IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellant,

v.

CARL T.C. GUTIERREZ, CLIFFORD A. GUZMAN, JOSEPH LUIS CRUZ, AND THELMA ANN D. AGUON PEREZ,
Defendants-Appellees.

Supreme Court Case No.: CRA04-004
Superior Court Case No.: CF0200-04

OPINION

Filed: November 9, 2005

Cite as: 2005 Guam 19

Appeal from the Superior Court of Guam
Argued and submitted on June 29, 2005
Hagåtña, Guam

Appearing for Plaintiff-Appellant:
Lewis W. Littlepage
Asst. Attorney General
Office of the Attorney General
Pedro's Plaza
287 W. O'Brien Dr.
Hagåtña, Guam 96910

Appearing for Defendant-Appellee
Carl T.C. Gutierrez:
F. Randall Cunliffe, *Esq.*
Cunliffe & Cook, P.C.
210 Archbishop F.C. Flores St., Ste. 200
Hagåtña, Guam 96932

Appearing for Defendant-Appellee
Clifford A. Guzman:
Larry Teker, *Esq.*
Teker, Torres & Teker, P.C.
Ste. 2A, 130 Aspinall Ave.
Hagåtña, Guam 96932

Appearing for Defendant-Appellee
Joseph Luis Cruz:
Joaquin C. Arriola, Jr., *Esq.*
Arriola, Cowan & Arriola
259 Martyr St., Ste. 201
P.O. Box X
Hagåtña, Guam 96932

Appearing for Defendant-Appellee
Thelma Ann D. Aguon Perez:
Anthony C. Perez, *Esq.*
Peter C. Perez, *Esq.*
Lujan Unpingco Aguigui & Perez, LLP
300 Pacific Daily News Bldg.
238 Archbishop F.C. Flores St.
Hagåtña, Guam 96910

BFORE: FRANCES M. TYDINGCO-GATEWOOD, Presiding Justice; ROBERT J. TORRES, JR., Associate Justice; MIGUEL S. DEMAPAN, Justice *Pro Tempore*.[1]

PER CURIAM:

[1] The Plaintiff-Appellant, the People of Guam ("People"), appeal from a Memorandum of Decision issued by the Superior Court of Guam ordering the dismissal with prejudice of the criminal case filed against the Defendants-Appellees, Carl T.C. Gutierrez, Clifford A. Guzman, Joseph Luis Cruz and Thelma D. Ann Aguon Perez (collectively, "Defendants"). The Memorandum amended a previously-issued Decision and Order that allowed for dismissal of the case without prejudice. The People argue on appeal that the trial court lost jurisdiction after ordering dismissal without prejudice. Alternatively, the People argue that the trial court violated the separation of powers doctrine and abused its discretion in ordering dismissal with prejudice. We reject the argument that the trial court lost jurisdiction and hold that the trial court was justified in dismissing the case with prejudice. Accordingly, we affirm.

I.

[2] The proceedings below involved a number of indictments and superseding indictments against the defendants. Perez was first indicted on November 20, 2003 in Superior Court Case No. CF551-03. The People then presented a superseding indictment against her on January 6, 2004. Gutierrez and Guzman were first indicted on December 30, 2003 in CF0615-03. A superseding indictment was then presented on February 20, 2004, joining Perez, Gutierrez, Guzman, and Cruz.

[3] Perez had waived her right to a speedy trial on December 10, 2003, but after the superseding indictment of January 6, 2004, she asserted her right on January 9, 2004. Guzman asserted his right to a speedy trial on January 29, 2004. Gutierrez asserted his right to a speedy trial on March 10,

[1] Chief Justice F. Philip Carbullido recused himself from this matter. As the next senior member of the panel, Associate Justice Frances Tydingco-Gatewood sits as Presiding Justice of the panel. Miguel S. Demapan, Chief Justice of the Commonwealth of the Northern Mariana Islands sits as Justice *Pro Tempore*.

2004. Cruz asserted his right to a speedy trial on March 18, 2004. Perez waived her right to a speedy trial on March 15, 2004.

[4] On April 20, 2004, the trial court dismissed a majority of charges in CF0615-03. The People then filed another superseding indictment against all four defendants on April 23, 2004. On June 2, 2004, the court dismissed CF0615-03. On June 9, 2004, the People then presented an indictment alleging the same criminal acts under a new case number, Superior Court Case No. CF0200-04. On July 7, 2004, the record and file in CF0615-03 was consolidated with CF0200-04.

[5] On July 9, 2004, Perez filed a Motion to Dismiss for Failure to Present Exculpatory Evidence. On July 12, 2004, Perez filed a Motion to Dismiss with Prejudice for Denial of Defendant's Right to a Speedy Trial. On July 13, 2004, Cruz filed a Motion to Dismiss Indictment for Lack of Speedy Trial. Gutierrez and Guzman joined both speedy trial motions and the motion to dismiss for failure to present exculpatory evidence.

[6] On August 4, 2004, the People filed a request for leave to dismiss. That same day, the court held a hearing on these pre-trial motions. On August 16, 2004, the trial court granted the People's motion to dismiss, but reserved the issue of whether such dismissal would be with or without prejudice.

[7] On August 27, 2004, the trial court issued decisions and orders ruling on the motions. In the first order, the court granted the motion to dismiss based on the prosecutor's failure to present exculpatory evidence to the grand jury. In the second order, the court denied the motion to dismiss regarding the speedy trial violation ("the Speedy Trial Order"). This order, however, also determined that the time for calculating speedy trial would begin when the defendant first asserted the right, and would not be reset upon the filing of a superseding indictment. In the third order, pursuant to the People's request for leave to dismiss, the court determined that dismissal of the case would be without prejudice ("the Dismissal without Prejudice Order"). The court dismissed the case without prejudice on reliance on the People's contention that its office "must give priority to cases involving physical violence, and that resources are inadequate to go forward at the present time." Appellant's

Excerpts of Record, ("ER"), tab 6, p. 3 (Decision & Order In Re: Dismissal with Prejudice). In the Dismissal without Prejudice Order, the trial court rejected the Defendants' argument that the case should be dismissed with prejudice due to the People's bad faith.

[8] On August 30, 2004, the trial court *sua sponte* gave notice that it would reconsider the Dismissal without Prejudice Order, and scheduled a hearing for September 1, 2004. All parties appeared at the hearing and arguments were made before the trial court. At the conclusion, the trial court ruled from the bench that dismissal would be with prejudice.

[9] The court instructed the People to file the dismissal order by September 3, 2004. The trial court then on September 10, 2004, issued a Dismissal with Prejudice Order memorializing the findings and conclusions of the September 1, 2004 hearing. The court's decision was based on its discovery that contrary to the prior assertions of the People in seeking dismissal without prejudice, the People were pursuing other non-violent criminal indictments. The court found the existence of another indictment against the Defendant Gutierrez to be contrary to the People's assertions during the hearing that there was a lack of resources necessary to prosecute non-violent cases within the Attorney General's Office. The court dismissed the case with prejudice, determining that the People were acting in bad faith, and that the opportunity to reindict the Defendants would be harassment. Appellant's ER, tab 8 (Memorandum of Decision: Reconsideration of Dismissal with Prejudice).

[10] The People did not file a dismissal as ordered by the trial court. Instead, the People filed a Notice of Appeal before this court on September 14, 2004. The Notice of Appeal specified that the People were appealing specifically from the August 27, 2004 Decision and Order holding that the time for calculating speedy trial would not be reset upon the filing of a new indictment (i.e., the Speedy Trial Order), and the September 10, 2004 Memorandum of Decision stating that the dismissal, based on the People's request, would be with prejudice (i.e., the Dismissal with Prejudice Order).

[11] This court held that the People could appeal from the Dismissal with Prejudice Order even without the entry of judgment pursuant to Title 8 GCA § 130.20(a)(5). This court also found, upon

the motion of Perez, joined by the remaining Defendants, that the People's appeal of the Speedy Trial Order was frivolous and issued sanctions accordingly.

II.

[12] This court has jurisdiction over the Dismissal with Prejudice Order pursuant to Title 8 GCA § 130.20(a)(5) (Westlaw through Guam Pub. L. 28-037 (2005)), which states that the government may appeal "[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." *See People v. Superior Court (Bruneman)*, 1998 Guam 24, ¶ 9 (stating that "section 130.20 is a jurisdictional statute"); *see also People v. Pak*, 1998 Guam 27, ¶ 6.

III.

