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Supreme Court of Guam, Clerk of Court

IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellant,

v.

MOSES M. MOSES,
Defendant-Appellee.

Supreme Court Case No.: CRA15-020
Superior Court Case No.: CF0275-14

OPINION

Cite as: 2016 Guam 17

Appeal from the Superior Court of Guam
Argued and submitted on October 28, 2015
Hagåtña, Guam

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BEFORE: ROBERT J. TORRES, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; KATHERINE A. MARAMAN, Associate Justice.

TORRES, C.J.:

[1] The Plaintiff-Appellant People of Guam claim error in the dismissal of three special allegations of possession or use of a deadly weapon in the commission of a felony associated with three counts of second degree robbery. After Defendant-Appellee Moses Moses pleaded guilty to the robbery counts, the People proceeded with charges on the special allegations alone, which the trial court dismissed. For the reasons set forth herein, we reverse the decision of the trial court.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] On June 1, 2014, around 3:30 a.m., Junior Yow called the police, reporting he had just been robbed at gunpoint while working at the 24 Hour Wash & Dry on Route 8 in Hagåtña. A man wearing a T-shirt over his face had threatened Yow with what appeared to be a semi-automatic handgun, fleeing with cash and Yow's cellphone. A nearby business's security guard provided police with a description and a license plate number, which police linked to Moses. Upon arrest, Moses permitted police to search his home in Barrigada where they discovered Yow's cellphone, clothing matching the description from the robbery, and a Powerline by Daisy 5501 BB gun. Moses admitted to robbing the laundromat and further admitted to committing very similar holdups within the previous week. The police thus connected Moses to two other robberies.

[3] One of these robberies occurred on May 25, 2014, at around 3:05 a.m., when a man walked into the Barrigada Shell Station with what appeared to be a handgun, his face covered by a shirt. The man pointed the gun at employees, and left with money and packs of Marlboro

Green Lights cigarettes. The other robbery occurred three days later, on May 28, 2014, at around 5:05 a.m., when a man with a cloth over his face entered the Barrigada 76/Circle K. After brandishing what appeared to be a black handgun, the man made off with cash and ten packs of cigarettes. Based on this evidence and his admissions, the People indicted Moses for all three robberies.

[4] During colloquy at a plea hearing, Moses admitted committing the three robberies. He then pleaded guilty without a plea agreement to three counts of second degree robbery under 9 GCA § 40.20(a)(3). However, Moses did not plead guilty to three accompanying special allegations under 9 GCA § 80.37, and the court acknowledged the People's ability to proceed with prosecution on those separated charges.

[5] Subsequently, Moses moved to dismiss the three special allegations, arguing that his use of a BB gun could not amount to use of a deadly weapon as defined in 9 GCA § 16.10(d). While hearing oral arguments on the motion, the trial court raised the question of whether Moses could legally be convicted of the deadly weapon special allegation, when he had already pleaded guilty to robbery while armed with or displaying what appears to be a deadly weapon, and therefore perhaps punishing Moses twice for the same conduct.

[6] The trial court later issued its Decision and Order denying Moses's Motion to Dismiss. The trial court acknowledged that the Supreme Court of Guam had yet to address whether a BB gun constituted a deadly weapon and looked to other jurisdictions for guidance. Ultimately the trial court declined to make a bright-line determination that the BB gun used by Moses was a deadly weapon, finding this a factual question to be determined by a jury. However, the court did make and grant its own motion to dismiss the matter on double jeopardy grounds. The court first expressed trepidation that a defendant carrying a deadly weapon and convicted in this

manner would face an "impermissible multiplicity" of charges, violating the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. Record on Appeal ("RA"), tab 43 at 4 (Dec. & Order, Apr. 14, 2015). While the court stopped short of declaring a constitutional violation, it was highly troubled by constitutional concerns. Second, the court analyzed the second degree robbery and special allegation statutes under 9 GCA § 1.22(a), prohibiting conviction of two offenses when one is included in the other. After reviewing the statutes, the court found the special allegation to be a lesser-included offense of the underlying charge. Consequently, the court utilized 9 GCA § 7.67(b) to dismiss the special allegation charges as an absurd application of the law. The People timely appealed this ruling.

