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Supreme Court of Guam, Clerk of Court

IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

FRANCIS JEROME TAISACAN,
Defendant-Appellant.

Supreme Court Case No. CRA19-020
Superior Court Case No. CF0282-19

OPINION

Cite as: 2023 Guam 19

Appeal from the Superior Court of Guam
Argued and submitted on February 4, 2021
Via Zoom video conference

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice; ROBERT J. TORRES, Associate Justice; KATHERINE A. MARAMAN, Associate Justice.[1]

MARAMAN, J.:

[1] Defendant-Appellant Francis Jerome Taisacan appeals from a final judgment of criminal conviction stemming from a break-in at a home in Chalan Pago. Taisacan was convicted of five substantive offenses, four conspiracy offenses, three deadly-weapon sentence enhancements, and one vulnerable-victim sentence enhancement. Taisacan claims insufficient evidence for his conviction for Home Invasion, errors related to the jury instructions, and errors related to the entry of certain convictions under Guam's criminal procedure statutes. He also claims ineffective assistance of counsel based on the cumulative effect of his trial counsel's failure to prevent these errors. We affirm in part, reverse in part, and remand for further proceedings.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] Taisacan was indicted for both conspiracy to commit and the substantive commission of Home Invasion, Second Degree Robbery, Burglary, and Criminal Trespass. He was also indicted for misdemeanor Theft. The substantive and conspiracy charges of Home Invasion, Second Degree Robbery, and Burglary included the Special Allegation of Use or Possession of a Deadly Weapon in the Commission of a Felony. The Second Degree Robbery charge also included the Special Allegation of a Vulnerable Victim.

[3] Deanna Quitugua testified at trial that one morning, she observed a white sedan parked outside her home in Chalan Pago. Two young men exited the vehicle; according to Quitugua, the vehicle's driver was carrying a "handgun of some sort," and the other man was carrying a baseball bat. Transcript ("Tr.") at 42-43 (Jury Trial, July 9, 2019). The two men entered Quitugua's home

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

while she was still inside it and stole several of her belongings, including her purse and a glass pickle jar filled with loose change. After the men left her home, Quitugua reported the incident to the Guam Police Department ("GPD") and provided the license plate number for the white sedan. GPD officers determined that the white sedan was registered to Anesha Aguero. Aguero testified that during the timespan of the alleged offenses, Ronnie Crisostomo had her vehicle. Aguero also testified that when Crisostomo returned the vehicle to her, Taisacan was with him.

[4] Shane Hocog testified that around the time of these events, Taisacan asked him to hold on to a black bag. Later, when Taisacan did not return to retrieve his bag, Hocog opened the bag and found an object he alternately described as "a black pistol," *id.* at 109, "a CO2 [pistol]," *id.*, or "a pellet gun," *id.* at 110.[2] Hocog then notified GPD and turned over the bag and its contents. Inside the bag, along with the apparent weapon, GPD found a set of car keys with a picture of Quitugua's granddaughter attached.

[5] At trial, the prosecutor presented Quitugua with the object found in Taisacan's bag; Quitugua admitted she was "not good with guns," but stated the object looked like what one of the perpetrators had carried inside her home. *Id.* at 49. Quitugua also visually identified Taisacan as the individual who had carried the airsoft pistol while inside her home.

[6] At the close of Plaintiff-Appellee People of Guam's ("People") case-in-chief, Taisacan's trial counsel moved for acquittal on the charge of Conspiracy to Commit Home Invasion, arguing there was no evidence presented to prove Taisacan and Crisostomo had formed a conspiratorial relationship. The trial court denied this motion, recalling certain testimony suggesting Crisostomo may have asked Taisacan to help him perpetrate the offenses. Taisacan's trial counsel did not

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[2] During trial, this object was referred to by the parties and the trial judge at different times as a "pellet gun," a "CO2 pistol," and an "airsoft pistol." It is unclear to this court whether these terms are synonymous. For purposes of this opinion, because the parties' briefing primarily calls the object an "airsoft pistol," we will use that term as well. We caution that our choice to use the term "airsoft pistol" is not meant to imply any factual findings.

move for acquittal on the substantive charge of Home Invasion. Although the trial court asked Taisacan's counsel whether he intended to do so, trial counsel declined, stating: "Mrs. Quitugua did on the stand point out Francis, and said he's the guy, so, on the other charge[s] [of] Home Invasion and Robbery, there is certainly sufficient evidence. So, I can't make a good faith motion on those charges." *Id.* at 165.

[7] Taisacan's trial counsel also moved for acquittal on all Deadly Weapon Allegations based on Taisacan's possession of the airsoft pistol. Taisacan argued, and the trial prosecutor conceded, the airsoft pistol did not qualify as a "deadly weapon" under Guam law.[3] But the trial court denied Taisacan's motion, theorizing that while Taisacan's airsoft pistol did not qualify as a "deadly weapon," Crisostomo's baseball bat potentially could, and Crisostomo's possession of the baseball bat could be legally imputed to Taisacan.

[8] After the defense rested, the trial court instructed the jury. As relevant to this appeal, Taisacan did not object to Jury Instruction 5I, "Liability for Co-Conspirator Acts," Jury Instruction 6A, "Elements of Home Invasion," or Jury Instruction 6C, "Elements of Conspiracy to Commit Home Invasion." Tr. at 32, 38-39 (Jury Trial, July 10, 2019).

[9] The jury returned guilty verdicts on all nine substantive and conspiracy charges and on four of the seven Special Allegations. The Superior Court entered a judgment of conviction for all thirteen of the guilty verdicts, and Taisacan was sentenced to forty years' imprisonment, with credit for time served.

[3] Prosecutor: "I kind of have to agree with [defense counsel], I've indicated to him before, I believe there's been – there has been cases ruling that an airsoft gun is not considered a dangerous weapon, unless it's used for bludgeoning purposes. But the way it was described by Mrs. Quitugua, the victim, holding it in the form of a pistol and not as a bludgeon, so just for that purpose, limited purposes, I would agree at this time the airsoft gun is not a deadly weapon." Tr. at 165-66 (Jury Trial, July 9, 2019).

Charge	**Verdict**	**Sentence**
Charge 1, Home Invasion	Guilty	15 years
Deadly Weapon Allegation	**Not Guilty**	**--**
Charge 2, Conspiracy to Commit Home Invasion	Guilty	5 years (concurrent with Charge 1)
Deadly Weapon Allegation	Guilty	5 years
Charge 3, Second Degree Robbery	Guilty	5 years
Deadly Weapon Allegation	**Not Guilty**	**--**
Vulnerable Victim Allegation	Guilty	5 years
Charge 4, Conspiracy to Commit Second Degree Robbery	Guilty	5 years (concurrent with Charge 3)
Deadly Weapon Allegation	Guilty	5 years
Charge 5, Burglary	Guilty	5 years (concurrent with Charge 1)
Deadly Weapon Allegation	**Not Guilty**	**--**
Charge 6, Conspiracy to Commit Burglary	Guilty	5 years (concurrent with Charge 1)
Deadly Weapon Allegation	Guilty	5 years
Charge 7, Criminal Trespass	Guilty	1 year (concurrent with Charge 1)
Charge 8, Conspiracy to Commit Criminal Trespass	Guilty	1 year (concurrent with Charge 1)
Charge 9, Theft	Guilty	1 year (concurrent with Charge 3)

Record on Appeal ("RA"), tab 65 (Judgment, Jan. 16, 2020). Taisacan timely appealed.

[10] At oral argument on appeal, Taisacan argued this court should overturn precedent established by *People v. Demapan*, 2004 Guam 24, holding that Criminal Trespass is not a lesser included offense of Burglary under Guam's double jeopardy statute, 8 GCA § 105.58(b). This issue was raised for the first time in Taisacan's reply brief, which meant the People had no

opportunity to respond in writing. After oral argument, the parties each submitted supplemental briefing as ordered by this court.