[13] "[T]he trial court's order granting or denying a motion to dismiss an indictment is reviewable for abuse of discretion." *United States v. Derr*, 726 F.2d 617, 619 (10th Cir. 1984). "A trial court abuses its discretion when its decision is based on an erroneous conclusion of law or where the record contains no evidence on which the judge could have rationally based the decision." *Town House Dep't Stores, Inc. v. Ahn*, 2003 Guam 6, ¶ 27 (quoting *Brown v. Eastman Kodak Co.*, 2000 Guam 30, ¶ 11). This court has stated:

> An abuse of discretion has been defined as that 'exercised to an end not justified by the evidence, a judgment that is clearly against the logic and effect of the facts as are found.' When using this standard, a reviewing court does not substitute its judgment for that of the trial court. Instead, we must first have a definite and firm conviction the trial court, after weighing relevant factors, committed clear error of judgment in its conclusion.

People v. Tuncap, 1998 Guam 13, ¶ 12 (quoting *Int'l Jensen, Inc. v. Metrosound U.S.A., Inc.*, 4 F.3d 819, 822 (9th Cir.1993))(citation omitted). This case also involves issues of statutory interpretation, which are subject to *de novo* review. *Ada v. Guam Tel. Auth.*, 1999 Guam 10, ¶ 10.

[14] The People raise two principle arguments in this appeal. First, that the trial court lost jurisdiction upon granting dismissal without prejudice, and thus was barred from later reconsidering

its decision and ordering dismissal with prejudice. Second, that the trial court, in granting dismissal with prejudice, abused its discretion and violated the separation of powers doctrine by intruding upon the Attorney General's prosecutorial discretion. The Defendants maintain that the trial court retained jurisdiction until the Notice of Appeal had been filed, and further argue that the trial court did not abuse its discretion and did not violate separation of powers.

[15] We thus must decide two issues: (1) whether the trial court had jurisdiction to enter the order dismissing the underlying proceeding with prejudice; and (2) if the court had such jurisdiction, did the court nonetheless abuse its discretion in dismissing the case with prejudice.

A. The Trial Court's Jurisdiction

[16] The People rely on a number of local statutes in support of its argument that the trial court lost jurisdiction over this case when it issued the dismissal without prejudice order which, as discussed *infra*, are completely irrelevant to this appeal. The People are aware that raising issues wholly without merit on appeal not only constitutes a waste of judicial resources, but will also result in sanctions. This court has already sanctioned the Attorney General for filing a frivolous appeal on the issue of calculation of speedy trial time and has awarded damages to Appellees including attorneys fees and costs. Such sloppy briefing will not be tolerated by this court. The Office of the Attorney General is hereby are reprimanded for submitting written arguments dealing with 7 GCA § 14109, 8 GCA §§ 130.25, 120.10 and rules of divestiture which are "groundless, without foundation and without merit." *In re Drexel Burnham Lambert Group Inc.*, 995 F.2d 1138, 1147 (2d Cir.1993).

1. Title 7 GCA § 14109

[17] The People rely upon Title 7 GCA § 14109 and argue that it confers upon the trial court the statutory authority to exercise jurisdiction. This provision states, in its entirety: "Jurisdiction over Nonresident Defendants. A court of this Territory may exercise jurisdiction on any basis not inconsistent with the Organic Act or the Constitution of the United States." Title 7 GCA § 14109

(Westlaw through Guam Pub. L. 28-037 (2005)). Relying on this statute, the People argue that due process is violated when the trial court retained jurisdiction after the case was dismissed without prejudice on August 27, 2004.

[18] At oral argument, the People sensibly abandoned its reliance on 7 GCA § 14109. The People clearly misinterpret 7 GCA § 14109. This provision is Guam's long-arm statute. *Cf. Harris Rutsky & Co. Ins. Services, Inc. v. Bell & Clements Ltd.,* 328 F.3d 1122, 1129 (9th Cir. 2003) ("California's long-arm statute allows courts to exercise personal jurisdiction over defendants to the extent permitted by the Due Process Clause of the United States Constitution. *See* Cal. Code Civ. Pro.§ 410.10 ('A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.')"). As such, it expressly governs personal jurisdiction over non-resident defendants. *See id.*; *see also United States ex rel. Thistlethwaite v. Dowty Woodville Polymer, Ltd.,* 110 F.3d 861, 868 (2nd Cir. 1997) (clarifying that "long-arm statutes govern personal jurisdiction, not subject matter jurisdiction").

[19] Long-arm statutes are generally relied upon in determining whether the court may constitutionally assert personal jurisdiction over a defendant found outside the jurisdiction. Long-arm statutes cannot be used to determine continuing jurisdiction based upon a court's actions in terminating a case in which the court validly has personal jurisdiction over the defendants. Furthermore, there is no question, and the People do not challenge, that the trial court had personal jurisdiction over the parties in this case when the case was commenced. The more appropriate question is whether the court's jurisdiction ceased when it entered the order dismissing the case without prejudice. While other statutes and principles of law may apply to the analysis of this question, section 14109 simply is not one of them. The People's argument regarding section 14109 is meritless.

2. Title 8 GCA § 130.25

[20] In its brief, the People also mistakenly relied on Title 8 GCA § 130.25, but similarly conceded this contention during oral argument. Title 8 GCA § 130.25 states that "[a]n appeal taken by the government in no case stays or affects the operation of a judgment in favor of the defendant,

until judgment is reversed." 8 GCA § 130.25 (Westlaw through Guam Pub. L. 28-037 (2005)). This provision is based on and is virtually identical to California Penal Code § 1242,[2] and has been interpreted as allowing for the discharge of a defendant and the refund of the bail money when charges have been dismissed. The section has also been interpreted as prohibiting the government from retaining the bail money until the final determination of the case on appeal. *See People v. McRae*, 179 P.2d 3, 4 (Cal. Dist. Ct. App. 1947) (rejecting the argument that an appeal from the dismissal order automatically stayed the judgment in favor of the defendant).

[21] The People initially relied on section 130.25 in contending that the instant appeal does not affect the Dismissal without Prejudice Order because the People did not appeal from this decision. This argument lacks merit and is extraneous to the case at hand. Section 130.25 relates to the effect of a judgment, and it is undisputed that the trial court did not issue a judgment in this matter.

3. Title 8 GCA § 120.10

[22] Finally, the People rely on Title 8 GCA § 120.10, which states:

> § 120.10. Judgment for Defendant: Discharge; Exceptions. (a) Where a general verdict is rendered or a finding by the court is made in favor of the defendant, a judgment of acquittal shall be given forthwith.
> (b) Except as otherwise provided by Subsection (c) and by §§ 7.28 and 7.34 of the Criminal and Correctional Code, if a judgment of acquittal is given, or a judgment imposing a fine only, and the defendant is not detained for any other legal cause, he shall be discharged, if in custody, as soon as the judgment is given.

Title 8 GCA § 120.10 (Westlaw through Guam Pub. L. 28-037 (2005)). This provision also does not apply to this case. The Defendants were not acquitted by a jury; therefore, the trial court did not issue a "judgment of acquittal." Moreover, the trial court's dismissal of the case without prejudice under Title 8 GCA § 80.70(a) did not operate as an acquittal. *See People v. Norris*, 824 N.E.2d 205, 213 (Ill. 2005) ("[I]t has been said that the ordinary effect of a *nolle prosequi* is to terminate the charge to which it is entered and to permit the defendant to go wherever he pleases, without entering into a recognizance to appear at any other time. *If it is entered before jeopardy has attached, it does not operate as an acquittal,* so as to prevent a subsequent prosecution for the same

[2] California Penal Code § 1242 states: "An appeal taken by the people in no case stays or affects the operation of a judgment in favor of the defendant, until judgment is reversed." Cal Penal Code § 1242 (2004).

offense.")(quoting *People v. Watson*, 68 N.E.2d 265, 266 (Ill. 1946)(emphasis added); *State v. Jones*, 601 A.2d 502, 504 (Vt. 1991) ("[A] nol pros does not ordinarily operate as an acquittal . . . ."); *State v. Reis*, 815 A.2d 57, 65 (R.I. 2003) ("A Rule 48(a) dismissal is not an acquittal."). Further, there was no "judgment imposing a fine only." 8 GCA § 120.10(b). In fact, there was no judgment at all. Section 120.10 does not apply under the facts of this case, and therefore does not support the People's argument that the trial court lacked jurisdiction to issue the dismissal with prejudice. The People's position on this section is groundless.

4. Divestiture Rule

[23] The People conclude by arguing that the trial court lost jurisdiction when the Defendants did not appeal the Dismissal without Prejudice Order. This argument misconstrues the rule regarding divestiture of jurisdiction.