II. JURISDICTION

[7] This court has jurisdiction over this case pursuant to 48 U.S.C.A. §§ 1424-1(a)(2) (Westlaw through Pub. L. 114-115 (2015)); 7 GCA §§ 3107 and 3108(a) (2005); and 8 GCA § 130.20(a)(5) (2005).

III. STANDARD OF REVIEW

[8] The standard of review is *de novo*. *See People v. Rios*, 2008 Guam 22 ¶ 8. "[I]f . . . the court dismisses the indictment based on its interpretation of the governing statutes, that is a legal determination we review *de novo*." *Id.* (alteration in original) (emphasis added) (quoting *United States v. La Cock*, 366 F.3d 883, 888 (10th Cir. 2004)). We review double jeopardy challenges *de novo*. *See People v. San Nicolas*, 2001 Guam 4 ¶ 8 (quoting *People v. Florida*, No. 96-00060A, 1997 WL 209044, at *6 (D. Guam App. Div. Apr. 21, 1997)). "Whether one offense merges with another is a question of statutory interpretation. . . . reviewed *de novo*." *People v. Diaz*, 2007 Guam 3 ¶ 55 (citations omitted).

IV. ANALYSIS

[9] The People argue that conviction for the deadly weapon special allegations is permissible under statutory and constitutional law. As a preliminary matter, there is the question of whether the trial court rightly allowed Moses to plead guilty to the robbery charges alone, while allowing trial on the attached special allegation. *See* Appellant's Br. at 14 n.3 (Aug. 3, 2015). The special allegations had to be proved because "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *People v. Muritok*, 2003 Guam 21 ¶ 43 (alteration in original) (emphasis omitted) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). We have also previously validated separation of special allegation and underlying offense.[1] Moreover, in *Muritok*, we adopted Supreme Court Justice Thomas's approach in *Apprendi*, 530 U.S. at 521 n.10 (Thomas, J., concurring), advocating the bifurcation of certain trials, between underlying charges and enhancements. *Muritok*, 2003 Guam 21 ¶ 47 n.8. Therefore, while it may seem unusual to try a special allegation alone, it is not legally impermissible. We now examine whether conviction for second degree robbery and the special allegation is impermissible double punishment in violation of the Fifth Amendment, the Organic Act of Guam, or 9 GCA § 1.22.

A. The Fifth Amendment

[10] Charging Moses with both second degree robbery and the special allegation "troubled" the trial court, possibly running afoul of constitutional double jeopardy provisions. The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same

[1] *See People v. Castro*, 2002 Guam 23 ¶¶ 2, 41 (affirming a guilty verdict as to negligent homicide, but not guilty with regard to an attached special allegation); *People v. Quitugua*, 2015 Guam 27 ¶¶ 43-44 (allowing a defendant to stipulate to an enhancement, while going to trial on an underlying offense).

offense to be twice put in jeopardy of life or limb." *San Nicolas*, 2001 Guam 4 ¶ 8 (quoting U.S. Const. amend V) (internal quotation marks omitted). Section 1421b(u) of the Organic Act of Guam extends the Fifth Amendment's Double Jeopardy Clause to Guam. *See* 48 U.S.C.A. § 1421b(u) (Westlaw through Pub. L. 114-115 (2015)). Thus, "[t]he Double Jeopardy clause, made applicable to Guam through the Organic Act, precludes courts from imposing multiple punishments for the same offense." *People v. Palisoc*, 2002 Guam 9 ¶ 35 (citing 48 U.S.C.A. § 1421b(d); *San Nicolas*, 2001 Guam 4 ¶¶ 8-9). When one act constitutes a violation of two distinct statutes, "the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304 (1932). However, legislatures are still free to enact a double penalty in a statute for the same conduct; the Double Jeopardy Clause merely prohibits a double penalty if it was not intended to be duplicative. *See Missouri v. Hunter*, 459 U.S. 359, 366 (1983). Our test is therefore one of statutory construction, including legislative intent. *See Albernaz v. United States*, 450 U.S. 333, 340 (1981). Consequently, the inquiry at hand is whether the legislature intended a double penalty; and if ambiguous, whether each statute requires proof of a fact that the other does not. *See Hunter*, 459 U.S. at 366; *Blockburger*, 284 U.S. at 304.

[11] The trial court articulated the general rule of the *Blockburger* test prohibiting duplicity, but did not analyze legislative intent. *See* RA, tab 43 at 4 (Dec. & Order).