II. JURISDICTION

[11] This court has jurisdiction over a criminal appeal from a final judgment of conviction. 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 118-22 (2023)); 7 GCA §§ 3107, 3108(a) (2005); 8 GCA §§ 130.10, 130.15(a) (2005).

III. STANDARD OF REVIEW

[12] When a defendant fails to move for a judgment of acquittal on a particular charge in the Superior Court, we review the sufficiency of evidence supporting conviction on that charge only for "plain error or manifest injustice." *People v. Maysho*, 2005 Guam 4 ¶ 6 (citing *United States v. Delgado*, 357 F.3d 1061, 1068 (9th Cir. 2004)); *see also United States v. Mongol Nation*, 56 F. 4th 1244, 1250-51 (9th Cir. 2023) ("Arguments seeking to overturn a criminal jury's verdict that are not renewed in a post-trial motion for judgment of acquittal are reviewed for plain error.").

[13] When a defendant fails to object to jury instructions at trial, we review those instructions for plain error. *E.g.*, *People v. Wesen*, 2022 Guam 18 ¶ 15. "To prevail on plain error review, a defendant must show: '(1) there was an error; (2) the error is clear or obvious under current law; (3) the error affected substantial rights; and (4) reversal is necessary to prevent a miscarriage of justice or to maintain the integrity of the judicial process.'" *Id.* (quoting *People v. Gargarita*, 2015 Guam 28 ¶ 11).

[14] Taisacan claims several errors related to the entry of certain convictions. Each presents a question of law turning on interpretation of provisions of Guam's criminal procedure statutes, which we review *de novo*. *People v. Acosta*, 2022 Guam 11 ¶ 22.

[15] "Ineffective assistance of counsel claims are questions of law which this court reviews *de novo*." *People v. Moses*, 2007 Guam 5 ¶ 9 (quoting *People v. Ueki*, 1999 Guam 4 ¶ 5). But while we may review ineffective assistance claims on direct appeal, they are usually "more properly entertained in a collateral proceeding." *Id.* (citing *Ueki*, 1999 Guam 4 ¶ 5).

IV. ANALYSIS

A. The Evidence Was Insufficient to Support the Home Invasion Conviction on the "Deadly Weapon or Dangerous Instrument" Element

[16] Taisacan argues there was insufficient evidence to sustain his conviction for Home Invasion. An essential element of the offense as charged required proof beyond a reasonable doubt that Taisacan was armed with "explosives," a "deadly weapon," or a "dangerous instrument." 9 GCA § 37.210(b) (added by Guam Pub. L. 32-047:2 (July 5, 2013)); RA, tab 34 at 2 (Second Am. Indictment, July 10, 2019). It is undisputed Taisacan was not armed with explosives. Taisacan argues his airsoft pistol does not qualify as a "deadly weapon" or a "dangerous instrument," meaning an essential element of Home Invasion was not proven, and the conviction cannot stand. Appellant's Br. at 12-14 (Apr. 6, 2020); *see also People v. Kanistus*, 2017 Guam 26 ¶ 26 ("[T]he Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged." (quoting *People v. Perry*, 2009 Guam 4 ¶ 12)). The People make two arguments in response. First, the People assert Taisacan's airsoft pistol qualifies as a deadly weapon or dangerous instrument under Guam law. Appellee's Br. at 10-13 (June 29, 2020). Second, the People argue that even if Taisacan's airsoft pistol does not so qualify, Taisacan vicariously possessed a deadly weapon due to his conspiratorial relationship with Crisostomo and Crisostomo's possession of a baseball bat. *Id.* at 14-15. We address these arguments in turn.

1. The only reasonably possible construction of the Home Invasion statute is that the terms "deadly weapon" and "dangerous instrument" are redundant

[17] At the outset, we recognize an anomaly in our Home Invasion statute, 9 GCA § 37.210. To obtain a conviction under 9 GCA § 37.210(b), the People had to prove Taisacan was "armed with . . . a deadly weapon or dangerous instrument." The meaning of "deadly weapon" is not disputed. Title 9 GCA § 37.10(c) provides that for all offenses defined under Title 9, Chapter 37 of the Guam Code Annotated (hereinafter, "Chapter 37"), the term "deadly weapon" has the same meaning as it does under 9 GCA § 16.10, which defines terms within Guam's homicide statutes. Title 9 GCA § 16.10 defines "deadly weapon" as "any firearm, or other weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner it is used or is intended to be used is known to the defendant to be capable of producing death or serious bodily injury." 9 GCA § 16.10(d) (2005). This definition of "deadly weapon" therefore applies to offenses within Chapter 37, including Home Invasion.

[18] By contrast, "dangerous instrument" is not defined in Chapter 37 or by reference through Guam's homicide statute. The only Guam statute that defines "dangerous instrument" is found within Title 9, Chapter 58, which governs the offense of Escape.[4] *See* 9 GCA § 58.10(e) (2005). Absent clear legislative intent to the contrary, we assume when the legislature defines a particular term in one statute, this same definition applies in related statutes as well. *See, e.g.*, *Murlin v. Pearman*, 2016 OK 47, ¶ 20, 371 P.3d 1094, 1098 ("Whenever the meaning of a word or phrase is defined in any statute, such definition is applicable to the same word or phrase whenever it occurs, except where a contrary intention plainly appears."); *State v. Cloutier*, 261 P.3d 1234, 1251 (Or. 2011) (en banc) ("[I]n the absence of evidence to the contrary, we ordinarily assume that the

[4] Compounding the anomaly, while 9 GCA § 58.10(e) defines "dangerous instrument" for purposes of offenses within Chapter 58, there are no offenses defined in Chapter 58 which use the term "dangerous instrument."

legislature uses terms in related statutes consistently.”). We note that the Home Invasion statute was passed 35 years after the definition of “dangerous instrument” was added to 9 GCA § 58.10, *compare* 9 GCA § 37.210(b) (added by P.L. 32-047:2 (July 5, 2013)), *with* 9 GCA § 58.10(e) (added by P.L. 14-146 (Sept. 9, 1978)), and that generally, a legislature is presumed to be “knowledgeable about existing law pertinent to the legislation it enacts,” *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 176 (1988). Because we find no clear legislative intent to the contrary, the definition of “dangerous instrument” found in Chapter 58 applies to the related criminal statutes in Chapter 37, including Home Invasion.

[19] But under 9 GCA § 58.10(e), a dangerous instrument is “any firearm, or other weapon, device, instrument, material, or substance, whether animate or inanimate, which in a manner it is used or intended to be used is known to be capable of producing death or serious bodily injury.” Aside from minor grammatical distinctions, in which we find no legal significance, the definition of “dangerous instrument” in 9 GCA § 58.10(e) is functionally identical to the definition of “deadly weapon” in 9 GCA § 16.10(d). *Compare* 9 GCA § 58.10(e), *with* 9 GCA § 16.10(d). If these two terms have the same meaning, then the compound phrase “deadly weapon or dangerous instrument” in 9 GCA § 37.210(b) is redundant. While statutory construction should avoid rendering statutory language redundant or superfluous “unless no other construction is reasonably possible,” *Miller v. Westfield Ins. Co.*, 606 N.W.2d 301, 305 (Iowa 2000), there is no “reasonably possible” alternative here.