[24] The issue raised by the People relates to jurisdiction in the sense of the power or ability to act or rule in a case. With regard to the power to act, this court has recognized the general rule that a trial court is divested of jurisdiction once a timely notice of appeal is filed. *Dumaliang v. Silan*, 2000 Guam 24, ¶ 14; *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58, 103 S. Ct. 400, 402 (1982) ("The filing of a notice of appeal is an event of jurisdictional significance--it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal."). This rule is not absolute, and "appellate courts have recognized exceptions such as post-appeal motions to the trial court that are in furtherance of the appeal." *Dumaliang*, 2000 Guam 24 at ¶ 14.

[25] Here, the trial court retained jurisdiction precisely because the Defendants did not appeal the Dismissal without Prejudice Order. *See id.* (recognizing the general rule that a trial court is divested of jurisdiction once a timely notice of appeal is filed). The Notice of Appeal in this case was filed on September 14, 2004. Under the divestiture rule, the trial court only lost jurisdiction to this court after this notice of appeal was filed. The trial court therefore had jurisdiction on September 1, 2004

when it ordered dismissal with prejudice and retained jurisdiction until September 14, 2004, when the People filed the instant appeal. The People's argument on divestiture is without foundation.

5. Authority to Reconsider

[26] The Defendants argue that the trial court has inherent authority to reconsider its own decisions. While it is correct that a trial court has the authority to reconsider prior decisions, *Guam Hous. and Urban Renewal Auth. v. Pac. Superior Enter. Corp.*, 2001 Guam 8 ¶ 13 (stating that "[i]nterlocutory orders are subject to reconsideration by the court at any time"), as an obvious matter this is true only while the court has jurisdiction over the case. Our concern, therefore, is whether any event occurred which would have acted to divest the lower court of jurisdiction. As stated earlier, the trial court was not divested of jurisdiction until the filing of a notice of appeal. *See Dumaliang v. Silan*, 2000 Guam 24, ¶ 14. Upon review of the record, we find that no other events occurred which had the effect of divesting the lower court of jurisdiction to enter its order of dismissal with prejudice.

[27] Furthermore, upon our independent consideration of the matter, we do not find that the filing of a request for leave to dismiss under Title 8 GCA § 80.70(a), or the lower court's act of dismissing the case without prejudice, divested the trial court of jurisdiction to later enter its order dismissing the case with prejudice.

[28] Very few courts have agreed with the argument that the prosecutor's filing of a dismissal without prejudice pursuant to its power to *nol pros*[3] divests the trial court of jurisdiction to dismiss a case with prejudice.

[29] One of these courts was the District Court of Appeals for Florida in *State v. Braden*, 375 So. 2d 49, 50 (Fla. Dist. Ct. App. 1979). The defendant in *Braden* was charged by information of the possession and sale of marijuana. *Id*. at 49. The state thereafter filed a *nolle pros*se. *Id.* at 50. "The

[3] The term *nol pros* is also referred to in case law as *nolle prosse* or *nolle prosequi*. *Nolle prosequi*, translated from Latin, means "to be unwilling to prosecute." *Wilson v. Renfroe*, 91 So. 2d 857, 859 (Fla. 1956). A dismissal under Title 8 GCA § 80.70(a) is derived in part from the original common law power of a prosecutor to dismiss a case pursuant to its *nolle prosequi* powers. *See* Notes, Title 8 GCA § 80.70 (acknowledging that "[s]ection 80.70 continues the substance of a portion of former Rule 48 . . . ."); *see United States v. Salinas*, 693 F.2d 348, 350-51 (5th Cir. 1982) (indicating the distinction between the common law power to *nol pros* and the authority conferred under Rule 48).

trial judge refused to recognize the nolle prosse, however, and entered an order dismissing the information with prejudice" upon its finding "that the state had 'flagrantly and intentionally' violated the discovery rules." *Id*. The state failed to appeal this dismissal with prejudice, but instead filed a second information charging the defendant only with possession, and not the sale, of marijuana. *Id*. The defendant moved to dismiss the second indictment. *Id.* The trial court "construed the second information to be a collateral attack upon the dismissal with prejudice of the first information." *Id*. The court dismissed the second indictment, finding that "the state's correct remedy should have been an appeal from the first dismissal." *Id*.

[30] The state appealed, arguing that "the dismissal with prejudice of the first information was a nullity because it followed a nolle prosse of that information by the state." *Braden*, 375 So. 2d at 50. The appellate court agreed. The court found that the state could *nolle prosse* a case at any time prior to the swearing in of the jury, and the state need not seek permission from the trial court. *Id*. Based on these rules, the court found that the *nolle prosse* that was filed by the state with regard to the first information was effective. *Id*. The issue, therefore, was the effect of the dismissal with prejudice of the first information following the *nolle prosse. Id*. The court held that "[a]s a general proposition, everything which occurs in a proceeding subsequent to the filing of a nolle prosse by the state is a nullity. Accordingly, the dismissal with prejudice of the first information was a nullity, from which the state was not required to appeal." *Id*. (citations omitted). The court further found that "[g]iven that the dismissal was a nullity, it was within the authority of the state to file a second information based upon the same criminal conduct that was the basis for the first information." *Id*. The court accordingly reversed the dismissal with prejudice of the second information.[4]

[31] *Braden* specifically held that a *nolle prosse* effectively ends a proceeding, and therefore any action taken subsequent to the filing of the *nolle prosse* is a nullity. *Id*. It is implied from the holding that the *nolle prosse* of a case divests the court of the authority to take any further action in

[4] Importantly, the court explained that "[a]lthough we are reversing the dismissal with prejudice of the second information, we do take note of the events which led the lower court to dismiss the first information. Although we have ruled that dismissal was a nullity, nothing in this opinion should be construed as preventing the lower court from entering appropriate sanctions against the state for failure to comply with the discovery orders issued by the lower court." *Braden*, 375 So. 2d at 50.

the case. The rule in Florida, however, allows for the *nolle prosse* of a case without leave of court and is different from the rule on Guam. As explained by the *Braden* court, "[a] nolle prosse may be filed at any time prior to the swearing in of the jury. *Permission of the trial court is not necessary*, because the decision to file a nolle prosse is within the sole discretion of the state." *Id.* (citations omitted) (emphasis added); *see also State v. R.J.* 763 So. 2d 370, 372 (Fla. Dist. Ct. App. 1998) ("[W]e hold that the trial court was without authority to accept [the defendant's] plea of no contest after the state announced a nolle prosse in open court. We accordingly reverse and remand with directions to the trial court to vacate the imposition of sentence and direct the Clerk of the Court to amend its records to reflect the announcement of a nolle prosse by the state."); *Wilson*, 91 So. 2d at 859 (Fla.1956) ("Under the common law of England prosecution in criminal cases were controlled by the Attorney General and he alone had the exclusive discretion to decide whether prosecution should be discontinued prior to the inception of jeopardy. In the absence of statute, the common law continues to be in force in most of the states of this country. Florida has adopted no statute on the subject.").[5] By contrast, leave of court *is* necessary under Guam statute which governs the *nolle prosse* power of the prosecution. Title 8 GCA § 80.70(a) provides:

> (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.

Title 8 GCA § 80.70(a) (Westlaw through Guam Pub. L. 28-037(2005)) (emphasis added). Because leave of court is required, the dismissal under section 80.70(a) is an act of the court. *See Jackson,* 420 So. 2d at n. 2 (quoting Wharton's Criminal Procedure, 12th ed., section 518, wherein it is stated: "[P]rosecutors in some jurisdictions still possess the absolute power to enter a nolle prosequi. In most jurisdictions, however, the decision to dismiss a pending prosecution can no longer be made by the prosecutor alone; the nolle prosequi as known to the common law has been abolished. The

[5] *See also State v. Jackson*, 420 So. 2d 320, 322 (Fla. Dist. Ct. App. 1982) (referencing the statements made by the *Wilson* court and further recognizing its recent unequivocal holding "that the State may nolle prosequi an information without the approval of the court at any time prior to the swearing in of the jury").

manner in which and the limitations under which the dismissal power may be exercised vary: The prosecutor may file a dismissal of an indictment or information only with the 'consent of the court', 'leave of court', or 'permission of the court' . . . ."). It therefore cannot be said that the court loses jurisdiction when a *nolle prosse* is filed by the People. *But cf. Jones*, 601 A.2d at 502-04 (rejecting the argument that the State's dismissal of the case without prejudice under their analogous Rule 48(a) ended the court's jurisdiction to take any further action and dismiss the case with prejudice).