[12] The People argue that the legislature intended to impose the special allegation to crimes that also include the use of a deadly weapon as an element. Appellant's Reply Br. at 5-7 (Sept. 15, 2015). Therefore, since the legislative intent is clear and unambiguous, there is no Fifth Amendment violation. *Id.* In persuasive support, the People cite two cases from the District

Court of Guam Appellate Division that considered this issue, finding that the legislature intended to apply the special allegation to second degree robbery. In one, the court focused on the fact that the Guam Legislature enacted the special allegation in Guam Public Law 14-143 in 1978, one year after enacting the robbery statute. *People v. Camacho*, No. 85-00013A, 1986 WL 68903, at *1 (D. Guam App. Div. Aug. 12, 1986). Additionally, the same public law amended subsection (b) of 9 GCA § 40.20, but did not touch subsection (a), the provision now at issue. *Id.* The *Camacho* court concluded this to be a deliberate omission, indicating intent to doubly punish those who use a deadly weapon in any felony with no exceptions. *Id.* In *People v. Petros*, the court used a plain meaning approach to come to the same conclusion. No. 82-00058A, 1983 WL 29957, at *4 (D. Guam App. Div. Aug. 25, 1983). Taking note of the language stating "[w]hoever unlawfully possesses or uses a deadly weapon . . . shall, *in addition to the punishment imposed for the commission of such felony*, be imprisoned," the court found intent to doubly punish armed felons. *Id.* (quoting 9 GCA § 80.37). Another case from the District Court of Guam Appellate Division dealt with the special allegation and 9 GCA § 40.20(a)(2), which is second degree robbery, requiring threats to put a person in fear of serious bodily injury. *People v. Ulloa*, No. 91-00071A, 1994 WL 129739, at *3 (D. Guam App. Div. Mar. 14, 1994). While the court disposed of the Fifth Amendment claim easily (since the relevant subsection mentioned no deadly weapon), it noted in dicta that "[i]n any event . . . [t]he enhancement statute contains no exceptions and applies to all felonies." *Id.* (citation omitted). In response, Moses argues that decisions from the District Court of Guam Appellate Division are merely persuasive and not controlling. Appellee's Br. at 4 (Sept. 2, 2015) (citing *People v. Quenga*, 1997 Guam 6 ¶ 13 n.4). Therefore, he claims this court should reject the notion that simply because a legislature passes two laws covering the same conduct with no exceptions, it necessarily intended double

punishment. *Id.* (citing *State v. Franklin*, 865 P.2d 1209, 1213-14 (N.M. Ct. App. 1993) (rejecting the state's argument that mere enactment of a firearm enhancement statute indicated a legislative intent to enhance the penalty for any crime committed with a firearm)).

[13] The People also cite two Ninth Circuit cases arising out of Guam, discussing the legislature's intent to impose additional punishment on those who use weapons during felonies. Reply Br. at 6-8. In analyzing whether it was proper to apply the special allegation to an aggravated assault statute that contained its own deadly weapon enhancement, the Ninth Circuit stated "Guam has clearly indicated its desire to impose cumulative sanctions on those who use deadly weapons in the commission of felonies. Indeed, Guam's purpose in enacting § 80.37 was specifically to impose a penalty that would be in addition to the punishment for the underlying felony." *People v. Snaer*, 758 F.2d 1341, 1344 (9th Cir. 1985) (citation omitted). However, the court specifically stated the claim was without merit because the underlying conviction was not based on the deadly weapon version of aggravated assault, but on a version of aggravated assault that did not mention a deadly weapon. *Id.* The People next cite *People v. Borja*, for the general finding that "Section 80.37 is an unambiguous expression of the Guam legislature's intent to impose additional punishment on those who use weapons during the commission of felonies." 732 F.2d 733, 736 (9th Cir. 1984) (citation omitted). However, *Borja* dealt with the special allegation applied to a statute that, like in *Snaer*, did not mention a deadly weapon at all. *Id.* at 734. Indeed, the court was analyzing the appropriateness of consecutive or concurrent sentences, and not whether two statutes proscribed the same conduct. *Id.* at 736.