[20] The People argue “dangerous instrument” can be distinguished from “deadly weapon” by interpreting the former to uniquely “criminalize *threats to use* an instrument to cause death or serious bodily injury.” Appellee’s Br. at 9 (emphasis added). The People ground their argument in the law of Connecticut because Connecticut’s home invasion statute is substantively similar to

our own, including the phrase "deadly weapon or dangerous instrument." *Compare* Conn. Gen. Stat. Ann. § 53a-100aa(a)(2) (2023), *with* 9 GCA § 37.210(b). In Connecticut, the term "dangerous instrument" is statutorily defined as "any instrument, article or substance which, under the circumstances in which it is used or attempted *or threatened to be used*, is capable of causing death or serious physical injury . . . ." Conn. Gen. Stat. Ann. § 53a-3(7) (2021) (emphasis added). Seizing upon this word "threatened," the People propose that a dangerous instrument differs from a deadly weapon in that while the latter must *actually* pose a threat of deadly force, the former need only *appear to the victim* to pose a threat of deadly force. Appellee's Br. at 9.

[21] Unlike the Connecticut statute, nowhere in the Guam Code is there a definition of "dangerous instrument" that contains the word "threatened." We assume that when the Guam Legislature created the Home Invasion statute, it did so with the knowledge that "dangerous instrument" was already defined in 9 GCA § 58.10. *See Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 587 U.S. ----, 139 S. Ct. 1881, 1890 (2019) ("Congress legislates against the backdrop of existing law." (quoting *McQuiggin v. Perkins*, 569 U.S. 383, 398 n.3 (2013))). Had the Guam Legislature intended Home Invasion to incorporate a more expansive definition of "dangerous instrument," we assume it would have made that intention clear. *See Azar v. Allina Health Servs.*, 587 U.S. ----, 139 S. Ct. 1804, 1812 (2019) ("This Court does not lightly assume that Congress silently attaches different meanings to the same term in . . . related statutes.").

[22] Accordingly, to adopt the People's interpretation would require the court to redefine a portion of 9 GCA § 37.210(b) by judicial fiat. This would be an unwarranted exercise of judicial authority. *Cf. State v. Gonzales*, 50 Ohio St. 3d 276, 2017-Ohio-777, 81 N.E.3d 419, at ¶ 13 ("In our limited role of statutory interpretation, we must refrain from inserting words to achieve a particular result."); *San Bernardino Valley Audubon Soc'y v. City of Moreno Valley*, 51 Cal. Rptr.

2d 897, 904-05 (Ct. App. 1996) ("Courts may not rewrite statutes to make express an intention not expressed in the statute itself."). Since 9 GCA §§ 58.10(e) and 16.10(d) are functionally identical, to interpret one—but not both—as applicable to "threats" would be to create an arbitrary distinction between the two. An arbitrary interpretation is no more proper than a redundant interpretation. *Cf. State v. Recall Dunleavy*, 491 P.3d 343, 361 (Alaska 2021) ("[A] court should not give a word an entirely fanciful meaning to avoid a minor redundancy.").

[23] And while Connecticut's Home Invasion statute is similar to ours, Connecticut's broader statutory scheme governing weapon usage is not. In Connecticut, a deadly weapon is defined by statute as "any weapon, whether loaded or unloaded, from which a shot may be discharged, or a switchblade knife, gravity knife, billy, blackjack, bludgeon, or metal knuckles," Conn. Gen. Stat. Ann. § 53a-3(6), while a dangerous instrument is defined as "*any* instrument, article or substance," *id.* § 53a-3(7) (emphasis added). Thus, in the Connecticut scheme, there is a statutory distinction between deadly weapons and dangerous instruments: a deadly weapon is an object that is deadly per se, "designed for the sole purpose of doing violence," whereas a "dangerous instrument" is any other object. *See State v. Osman*, 573 A.2d 743, 747 (Conn. App. Ct. 1990), *rev'd on other grounds by State v. Osman*, 589 A.2d 1227, 1229 (Conn. 1991) (per curiam). These classifications are mutually exclusive: "[T]he [Connecticut] legislature intended the term dangerous instrument to apply only to those weapons that are not deadly per se . . . ." *Id.* By contrast, Guam's statutory scheme does not classify any objects as "deadly per se." Under 9 GCA § 16.10(d), a deadly weapon can be "*any* firearm, or other weapon, device, instrument, material or substance, whether animate or inanimate," (emphasis added), and under 9 GCA § 58.10(e) the same is true of dangerous instruments. Accordingly, Connecticut law does not inform Guam law in this area. In

Connecticut, "deadly weapons" and "dangerous instruments" are terms with distinct and exclusive statutory definitions, so the use of both terms in succession is not redundant.

[24] Under Guam law, we can draw no reasonable distinction between a "deadly weapon" under 9 GCA § 16.10(d) and a "dangerous instrument" under 9 GCA § 58.10(e). *See Cox v. Iowa Dep't of Hum. Servs.*, 920 N.W.2d 545, 553 (Iowa 2018) ("[W]e give effect to all the words in the statute unless no other construction is reasonably possible."). Thus, barring clarification from the Guam Legislature, the phrase "deadly weapon or dangerous instrument" in the Home Invasion statute is redundant. *See Wood Cnty. v. State Bd. of Vocational, Tech. & Adult Educ.*, 211 N.W.2d 617, 621 (Wis. 1973) ("If the legislature has created redundancies, it is not up to this court to create functions for such parts."). We reject the premise that Taisacan's airsoft pistol could qualify as a dangerous instrument even if it is not a deadly weapon, or vice versa—it must be both, or neither.

2. There was insufficient evidence to prove Taisacan's airsoft pistol was a deadly weapon or dangerous instrument

[25] Because there is no distinction between a "deadly weapon" and a "dangerous instrument" in 9 GCA § 37.210(b), we analyze Taisacan's airsoft pistol under the more developed framework of 9 GCA § 16.10(d). *See, e.g.*, *People v. Rachulap*, 2022 Guam 9 ¶¶ 35-36. For an object to qualify as a "deadly weapon," three requirements must be met: first, the object must be "used or . . . intended to be used" in the manner of a deadly weapon or dangerous instrument; second, the object, as used or intended to be used, must actually be "capable of producing death or serious bodily injury," and third, the defendant must *know* the object, as it was used or intended to be used, could produce death or serious bodily injury. 9 GCA § 16.10(d).

[26] Although Taisacan challenges the "deadly weapon" classification on all three prongs of this statute, Appellant's Br. at 12-14, the "capable of producing death or serious bodily injury" prong is dispositive. As the trial prosecutor conceded, the People presented no evidence proving

the airsoft pistol was capable of firing a projectile. Tr. at 165-66 (Jury Trial, July 9, 2019). There was also no evidence presented as to what sort of projectile, if any, the airsoft pistol was designed to fire, or any evidence about the nature and capabilities of airsoft pistols generally. Without receiving *some* evidence to that effect, the jury had no basis to find Taisacan's airsoft pistol was capable of causing death or serious bodily injury. *See, e.g.*, *State v. Williamson*, 845 S.E.2d 876, 885 (N.C. Ct. App. 2020) (when the alleged "deadly weapon" is an airsoft pistol, "there must be evidence in the record of the weapons' capability to inflict death or serious bodily injury"); *Osman*, 573 A.2d at 746-48; *J.M.P. v. State*, 43 So. 3d 189, 191 (Fla. Dist. Ct. App. 2010). Thus, because a rational jury could not have concluded the airsoft pistol was *capable* of producing death or serious bodily injury, Taisacan's airsoft pistol does not qualify as a "deadly weapon or dangerous instrument" under 9 GCA § 37.210(b).

B. We Will Not Impute Crisostomo's Liability to Taisacan

[27] The People argue that even if Taisacan did not personally possess a deadly weapon or dangerous instrument, he can still be held liable for Home Invasion based on the actions of his co-conspirator, Ronnie Crisostomo. *See* Appellee's Br. at 14-15, 21-24. The People's argument on this point has two components: first, Crisostomo's actions satisfied all elements of Home Invasion; and second, Crisostomo's liability can be vicariously imputed to Taisacan.

