IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM
Plaintiff-Appellee

vs.

DONICIO M. SAN NICOLAS
Defendant-Appellant

OPINION

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Supreme Court Case No. CRA00-0005
Superior Court Case No. CF0471-97

Appeal from the Superior Court of Guam
Argued and submitted on Feb. 8, 2001
Hagåtña, Guam

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BEFORE: BENJAMIN J.F. CRUZ, Chief Justice; PETER C. SIGUENZA, JR., and F. PHILIP CARBULLIDO, Associate Justices.

CARBULLIDO, J.:

[1] Donicio M. San Nicolas (hereinafter "San Nicolas") was indicted on two counts of Aggravated Murder (as a First Degree Felony), one count of Murder (as a First Degree Felony), one count of Attempted Murder (as a First Degree Felony), one count of Aggravated Assault (as a Second Degree Felony), and two counts of Child Abuse (as a Third Degree Felony). After a trial by jury, San Nicolas was convicted of the two counts of Child Abuse. The trial court sentenced San Nicolas to three years imprisonment for each count, to be served consecutively. San Nicolas appeals the sentence and argues that the lower court was required to impose concurrent sentences. We affirm the trial court's decision.

I.

[2] San Nicolas was indicted on charges that stemmed from an incident on July 27, 1997, wherein San Nicolas brought two minors, Christina San Nicolas and April Camacho, to the Lonfit River. While swimming under his supervision, the girls were swept downstream in a strong current. April escaped physically unharmed but emotionally shaken while Christina, San Nicolas' daughter, drowned. Although knowing of the minors' perilous state and despite April's pleas for help, San Nicolas did not attempt to help in a rescue attempt and is alleged to have held the girls' heads below the water.

[3] San Nicolas was acquitted of both the aggravated murder and murder charges as to Christina, and the attempted murder and aggravated assault charges as to April. He was, however, convicted on the two Child Abuse counts, each charging that San Nicolas "knowingly, and unreasonably caused and permitted the physical, mental, and emotional health of [the child victim] to be endangered" while in his care and custody. Appellant's Excerpts of Record, tab 1, pp. 1-3 (Indictment, Oct. 29, 1997). One charge named April as a victim, and the other named Christina as the victim. *See id.*

[4] On March 3, 1998, San Nicolas filed a Notice of Motion for Acquittal and Motion for Acquittal Notwithstanding the Verdicts. The trial court denied San Nicolas' motion. Prior to sentencing, San Nicolas entered into an agreement with the Government, which was approved by the trial court, wherein he waived his right to appeal the convictions in exchange for the Government's promise to dismiss the two Aggravated Assault Charges and the two lesser-included Misdemeanor Assault charges. San Nicolas specifically reserved his right to appeal the sentence for the Child Abuse convictions.

[5] The trial court entered a judgment of the convictions on May 19, 2000. The court sentenced San Nicolas to three years imprisonment for each count of Child Abuse, to be served consecutively. San Nicolas timely filed a Notice of Appeal.

II.

[6] This court has jurisdiction to hear the appeal of a final judgment of conviction pursuant to Title 8 GCA § 130.15(a) (1993) and Title 7 GCA §§ 3107 and 3108 (1994).

III.

[7] The issue before this court is whether the trial court erred in sentencing San Nicolas to consecutive terms of imprisonment where San Nicolas' acts during one criminal episode gave rise to two separate charges and convictions of Child Abuse.

A. The Double Jeopardy Clause.

[8] The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend V. The Bill of Rights of the Organic Act of Guam similarly provides that "[n]o persons shall be subject for the same offense to be twice put in jeopardy of punishment . . . ." 48 U.S.C. § 1421b(d) (1950); *see also People v. Reyes*, 1998 Guam 32, ¶ 23 (recognizing that the Double Jeopardy Clause of the United States Constitution is made applicable to Guam through the Organic Act). It is well established that the Double Jeopardy Clause protects against successive prosecutions as well as successive criminal punishments for the same crime. *See United States v. Ursery*, 518 U.S. 267, 273, 116 S.Ct. 2135, 2139-40 (1996); *Hudson v. United States*, 522 U.S. 93, 99, 118 S.Ct. 488, 493 (1997). "A double jeopardy claim is a question of law reviewed *de novo* . . . ." *People v. Florida*, Crim. No. 96-00060A, 1997 WL 209044, at * 6 (D. Guam App. Div. Apr. 21, 1997); *see also Reyes*, 1998 Guam 32 at ¶ 9 (reviewing *de novo* the constitutional claim of ineffective assistance of counsel) (citations omitted); *Camacho v. Camacho*, 1997 Guam 5, ¶ 24 (reviewing questions of law *de novo*). The legality of sentence is also reviewed *de novo*. *See United States v. Farmigoni*, 934 F.2d 63, 65 (5th Cir. 1991).

