

**JESUS P. DISINI, PETITIONER, VS. THE HONORABLE  
SANDIGANBAYAN, THE REPUBLIC OF THE PHILIPPINES, AS  
REPRESENTED BY THE PRESIDENTIAL COMMISSION ON GOOD  
GOVERNMENT (PCGG), RESPONDENTS.**

*G.R. No. 180564. June 22, 2010*

Ponente: ABAD, J.

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**ABAD, J.:**

This case is about the elementary rule of fair play and the dire effect on the Republic's credibility when it reneges on its undertaking to protect witnesses to whom it had given immunity from prosecution.

**The Facts and the Case**

In 1989 respondent Republic of the Philippines, represented in this case by the Presidential Commission on Good Government (PCGG), wanted petitioner Jesus P. Disini to testify for his government in its case against Westinghouse Electric Corporation[1] (Westinghouse) before the United States District Court of New Jersey and in the arbitration case that Westinghouse International Projects Company and others filed against the Republic[2] before the International Chamber of Commerce Court of Arbitration. Disini worked for his second cousin, Herminio T. Disini (Herminio), as an executive in the latter's companies from 1971 to 1984. The Republic believed that the Westinghouse contract for the construction of the Bataan Nuclear Power Plant, brokered by one of Herminio's companies, had been attended by anomalies.

On February 16, 1989 respondent Republic and petitioner Disini entered into an Immunity Agreement under which Disini undertook to testify for his government and provide its lawyers with the information, affidavits, and documents they needed for prosecuting the two cases.[3] Acknowledging Disini's concern that the Republic could become a party to yet other proceedings relating to the matters subject of his testimony, the Republic guaranteed that, apart from the two cases, it shall not compel Disini to testify in any other domestic or foreign proceeding brought by the Republic against Herminio.[4]

**The pertinent terms of the immunity read:**

1. Jesus P. Disini agrees to appear and to testify truthfully in the civil matter captioned Republic of the Philippines, et al. v. Westinghouse Electric Corporation, et al., (now pending as No. 88-5150 in the United States District Court for the District of New Jersey (or any jurisdiction to which it may be transferred) and in the arbitration proceedings captioned Westinghouse International Projects Company, Westinghouse Electric S.A. Westinghouse Electric Corporation v. National Power Corporation, Republic of the Philippines and Burns & Roe Enterprises v. National Power Corporation, Republic of the Philippines (now pending as Nos. 6401/BGD and 6423/BGD, respectively in the International Chamber of Commerce Court of Arbitration); to provide to the attorneys for the Republic of the Philippines all documents in his possession or under his control related to the subject matter of said action; to submit to interviews by those attorneys upon reasonable notice; to provide affidavits regarding his knowledge of the subject matter of said actions; and to cooperate truthfully

with the Republic of the Philippines and its attorneys in the prosecution of this action, subject to the provision set forth in this paragraph and at paragraph 3, below. The parties acknowledge that the Republic of the Philippines is or may become a party to other proceedings relating to circumstances as to which Jesus P. Disini may have knowledge. The Republic of the Philippines by this instrument agrees that it shall not compel the testimony of Jesus P. Disini in any proceeding, domestic or foreign, other than this civil matter and these arbitration proceedings and, in the event this civil matter or any portion thereof is referred for arbitration, then and in that event, in said arbitration proceedings resulting from said reference.

2. The Republic of the Philippines agrees that it shall not institute, prosecute or maintain any criminal, civil or administrative proceeding, audit or investigation against Jesus P. Disini, for or in connection with (a) any conduct directly or indirectly relating to or arising out of the construction of the Philippine Nuclear Power Plant in Bataan, Philippines or Jesus P. Disini's former employment by Herminio T. Disini or any company in which Herminio T. Disini owned any interest prior to July 1, 1984; or (b) any claim or matter, civil, criminal or administrative, known or unknown, arising under the Internal Revenue Code of the Philippines, which exists as of the date of this agreement; and it further agrees that it shall not use, directly or indirectly, against Jesus P. Disini, any information, lead or document obtained from him pursuant to this agreement.

3. Should the Republic of the Philippines name Herminio T. Disini a defendant in any of the above-referenced matters, or in any resulting arbitration proceeding, or any other proceeding ancillary to said matters, the Republic of the Philippines shall not call Jesus P. Disini to testify as a witness in said matters on any claim brought by the Republic of the Philippines against Herminio T. Disini. Nothing herein shall affect Jesus P. Disini's obligation to provide truthful information or testimony. (Underscoring supplied.)