[28] We agree there was sufficient evidence to prove Crisostomo committed Home Invasion. The evidence suggests Crisostomo and Taisacan performed the same acts, except Crisostomo possessed a baseball bat while doing so. Applying the same three-part test under 9 GCA § 16.10(d) as above, Crisostomo's bat, unlike Taisacan's airsoft pistol, qualifies as a deadly weapon or dangerous instrument. Unlike the airsoft pistol, the capabilities of which are not obvious, the destructive potential of a baseball bat is self-evident. *See, e.g.*, *Hammons v. State*, 856 S.W.2d

797, 801 (Tex. Ct. App. 1993) ("[W]e are inclined to believe that all mankind know that death or serious bodily injury can be inflicted by a baseball bat in the hands of a grown man."). Applying common sense and everyday experience, a rational jury could have found Crisostomo used or intended to use the baseball bat, the baseball bat was capable of inflicting death or serious bodily injury, and that Crisostomo knew this.

[29] Even so, we disagree that Crisostomo's liability can be imputed to Taisacan here. The People argue this court should hold Taisacan vicariously liable under the federal court doctrine called "*Pinkerton* liability," which derives from the U.S. Supreme Court's decision in *Pinkerton v. United States*, 328 U.S. 640 (1946). The doctrine provides that "a conspirator may be held liable for criminal offenses committed by a coconspirator that are within the scope of the conspiracy, are in furtherance of it, and are reasonably foreseeable as a necessary or natural consequence of the conspiracy." *State v. Walton*, 630 A.2d 990, 997 (Conn. 1993) (citing *Pinkerton*, 328 U.S. at 647-48). Although the *Pinkerton* decision itself is controlling only within the federal criminal system, many states have adopted some version of *Pinkerton* liability through judicial common law—while others have explicitly declined to do so. *Compare People v. Zielesch*, 101 Cal. Rptr. 3d 628, 633 (Ct. App. 2009), *with People v. McGee*, 399 N.E.2d 1177, 1182 (N.Y. 1979).[5]

[30] *Pinkerton* liability is not the law of Guam. There is no Guam statute that expressly provides for vicarious criminal liability in this way. Thus, to adopt *Pinkerton* liability would be to create a broad new theory of criminal liability through judicial common law. This would diverge from our well-established preference to leave legislative matters to the legislature. *See Carlson v. Guam*

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[5] Many legal academics and commentators have recognized potential constitutional issues raised by application of the *Pinkerton* doctrine, particularly when the relationship between the conspirator and the substantive offense committed by another is highly attenuated. *See, e.g.*, Bruce A. Antkowiak, *The Pinkerton Problem*, 115 Penn. St. L. Rev. 607, 610-11 (2011); Andrew Ingram, *Pinkerton Short-Circuits the Model Penal Code*, 64 Vill. L. Rev. 71, 72-73 (2019); Paul Marcus, *Criminal Conspiracy Law: Time to Turn Back From an Ever Expanding, Ever More Troubling Area*, 1 Wm. & Mary Bill Rts. J. 1 (1992).

Tel. Auth., 2002 Guam 15 ¶ 46 n.7 ("Courts are not in the business of judicial legislation."); *see also* Bruce A. Antkowiak, *The Pinkerton Problem*, 115 Penn. St. L. Rev. 607, 624 (2011) (asserting that "[w]here legislatures want to include *Pinkerton* liability in their Crimes Codes, they know how to find the words to do so," and citing examples where state legislatures have done so). The People's arguments for the creation of a new liability theory should be properly directed to the Guam Legislature, not to this court. *See People v. Muritok*, 2003 Guam 21 ¶ 47 (recognizing that power to change statutes that embrace legislative policy "lies with the Guam Legislature, not this court, as we have no authority in that regard")

[31] There is also a clear pathway in Guam law already to prosecute a defendant for actions undertaken by the defendant's co-actor—guilt established by complicity. Under 9 GCA § 4.60, a defendant may be prosecuted for an offense committed by another where the defendant, "with the intention of promoting or assisting in the commission of the offense, . . . induces or aids another person to commit the offense." 9 GCA § 4.60 (2005). While the People initially prosecuted Taisacan under a theory of complicity,[6] they did not request a jury instruction on complicity, and the Superior Court did not give one *sua sponte*.[7] The People acted at their own peril pursuing charges against Taisacan for Home Invasion as a principal and by an untested theory of vicarious liability, rather than as an aider-and-abettor under the complicity statute. Since we are disinclined to expand vicarious liability in this context beyond what Guam statute already provides for, we

[6] The magistrate's complaint which commenced this case initially alleged Taisacan committed Home Invasion by Complicity under 9 GCA § 4.60. *See* RA, tab 1 at 1-2 (Mag. Compl., May 17, 2019). Yet in the Indictment, First Amended Indictment, and Second Amended Indictment, Taisacan was charged only with Home Invasion, with no reference to a complicity theory. *See* RA, tab 11 at 1 (Indictment, May 24, 2019); RA, tab 34 at 1 (Second Am. Indictment, July 10, 2019).

[7] Given this circumstance, we will not analyze whether complicity principles would provide sufficient evidence to affirm Taisacan's conviction here. "[A]ppellate courts cannot consider evidence of a defendant's complicity in a criminal act if the jury was not instructed on complicity since this would violate the defendant's Sixth Amendment right to a jury trial." *Akron v. Cabell*, 2013-Ohio-5113, at ¶ 18 (quoting *State v. Peterson*, 2007-Ohio-4979, at ¶ 23).

conclude that Crisostomo's liability cannot be imputed to Taisacan here, and we vacate his Home Invasion conviction.[8]

[32] Additionally, our rejection of *Pinkerton* liability forecloses Taisacan's conviction for the Deadly Weapon Special Allegation attached to *Conspiracy to Commit* Home Invasion. Because we have already rejected the premise that Taisacan's airsoft pistol qualifies as a deadly weapon, he cannot be convicted of this Special Allegation based on his possession of the airsoft pistol. And while the baseball bat may qualify as a deadly weapon, there was no evidence presented that Taisacan himself possessed the bat at any point during the conspiracy. That leaves only the possibility that Taisacan could have "possessed" the baseball bat insofar as *Crisostomo* actually possessed the bat. However, this application of vicarious liability is precisely what we have rejected above. Since Crisostomo's possession of the baseball bat cannot be imputed to Taisacan for the "deadly weapon" element of Home Invasion, it also cannot be imputed to Taisacan for the "deadly weapon" element of the Special Allegation. As there was insufficient evidence that Taisacan possessed a deadly weapon in the commission of Conspiracy to Commit Home Invasion, we reverse the conviction for the Special Allegation of Use or Possession of a Deadly Weapon attached to Charge 2.

C. The Challenged Jury Instructions Do Not Require a New Trial

[33] Taisacan next argues that three of the Superior Court's jury instructions were erroneous and entitle him to a new trial: Jury Instructions 5I, 6A, and 6C. Appellant's Br. at 18; *see id.* at 16-19. The challenges to the first two instructions are moot given our reversal of the Home Invasion conviction above.

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[8] In vacating Taisacan's conviction for Home Invasion, we also moot a procedural challenge by Taisacan to the simultaneous entry of convictions for Home Invasion and Conspiracy to Commit Home Invasion under 9 GCA § 1.22(b). *See* Appellant's Br. at 9-10. Our reversal of the Home Invasion conviction ensures Taisacan will not be simultaneously convicted of both charges.