[9] The Double Jeopardy Clause embodies a protection that is basic in concept, but difficult and

complex in actual application. There is nearly universal agreement that an individual once tried for an offense should not be forced again to defend himself against the same charge. However, the application of the general principle and the scope of its protection have been fraught with inconsistencies. While the application of the double jeopardy law is quite complex, a few principles have emerged through case law. In determining whether multiple punishments violate the Double Jeopardy Clause courts look to the punishment authorized by the legislative branch. *See Whalen v. United States*, 445 U.S. 684, 688, 100 S.Ct. 1432, 1436 (1980). The Double Jeopardy Clause embodies the principle that the power to define criminal offenses and impose punishment resides wholly with the Legislature, *see id.* at 689, 100 S.Ct. at 1436, and is subject only to constitutional limitations under the Eighth Amendment. *See Bell v. United States*, 349 U.S. 81, 82, 75 S.Ct. 620, 622 (1955). The Legislature is free to define crimes and fix punishments, and the double jeopardy guarantee is primarily aimed at restraining courts and prosecutors from acting contrary to legislative intent. *See People v. Djekich*, 229 Cal. App. 3d 1213, 1223, 280 Cal. Rptr. 824, 830 (Ct. App. 1991). Accordingly, "[t]he Double Jeopardy Clause at the very least precludes . . . courts from imposing consecutive sentences unless authorized by [the Legislature] to do so." *Whalen*, 445 U.S. at 689, 100 S.Ct. at 1436. Therefore, when determining whether the legislature has authorized that the defendant be punished twice for two violations of the same statute, we must discern the legislative intent. *See United States v. Weathers*, 186 F.3d 948, 951 (D.C. Cir. 1999) (citing *Jones v. Thomas*, 491 U.S. 376, 381, 109 S.Ct. 2522, 105 L.Ed.2d 322 (1989). We review issues of statutory interpretation *de novo*. *See Pangelinan v. Gutierrez*, 2000 Guam 11, ¶ 7; *Ada v. Guam Telephone Authority*, 1999 Guam 10, ¶ 10.

[10] Two distinct tests have emerged in determining whether the legislature intended to allow for

cumulative punishments of statutory violations: (1) the *Blockburger* test and (2) the "unit of prosecution" test. *See e.g. Whalen*, 445 U.S. at 691-92, 100 S.Ct. at 1437-38 (employing the *Blockburger* test in determining whether multiple punishments are allowed when the defendant violates two statutes); *Ladner v. United States*, 358 U.S. 169, 177, 79 S.Ct. 209, 214 (1958) (employing the unit of prosecution test in determining whether multiple punishments are proper when the defendant commits two violations of the same statute). While both tests focus on legislative intent, there is a clear rule as to which test must be employed in determining whether multiple punishments are allowed for double jeopardy purposes.

1. The *Blockburger* test.

[11] When a statute is ambiguous regarding whether a violation of two different statutes constitutes separate offenses allowing for multiple punishments, courts employ the rule of statutory construction set forth in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182 (1932). *See Whalen*, 445 U.S. at 691-92, 100 S.Ct. at 1437-38. The *Blockburger* Court provided that "[w]here the same act or transaction constitutes a violation of *two distinct statutory provisions*, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." *Blockburger*, 284 U.S. at 304, 52 S.Ct. at 182 (emphasis added). The *Blockburger* test embodies the presumption that the Legislature "ordinarily does not intend to punish the same offense under two different statutes." *Whalen*, 445 U.S. at 691-92, 100 S.Ct. at 1437-38. In other words, the test is used to determine whether the violation of two distinct statutes constitutes the "same offense", and if so, courts presume that the Legislature intends only one punishment for the violations. *Id.* at 692, 100 S.Ct. at 1438.