[32] So long as the court retains actual jurisdiction over the case it can reconsider its prior orders. *See Guam Hous. and Urban Renewal Auth.*, 2001 Guam 8 at ¶ 13 ("Interlocutory orders are subject to reconsideration by the court at any time."). We do not see any compelling reason to exclude orders granting dismissal upon motion of the government from this rule. Like any other decision over which the trial court possesses the authority to enter, the trial court's decision granting "leave" to dismiss can be reconsidered while the case remains pending before it.

[33] The People have not cited any authority, and we have found none, which holds that the trial court's decision granting leave to dismiss without prejudice ends the matter and divests the court of jurisdiction in the same manner as does the filing of a notice of appeal. By contrast, even with regard to the entry of a judgment, the trial court retains the jurisdiction to vacate the judgment in certain instances. *See* Title 8 GCA § 105.66(c)(Westlaw through Guam Pub. L. 28-037 (2005)) ("A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on a remand of the case."); Title 8 GCA 110.30(b) (Westlaw through Guam Pub. L. 28-037 (2005)) ("If the trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment.").

[34] We therefore hold that the trial court did not lose jurisdiction either when the People requested dismissal of the case without prejudice, or when the trial court ordered dismissal without prejudice on August 27, 2004. Accordingly, the trial court had jurisdiction to reconsider its decision, and to subsequently order dismissal with prejudice on September 1, 2004.

B. Dismissal of the Indictment with Prejudice

[35] We must next consider whether the lower court otherwise erred, or abused its discretion, in its decision dismissing with prejudice. With regard to this issue, we must consider: (1) whether the lower court abused it discretion in reconsidering its decision granting leave to dismiss the case without prejudice; (2) whether, under 8 GCA § 80.70(a), the lower court was permitted to *sua sponte* dismiss the case with prejudice upon the finding that the People acted in bad faith; and (3) whether the lower court was required to give forewarning prior to dismissing the case with prejudice.

1. Reconsideration

[36] Gutierrez and Cruz argue that the lower court had the authority to reconsider any decision previously made in the case. Defendant Cruz further cites the law of the case doctrine, arguing that "[a]lthough the 'law of the case' doctrine ordinarily precludes the court from reconsidering issues decided in the same case, it does not limit the court's power and its discretion to reconsider orders it reasonably believes to have been wrong." Cruz's Appellee's Br., p. 5 (May 6, 2005).

[37] As a general rule of discretion, rulings made in a proceeding are considered the law of the case and are binding in later proceedings. *People v. Hualde*, 1999 Guam 3, ¶ 13 ("[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."). The law of the case doctrine applies to decisions made on appeal as well as decisions made at the trial court level. *See id.* While courts are generally in accord that the law of the case doctrine applies to prevent reconsideration of an order entered by a *different* judge, *see Goldey v. Trustees of Univ. of Pa.*, 675 A.2d 264, 266 (Pa. 1996) (citing the trial court's acknowledgment of the "general rule that one judge should not ordinarily overrule the interlocutory decision *of another judge of the same court* in the same case") (emphasis added); *Guam Hous. and Urban Renewal Auth.*, 2001 Guam 8 at ¶ 14 (analyzing whether the trial court erred in departing from the law of the case where it reconsidered an earlier order granting interpleader), this court has not previously decided whether the law of the case doctrine constrains reconsideration of decisions made by the same judge in the same proceeding. Courts are split on this issue.

[38] Some courts hold that the law of the case doctrine does not apply when the same judge is reconsidering his or her own decision. *See Leoni v. Whitpain Township Zoning Hearing Bd.,* 709 A.2d 999, 1001 (Pa. Commw. Ct. 1998) ("The Supreme has . . . considered 'the rule that a judge should not overrule a decision of another judge of the same court in the same case,' and reiterated the 'the need for finality and the prevention of judge shopping.' Here, the doctrine and the interests it is meant to protect are obviously not implicated, because Judge Moore took part in both decisions in question.")(citations omitted); *State v. Sharp*, 702 P.2d 959, 961 (Mont. 1985) ("The policies supporting the 'law of the case' doctrine do not apply in a situation, such as in the case at bar, where the same judge is on the case for its duration.").[6] By contrast, other courts do recognize application of the doctrine to preclude reconsideration of orders entered by the same judge. As was explained by one court, "[t]here are two distinct situations where the law of the case doctrine is applicable. First, a court ordinarily will not reconsider its own decision made at an earlier stage of the trial or on a prior appeal, absent clear and convincing reasons to reexamine the prior ruling. Second, an inferior court must apply the decision of a superior appellate tribunal on remand." *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 532 (7th Cir. 1982)(citations omitted); *accord Casey v. Planned Parenthood,*14 F.3d 848, 856 n.11 (3d Cir.1994) (stating that "law of the case rules apply to *subsequent rulings by the same judge in the same case* or a closely related one, to rulings by different

---

[6] The concurring justice in *Blyther v. Chesapeake & Potomac Tel. Co.*, 661 A.2d 658, (D.C. 1995) recognized that his court had not previously "decided whether the law of the case doctrine applies to prevent a judge from reconsidering his or her own prior order." *Id*. at 662. The judge rejected the proposition, and offered an explanation for why the doctrine should not apply to reconsideration of a judge's own prior rulings, explaining:

> With respect to courts of coordinate jurisdiction, we have observed that the doctrine "serves the judicial system's need to dispose of cases efficiently by discouraging 'judge-shopping' and multiple attempts to prevail on a single question." In the single-judge situation, the concern of judge-shopping is, of course, not present.
>
> . . .
>
> "Judges are constantly reexamining their prior rulings in a case on the basis of new information or argument, or just fresh thoughts...." It is both appropriate and ultimately efficient to permit the judge to act upon such new thoughts, in that it is likely to yield a more accurate result earlier than would be permitted as the result of an appeal. "No one will suggest that [a] judge himself may not change his mind and overrule his own order...." Therefore, I would hold that the law of the case doctrine is no bar to a judge revising or reversing his or her own decisions.

Id., 661 A.2d at 662 -63 (Ruiz, concurring) (citations omitted).

judges at the same level, or to the consequences of the failure to preserve an issue for appeal") (emphasis added); *Chun v. Bd. of Trustees,* 992 P.2d 127, 136 (Haw. 2000) ("The phrase 'law of the case' has been used, *inter alia,* to refer to 'the usual practice of courts to refuse to disturb all prior rulings in a particular case, including rulings made by the judge himself.'") (quoting *Wong v. City and County of Honolulu,* 665 P.2d 157, 162 (Haw. 1983)).

[39] It is clear, however, that courts accepting the applicability of the doctrine in reconsidering orders made by the same judge have harmonized the law of the case doctrine with the general rule regarding reconsideration. *See Williams v. Comm'r of Internal Revenue,* 1 F.3d 502, 503 (7th Cir. 1993) ("If the same judge had handled the case throughout, the law of the case doctrine would not have prevented him from reversing himself, unless the time for reconsideration had expired.") (citations omitted). Thus, whether or not proceeding under law of the case doctrine, a judge is nonetheless constrained by principles governing reconsideration. As was elucidated by the Seventh Circuit:

> Controversy over the doctrine of law of the case properly focuses on its invocation by a judge asked to change a previous ruling of his in a case, or by judges asked to change a previous ruling by a coordinate (as distinct from superior) court in a case. *In these, the only interesting applications of the doctrine, it is a doctrine about reconsideration.* That is how it normally is expressed. Here is a typical formulation: "a court will ordinarily not reconsider its own decision made at an earlier stage of the trial or on a prior appeal, absent clear and convincing reasons to reexamine the prior ruling." *Gertz v. Robert Welch, Inc.,* 680 F.2d 527, 532 (7th Cir.1982).

Johnson v. Burken, 930 F.2d 1202, 1207 (7th Cir. 1991)(emphasis added)(citations omitted).

[40] Whether or not the issue is precisely one of departing from the law of the case, the underlying inquiry nonetheless focuses on whether the trial court was acting appropriately in reconsidering the prior decision.[7] Similar standards apply in granting reconsideration or in departing from the law of

---

[7] The interconnectedness of the law of the case doctrine and the rules governing reconsideration was expressed by the Supreme Court of Hawaii, which stated:

> "Law of the case does not . . . have the inexorable effect of *res judicata* and does not preclude the court from reconsidering an earlier ruling if the court feels that the ruling was probably erroneous and more harm would be done by adhering to the earlier rule than from the delay incident to a reconsideration and the possible change in the rule of law to be applied." In fact, it has been noted that, so long as a trial court retains jurisdiction, it "always has the power to reexamine, modify, vacate, correct and reverse its prior rulings and orders."