[34] Taisacan first argues Jury Instruction 5I, "Liability for Co-Conspirator Acts," misstates the law of Guam by providing: "[a] member of a conspiracy is criminally responsible for the crimes that he conspired to commit, no matter which member of the conspiracy commits the crime." Tr. at 108-09 (Jury Trial, July 10, 2019); RA, tab 38 at Instr. 5I (Jury Instrs., July 11, 2019). But the only conviction to which this error applies is Home Invasion, as this was the only substantive offense established by conspirator liability.[9] Since we have already reversed the Home Invasion conviction for insufficient evidence, we need not consider whether this instruction would be an alternative basis to reverse the same conviction. And since a finding of insufficient evidence precludes retrial on that charge, *People v. Angoco*, 2004 Guam 11 ¶ 20, there is no need to determine this issue for retrial purposes. This same principle applies to Taisacan's challenge to Jury Instruction 6A, "Essential Elements of Home Invasion," which challenges the inclusion of "to wit" language in the instruction.[10] Since the conviction is already reversed, and since there can be no retrial for Home Invasion, there is no need to decide whether the "Essential Elements of Home Invasion" instruction was erroneous.

[35] Taisacan also argues Jury Instruction 6C, "Essential Elements of Conspiracy to Commit Home Invasion," misstates the law of Guam on conspiracy offenses. Because Taisacan did not object to this instruction at trial, we review for plain error. *See Wesen*, 2022 Guam 18 ¶ 15. "The first prong of plain error analysis requires the defendant to prove there was error." *People v. Bosi*,

[9] Taisacan has not challenged any of his other substantive convictions on the theory that only Crisostomo, not Taisacan himself, committed the offenses. Our review of the record confirms there was sufficient evidence supporting Taisacan's direct liability for each of the Burglary, Second Degree Robbery, Criminal Trespass and Theft convictions.

[10] This argument appears to present an issue of first impression for the court. Although we leave this question for another day, we note that other courts to consider this issue have reached different conclusions. *Compare State v. Williams*, 430 P.3d 448, 460-61 (Kan. 2018) (holding that phrase "the defendant used a deadly weapon, a baseball bat" did not instruct jury that a baseball bat was a deadly weapon but "merely informed the jury what the State had to prove"), *with State v. Levy*, 132 P.3d 1076, 1079, 1082 (Wash. 2006) (en banc) (holding that phrase "a deadly weapon, to-wit . . . a crowbar" was improper because it effectively informed jury it "need not consider whether the State proved that [the crowbar's] use caused it to be qualified as a deadly weapon").

2022 Guam 15 ¶ 48. Jury Instruction 6C provides that one essential element of Conspiracy to Commit Home Invasion was Taisacan "intended to engage in, promote, or assist in the conduct which constitutes the crime of Home Invasion." Tr. at 112 (Jury Trial, July 10, 2019); RA, tab 38 at Instr. 6C (Jury Instrs.). This language accurately tracks 9 GCA § 13.30(b), which defines the offense of Conspiracy, so the instruction does not misstate the law. Still, Taisacan argues the Superior Court erred by giving the jury this principle of law instead of principles deriving from 9 GCA § 4.60, "Guilt Established by Complicity." Appellant's Br at 17-18. Taisacan's preferred instruction would have provided:

> A person is guilty of an offense if, with the intention of promoting or assisting in the commission of the offense, he induces or aids another person to commit the offense. *If the definition of the offense includes lesser offenses, the offense of which each person shall be guilty shall be determined according to his own culpable mental state and to those aggravating or mitigating factors which apply to him.*

9 GCA § 4.60 (emphasis added). Relying on the portion of the statute italicized above, Taisacan argues that because Home Invasion includes lesser offenses (such as Burglary), the Superior Court should have instructed the jury that Taisacan can be held liable only for the offenses which correspond to his culpable mental state and other relevant factors. Appellant's Br. at 17-18. In his view, this instruction would have led the jury to acquit him of Conspiracy to Commit Home Invasion.

[36] Taisacan's argument appears to conflate the elements of Conspiracy to Commit Home Invasion with those applicable to the substantive offense of Home Invasion. It would have been erroneous for the Superior Court to instruct, within a conspiracy instruction, that the jury must consider whether Taisacan had the culpable mental state necessary to commit the substantive offense of Home Invasion. Guam law provides that a defendant's lack of culpability for the substantive offense he conspires to commit is not a defense to liability for a charge of conspiracy

to commit that offense. 9 GCA § 13.45(b)(1) (2005). Even if Taisacan lacked the culpable mental state necessary to be convicted for Home Invasion, that finding would not preclude his liability for *Conspiracy to Commit* Home Invasion. Instead, the only mental state the People needed to prove on this charge was that Taisacan "intended to engage in, promote, or assist in the conduct which constitutes" Home Invasion. 9 GCA § 13.30 (2005). The instruction provided this principle of law verbatim, so it was not erroneous—and thus not plainly erroneous.

[37] Because we need not reach the challenges to Jury Instructions 5I and 6A, and because Jury Instruction 6C was not erroneous, Taisacan is not entitled to a new trial based on jury instructions.

D. The Superior Court Erred by Entering Certain Convictions

[38] Taisacan asserts that many of his convictions were redundant and therefore barred under several procedural statutes. We address each argument.

1. We vacate three of four Conspiracy charges as redundant

[39] Taisacan was convicted of four Conspiracy charges: (1) Conspiracy to Commit Home Invasion, (2) Conspiracy to Commit Burglary, (3) Conspiracy to Commit Second Degree Robbery, and (4) Conspiracy to Commit Criminal Trespass. Taisacan argues the evidence proved only a single conspiratorial agreement between him and Crisostomo; he thus argues that three of the four convictions are barred. Appellant's Br. at 15 (citing 9 GCA § 13.35 (2005)).

[40] Title 9 GCA § 13.35 provides: "If a person conspires to commit a number of crimes, he may be convicted of only one conspiracy so long as those multiple crimes are the object of the same agreement or continuous conspiratorial relationship." As we recognized in *People v. Quenga*:

> Our statute is an adoption of Model Penal Code section 5.03(3), which itself is a codification of the rule enunciated by the United States Supreme Court in *Braverman v. United States*, 317 U.S. 49, 53 (1942) ("Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which

> constitutes the conspiracy which the statute punishes. The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one.").

2015 Guam 39 ¶ 73. Here, the People concede there was only one conspiratorial agreement between Taisacan and Crisostomo, Appellee's Br. at 25-26, and we agree this is the only reasonable reading of the evidentiary record. Thus, only one of Taisacan's conspiracy convictions can stand. Under *Quenga*, a court should "vacate all but the most serious conspiracy count" in accordance with 9 GCA § 13.35. 2015 Guam 39 ¶ 78. The most serious conspiracy count here was Conspiracy to Commit Home Invasion, as it is the only conviction of the four to be graded as a First Degree Felony. Under *Quenga*, we vacate Taisacan's convictions for Conspiracy to Commit Burglary, Conspiracy to Commit Second Degree Robbery, and Conspiracy to Commit Criminal Trespass.

[41] We also vacate the Special Allegations under 9 GCA § 80.37 attached to the convictions for Conspiracy to Commit Burglary and Conspiracy to Commit Second Degree Robbery. A Special Allegation is a sentence enhancement, rather than a substantive offense of its own. *People v. Moses*, 2016 Guam 17 ¶ 27. Accordingly, a defendant cannot be convicted solely of a sentence enhancement without an underlying charge to which the Special Allegation is attached. *Id.* ¶ 29 (citing *People v. Tedtaotao*, Crim. No. 93-00001A, 1994 WL 129737, at *6 (D. Guam App. Div. Mar. 15, 1994), *aff'd*, 46 F.3d 1144 (9th Cir. 1995)).[11]

2. Theft is a lesser included offense of Second Degree Robbery

[42] Taisacan argues his Theft conviction cannot stand because it is a lesser included offense of Second Degree Robbery. Appellant's Br. at 11. We agree.

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[11] The People suggest these special allegations should not be vacated, but instead "severed and added to the appropriate count, as to prohibit a defendant to circumvent penalty enhancements under the guise of complying with Section 1.22." Appellee's Br. at 30. Finding no supportive authority for this practice, we decline to do so.