[12] *Blockburger* applies only where the defendant is convicted of violating two distinct statutory provisions. *See United States v. Esch*, 832 F.2d 531, 541 (10th Cir. 1987). In the instant case, San Nicolas was convicted of two violations of the same statute, namely, the Child Abuse statute; therefore, the *Blockburger* test is inapplicable in determining whether consecutive sentences are proper. Accordingly, the trial court's use of the *Blockburger* test was improper.

2. The "unit of prosecution" test.

[13] Where the defendant is convicted of *two violations of the same statute*, courts determine "what act the legislature intended as the 'unit of prosecution' under the statute." *Weathers*, 186 F.3d at 366; *see Esch*, 832 F.2d at 541. The relevant inquiry is "whether the conduct at issue was intended to give rise to more than one offense under the same [statutory] provision." *See United States v. McLaughlin*, 164 F.3d 1, 14 (D.C. Cir. 1998). Thus, the issue remains one of legislative intent, and courts look to the language of the statute and legislative history. *See Landner*, at 177, 79 S.Ct. at 214. If the legislative intent is ambiguous, rather than applying the *Blockburger* principles, courts resort to the rule of lenity wherein "'doubt will be resolved against turning a single transaction into multiple offenses' . . . ." *McLaughlin*, 164 F.3d at 14-15 (quoting *United States v. Bell*, 349 U.S. 81, 84, 75 S.Ct. 620, 622 (1955) (clarifying that "[i]n the 'unit of prosecution' cases, although the ultimate question remains one of legislative intent, the *Blockburger* test is not used."); *see Esch*, 832 F.2d at 540 (recognizing that the *Blockburger* test only applies when the defendant is convicted under two separate statutory provisions). The legislature is the sole branch of the government empowered to define crimes and punishments, and a court must decline to increase a penalty on an individual when not clearly authorized by the legislature. *See Ladner*, 358 U.S. at

178, 79 S.Ct. at 214. This reflects the presumption in the law that doubt as to legislative intent should be resolved in favor of the defendant, and thus against the imposition of a harsher punishment. *See Bell*, 349 U.S. at 83, 75 S.Ct. at 622.

B. Discussion.

[14] Because San Nicolas was charged with two violations of the same statute, the unit of prosecution analysis is the proper test to employ in determining whether he could be sentenced consecutively. Because the trial court failed to make this analysis, we proceed to do so.

In determining the relevant "unit of prosecution" of the Child Abuse statute, we first look to the plain language of the statute. The Child Abuse statute provides:

> **§31.30. Child Abuse; Defined & *Punished*.** (a) A person is guilty of *child abuse* when:
> (1) he subjects a child to cruel mistreatment; or
> (2) having a child in his care or custody or under his control, he:
> (A) deserts that child with intent to abandon him;
> (B) subjects that child to cruel mistreatment; or
> (C) unreasonably causes or permits the physical or, emotional health of that child to be endangered.
> (b) Child abuse is a felony of the third degree when it is committed under circumstances likely to result in death or serious bodily injury. Otherwise, it is a misdemeanor.

Title 9 GCA § 31.30 (1994).

[15] San Nicolas argues that resort must be made to the rule of lenity because the Child Abuse statute is ambiguous as to whether the Legislature intended to create multiple punishments for a single act affecting more than one victim. Case law compels us to disagree. Discussion of cases that conduct a "unit of prosecution" inquiry is instructive in this regard.