Chun, 992 P.2d at 136 (citations omitted).

the case. Under the law of the case doctrine, issues previously decided may not be reconsidered, and are binding, unless an exception to the doctrine applies. A court may depart from the law of the case where:

> 1) the first decision was clearly erroneous; 2) an intervening change in the law has occurred; 3) the evidence on remand is substantially different; 4) other changed circumstances exist; or 5) a manifest injustice would otherwise result. Failure to apply the doctrine of the law of the case absent one of the requisite conditions constitutes an abuse of discretion.

Hualde, 1999 Guam 3 at ¶ 13 (citations omitted); *see also Lujan v. Lujan*, 2002 Guam 11, ¶ 7.

[41] Similarly, "[t]his court has adopted three prongs to justify reconsideration: 'where the trial court: (1) is presented with new evidence; (2) committed clear error or the decision was manifestly unjust, or (3) if there is an intervening change in controlling law.'" *Petition of Quitugua v. Flores*, 2004 Guam 19, ¶ 38 (quoting *Ward v. Reyes,* 1998 Guam 1, ¶ 10)(reviewing the grant of reconsideration pursuant to GRCP 59(e)) (citation omitted).

[42] We find that the trial court in the present case did not abuse its discretion in reconsidering its first order dismissing the case without prejudice under either the law of the case doctrine *or* the rules governing reconsideration. *See Guam Hous. and Urban Renewal Auth.*, 2001 Guam 8 at ¶¶ 13-15 (reviewing the court's decision to reconsider a prior order in light of the law of the case doctrine for an abuse of discretion). In its order dismissing the case with prejudice, the lower court stated that its decision was based on a finding that the People acted in bad faith in stating that it

---

Similarly, in *Avitia v. Metro. Club of Chicago, Inc.* 49 F.3d 1219, 1227 (7th Cir. 1995), the court squarely addressed the question of "whether the doctrine of law of the case precluded the judge from changing his ruling." The court explained that:

> The doctrine of law of the case establishes a presumption that a ruling made at one stage of a lawsuit will be adhered to throughout the suit. But it is no more than a presumption, one whose strength varies with the circumstances; it is not a straitjacket. One of the circumstances is the hierarchical relation between the court that rendered the questioned ruling and the court asked to reconsider it. If the original ruling was by a higher court, the lower court will be required by the most elementary sense of stare decisis to adhere to the ruling unless the reasons for departure are truly compelling, such as a contrary ruling by a still higher court. But if the ruling in question was by the same court (and regardless of whether the same judge or panel or a previous judge or panel of that court made the ruling), the duty of adherence is less rigid. *A judge may reexamine his earlier ruling (or the ruling of a judge previously assigned to the case, or of a previous panel if the doctrine is invoked at the appellate level) if he has a conviction at once strong and reasonable that the earlier ruling was wrong, and if rescinding it would not cause undue harm to the party that had benefitted from it.*

Avitia, 49 F.3d at 1227 (citations omitted)(emphasis added).

lacked the resources to prosecute cases which were not violent crimes. This rationale falls within the exception to the law of the case doctrine that a prior decision may be reconsidered if "changed circumstances exist," or a "manifest injustice would otherwise result." *Hualde*, 1999 Guam 3 at ¶ 13; *see also Guam Hous. and Urban Renewal Auth.*, 2001 Guam 8 at ¶ 15 (determining that the party's position regarding its surety status affected the earlier decision granting interpleader, and that the trial court correctly determined that the party's change in position regarding its surety status constituted a "change of circumstances warranting its reconsideration of the order granting interpleader" entered previously by a different judge). The conclusion is similarly warranted under the general principles governing reconsideration. The trial court's basis for reconsidering its order of dismissal without prejudice falls within the ground justifying reconsideration where there is "new evidence" or the earlier decision was "manifestly unjust." *Quitugua*, 2004 Guam 19 at ¶ 38 (quoting *Ward*, 1998 Guam 1 at ¶ 10). The trial court therefore did not abuse its discretion in revisiting its order denying the case without prejudice.

2. Authority under Title 8 GCA § 80.70(a)

[43] We must next decide whether, under 8 GCA § 80.70(a), the lower court was permitted to dismiss the case with prejudice *sua sponte* upon the court's finding that the People acted in bad faith.

a) The People's Motion to Dismiss

[44] On August 4, 2004, the People filed a Contingent Motion to Dismiss without Prejudice in the trial court. Appellant's ER, tab 2, p. 1 (Contingent Mot. to Dismiss without Prejudice). The contingent nature stems from the People's request that the motion be withdrawn and the case proceed to trial if the trial court were to dismiss with prejudice. Appellant's ER, tab 2, p. 1 (Contingent Mot. to Dismiss without Prejudice). The Motion explained that the Office of the Attorney General "does *not* have current sufficient resources with attorneys or investigators to go forward at the present time." Appellant's ER, tab 2, p. 1 (Contingent Mot. to Dismiss without Prejudice). The Motion further detailed that attorneys were leaving the office and that contracts for other attorneys had been invalidated. For this reason, "[t]he lack of resources requires that the Office prioritize the cases currently before it and handle those first that most seriously impact the safety of citizens of Guam,

such as homicides and violent crimes." Appellant's ER, tab 2, p. 2 (Contingent Mot. to Dismiss without Prejudice).

[45] Although the Motion cites no authority, statutory or otherwise, as the basis for making a contingent motion, during the August 27, 2004 hearing on pre-trial motions, the prosecutor explained the "contingent" nature of the motion, stating that "the case law is such that the Court needs to advise us of the consequences of such a dismissal, and that if it is considering such, then give us the opportunity to withdraw the motion." Transcript ("Tr."), vol. 2, p. 8 (Hr'g on Mot., Aug. 4, 2004).

[46] The pertinent statute with regard to criminal dismissals is Title 8 GCA § 80.70, which states in its entirety:

> (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.
>
> (b) If there is unnecessary delay in bringing a defendant to trial, the court, on its own motion, may dismiss the indictment, information or complaint. The reasons for the dismissal shall be set forth in an order entered upon the minutes.
>
> (c) The court on its own motion may dismiss a prosecution pursuant to § 7.67 of the Criminal and Correctional Code.

8 GCA § 80.70 (Westlaw through Guam Pub. L. 28-037(2005).

[47] During the August 27, 2004 hearing, the trial court referred to 8 GCA § 80.70(a), asking the prosecutor, "Isn't first you're asking for leave to file a dismissal?"[8] Tr., vol. 2, p. 9 (Hr'g on Mot., Aug. 4, 2004). Accordingly, in its August 18, 2004, Memorandum on Dismissal without Prejudice, the People cited 8 GCA § 80.70(a) as the basis for its dismissal motion.[9] Appellant's ER, tab 3, p.

---

[8] In addition, defense attorneys pointed out that 8 GCA § 80.70 applied to the People's motion. The attorney for Cruz stated, "[W]e agree with the Court that § 80.70 does control in this case and there is really, Your Honor, no such thing as a contingent motion to dismiss. Either the Government is moving to dismiss or not." Tr., vol. 2, p. 10 (Hr'g on Mot., Aug. 4, 2004). The attorney for Perez also agreed, saying "Under § 80.70(a) they ask for leave of Court to file the dismissal and then the Court will either grant that leave and dismiss with or without prejudice." Tr., vol. 2, p. 11 (Hr'g on Mot., Aug. 4, 2004).

[9] Because the motion is based on 8 GCA § 80.70(a), it is necessary to reconcile the "contingent" nature of the People's request (that the motion be withdrawn depending on the type of dismissal), with the procedure whereupon the motion is simply submitted to the court for its consideration. As a general rule, the court would dismiss the case without

2 (People's Mem. on Dismissal without Prejudice).

b) Rule 48(a) of the Federal Rules of Criminal Procedure

[48] This case presents the first instance for the interpretation of 8 GCA § 80.70(a) by this court. Section 80.70(a) is modeled, in part, after Rule 48(a) of the Federal Rules of Criminal Procedure,[10] which states:

> **(a) By the Government.** The government may, with leave of court, dismiss an indictment, information, or complaint. The government may not dismiss the prosecution during trial without the defendant's consent.
> **(b) By the Court.** The court may dismiss an indictment, information, or complaint if unnecessary delay occurs in:
> **(1)** presenting a charge to a grand jury;
> **(2)** filing an information against a defendant; or
> **(3)** bringing a defendant to trial.