[14] The parties neglect to cite *People v. Iglesias*, 839 F.2d 628 (9th Cir. 1988), which is dispositive on this issue. In *Iglesias*, the defendant was convicted of violating 9 GCA § 19.20(a)(3), which is assault that causes or attempts to cause "bodily injury to another *with a*

deadly weapon." *Iglesias*, 839 F.2d at 629 (emphasis added). Iglesias was punished for a specific felony committed with a deadly weapon (assault), and for generally committing a felony with a deadly weapon (the special allegation). *Id.* On appeal, Iglesias argued that under the Fifth Amendment, he should not have received enhanced punishment for using a deadly weapon when the underlying felony already included the use of a deadly weapon as an element of the offense. *Id.* at 628. This is the double jeopardy question the Ninth Circuit had previously left open in *Snaer*. *Id.* at 629; *see also Snaer*, 758 F.2d at 1344. The court affirmed Iglesias's convictions under the same reasoning seen in the District Court of Guam Appellate Division's earlier decisions. *Iglesias*, 839 F.2d at 629; *see also Camacho*, 1986 WL 68903, at *1; *Petros*, 1983 WL 29957, at *4. The Ninth Circuit reasoned the Guam legislature could have easily and explicitly excluded any felony from the reach of 9 GCA § 80.37 under Public Law 14-143, but clearly chose not to do so. *Iglesias*, 839 F.2d at 629. The court also found the meaning of 9 GCA § 80.37 to be plain and clear on its face, applying to all those who possess or use a deadly weapon during commission of any felony. *Id.* Based on this legislative omission and unambiguous language, the court found that the legislature intended for the special allegation to apply, even where the underlying felony included use of a deadly weapon as an element. *Id.*

[15] Here, Moses was convicted of an underlying felony (second degree robbery) mentioning a deadly weapon. Under the Ninth Circuit's ruling in *Iglesias*, the legislature intended 9 GCA § 80.37 to apply in this situation, doubly punishing a felon for using a deadly weapon. *See id.* The District Court of Guam Appellate Division cases are merely persuasive to this court, and the People's authority is not quite on point. However, the Ninth Circuit's ruling in *Iglesias* resolves the Fifth Amendment query; there is no constitutional double jeopardy violation from conviction of both second degree robbery and the deadly weapon special allegations.

[16] Since legislative intent is not ambiguous here, there is no need to apply the *Blockburger* analysis. *See Hunter*, 459 U.S. at 368-369 ("Where, as here, a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the 'same' conduct under *Blockburger*, a court's task of statutory construction is at an end . . . ."). Additionally, Moses's claim that the rule of lenity should favor the defendant is inapplicable. *See United States v. Millis*, 621 F.3d 914, 917 (9th Cir. 2010) ("The rule of lenity applies only where after seizing every thing from which aid can be derived, the Court is left with an ambiguous statute." (citations and internal quotation marks omitted)).

B. The Organic Act of Guam

[17] The Organic Act's Bill of Rights contains a stand-alone provision against double punishment, providing that "[n]o persons shall be subject for the same offense to be twice put in jeopardy of punishment." *San Nicolas*, 2001 Guam 4 ¶ 8 (alteration in original) (quoting 48 U.S.C.A. § 1421b(d)). In the 1968 Mink Amendment, Congress "extended certain constitutional rights to Guam 'to the extent that they [had] not been previously extended.'" *People v. Guerrero*, 290 F.3d 1210, 1214 (9th Cir. 2002) (alteration in original) (quoting 48 U.S.C.A. § 1421b(u) (Westlaw through Pub. L. 114-115 (2015)). This extension encompassed federal Fifth Amendment rights. *See id.* Provisions in state constitutions can at times contain stronger rights protection than their federal versions. *See, e.g.*, *Am. Tower Corp. v. City of San Diego*, 763 F.3d 1035, 1050 (9th Cir. 2014) (stating that the California Constitution's due process protections are broader than those contained in the Fourteenth Amendment). The question is thus, whether the Organic Act's double jeopardy prohibition exceeds the rights established in the Federal Constitution.