Petitioner Disini complied with his undertaking but 18 years later or on February 27, 2007, upon application of respondent Republic, respondent Sandiganbayan issued a subpoena duces tecum and ad testificandum against Disini, commanding him to testify and produce documents before that court on March 6 and 30, 2007 in an action that the Republic filed against Herminio.[5] Disini filed a motion to quash the subpoena, invoking his immunity agreement with the Republic, but respondent Sandiganbayan ignored the motion and issued a new subpoena, directing him to testify before it on May 6 and 23, 2007.

On July 19, 2007 the PCGG issued Resolution 2007-031,[6] revoking and nullifying the Immunity Agreement between petitioner Disini and respondent Republic insofar as it prohibited the latter from requiring Disini to testify against Herminio. On August 16, 2007 respondent Sandiganbayan denied Disini's motion to quash subpoena,[7] prompting the latter to take recourse to this Court.

#### The Issues

Two issues are presented:

1. Whether or not the PCGG acted within its authority when it revoked and nullified the Immunity Agreement between respondent Republic and petitioner Disini; and
2. Whether or not respondent Sandiganbayan gravely abused its discretion when it denied petitioner Disini's motion to quash the subpoena addressed to him.

#### Discussion

One. Respondent Republic contends that the power to grant immunity given the PCGG covers only immunity from civil or criminal prosecution. It does not cover immunity from providing evidence in court. The Republic even believes that immunity from the need to testify in other ill-gotten wealth cases would defeat the very purpose of Executive Order 1 which charged the PCGG with the task of recovering all ill-gotten wealth of former President Marcos, his family, relatives, subordinates, and close associates.

Section 5 of Executive Order (E.O.) 14, which vests on the PCGG the power to grant immunity to witnesses provides:

Sec. 5. The Presidential Commission on Good Government is authorized to grant immunity from criminal prosecution to any person who provides information or testifies in any investigation conducted by such Commission to establish the unlawful manner in which any respondent, defendant or accused has acquired or accumulated the property or properties in question in any case where such information or testimony is necessary to ascertain or prove the latter's guilt or his civil liability. The immunity thereby granted shall be continued to protect the witness who repeats such testimony before the Sandiganbayan when required to do so by the latter or by the Commission.

Construing the above, the Court has ruled in a previous case that the scope of immunity offered by the PCGG may vary.[8] It has discretion to grant appropriate levels of criminal immunity depending on the situation of the witness and his relative importance to the prosecution of ill-gotten wealth cases. It can even agree, as in this case, to conditions expressed by the witness as sufficient to induce cooperation.

The language of Section 5, E.O. 14, said the Court, affords latitude to the PCGG in determining the extent of that criminal immunity.[9] In petitioner Disini's case, respondent Republic, acting through the PCGG, offered him not only criminal and civil immunity[10] but also immunity against being compelled to testify in any domestic or foreign proceeding, other than the civil and arbitration cases identified in the Immunity Agreement, just so he would agree to testify. Trusting in the Government's honesty and fidelity, Disini agreed and fulfilled his part of the bargain. Surely, the principle of fair play, which is the essence of due process, should hold the Republic on to its promise.

The Republic of course points out that the immunity from criminal or civil prosecution that Section 5 of E.O. 14 authorizes does not cover immunity from giving evidence in a case before a court of law.

But in reality the guarantee given to petitioner Disini against being compelled to testify in other cases against Herminio constitutes a grant of immunity from civil or criminal prosecution. If Disini refuses to testify in those other cases he would face indirect contempt, which is essentially a prosecution for willful disobedience of a valid court order, a subpoena.[11] His refusal to testify will warrant the imposition against him of the penalty of fine not exceeding P30,000.00 or imprisonment not exceeding 6 months or both fine and imprisonment.[12]

Here, petitioner Disini's refusal to testify as ordered by the Sandiganbayan is certain to result in prosecution for criminal contempt. It constitutes criminal contempt since guilt would draw a penalty of fine or imprisonment or both. Said the Court in *Montenegro v. Montenegro*: [13]

Contempt, whether direct or indirect, may be civil or criminal depending on the nature and effect of the contemptuous act. Criminal contempt is "conduct directed against the authority and dignity of the court or a judge acting judicially; it is an act obstructing the administration of justice which tends to bring the court into disrepute or disrespect. On the other hand, civil contempt is the failure to do something ordered to be done by a court or a judge for the benefit of the opposing party therein and is therefore an offense against the party in whose behalf the violated order was made. If the purpose is to punish, then it is criminal in nature, but if to compensate, then it is civil.[14]

In criminal contempt, the proceedings are regarded as criminal and the rules of criminal procedure apply. What is more, it is generally held that the State or respondent Republic is the real prosecutor in such a case.[15] The grant, therefore, of immunity to petitioner Disini against being compelled to testify is ultimately a grant of immunity from being criminally prosecuted by the State for refusal to testify, something that falls within the express coverage of the immunity given him.