Fed. R. Crim. P. 48.

i. Purpose of Rule 48(a)

[49] The seminal case discussing Rule 48(a) is *Rinaldi v. United States*, 434 U.S. 22, 98 S. Ct. 81 (1977), where the Government filed a Rule 48(a) motion seeking leave to dismiss federal charges against the defendant, who had already been convicted in state court, in violation of the *Petite* policy against multiple prosecutions for the same act. *See Petite v. United States*, 361 U.S. 529, 80 S. Ct. 450 (1960). The federal district court in *Rinaldi* denied the motion and the Fifth Circuit affirmed. *Rinaldi*, 434 U.S. at 23-24, 98 S. Ct. at 82-83. The U.S. Supreme Court reversed, holding that the case be remanded for the purpose of dismissing the federal indictment. *Rinaldi*, 434 U.S. at 32, 98 S. Ct. at 86. The Court interpreted the rule as follows: "The principal object of the 'leave of court' requirement is apparently to protect a defendant against prosecutorial harassment, *e.g.*, charging, dismissing, and recharging, when the Government moves to dismiss an indictment over the defendant's objection." *Rinaldi*, 434 U.S. at 29 n. 15, 80 S. Ct. at 85 n. 15.

---

prejudice. *See* CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE CRIM. § 811 (3d ed. 2004).

[10] The federal source is acknowledged in the Compiler's Notes, which state that "[s]ection 80.70 continues the substance of a portion of former Rule 48 . . . ." Notes, 8 GCA § 80.70.

[50] The leave of court requirement was recognized as investing some discretion in the trial court when ruling on the prosecutor's motion to dismiss. *Id*. This requirement was a departure from the common law right of the prosecutors to enter a *nolle prosequi* and dismiss the case without first seeking leave of the court. CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE CRIM. § 812 (3d ed. 2004).

ii. Presumption of good faith and rebuttal by showing of bad faith

[51] Under Rule 48(a), the prosecutor is recognized as having a presumption of good faith in bringing the motion. The Court in *Rinaldi* determined that "[t]he salient issue . . . is not whether the decision to maintain the federal prosecution was made in bad faith but rather whether the Government's later efforts to terminate the prosecution were similarly tainted with impropriety." *Rinaldi*, 434 U.S. at 30, 98 S. Ct. at 85. The prosecutor's good or bad faith *in bringing the motion* is the determining factor in granting or denying the motion. In *United States v. Greater Blouse, Skirt & Neckwear Contractors Ass'n*, 228 F.Supp. 483, 486 (S.D.N.Y. 1964), the court recognized that in recommending dismissal, there is a "presumption that [the prosecutor] is acting in good faith and in the proper discharge of his duties."

[52] The circuit courts have universally held that the prosecution is entitled to a presumption of good faith when bringing a Rule 48(a) motion, and the motion should generally be granted as a matter of course. *United States v. Dyal*, 868 F.2d 424, 428 (11th Cir. 1989) ("We conclude that, in the dismissal of an indictment, information or complaint under Rule 48(a), the government is entitled to a presumption of good-faith."); *Salinas*, 693 F.2d at 352 ("[T]his Court begins with the presumption that the prosecutor acted in good faith in moving to dismiss the first indictment."); *United States v. Palomares*, 119 F.3d 556, 560 (7th Cir. 1997) ("the United States attorney is entitled to a presumption that its motions to dismiss are grounded in good faith"); *United States v. Hayden*, 860 F.2d 1483, 1488 (9th Cir. 1988) ("[W]hen the government requests a Rule 48(a) dismissal in good faith, the district court is duty bound to honor the request.").

[53] The presumption, however, is not absolute. The "presumption [of good faith] is rebutted upon a showing of a lack of good faith." *Salinas*, 693 F.2d at 352. The court in *Salinas* credited the prosecutor with good faith and granted dismissal without prejudice, and the prosecutor sought a second indictment a week later. *Salinas*, 693 F.2d at 352-53 (footnote omitted). However, "[i]t was not until the arraignment of the second indictment that the lack of good faith on the part of the Government first became evident." *Salinas*, 693 F.2d at 352. The only reason ever proffered for dismissal was the prosecutor's dissatisfaction with the jury, and the court stated that "[i]t is apparent, therefore, that the Government used Rule 48(a) to gain a position of advantage or to escape from a position of less advantage in which the Government found itself as the result of its own election." *Id.* at 353 (internal quotation marks omitted). The court determined there was "sufficient evidence to overcome the presumption that the Government made the motion to dismiss in good faith." *Id.* The court criticized the prosecutor's action, stating: "After the district court placed its confidence in the Government by granting the motion to dismiss the indictment, the Government's lack of good faith became evident. Because of the improper motives of the Government in moving to dismiss the first indictment, the conviction is reversed." *Id.*

[54] Under *Salinas,* "the key factor in a determination of prosecutorial harassment is the propriety or impropriety of the Government's efforts to terminate the prosecution--the good faith or lack of good faith of the Government in moving to dismiss. The Government must not be motivated by considerations 'clearly contrary to the public interest.'" *Id.* at 351. Once bad faith in bringing the motion is found, the court may conclude that the prosecutor's actions would result in harassment, thereby warranting the denial of the government's motion to dismiss. *Id.* Courts similarly equate a finding of bad faith to a finding that the dismissal was not within the public interest. The Eighth Circuit has held that a district court must "grant the motion [to dismiss] unless the dismissal 'would be clearly contrary to manifest public interest, determined by whether the prosecutor's motion to dismiss was made in bad faith.'" *United States v. Rush*, 240 F.3d 729, 730 (8th Cir. 2001)(quoting *United States v. Goodson*, 204 F.3d 508, 512 (4th Cir. 2000)).

[55] The Fifth Circuit's reversal in *Salinas* was not lightly given, for the court acknowledged the presumption due to the government in seeking dismissal, and concisely articulated the rule as follows:

> The presumption that the prosecutor is the best judge of the public interest is rebutted when the motion to dismiss contravenes the public interest because it is not made in good faith. In such a case, Rule 48(a) mandates that the court deny the Government's motion to dismiss the indictment: "under the discretion yielded to [the court] by 48(a) to 'check [an] abuse of Executive prerogative,' the court can and must deny the motion to dismiss."

Salinas, 693 F.2d at 352 (quoting *In re Washington,* 544 F.2d 203, 209 (5th Cir. 1976)(en banc), *rev'd on other grounds, Rinaldi v. United States*, 434 U.S. 22, 98 S. Ct. 81 (1977) (citation omitted)).

iii. Separation of Powers issues

[56] As recognized by the *Salinas* court and as argued by the People herein, however, the court's discretion in granting or denying dismissals impacts certain powers of the executive branch, and specifically the Attorney General's prosecutorial discretion.

> The Rule was not promulgated to shift absolute power from the Executive to the Judicial Branch. Rather, it was intended as a power to check power. The Executive remains the absolute judge of whether a prosecution should be initiated and the first and presumptively the best judge of whether a pending prosecution should be terminated.

United States v. Smith, 55 F.3d 157, 158-59 (4th Cir. 1995) (quoting *United States v. Cowan*, 524 F.2d 504, 513 (5th Cir. 1975)).

[57] It is undisputed that a trial court's evaluation of dismissals pursuant to Rule 48(a) is narrow. "The court is limited to assessing whether the government's motion is contrary to manifest public interest because it is not based on the prosecutor's good faith discharge of her duties." *United States v. Jacobo-Zavala*, 241 F.3d 1009, 1013 (8th Cir. 2001). Accordingly, dismissals implicate the separation of powers doctrine, because "[t]he decision to indict, allege specific charges, or dismiss charges is inherently an exercise of executive power, and the prosecutor has broad discretion in these matters. The executive can choose not to prosecute one case, yet prosecute vigorously another involving the same issues." *United Stats v. Martin*, 287 F.3d 609,623 (7th Cir. 2002)(citations omitted).

[58] The People argue that when it is acting lawfully and within its constitutional and statutory authority, the court cannot interfere with the exercise of prosecutorial discretion without violating separation of powers. The People rely on a number of cases that emphasize the presumption of good faith to support this assertion. The People's interpretation of these cases, however, fail to recognize the essential element of the presumption, namely, that the government must have been acting in good faith. Moreover, it is apparent that the trial court here, as in *Salinas*, applied the presumption of good faith.