[43] Under Guam law, the People may prosecute a defendant for more than one offense arising from the same set of facts, but a defendant may not be *convicted* of two offenses if one is included within the other. 9 GCA § 1.22(a) (2005); *People v. Aldan*, 2022 Guam 4 ¶ 30. One test to determine whether an offense is included within another is when "[i]t is established by proof of the same or less than all the facts required to establish the commission of the [other] offense . . . ." 8 GCA § 105.58(b)(1) (2005). *See generally People v. Aguirre*, 2004 Guam 21 ¶ 17 & n.2 (noting similarities between 8 GCA § 105.58(b)(1)'s "same or less facts" test and the test established in *Blockburger v. United States*, 284 U.S. 299 (1932)). Under this test, Theft is a lesser included offense of Second Degree Robbery because Second Degree Robbery occurs "in the course of committing a theft." 9 GCA § 40.20(a) (2005). "[B]ecause the greater offense of robbery cannot occur unless a theft also occurs," the same facts that prove Second Degree Robbery prove Theft as well. *State v. Wall*, 126 P.3d 148, 151 (Ariz. 2006) (en banc); *cf. People v. Joshua*, 2015 Guam 32 ¶ 43 (holding Burglary is a lesser included offense of Home Invasion "because the statute for Home Invasion sets out that it is a Burglary with [an] additional element").

[44] Because Theft is a lesser included offense of Second Degree Robbery under 8 GCA § 105.58(b)(1), simultaneous convictions for both offenses violate 9 GCA § 1.22(a). *See People v. Afaisen*, 2016 Guam 31 ¶ 52 ("Although a defendant may be prosecuted for two crimes stemming from the same conduct, that defendant may not be convicted for both crimes."); *Acosta*, 2022 Guam 11 ¶ 58 ("[T]he trial court should have conducted an included-offense analysis and entered convictions only for those offenses which do not violate 9 GCA § 1.22."); *see also People v. Cummins*, 2010 Guam 19 ¶ 13 ("[W]hen the lesser and greater offense have been independently

charged[,] the defendant may not be sentenced on both charges . . . ."). Taisacan's Theft conviction is therefore vacated.[12]

3. Burglary is a lesser included offense of Home Invasion

[45] Taisacan next argues he cannot be convicted of both Burglary and Home Invasion because the former is included within the latter under 8 GCA § 105.58(b)(1). Taisacan is correct; we have already so held in *People v. Joshua*, 2015 Guam 32 ¶ 43. The Superior Court therefore erred under 9 GCA § 1.22(a) by entering convictions on both offenses. But since the Home Invasion conviction is now reversed and vacated, 9 GCA § 1.22(a) no longer bars the Superior Court from entering a conviction for Burglary. *See People v. Medina*, 161 P.3d 187, 197 (Cal. 2007) ("If a greater offense is reversed on appeal, the lesser included offense may be revived by operation of law."); *State v. Turner*, 238 P.3d 461, 469 n.11 (Wash. 2010) (en banc) ("[A] lesser conviction previously vacated on double jeopardy grounds can be reinstated following the appellate reversal of a defendant's more serious conviction based on the same criminal conduct."). Thus, on remand, the Superior Court is not precluded from reinstating the Burglary conviction.

4. Criminal Trespass is a lesser included offense of Burglary

[46] In his opening brief, Taisacan asserts that Criminal Trespass is a lesser included offense of Burglary. In response, the People correctly note that this court has already decided to the contrary in *People v. Demapan*, 2004 Guam 24. *See* Appellee's Br. at 27. In his reply brief, Taisacan argues for the first time to overrule *Demapan*—specifically, its analysis under 8 GCA § 105.58(b)(3), a provision separate from the "same or less facts" test discussed above. Appellant's Reply Br. at 9-10 (July 14, 2020).

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[12] However, as Part IV(D)(3) of this opinion explains, where a greater offense is overturned on appeal, the Superior Court is not precluded from reinstating a previously vacated conviction on an included offense. *See infra* Part IV(D)(3).

[47] At the outset, we recognize that *stare decisis* counsels against revisiting a previously decided issue. *See, e.g.*, *People v. Ramey*, 2019 Guam 11 ¶ 17 ("It is, of course, a fundamental jurisprudential policy that prior applicable precedent usually must be followed even though the case, if considered anew, might be decided differently by the current justices." (quoting *Duenas v. Brady*, 2008 Guam 27 ¶ 17 n.4)). But *stare decisis* is ultimately a "flexible policy," *Leon-Guerrero v. Gov't of Guam*, 2022 Guam 5 ¶ 12, not an "inexorable command," *Ramey*, 2019 Guam 11 ¶ 17. *Stare decisis* "permits this court to reconsider, and ultimately to depart from, our own prior precedent in an appropriate case," *Leon-Guerrero*, 2022 Guam 5 ¶ 12 (quoting *Duenas*, 2008 Guam 27 ¶ 17 n.4), such as when the court's prior decision "rested on unsound principles," *People v. Reselap*, 2022 Guam 2 ¶ 43 (citing *Ramey*, 2019 Guam 11 ¶ 17). And "stare decisis does not require that we continue an incorrect reading of [a] statute." *Arreola v. Scentsy, Inc.*, 531 P.3d 1148, 1154 (Idaho 2023) (quoting *Greenough v. Farm Bureau Mut. Ins. Co. of Idaho*, 130 P.3d 1127, 1130-31 (Idaho 2006)). On review, we now recognize that *Demapan*'s analytical approach to 8 GCA § 105.58(b)(3) inadvertently blended two distinct analytical frameworks: one under subsection (b)(1) and the other under subsection (b)(3). This created an unworkable legal test and thus rested on unsound principles.

[48] Title 8 GCA § 105.58(b) is based on Model Penal Code § 1.07(4). *See* 8 GCA § 105.58, Note. *Demapan* considered whether Criminal Trespass is included within Burglary under 8 GCA § 105.58(b). 2004 Guam 24 ¶ 9. The *Demapan* court first decided Criminal Trespass is not a lesser included offense of Burglary under subsection (b)(1)—the "same or less facts" test discussed above. *See id.* ¶ 11. The court reasoned that while Burglary and Criminal Trespass have certain essential elements in common, each has one element the other lacks. *See id.* ¶¶ 10-12. The offense of Criminal Trespass requires proof that the defendant *knew* he was not permitted to be on the

property, while the offense of Burglary does not; and Burglary requires proof that the defendant entered the property *with intent to commit an offense therein*, while Criminal Trespass does not. *Id.* ¶ 11. Since each offense has a distinct element, neither offense is proved solely by the "same or less facts" which proves the other. That holding was not "unsound in principle," and we reaffirm it here.

[49] Yet *Demapan* proves unworkable in its application of 8 GCA § 105.58(b)(3). Under that subsection, one offense is included within another when "[i]t differs from the offense charged *only* in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission." 8 GCA § 105.58(b)(3) (emphasis added). The *Demapan* court emphasized the word "only," reasoning that because Burglary and Criminal Trespass each have a distinct element, they cannot be said to differ from one another "only" in terms of injury and/or culpability. *See* 2004 Guam 24 ¶ 12.