[16] The seminal "unit of prosecution" case is *Bell v. United States*. In *Bell*, the defendant was convicted of violating a section of the Mann Act. The relevant provisions of the Act provided:

"'Whoever knowingly transports in interstate or foreign commerce . . . any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose . . . [s]hall be fined not more than $5,000 or imprisoned not more than five years, or both.'" *Id.* 349 U.S. at 82, 75 S.Ct. at 621 (citations omitted). The defendant transported two women, in the same car and on the same trip, across state lines in violation of the Act. He was charged and pled guilty to two separate counts of violating the Act, each referring to a different woman. *Id.* The defendant argued that he committed one offense and thus could not be subjected to cumulative punishments under the two counts. *Id.* The issue before the Supreme Court was "'[w]hat Congress has made the allowable unit of prosecution,'" and specifically, whether "Congress . . . [made] the simultaneous transportation of more than one woman in violation of the Mann Act liable to cumulative punishment for each woman so transported." *Id*. 349 U.S. at 81-83, 75 U.S. at 621-22 (citations omitted). The Court acknowledged that Congress may, at its discretion, set appropriate punishment for the commission of crimes, however, in that case, resort to the statute was of no avail. The Court determined that the statute did not reflect any Congressional intent regarding the appropriate punishment for two separate violations of the Act. *Id.* Therefore, the court employed the rule of lenity, and determined that the defendant's actions constituted one offense and punishment must be limited accordingly. *Id*. 349 U.S. at 83-84, 75 U.S. at 622.

[17] Similarly, in *Ladner v. United States*, the defendant discharged a single shot from a shotgun into an automobile, wounding two police officers. *Id.* 358 U.S. at 170-71, 79 S.Ct. at 210. He was convicted of assaulting two federal officers with a deadly weapon in violation of 18 U.S.C. § 254, and was sentenced consecutively for each violation. *Id*. The statute provided:

> Whoever shall forcibly resist, oppose, impede, intimidate, or interfere with any person . . . (if he is a federal officer designated in § 253) while engaged in the

> performance of his official duties, or shall assault him on account of the performance of his official duties, shall be imprisoned not more than three years . . .

Id. 358 U.S. at 170, 79 S.Ct. at 210, n. 1. After serving the first of his consecutive sentences, the defendant made a motion to correct the second sentence. *Id.* 358 U.S. at 170, 79 S.Ct. at 210. The issue before the Court was whether Congress intended that a single discharge of a shotgun to constitute one offense under the statute, or, in the alternative, a separate offense for each officer assaulted. *Id.* 358 U.S. at 173, 79 S.Ct. at 211. The government argued that: "The legislation was aimed at protecting federal officers, not only to promote the orderly functioning of the federal government . . . , but also to protect the individual officers . . . . *Both of these legislative objectives make the individual officers a separate unit of prosecution.*" *Id*. 358 U.S. at 174, 79 S.Ct. at 212 (emphasis added). The Court found that the plain language and legislative history of the statute were ambiguous regarding the appropriate unit of prosecution and thus refused to find that "Congress intended that a single act of assault affecting two officers constitutes two offenses under the statute." *Id.* 358 U.S. at 176, 79 S.Ct. at 213. Because of the ambiguity regarding Congress' intent, the Court applied the rule of lenity and interpreted the statute to mean that a single shot injuring two officers constituted a single violation of the statute. *See id.* 358 U.S. at 177-78, 79 S.Ct. at 214.

[18] In both *Bell and Ladner*, the Supreme Court determined that the language and history of the relevant statutes were ambiguous as to the appropriate unit of prosecution. However, other courts have refused to find ambiguity in seemingly similar statutes. For instance, in *Missouri v. Whitley*, 382 S.W.2d 665 (Mo. 1964), the defendant caused an automobile accident in which three persons were killed. *Id.* at 666. The defendant was subsequently charged with three counts of manslaughter and was sentenced consecutively for each count. *Id*. The defendant appealed, arguing that the

sentencing was invalid and that the court was limited to imposing one sentence for one offense resulting from the single accident. *Id.* The manslaughter statute provided in pertinent part: "'Every killing of a human being by the act, procurement or culpable negligence of another . . . shall be deemed manslaughter.'" *Id.* 666-67 (quoting MO REV STAT. § 559.070 (1959). The appeals court upheld the sentences holding that the gravamen of the offense is the killing of a human being and that the statute, by its terms, contemplates that there shall be as many offenses as there were victims. *Id*. at 667.