[59] In the Dismissal without Prejudice Order, the trial court rejected the Defendants' arguments of bad faith, stating that the possibility of reindictment after dismissal "does not necessarily lead to the conclusion that the request was made to harass the defendants." Appellant's ER, tab 6, p. 3 (Decision & Order In Re: Dismissal with Prejudice). The court further found that the inference that reindictment was possible was "inadequate to overcome the presumption that the People were acting in good faith in requesting dismissal." Appellant's ER, tab 6, p. 3 (Decision & Order In Re: Dismissal with Prejudice).

[60] It was only upon the unsealing of the other pending criminal case against Gutierrez (CF0216-04), wherein Gutierrez was indicted on July 1, 2004, "that the lack of good faith on the part of the Government first became evident." *Salinas*, 693 F.2d at 352. This indictment in a separate case is contrary to the People's assertions during the hearing that there was a lack of resources at the Attorney General's Office, and in its Memorandum that "[c]ases involving the public safety is the first and primary duty of Attorney General. Priorities must be set and resources can only be stretched so thin." Appellant's ER, tab 3, p. 4 (People's Mem. on Dismissal without Prejudice). The other pending criminal case did not involve public safety, as it was a government corruption case involving the payments received by Gutierrez from the Guam Retirement Fund. In addition, the trial court clearly had cause to question the candor of Prosecutor Littlepage, who stated during the August 27, 2004 hearing, "I know of no other current indictments involving the – any of the other defendants."

Tr., vol. 2, p. 27 (Hr'g on Mot., Aug. 27, 2004).[11] The court also found, given that the People have not been successful in obtaining indictments that withstand pretrial scrutiny, the opportunity to reindict the Defendants would be harassment. Appellant's ER, tab 8, p. 3 (Mem. of Decision: Recons. of Dismissal with Prejudice, Sept. 10, 2004). The trial court properly considered the reasons provided by the People in support of its request to dismiss the indictment and such an inquiry is mandated by Title 8 GCA § 80.70(a).[12]

c) Scope of Authority Under Title 8 GCA § 80.70(a)

[61] In the instant case, the evidence of bad faith in bringing the motion are sufficient to overcome the presumption of good faith. The remaining question, therefore, is whether the trial court was permitted to dismiss the case with prejudice upon its finding of bad faith. The plain language of Title 8 GCA §80.70(a), and the analogous Rule 48(a) of the Federal Rules of Criminal Procedure, states that a case may be dismissed by the government upon leave of the court. Neither rule addresses whether the court may dismiss a case with prejudice upon the finding of bad faith by the filing of a motion to dismiss by the government in seeking dismissal.

[62] We start our analysis with the text of section 80.70(a). *Sumitomo Constr. Co. v. Gov't of Guam*, 2001 Guam 23, ¶ 17 ("It is a cardinal rule of statutory construction that courts must look first to the language of the statute itself.") (citations omitted). That section provides:

> 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.

---

[11] During oral arguments, Justice *Pro Tempore* Demapan candidly characterized this misrepresentation as a "lie."

[12] During oral arguments before this court, one of the counsels stated that there are some Superior Court judges who do not require the Attorney General to submit a reason for dismissing the case pursuant to the mandates of 8 GCA § 80.70(a). The law is clear that the prosecuting attorney must file a statement of his reasons for seeking dismissal and the judge, where leave is granted, must set forth the reasons for granting such leave to file a dismissal. Judge *Pro Tempore* Benson obviously followed the statutory directives mandate and of course, we expect all trial judges to do the same.

Title 8 GCA § 80.70(a). The section clearly contemplates that the government request leave to dismiss from the court. However, by its terms, the section does not allow for a *sua sponte* dismissal of the indictment with prejudice. This suggests that section 80.70(a) does not authorize courts to *sua sponte* dismiss a case with prejudice.

[63] Support for such an interpretation can be found by examining the language of Title 8 GCA §§ 80.70(b) and (c). *Sumitomo*, 2001 Guam 23 at ¶ 17 ("[I]n determining legislative intent, a statute should be read as a whole, and therefore, courts should construe each section in conjunction with other sections.") (citations omitted). Those sections provide:

> (b) If there is unnecessary delay in bringing a defendant to trial, *the court, on its own motion*, may dismiss the indictment, information or complaint. The reasons for the dismissal shall be set forth in an order entered upon the minutes.
>
> (c) The court *on its own motion* may dismiss a prosecution pursuant to § 7.67 of the Criminal and Correctional Code.

Title 8 GCA §§ 80.70(b) and (c) (emphasis added) (Westlaw through Guam Pub. L. 28-037 (2005)). Sections 80.70(b) and (c) explicitly authorize *sua sponte* dismissal by the court under specified circumstances. "[W]ords and people are known by their companions." *Gutierrez v. Ada*, 528 U.S. 250, 255, 120 S. Ct. 740, 744 (2000). "[T]he language of the statute cannot be read in isolation, and must be examined within its context . . . A statute's context includes looking at other provisions of the same statute and other related statutes." *Aguon v. Gutierrez*, 2002 Guam 14, ¶ 9 (citations omitted). Comparison of the subsections of the statute is revealing. Had A reading of section 08.07 in its entirety reveals that if the legislature intended to allow trial courts to *sua sponte* dismiss a case under section 80.70(a), it could have expressly authorized such action as it did in sections 80.70(b) and (c).

[64] Furthermore, courts interpreting Rule 48(a) have generally recognized that the rule only provides a trial court with two options: grant or deny the motion to dismiss the indictment.[13] *See*

[13] "[Q]uestions of statutory interpretation may be aided by reference to the prevailing interpretation of other statutes that share the same language and either have the same general purpose or deal with the same general subject as the statute under consideration." *Aguon v. Gutierrez*, 2002 Guam 14, ¶ 11 (quoting *Santos v. Immigration & Naturalization Serv.*, 525 F. Supp 655, 666 (S.D.N.Y. 1981)).

Salinas, 693 F.2d at 352 (stating that where the motion to dismiss was not brought in good faith, "Rule 48(a) mandates that the court deny the Government's motion to dismiss the indictment: 'under the discretion yielded to [the court] by 48(a) to 'check [an] abuse of Executive prerogative,' the court can and must deny the motion to dismiss.'") (quoting *In re Washington*, 544 F.2d at 209, *rev'd on other grounds*, 434 U.S. 22, 99 S. Ct. 81 (1977) (citations omitted); *Hayden*, 860 F.2d at 1487 ("If the district court finds that the prosecutor is acting in good faith . . . it should grant the motion; conversely, Rule 48(a) empowers the district court to exercise its discretion in denying the motion when it specifically determines that the government is operating in bad faith."). The purpose of the rule is to prevent harassment of the defendant and to protect the public interest and should not be interpreted as a means for courts to intrude on the executive's traditional realm of authority.

[65] Some courts, however, have concluded that the *sua sponte* dismissal of a case with prejudice is warranted under limited circumstances. In *United States v. Derr*, 726 F.2d 617, 618 (10th Cir. 1984), the defendant was indicted by a federal grand jury. On the day of trial, the prosecutor filed a motion to dismiss under Rule 48(a), claiming, without explanation, that dismissal would be in the interest of justice. *Id.* The trial court dismissed the indictment without prejudice. *Id.* Thereafter, the prosecutor obtained a second indictment on the same charges. *Id.* The defendant filed a motion to dismiss, arguing that the court erred in granting the first dismissal where the prosecutor offered no reasons to support its motion. *Id.* The trial court agreed that it abused its discretion in granting the motion without "receiving a factual basis," and granted the defendant's motion to dismiss. *Id.* The prosecutor appealed, arguing that the rule does not require the prosecutor to give reasons for seeking an indictment.

[66] On appeal, the court held that the primary purpose of the "leave of court" requirement is to "prevent harassment of a defendant by a prosecutor's charging, dismissing, and recharging the defendant with a crime." *Derr*, 726 F.2d at 619. The court found that "to honor the purpose of the rule, the trial court at the very least must know the prosecutor's reasons for seeking to dismiss the indictment and the facts underlying the prosecutor's decision." *Id.* The court further stated that an

order granting dismissal of the indictment without prejudice may be reviewed after the government secures a second indictment against the defendant. *Id*. On the precise issue of whether the trial court's "remedy– dismissing the second indictment, in effect altering the first dismissal to one with prejudice–was appropriate," *id*., the court affirmed. In seeking the first dismissal, the government explained its reasoning to be for the purpose of continuing the investigation due to dissatisfaction with the state of the investigation thus far. *Id*. The court on appeal determined that based on this reasoning, the trial court would have been required to deny the government's motion to dismiss, and, therefore, "remanding the case for a determination whether the government had valid reasons for dismissing the original indictment would be fruitless." *Id*. The court further explained:

> Moreover, if the trial court had initially ruled correctly and refused to dismiss the original indictment, the government's only alternatives would have been to try a case in which it was obviously unprepared to proceed or to move to dismiss the indictment with prejudice. Thus, we do not regard the trial court's remedy as unduly harsh. *Under the circumstances, dismissing the second indictment was the only sanction that would effectuate the primary purpose of Rule 48(a).*

Id. (emphasis added).