[18] Moses argues that statutes should be construed so as to avoid rendering any statutory language superfluous. Appellee's Br. at 6 (citing *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991)). Accordingly, Moses asserts that the Organic Act should function like a more protective state constitution, simply because there are two double jeopardy provisions. *Id.* In support, he cites several cases from jurisdictions utilizing their own constitutions as a more stringent protection against double punishment. *See id.* (citing *State v. Guillaume*, 975 P.2d 312 (Mont. 1999); *Cross v. State*, 15 N.E.3d 569 (Ind. 2014); *State v. Houtenbrink*, 539 A.2d 714 (N.H. 1988) (superseded by statute)). In *Guillaume*, the Montana Supreme Court rejected the *Hunter* reasoning, finding a double jeopardy violation under the Montana Constitution (even with nearly identical language as the federal version), regardless of legislative intent to doubly punish. 975 P.2d at 316. Because the use of a weapon was the only reason for elevating the underlying crime to a felony, the court found applying an additional weapon enhancement violated the Montana State Constitution's protection. *Id.* at 317. Moses urges us to follow this approach. *See* Appellee's Br. at 7.

[19] In response, the People concede that state constitutions can provide greater protections than the federal version, but argue there is no substantive difference in the language at hand. Reply Br. at 10. Additionally, the People assert that while the jurisdictions cited by Moses all have established jurisprudence applying greater protections, we have no such precedent. *Id.*

[20] A similar dispute, arising out of Guam, came before the Ninth Circuit in *Guerrero*. 290 F.3d at 1210. In that case, Guerrero, a Rastafarian, was convicted of importing marijuana into Guam, which he used in his religious practices. *Id.* at 1212. In considering this case on appeal, we had ruled that the Free Exercise Clause in the Organic Act was more protective than the federal version, safeguarding Guerrero's religious practices. *See id.* at 1213. On appeal to the

Ninth Circuit, Guerrero maintained he was shielded by two layers of protection: the Organic Act's Bill of Rights, "subject to final construction by [this court], and a federal Bill of Rights, subject to final construction by the U.S. Supreme Court." *Id.* at 1216. He argued that subsection (u) of the Mink Amendment is "a floor below which the Guam legislature cannot dip," whereas the standalone provision is analogous to a state constitution, and should be interpreted more broadly. *Id.* The Ninth Circuit had to decide whether we had authority to interpret section 1421b(a) as providing more protection for religious freedom than its federal counterpart, despite the clauses being nearly identical.[2] The court explained that Guam is a federal instrumentality, and the Organic Act's Bill of Rights is a federal statute. *Id.* at 1217. Further, "[n]ot even a sovereign State may interpret a federal statute or constitutional provision in a way contrary to the interpretation given it by the U.S. Supreme Court." *Id.* Therefore, because of the similarity of the provisions involved, the Ninth Circuit held that "a territorial court lacks the authority to interpret a federal statute or federal constitutional provision contrary to the interpretation the U.S. Supreme Court has given it." *Id.* at 1217-18 (footnote omitted). The Ninth Circuit extended this reasoning to the Speedy Trial Clause and its nearly identical Organic Act counterpart (the only difference being use of the word "enjoy" instead of "have"). *United States v. Drake*, 543 F.3d 1080, 1085 (9th Cir. 2008). We further applied this same reasoning to identical right to petition clauses, opting to follow federal interpretations. *Guam Greyhound, Inc. v. Brizill*, 2008 Guam 13 ¶ 16.

[21] Here, Moses also argues for protection under the Organic Act that is broader than that from the United States Constitution, even with very similar provisions. *See* Appellee's Br. at 7.

[2] The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. The Organic Act similarly provides that "[n]o law shall be enacted in Guam respecting an establishment of religion or prohibiting the free exercise thereof." 48 U.S.C.A. § 1421b(a).

The *Guerrero* ruling certainly makes this argument difficult. However, it does not foreclose all possibility of using the Organic Act in this manner; leaving open the possibility that we could interpret the Organic Act to be more protective, if the provision were substantively different than the federal version. Here, the provisions are nearly identical (though more distinct than in *Guerrero*): The Fifth Amendment declares, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The Organic Act reads, "[n]o person shall be subject for the same offense to be twice put in jeopardy of punishment." 48 U.S.C.A. § 1421b(d). The only arguable difference is use of the language "punishment" instead of "life or limb." Since the *Guerrero* ruling discounted the significance of having separate but substantively identical provisions, the only viable argument is that the use of the word "punishment" contemplates greater protection. We find this is not reason enough to recognize more protection than that currently bestowed by the Fifth Amendment. It would be folly to here find different meanings in substantively identical language, based solely on the usage of a more modern vocabulary.

