be found guilty for committing a crime wherein the property of a co-owner was taken,[17] such a prosecution would *only* be possible *if* the same defendant was "not privileged to infringe" on the property taken. *See Rios I*, 2008 Guam 22 ¶ 11 ("The dismissal . . . is . . . accurately described as an order setting aside an indictment or granting Defendants summary judgment on an indictment."). The "not privileged to infringe" clause of the law was what the trial court emphasized in its orders, and it is interpretation of this clause which controls this appeal. *See* SER at 10-11 (July 2005 Dec. & Order 1).

[37] Apart from the distinction discussed above, there are few textual distinctions between the law interpreted in *Jenkins* and *Williams* and the law interpreted here. The *Jenkins* court held that:

> In order to prove that appellant committed theft, the State was required to prove that appellant (1) knowingly, (2) obtained or endeavored to obtain, (3) *the*

[17] This would be an impossible result under the New York law discussed in *Zinke* and *People v. Rosenfeld*, 844 N.Y.S.2d 587, 592 n.9 (N.Y. Sup. Ct. 2007).

> *property of another*, (4) with the intent to permanently or temporarily deprive the other person of the property. The State failed to present any evidence that appellant obtained "the property of another" because it failed to prove that appellant was not entitled to the benefits the employer paid him. In order to support a theft conviction, the evidence must show that someone other than the defendant owned the subject property. One with an ownership interest in property cannot commit theft in taking it.

898 So. 2d at 1135 (citations omitted). This definition of theft was taken from Fla. Stat. § 812.014(1)(a) & (2)(c) (2000). *Id.* The immediately preceding section of the Florida Statutes, section 812.012, defines "property of another" as follows: "property in which a person has an interest upon which another person is *not privileged to infringe* without consent, whether or not the other person also has an interest in the property." Fla. Stat. § 812.012(5) (emphasis added). This definition of "property of another" is similar to what is provided in the Guam Code. *Compare* Fla. Stat. § 812.012(5) *with* 9 GCA § 43.10(e) ("property in which any person other than the defendant has an interest which the defendant is *not privileged to infringe*, regardless of the fact that the defendant also has an interest in the property . . . ." (emphasis added)).

[38] In contrast, the language of the California statute discussed in *People v. Ochoa* is not similar to the language interpreted here. 282 Cal. Rptr. at 809. The *Ochoa* court defined the crime of "welfare fraud" in the following way:

> We read the unambiguous language of the statute as setting forth three elements which comprise the crime of welfare fraud: (1) a false statement or representation, impersonation or other fraudulent device; (2) which statement, representation, impersonation or other device results in the obtaining or retention of aid . . . and (3) which aid was obtained for or retained by one not in fact entitled thereto. Thus, nonentitlement to the aid obtained or received is clearly an element of the crime of welfare fraud.

Id. This holding construes section 10980 of the California Welfare and Institutions Code, which reads:

> Whenever any person has, willfully and knowingly, with the intent to deceive, by means of false statement or representation, or by failing to disclose a material

> fact, or by impersonation or other fraudulent device, obtained or retained aid under the provisions of this division for himself or herself or for a child not in fact entitled thereto, the person obtaining this aid shall be punished as follows[.]

Cal. Welf. & Inst. Code § 10980(c) (2001). Although this statute does speak in terms of "non-entitlement," which can fairly be described as equivalent to "something which a person is not privileged to infringe," the text of the law is clearly dissimilar to both 9 GCA § 43.10(e) and to the Florida statutes discussed earlier. The statute also is not couched in terms of defining "property of another" within the larger definition of "theft," but rather describes a separate stand-alone crime.

[39] The trial court appears to have based its orders upon the similarities between the Florida statute construed in *Jenkins* and 9 GCA § 43.10(e). From these similarities, the trial court then ruled that "as a matter of law, the People cannot show that Defendant Gutierrez received property to which he was not privileged to infringe." SER at 10-11 (July 2005 Dec. & Order 1). Although this was obviously not a necessary result, we discern no "clear error" in the trial court's ruling. *See Fogel*, 668 F.2d at 109 (citing *Zdanok*, 327 F.2d at 951-53; *Higgins*, 116 F.2d at 317). Even though the facts of this case and those in *Jenkins* are not identical, the relevant portions of the two relevant statutes are virtually indistinguishable. The *Ochoa* case is not as close, and the laws considered therein are not sufficiently similar to 9 GCA § 43.10(e) to convince us that the trial court "usurped the function of the jury." Appellant's Br. at 14-16; Reply Br. at 3-6. "Clear error" is the standard for reversal of a decision based on the law of the case, and the lack of clear error here means that the trial court's orders must be affirmed.

[40] The People have failed to prove that the orders of the trial court were clearly erroneous; therefore, this court does not proceed to the merits of the other arguments asserted by Gutierrez concerning the effects of *Hamling*, 418 U.S. 87, and *Russell*, 369 U.S. 749. Since the dismissals

of the charges against Gutierrez were at least partially based upon the law of the case analysis discussed above, those dismissals will stand. *See* ER at 37 (June 2010 Dec. & Order) ("The Second Charge was dismissed *both* because the People failed to allege that Defendant Gutierrez *took the property of another which he was not entitled to infringe upon* and because the People 'fail[ed] to identify the statutory elements of the offense charged, Guilt Established by Complicity.'" (emphases added)).

[41] One final issue is whether the dismissals should be with or without prejudice. The trial court in its May 2010 Dec. & Order stated that "[t]he decision as to whether these dismissals are with or without prejudice will be decided later upon hearing." *Id.* at 30. The June 2010 Dec. & Order did not resolve the issue of the characterization of the dismissal. The case will be remanded to the trial court for the limited purpose of determining how these dismissals are to be characterized.

V. CONCLUSION

[42] The Notice of Appeal filed by the People in this case on June 18, 2010 was timely as to all the dismissals contemplated by the May 2010 Dec. & Order and within the June 2010 Dec. & Order. The filing of a motion to reconsider the May 2010 Dec. & Order tolled the normal 30-day time limit for the People to file a Notice of Appeal under GRAP 4(b)(1)(B), and the Notice of Appeal was filed within 30 days after the June 2010 Dec. & Order.

[43] The trial court did not err by utilizing the law of the case doctrine in making its orders of May 8, 2010 and June 7, 2010. As the People failed to timely appeal the 2005 Orders issued by the trial court, this court needed only to review the propriety of the trial court's application of the law of the case in its May and June 2010 Decisions and Orders, and not the legal conclusions of the 2005 Orders. The legal conclusions reached in the May and June 2010 Decisions and Orders

by the trial court based on its application of the law of the case doctrine were not "clearly erroneous"; accordingly, the orders are **AFFIRMED**. The case is **REMANDED** to the trial court for the limited purpose of properly characterizing the dismissals affirmed herein as "with prejudice" or "without prejudice."

Original Signed By: **Miguel S. Demapan**
MIGUEL S. DEMAPAN
Justice *Pro Tempore*

Original Signed By: **John A. Manglona**
JOHN A. MANGLONA
Justice *Pro Tempore*

Original Signed By: **Robert J. Torres**
ROBERT J. TORRES
Chief Justice