[19] Further, in *Utah v. James*, 631 P.2d 854 (Utah 1981), the defendant held five victims hostage during the commission of a robbery. *Id*. at 855. He was charged and convicted of five counts of aggravated kidnapping. *Id.* The statute provided that a defendant commits a kidnapping if the defendant confines "the victim." *See id*. at n. 2, *and* UTAH CODE ANN. § 76-5-302 (1953). The defendant appealed the convictions, arguing that his actions constituted a single criminal act and thus only one violation of the statute. *Id*. at 855. The court emphasized that, in crimes against the person, a single criminal act can give rise to as many offenses as there are victims, as is made clear by the language of the statute which speaks in terms of the singular victim. *Id*.

[20] In cases where the defendant's single act injures more than one person, legislative intent as to the appropriate unit of prosecution can be gleaned by the descriptive words of the statute. *See McKinney v. Alabama*, 511 So.2d 220, 224-25 (Ala. 1987) (citing R. Owens, *Alabama's Minority Status: A Single Criminal Act Injuring Multiple Persons Constitutes Only a Single Offense*, 16 CUMB L. REV. 85, 105-07 (1985-86)). Specifically, statutes using the word "any" compels a construction that only one conviction under the statute is allowed despite the number of victims. *See id*. at 225; *cf. United States v. Corbin Farm Service*, 444 F. Supp. 510, 530, n. 10 (E.D. Cal.

1978) (acknowledging that the Fifth Circuit has held that the use of the word "any" followed by a singular noun or pronoun in a statute, i.e. "conceals any prisoner after his escape," is not sufficient to show an intent that the number of violations equals the number of escapees) (citation omitted), *aff'd* 578 F.2d 259 (9th Cir. 1978). By contrast, statutes using the singular words "a" or "another" reveal the intent that each victim be the appropriate unit of prosecution. *See McKinney*, 511 So.2d at 225 (citing Owens, 16 CUMB L. REV. 105-07) (describing statutes which criminalize "abandoning a child" and "endangering the welfare of a child" as falling within the class of statutes which define each victim as the appropriate unit of prosecution).

[21] We find that the plain language of the Child Abuse statute clearly evinces the legislative intent as to the proper unit of prosecution. The language of the statute refers to a person's actions with regard to "a child." Because the statute makes it a crime to subject "*a child* to cruel and unusual treatment," or to have "*a child* in his care or custody . . . [and] unreasonably cause . . . the physical or emotional health of *that child* to be endangered," it is evident that the legislature intended that each separate child be the appropriate unit of prosecution. 9 GCA § 31.30 (emphasis added). *See McKinney*, 511 So.2d at 224-25; *cf. Massachusetts v. Iacono*, 478 N.E.2d 144, 148-49 (Mass. App. Ct. 1985) (recognizing that where the statute speaks of the "person" is indicia that the number of victims measures the number of offenses).

[22] The Child Abuse statute is distinguishable from the statutes in *Bell* and *Ladner*, wherein the crimes were defined, respectively, as the taking of "*any*" woman or across state lines and the assaulting of "any" federal officer. The use of the word "any" is not as clear an indication of the proper unit as the use of the term "a child." We decline to depart from the axiom of statutory construction that the words of a statute be given their common, ordinary meaning. *See People v.*

Quichocho, 1997 Guam 13, ¶ 15. Therefore, like the statutes in *James* and *Whitley*, the use of the singular descriptive term "a" compels a construction that the legislature intended that each child victim be the appropriate unit of prosecution. Because the legislative intent is unambiguous, it is unnecessary to resort to the rule of lenity.

[23] San Nicolas additionally argues that he engaged in a continuing course of conduct, and therefore 9 GCA § 1.22(e) specifically acts as a limitation on imposing consecutive sentences. The statute provides:

> **§ 1.22. Prosecution for Conduct Which Constitutes More Than One Offense.** When the same conduct of the defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense. *He may not, however, be convicted of more than one offense if:*
> . . .
> (e) the offense is defined as a continuing course of conduct and the defendant's course of conduct was uninterrupted, unless the law provides that specific periods of such conduct constitute separate offenses.

Title 9 GCA § 1.22(e) (1993) (emphasis added).