[22] Moses's call to use the Organic Act as a more protective local constitution is potentially viable. However, the *Guerrero* ruling narrows the availability of such remedy, making it only plausible if the language in the Organic Act and Federal Constitution were substantively different. While the Organic Act uses "punishment" instead of "life or limb," this fails to offer sufficient cause to recognize a source of greater protection in our case law.

C. Title 9 GCA § 1.22

[23] The trial court found that conviction for both 9 GCA § 80.37 and 9 GCA § 43.20(a)(3) would violate 9 GCA § 1.22(a), one being a lesser-included *offense* of the other. During oral arguments, the issue arose as to whether the special allegation is an "offense" for the purposes of

9 GCA § 1.22, and the parties submitted supplemental briefing on this issue. If one offense is included in the other, or is merely a general or specific iteration, a defendant "may not . . . be convicted of more than one *offense*." 9 GCA § 1.22 (2005) (emphasis added). This statutory double jeopardy language seems narrower than its constitutional and Organic Act counterparts, which do not specifically address the statutory means of punishment. *Compare id.*, *with* U.S. Const. amend. V, *and* 48 U.S.C.A. § 1421b(d). Determining whether the special allegation is an "offense" for purposes of section 1.22 dictates analysis of the broader statutory scheme and case law.

[24] While the term "offense" is not neatly defined in the Guam Code Annotated, various provisions provide an indirect definition. "No conduct constitutes an offense unless it is a crime or violation under this Code or other statute of this Territory." 9 GCA § 1.20(a) (2005). A "crime" is an offense for which a prison term is authorized as possible punishment. *See* 9 GCA § 1.18(a) (2005). "Crimes are classified as felonies, misdemeanors, or petty misdemeanors." *Id.* An offense that is not a crime (no possible prison sentence) is considered a violation. 9 GCA § 1.18(f). Any offense that is declared to be a crime but without specified grade or sentence is a misdemeanor. 9 GCA § 1.18(d).

[25] The People argue that applying this "offense" framework to the special allegation would lead to absurd results. Appellant's Supp. Br. at 5 (Jan. 25, 2016). The special allegation carries a mandatory prison term, so it could not be termed a violation. *Id.* Therefore, it would have to be a crime, classified as a felony, misdemeanor, or petty misdemeanor. Since the special allegation is not declared to be a felony, with no specified grade or sentence, under 9 GCA § 1.18(d) the special allegation would have to be a misdemeanor, meaning that a defendant would strangely be found guilty of a misdemeanor for an underlying felony. *Id.* Also, given the 5-25

year sentencing range, the special allegation would far exceed the one-year maximum sentencing range for a misdemeanor under 9 GCA § 80.34. *Id.* The People submit that offenses that do not adhere to general sentencing levels of felonies (e.g., burglary, first degree criminal sexual conduct, kidnapping, and home invasion) specifically state their felony level and sentencing range, which 9 GCA § 80.37 does not do. *Id.* at 5-6. The People point to several provisions where Chapter 80 provides additional punishment, none of which are classified as a felony or misdemeanor and must all be necessarily attached to an underlying felony.[3] Therefore, the People argue these provisions are not "offenses" themselves, and are merely sentencing enhancements. *Id.* at 6.

[26] Moses argues that 9 GCA § 1.20 was intended to abolish the existence of common law offenses. Appellee's Supp. Br. at 2-3 (Jan. 28, 2016). Since the special allegation is codified, Moses asserts it is not made a non-offense by this statute. *Id.* at 3. Instead, Moses reasons that because the special allegation carries its own sentence of imprisonment, it is a crime under 9 GCA § 1.18(a) and therefore an offense under 9 GCA § 1.20(a). *Id.* Additionally Moses asserts that unlike the 9 GCA § 80.37 provisions, most sentencing enhancements do not provide their own sentence, but merely allow for a greater maximum for the underlying offense. Appellee's Supp. Br. at 3-4; *see also* 9 GCA §§ 80.38, 80.40, 80.42 (2005). The deadly weapons and felony release provisions additionally do not run concurrent with their underlying offense. Appellee's Supp. Br. at 4. Moses next declares that simply because the special allegation depends on an underlying offense does not automatically categorize it as a non-offense. *Id.* at 4. Moses analogizes this to robbery requiring proof of theft, and aggravated murder requiring the

[3] Additional punishment tied to underlying felonies for deadly weapons used in felonies (section 80.37); felonies committed on release (section 80.37.1); habitual offenders (section 80.37.2); and vulnerable victims (section 80.37.3).

commission of an underlying felony. *Id.* Finally, Moses maintains that under 9 GCA § 1.36, chapter, article, or section headings do not affect the scope, meaning, or intent of the criminal code provisions, so location in the imprisonment chapter has no bearing on whether the special allegation is an offense. *Id.* at 4-5.