[67] A similar result was reached by the Fifth Circuit in *Salinas*, discussed *supra*. *Salinas*, 693 F.2d 348. In *Salinas*, the court held that a finding of bad faith by the government may warrant dismissal of a conviction had on a later indictment. This result was reached due to the court's finding that it "has no choice but to vindicate the purpose of Rule 48(a) to protect the defendant's rights." *Salinas,* 693 F.2d at 353. The Thus, the court's decision that a finding of bad faith in bringing the first motion to dismiss may support dismissal of the second indictment and conviction was based on the need to preserve the purpose of Rule 48(a) which is to protect the defendant from harassment. The harassment identified is the "charging, dismissing, and recharging without placing the defendant in jeopardy." *Id*. at 351 (quoting *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965)).

[68] Finally, it is important to reconcile a trial court's power to dismiss under section 80.70(a) with the notion that the power to prosecute rests with the executive. In *State v. Braunsdorf*, 297 N.W.2d 808 (Wis. 1980), the Wisconsin Supreme Court rejected the argument that trial courts have

inherent authority to dismiss a case with prejudice for a failure to prosecute. The court reasoned that although judicial economy weighed in favor of inherent authority, "a dismissal in a criminal case has broader implications for society as a whole." *Id.* at 816. The court found that where "the defendant's constitutional rights are not implicated . . . the competing interests involved are the need of the court to have a remedy for the sort of conduct shown here by the assistant district attorney, as well as to exercise control over its calendar, and that of society to be secure from crime through the regular enforcement of the criminal laws." *Id.* The court concluded that "[t]he balance weighs heavily in favor of society's interests" and held that trial courts did not have inherent authority to dismiss criminal cases with prejudice. *Id.*

[69] Based on the text of section 80.70(a), the statute in its entirety and relevant caselaw we hold that, as a general rule, section 80.70(a) does not authorize trial courts to *sua sponte* dismiss indictments with prejudice. The interests of the court in managing its business, the interest in protecting a defendant against harassment, and the interest in preserving the prosecutorial discretion is best furthered by a rule which allows a trial court to deny, but not dismiss with prejudice, a prosecutor's motion to dismiss under section 80.70(a) where the court finds that the prosecutor was acting in bad faith. This interpretation maintains the prosecutor's ability to try a case in which it deems worthy of prosecution while concurrently protecting the defendant's interest in being spared the harassment of a dismissal and reindictment of the charges. An exception occurs when a trial court grants a motion to dismiss without prejudice and later discovers that the earlier motion was made in bad faith; under these limited circumstances the trial court may dismiss the indictment with prejudice after a subsequent indictment.[14]

[14] Dismissal of the re-filed case makes particular sense where a defendant is later indicted subsequent to a dismissal without prejudice under section 80.70(a). In such case, as was the case in *Derr* and *Salinas*, if this earlier dismissal was pursuant to a motion later found to have been brought in bad faith, then the only way to vindicate the defendant's rights to be free from harassment is to dismiss the later case with prejudice. By being charged with a second indictment, the defendant has actually suffered the harassment which was meant to be protected against in the grant of leave to dismiss the first indictment. Because the harassment has already occurred due to an error in granting the first motion to dismiss, the only way to vindicate the defendant's rights under section 80.70(a) is to dismiss the later indictment.

[70] Under the general rule, the trial court in this case would not have had the authority to *sua sponte* dismiss the case with prejudice. However, in light of the unique posture of the case before the Superior Court, we find the trial court's action to be justified. Specifically, the trial court made a finding of bad faith based on the misrepresentations made by the prosecution, summarized *supra*, and we give deference to his findings.[15] The trial court could not deny the motion to dismiss because the court had already dismissed the case for the prosecution's failure to present exculpatory evidence to the grand jury. Similar to the situation in *Salinas*, remanding the case for the trial court to deny the motion to dismiss because of the government's bad faith in seeking dismissal would be fruitless. Furthermore, the trial court made an additional finding that any future indictments of the defendants in this case would constitute harassment. The fact that this case could not have proceeded any further makes it unnecessary to pursue this matter any further.[16]

[71] We also take this opportunity to express our concerns with the Office of the Attorney General's conduct both at the trial and appellate levels. In a span of eight months from November 3, 2003 to July 7, 2004, a total of sixteen indictments including three superseding indictments were returned against the defendants in this case.[17] Five were against Mrs. Perez, four were against Mr. Gutierrez, four were against Mr. Guzman, and three were against Mr. Cruz. In addition, early on in the prosecution of this case, all four defendants asserted their constitutional right to a speedy trial. The record also shows that the trial court ordered dismissal of the indictments a total of six times, five of which were "without prejudice" and the last, which is the subject of this appeal was "with prejudice." One of the dismissals granted by the trial court was based on the Attorney General's failure to present exculpatory evidence to the Grand Jury.

---

[15] A trial court's finding of bad faith is a finding of fact reviewed for clear error. *LaSalle Nat. Bank v. First Connecticut Holding Group, LLC.*, 287 F.3d 279, 288 (3rd Cir. 2002). *See also Guam Imaging Consultants, Inc. v. Guam Mem'l Hosp. Auth.*, 2004 Guam 15, ¶ 15 (reviewing a trial court's finding of fact for clear error). There is nothing in the record which "produces a definite and firm conviction that the court below committed a mistake." *Id.* at ¶ 30 (citations omitted).

[16] While not determinative, we note that the Assistant Attorney General conceded during oral arguments that there were "no plans to reindict the case."

[17] The following facts are set forth *supra* pp. 3-6.

[72] At the appellate level, the Attorney General advanced arguments in its brief and during oral arguments that are irrelevant and extraneous to the case *sub judice*. Furthermore, the Attorney General's Office consistently argued that the reason provided to the lower court in support of its request to dismiss the instant indictment - that is, the Office's lack of resources – should never have been considered by the trial court in its decision to dismiss the case. To stand before this court and insist that the reason provided by the Attorney General's Office should not have been considered in the decision-making process would be akin to holding that the trial court must disregard the mandate of section 80.70(a). Clearly, in order to make an informed decision, the trial court judge had to consider the specific reason to dismiss the case, as submitted by the Attorney General. The Attorney General's argument is disingenuous at best. Finally, the Attorney General has pursued this appeal, despite statements made by the Assistant Attorney General during oral arguments that there are "no plans to reindict the case." Such conduct, considered in the aggregate, constitutes a continuing course of bad faith.

[73] Based on these findings, the Office of the Attorney General is again reprimanded for wasting limited judicial resources and for forcing the defendants to face the anxiety of criminal charges when the Office of the Attorney General had no intention, notwithstanding the dismissal with prejudice by the trial court, to reindict the Defendants to the fullest extent of the law.

3. Whether Forewarning is Required

[74] The People argue that section 80.70(a) requires trial courts to give a forewarning before *sua sponte* dismissing a case with prejudice. We need not address whether forewarning is required under Title 8 GCA § 80.70(a) based on our holding that trial courts may only grant or deny a motion to dismiss an indictment without prejudice brought in bad faith. In the instant case, on the same day that the trial court granted the People's motion to dismiss without prejudice, which was later reconsidered, the trial court granted the a motion to dismiss the indictment against the Defendants based on the prosecutor's failure to present exculpatory evidence to the grand jury. Therefore,

because the government could not proceed with the prosecution, any forewarning given by the trial court would have been futile to the government's efforts to prosecute under the indictment.

IV.

[75] We hold that the trial court had jurisdiction to reconsider its order dismissing the underlying indictment without prejudice. Furthermore, we hold that the options available to a court upon a finding of bad faith by the prosecution in bringing a Title 8 GCA § 80.70(a) motion are to either grant or deny the motion. Although Title 8 GCA § 80.70(a) does not authorize trial courts to *sua sponte* dismiss a proceeding with prejudice upon a finding of bad faith, the trial court's action in this case was justified given the unique posture of the case before the trial court. The lower court's decision is **AFFIRMED**. This case is remanded for the entry of judgment dismissing the underlying proceeding against the Defendants with prejudice.