[24] The statute specifically governs convictions, and not sentencing, therefore, it is questionable whether the statute applies in the context of sentencing. *Cf. Djekich*, 229 Cal. App. 3d 1213, 280 Cal. Rptr. 824 (analyzing the propriety of multiple sentencing under a statute which prohibited cumulative sentencing if the acts underlying the multiple violations constitutes a continuous course of action). Moreover, section 1.22(e) speaks to crimes in which the unit of prosecution is the "continuous course of conduct." In other words, in accordance with section 1.22(e) the government cannot obtain more than one conviction if the statute criminalizes a course of conduct over a course of time as opposed to specific acts committed.

[25] It is within the legislature's discretion to define a crime in terms of a "course of conduct" as opposed to separate acts. *See United States v. Johnson*, 612 F.2d 843, 845-46 (4th Cir. 1979). The

test is whether the statute prohibits individual acts, or instead, the course of action which they constitute. *See id.*; *Blockburger*, 284 U.S. at 301-02, 52 S.Ct. at 181 (citation omitted). If the former, then each act is punishable separately, if the latter, a court may only impose one penalty. *See Blockburger*, 284 U.S. at 302, 52 S.Ct. at 181.

[26] Courts have conducted an analysis of whether a statute proscribes a continuous course of conduct. For example, in *United States v. Johnson*, the defendant was convicted and sentenced consecutively on three separate counts of violating 18 U.S.C. § 659 for three thefts of gasoline from an interstate pipeline system, tank, and storage facility. *Johnson*, 612 F.2d at 844. The defendant challenged the sentence on the ground that the three thefts constituted a single, continuous transaction and thus only one violation of the statute. *Id.* The court conducted a unit of prosecution analysis looking to whether the statutory language indicated that the legislature intended to proscribe distinct and separate acts as opposed a continuous course of conduct. *Id.* at 845-46. The court determined that the plain language of the statute clearly showed that each theft would constitute a separate offense, and that the statute was not enacted to prohibit a "course of conduct." *See id.* at 846.

[27] By contrast, the issue in the instant case is not whether San Nicolas' acts constitute a "continuous course of conduct"; rather, we are concerned with the legislature's intent to allow for multiple punishments where there are two victims. There is a distinction between the continuous acts involved and the number of victims involved. We are not concerned with whether the Child Abuse statute makes San Nicolas' course of action at the river one crime, as opposed to separately punishable crimes for the separate acts of leading the girls to the river, allowing them to get into the water, and failing to direct the children to get out of the water after appreciating the danger inherent

in the situation. Here, San Nicolas was not charged with two separate counts of Child Abuse on the basis of distinct acts committed during the river episode, rather, he was charged separately on the basis that there were two different victims. San Nicolas argues that the act of leading the two girls to the river constituted the single act of child abuse. Yet, even accepting this argument, the only issue remaining is whether the fact that there were two different victims validates the imposition of consecutive sentences. Thus, assuming the section 1.22(e) governs sentencing, because the validity of consecutive sentencing turns on the number of victims, and not the continuous nature of the acts committed against each victim, the statute is inapplicable and thus does not limit the imposition of multiple sentences.

[28] Because we find that the Child Abuse statute reflects the legislative intent to create a separate offense for each victim, we hold that the trial court did not err in imposing consecutive sentences. In accordance with section 80.10(b) of Title 9 of the Guam Code Annotated, the trial judge had the discretion to impose either concurrent or consecutive sentences "[w]here the judgment of conviction included more than one crime . . . ." Title 9 GCA § 80.10(b) (1996). Here, the judgment of conviction consisted of two offenses of Child Abuse and thus consisted of "more than one crime." The trial court, therefore, acted within its discretion in imposing consecutive sentences.

IV.

[29] San Nicolas was convicted of two separate violations of the same statute, therefore, the trial court erroneously applied the *Blockburger* test in deciding whether to impose consecutive sentences. However, we find that the imposition of consecutive sentences was proper under the "unit of prosecution" analysis. An appellate court may affirm the judgment of a lower court on any ground

supported by the record, *see generally Lujan v. Hemlani*, 2000 Guam 21 (affirming the trial court's decision on other grounds), we therefore **AFFIRM** the imposition of consecutive sentences.

PETER C. SIGUENZA, JR.
Associate Justice

F. PHILIP CARBULLIDO
Associate Justice

BENJAMIN J.F. CRUZ
Chief Justice