[27] Both parties point to 9 GCA § 1.20(a), stating that no conduct is an offense unless it is a crime or violation. While the special allegation is not a common law crime aimed at by the statute, it makes little sense to ignore the plain language of a statute stating that every offense must be either a crime or violation. *See* 9 GCA § 1.20(a). Further, Moses's argument that the special allegation is a crime simply because it carries a sentence of imprisonment fails to recognize that crimes must be further classified as felonies, misdemeanors, or petty misdemeanors. *See* 9 GCA § 1.18(a). The special allegation is not defined as a felony, and it is unreasonable to term it a misdemeanor. Instead, it functions as a sentencing enhancement, carrying its own punishment.

[28] Case law prescribes the same conclusion. Moses points to *State v. Van den Berg*, wherein the Hawaii Supreme Court considered whether conviction for second degree murder, which had a higher mandatory minimum from use of a firearm, and a firearm enhancement, violated a state double jeopardy statute. 65 P.3d 134 (Haw. 2003). The court held the statute prohibited conviction for both, as the underlying felony was an included offense of the firearm statute (concluding they were both "offenses"). *Id.* at 140-41. Importantly, the firearm statute at issue was itself specifically designated as a Class A felony. *Id.* at 139.

[29] As for the provision at issue here, where a defendant argued that special allegations were additional felonies in violation of 9 GCA § 1.22(e), the District Court of Guam Appellate Division found that "the violation of § 80.37 is not an offense in and of itself." *People v.*

Tedtaotao, No. 93–00001A, 1994 WL 129737, at *6 (D. Guam App. Div. Mar. 15, 1994), *aff'd*, 46 F.3d 1144 (9th Cir. 1995). Since a defendant could not be convicted solely of a violation of 9 GCA § 80.37 without an underlying felony, the court found the special allegations were not separate offenses, but must be linked in this manner. *Id.*; *see also People v. Perez*, 1999 Guam 2 ¶ 4 n.3 (recognizing a problem with conviction for a special allegation when jury acquitted defendant of the underlying felony).

[30] Adding a felony would certainly constitute an "offense." *Van den Berg* is easily distinguishable in that the firearm enhancement at issue there was clearly designated a Class A felony, whereas our special allegation contains no such definition and does not add a felony upon conviction. *Compare* 65 P.3d at 139-40, *with* 8 GCA § 80.37. We also find the ruling in *Tedtaotao* persuasive, as an indication that the special allegation is not an offense in and of itself. *See* 1994 WL 129737, at *6. Additionally, the *Van den Berg* court stated that conviction for the firearms statute would be allowed with "clear legislative intent to create an exception to the statutory prohibition." 65 P.3d at 139. Thus even if the special allegation were an "offense," the *Van den Berg* reasoning would likely still allow double conviction, given that 9 GCA § 80.37 expressly applies in addition to the underlying felony.

[31] There is no convenient definition of an "offense" in the Guam Code Annotated. However, persuasive case law and the overall statutory scheme indicate the special allegation is not an "offense." Therefore, we find that the special allegation is outside the scope of 9 GCA § 1.22.

V. CONCLUSION

[32] We hold that conviction for both second degree robbery and the deadly weapon special allegation results in no double jeopardy violation under either the Fifth Amendment or the

Organic Act of Guam. Further, we find 9 GCA § 1.22 inapplicable, as the special allegation is not an "offense" for purposes of the statute. Therefore, the trial court erred in dismissing the special allegations.

[33] Accordingly, we **REVERSE** the trial court's Decision and Order, and **REMAND** this matter for further proceedings not inconsistent with this opinion.

/s/
F. PHILIP CARBULLIDO
Associate Justice

/s/
KATHERINE A. MARAMAN
Associate Justice

/s/
ROBERT J. TORRES
Chief Justice