[50] The problem with this approach is that it interpolates subsection (b)(1) principles into the subsection (b)(3) analysis, thereby conflating the two analyses. Burglary and Criminal Trespass each have distinct elements, which means they do not satisfy the "same or less facts" test of subsection (b)(1). But *Demapan* ultimately holds that where two offenses do not satisfy the subsection (b)(1) test due to "different proof requirements," nonsatisfaction also "dictate[s] against a finding" that the subsection (b)(3) test could apply. 2004 Guam 24 ¶ 12. In effect, *Demapan* provides that the "same or less facts" of subsection (b)(1) also controls the subsection (b)(3) test. But this violates "one of the most basic interpretive canons, that '[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous . . . .'" *Corley v. United States*, 556 U.S. 303, 314 (2009) (alteration in original) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)). *Demapan* deprives subsection (b)(3) of an independent purpose; it is

either redundant or superfluous, controlled in either case by the outcome under subsection (b)(1). This construction should be avoided because it is clearly inconsistent with the purposes and policies of the act in question. *See Villalon v. Hawaiian Rock Prods., Inc.*, 2001 Guam 5 ¶ 24; Model Penal Code § 1.07 cmt. 5 at 108 (Am. L. Inst. 1985) ("Conviction of an offense and an 'included offense' as defined by Paragraphs (b) and (c) of Subsection (4) would not necessarily be barred under the *Blockburger* test. . . . [Nevertheless,] [i]t would be a perversion of the legislative intent to use these statutes to pyramid convictions and punishment."). Instead, subsection (b)(3) must apply to some circumstances which subsection (b)(1) does not. *See, e.g.*, *Drinkard v. Walker*, 636 S.E.2d 530, 534 n.32 (Ga. 2006) (in analogous legislative scheme, other tests "resolve potential gaps in the [subsection (b)(1)] analysis").

[51] Further complicating the issue, *Demapan* also implies that the "lesser kind of culpability" prong of 8 GCA § 105.58(b)(3) would apply only where two offenses have identical elements except for different scienter requirements under the Model Penal Code's possible mental states. *See* 2004 Guam 24 ¶¶ 9-12; *see also* 9 GCA § 4.25 (2005) (adopting the MPC mental states of intentionally, knowingly, recklessly, and criminally negligent). *Demapan*'s holding that Criminal Trespass is not included within Burglary is premised on the notion that the offenses differ in *two* respects (rather than only *one*): scienter (knowledge vs. intent) plus another element attached to the respective *mens rea* requirements (knowledge of *lack of authority to enter* vs. intent *to commit a crime therein*). Thus, under *Demapan*, because Criminal Trespass and Burglary differ in more than just "knowledge vs. intent," Criminal Trespass is not included within Burglary under 8 GCA § 105.58(b)(3).

[52] But this is far from the "novel and broad test" that was intended by the drafters of the Model Penal Code. *See* Christen R. Blair, *Constitutional Limitations on the Lesser Included Offense*

Doctrine, 21 Am. Crim. L. Rev. 445, 450 (1984). The portion of the Model Penal Code codified at 8 GCA § 105.58(b) was intended to work in tandem with a separate provision that captured this exact scenario—Model Penal Code § 2.02(5), codified at 9 GCA § 4.35. Section 4.35 provides that proof of one of the Model Penal Code's culpable mental states suffices as proof of any "lower" culpable mental state as well. *See Aguirre*, 2004 Guam 21 ¶ 21 (interpreting 9 GCA § 4.35 to mean "the lower forms of mental culpability are necessarily subsumed within the higher mental states" (quoting *People v. Green*, 437 N.E.2d 1146, 1150 (N.Y. 1982))).[13] As the commentary to the Model Penal Code notes, our subsection (b)(3) was intended as a backstop because "[a]bsent a provision such as Section 2.02(5) of the Model Penal Code, such offenses would not necessarily be included offenses within the meaning of [the "same or less facts" test]." *See* Model Penal Code § 1.07 cmt. 5 at 133. Under *People v. Aguirre*, where two offenses differ only in terms of the culpable mental states defined by 9 GCA § 4.25, then the "lower" *mens rea* offense is included within the "higher" *mens rea* offense via the "same or less facts" test of 8 GCA § 105.58(b)(1). *See* 2004 Guam 21 ¶¶ 20-21. Thus, the only circumstance *Demapan* suggests subsection (b)(3) might apply is also within the scope of subsection (b)(1).

[53] As this court disfavors redundant or superfluous statutory constructions, we conclude that the *Demapan* construction of 8 GCA § 105.58(b)—depriving subsection (b)(3) of a purpose independent of subsection (b)(1)—is unsound. We must construe the statute "to give effect to all of its provisions so that no part would be superfluous or insignificant." *Macris v. Richardson*, 2010 Guam 6 ¶ 15. To do so, subsection (b)(3) must be uncoupled from subsection (b)(1), which requires a departure from *Demapan*'s prescription that the nonsatisfaction of subsection (b)(1)

[13] As an example, the crime of Murder under 9 GCA § 16.40(a) can be proved by two different mental states: "intentionally" committing criminal homicide under subsection (a)(1), or committing criminal homicide "recklessly" under subsection (a)(2). Under 9 GCA § 4.35, proof that the defendant committed homicide "knowingly" suffices as proof that the defendant committed homicide "recklessly" as well. *People v. Aguirre*, 2004 Guam 21 ¶ 21.

"dictates against a finding" that subsection (b)(3) could apply. For subsection (b)(3) to have independent meaning, there must be a circumstance where subsection (b)(3) applies though subsection (b)(1) does not. *See* Model Penal Code § 1.07 cmt. 5 at 108.

[54] To interpret 8 GCA § 105.58(b)(3), we look to legislative intent. Each of the statutes relevant here—8 GCA § 105.58(b), as well as 9 GCA § 37.20(a) (defining Burglary), and 9 GCA § 37.30(a) (defining Criminal Trespass)—were created by the Guam Law Revision Commission in the 1977 Guam Criminal and Correctional Code ("1977 Criminal Code").[14] The Commission was created by the Guam Legislature through Public Law 12-93, which tasked the Commission with the responsibility to:

> (b) Conduct a continuing, comprehensive and expeditious examination of Guam's common and statutory law and judicial decisions in order to identify and resolve defects, anachronisms and archaisms therein;
>
> . . . ;
>
> (d) Prepare, adopt, and submit to the Speaker, as completed, reports and recommendations concerning specific revisions to the law. . . .

Guam Pub. L. 12-93:1 (Jan. 7, 1974). The 1977 Criminal Code was the culmination of those efforts. Included within the 1977 Criminal Code are several annotations and comments by the then-Compiler of Laws, some of which explain the Commission's intentions in creating certain statutes. Although these notes by the Compiler are emphatically *not* a source of substantive Guam law, *see* 1 GCA § 101(a) (2005), they are nonetheless useful for discerning the intent of the Commission—and thus serve as valuable quasi-legislative history.[15]

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[14] Each of these three statutes substantively tracks a corresponding provision of the Model Penal Code. *Compare* 8 GCA § 105.58(b), *with* Model Penal Code § 1.07(4); *compare* 9 GCA § 37.20(a), *with* Model Penal Code § 221.1(1); *compare* 9 GCA § 37.30, *with* Model Penal Code § 221.2.

[15] *Demapan* considered this note but evidently found it had no persuasive power, succinctly noting that Compiler's Comments are "not part of the law." 2004 Guam 24 ¶ 8 (quoting 1 GCA § 101(a) (2000)). While this is true, it misapprehends the value of the Comment. The Comment is useful not to provide substantive law, but to explain the source of the statutory text and the legislative intent in creating the statute. We have afforded at least some reliance to Compiler's Notes and Comments for this purpose in many subsequent cases. *See, e.g.*, *People v. Stephen*, 2009 Guam 8 ¶ 31; *People v. Patrick*, 2016 Guam 2 ¶ 14; *People v. Castro*, 2016 Guam 16 ¶ 20.

[55] According to the Compiler's Comment to Chapter 37 of the 1977 Criminal Code, the offense of Criminal Trespass was "created as a less[e]r included offense to that [of] burglary. The main difference is that no intent to commit a crime is required for conviction of 'criminal trespass.'" Guam Crim. & Corr. Code, cmt. to Ch. 37 (1977). The Commission therefore intended Criminal Trespass to be a lesser included offense of Burglary, yet it defined each offense with unique elements, thus placing it beyond the reach of 8 GCA § 105.58(b)(1). It stands to reason that the Commission instead intended Criminal Trespass to be a lesser included offense of Burglary under subsection (b)(3)—and did not intend the nonsatisfaction of the subsection (b)(1) test to preclude that result.

[56] Assuming that the Commission intended Criminal Trespass to be a lesser included offense of Burglary under 8 GCA § 105.58(b)(3), we must decide which prong of subsection (b)(3) applies. Subsection (b)(3) applies in two contexts: where one offense differs from another only in terms of "a less serious injury or risk of injury to the same person, property or public interest," and where one offense differs from another only in terms of "a lesser kind of culpability." 8 GCA § 105.58(b)(3). We conclude that Criminal Trespass differs from Burglary in the respect that "a lesser kind of culpability suffices to establish its commission." *See* 8 GCA § 105.58(b)(3). We reject *Demapan*'s implied premise that the statute's reference to "a lesser kind of culpability" refers only to "scienter element[s]" that contain two of the Model Penal Code's different possible mental states but are otherwise identical. *See* 2004 Guam 24 ¶¶ 11-12. We agree with the drafters of the Model Penal Code, other state legislatures that have adopted this portion of the model code, and the Georgia Supreme Court that the "lesser kind of culpability" test is intended to fill the gap left by the "same or less facts" test. *See* Model Penal Code § 1.07 cmt. 5 at 133-34; Commentary to Haw. Rev. Stat. § 701-109 (Westlaw 2023); *Drinkard*, 636 S.E.2d at 534 n.32. But that legislative

intent can be given effect only if we read the phrase "a lesser kind of culpability" to mean something other than a lower culpability level under 9 GCA § 4.25.

[57] The Tennessee Supreme Court, applying an adopted test similar to 8 GCA § 105.58(b)(3),[16] found significance in the phrase "a *different* mental state indicating a *lesser kind* of culpability." *State v. Ely*, 48 S.W.3d 710, 720 (Tenn. 2001). The court explained that this phrase is meant to include "certain offenses in the Code that are related but have different mental states that do not fit neatly into the hierarchy of intentional, knowing, reckless, or negligent." *Id.* at 720-21. Accordingly, Tennessee holds that Criminal Trespass is a lesser included offense of Burglary because:

> In order to be found guilty of aggravated criminal trespass, a defendant must know that he or she does not have the owner's consent to enter or remain on the owner's property. There is no requirement that a defendant intend to commit a felony, theft or assault while on the property. *Thus, the different mental state for entering or remaining on the property indicates a lesser kind of culpability for a defendant than that required for burglary.*

State v. Terry, 118 S.W.3d 355, 359 (Tenn. 2003). Therefore, the "lesser kind of culpability" test applies where two offenses differ in terms of atypical *mens rea* requirements that do not fit neatly within the Model Penal Code's hierarchy of mental states. That is the circumstance with Criminal Trespass and Burglary. These offenses are conceptually related; each is codified in Title 9, Chapter 37, and the Guam Compiler of Laws has provided the Burglary statute (9 GCA § 37.20) as a cross-reference for the Criminal Trespass statute (9 GCA § 37.30). Each offense stems from the circumstance in which a criminal defendant is present on the property of another despite a lack of

[16] Tennessee has adopted a modified version of Model Penal Code § 1.07(4) by judicial common law. *See State v. Burns*, 6 S.W.3d 453, 466-67 (Tenn. 1999); *State v. Ely*, 48 S.W.3d 710, 718 (Tenn. 2001) (recognizing that *Burns* "adopt[ed] a modified Model Penal Code approach" to lesser included offenses). Title 8 GCA § 105.58(b) is also based on Model Penal Code § 1.07(4). *See* 8 GCA § 105.58, Note.

permission to be there. They differ only in terms of atypical *mens rea* requirements that do not fit within the 9 GCA § 4.25 hierarchy.

[58] With this perspective, it is evident that Criminal Trespass is conceptually a less culpable version of Burglary. The core difference lies in the offender's mental state upon entering the property. For Burglary, the defendant possesses the intent to commit an additional offense once inside, while for Criminal Trespass, the defendant merely knows they lack permission for entry. Although there may be some dissimilarity in the facts necessary to prove knowledge of a lack of permission as opposed to intent to commit an additional offense, the former is a *lesser kind* of culpability. This is a circumstance to which 8 GCA § 105.58(b)(3) properly applies. Accordingly, we hold that Criminal Trespass is a lesser included offense of Burglary under 8 GCA § 105.58(b)(3), overruling *People v. Demapan*, 2004 Guam 24 ¶¶ 11-12. We therefore vacate Taisacan's conviction for Criminal Trespass under 9 GCA § 1.22.

E. We Decline to Reach Taisacan's Claim of Ineffective Assistance of Counsel

[59] Finally, Taisacan claims ineffective assistance of counsel based on the cumulative effect of several alleged errors of trial counsel, including failure to move for a judgment of acquittal on the offense of Home Invasion, failure to object to jury instructions, and failure to raise several issues of law on improper convictions. Appellant's Br. at 19-21. However, we have repeatedly held that an ineffective assistance of counsel claim is better heard under a writ of habeas corpus because this claim typically requires an evidentiary hearing. *See, e.g.*, *People v. Borja*, 2017 Guam 20 ¶ 15. An evidentiary hearing is usually necessary because "the trial record often lacks a sufficient evidentiary basis as to what counsel did, why it was done, and what, if any, prejudice resulted." *People v. Campbell*, 2006 Guam 14 ¶ 47.

[60] The record, as it stands today, does not allow us to determine why Taisacan's trial counsel believed he could not make a good faith motion for acquittal on the Home Invasion charge, why he did not object to the jury instructions, or why he failed to raise the issues of law discussed in Part IV(D) of this opinion. The record does not reveal whether trial counsel's failure to object should be attributed to legal strategy, negligence, or some other factor. We therefore decline to reach the issue here. If Taisacan wishes to pursue this claim in a collateral proceeding, he must develop the record further.

V. CONCLUSION

[61] The evidence was insufficient to convict Taisacan of Home Invasion, so we **REVERSE** the conviction on Charge 1. The evidence was also insufficient to convict Taisacan of the Special Allegation of Use or Possession of a Deadly Weapon in the Commission of a Felony attached to Charge 2, so we **REVERSE** that conviction as well.

[62] Given the erroneous entry of redundant convictions, explained in Part IV(D) of this opinion, we **VACATE** these convictions:

- Charge 4: **Conspiracy to Commit Second Degree Robbery** (As a First Degree Felony)
  - ***Special Allegation***: Use of a Deadly Weapon in the Commission of a Felony
- Charge 6: **Conspiracy to Commit Burglary** (As a Second Degree Felony)
  - ***Special Allegation***: Use of a Deadly Weapon in the Commission of a Felony
- Charge 7: **Criminal Trespass** (As a Misdemeanor)
- Charge 8: **Conspiracy to Commit Criminal Trespass** (As a Misdemeanor)
- Charge 9: **Theft** (As a Misdemeanor)

We do not reverse any convictions based on jury-instruction challenges, and we do not reach Taisacan's claim of ineffective assistance of counsel.

[63] We **AFFIRM** and **REMAND** for resentencing on these convictions:

- Charge 2: **Conspiracy to Commit Home Invasion** (As a First Degree Felony)

- Charge 3: **Second Degree Robbery** (As a Second Degree Felony)
  - ***Special Allegation***: Vulnerable Victim

The Superior Court is not precluded from reinstating the Burglary conviction if it so chooses.

/s/
ROBERT J. TORRES
Associate Justice

/s/
KATHERINE A. MARAMAN
Associate Justice

/s/
F. PHILIP CARBULLIDO
Chief Justice