Respondent Republic claims that the grant of immunity to petitioner Disini against being compelled to testify against Herminio contravenes the state's public policy respecting the recovery of illegally acquired wealth under the regime of former President Marcos.

But the same authority that adopted such policy, former President Corazon C. Aquino, is the same authority that gave the PCGG the power to grant immunity to witnesses whom it might use to recover illegally acquired wealth during that regime. In the case of *Tanchanco v. Sandiganbayan*,<sup>[16]</sup> the Court regarded as valid and binding on the government the immunity it gave former National Food Authority Administrator, Jesus Tanchanco for all "culpable acts of his during his service in the Marcos government," which would include possible prosecution for any illegal wealth that he may himself have acquired during that service. The Court did not regard such immunity in contravention of the state policy on recovery of ill-gotten wealth under the auspices of the Marcos regime.

True, respondent Republic may have other cases in which it also needed petitioner Disini's testimony. But such circumstance does not necessarily invalidate the concession it gave him--the freedom from being compelled to give evidence in specific cases. It may be assumed that the Republic regarded Disini's testimony in the two cases covered by the agreement more important and critical than those other cases. It is well known that the cases with *Westinghouse* before the New Jersey District Court and the International Arbitration Tribunal concerning the construction of the Bataan Nuclear Power Plant had so huge a financial impact on the Republic that it was willing to waive its power and right to compel petitioner Disini's testimony in other cases.

Two. Petitioner Disini argues that respondent Republic, through the PCGG, should not be allowed to revoke the guarantee it gave him against being compelled to testify in other cases, the Republic being in estoppel for making him believe that it had the authority to provide such guarantee. The Republic rejects this argument, however, invoking Section 15, Article XI of the 1987 Constitution which provides: "The right of the State to recover properties unlawfully acquired by public officials or employees from them or from their nominees, or transferees, shall not be barred by prescription, laches or estoppel."

But, first, the estoppel that petitioner Disini invokes does not have the effect, if recognized, of denying the state its right to recover whatever ill-gotten wealth Herminio may have acquired under the Marcos regime. The action against Herminio can continue, hampered only by the exclusion of Disini's testimony. And there are other ways of proving the existence of ill-gotten wealth. Second, although the government cannot be barred by estoppel based on unauthorized acts of public officers,<sup>[17]</sup> such principle cannot apply to this case since, as already pointed out, respondent PCGG acted within its authority when it provided Disini with a guarantee against having to testify in other cases.

A contract is the law between the parties. It cannot be withdrawn except by their mutual consent.<sup>[18]</sup> This applies with more reason in this case where petitioner Disini had already complied with the terms and conditions of the Immunity Agreement. To allow the Republic to revoke the Agreement at this late stage will run afoul of the rule that a party to a compromise cannot ask for a rescission after it had enjoyed its benefits.<sup>[19]</sup>

The Republic also cites the last sentence of paragraph 3 of the Immunity Agreement which reads:

Nothing herein shall affect Jesus P. Disini's obligation to provide truthful information or testimony.<sup>[20]</sup>

The Republic interprets this as enjoining Disini, despite the immunity given him against being compelled to testify in other cases, to "provide truthful information or testimony" in such other cases.

But this reasoning does not sound right. The grant of immunity in paragraph 3 of the agreement quoted above to petitioner Disini against being compelled to testify in "other cases" against Herminio is quite clear and does not need any interpretation. Where a stipulation in an agreement is clear, its literal meaning controls.<sup>[21]</sup>

Besides, Disini undertook to testify for the Republic in its two foreign cases and provide its lawyers all the information and testimony they needed to prosecute the same. The last sentence in the paragraph that enjoins Disini to "provide truthful information or testimony," despite the guarantee not to be compelled to testify against Herminio, merely emphasizes the fact that such concessions does not affect his obligation to "provide truthful information or testimony" in the two cases mentioned in the preceding paragraphs.

#### Final Note

The Court should not allow respondent Republic, to put it bluntly, to double cross petitioner Disini. The Immunity Agreement was the result of a long drawn out process of negotiations with each party trying to get the best concessions out of it.[22] The Republic did not have to enter that agreement. It was free not to. But when it did, it needs to fulfill its obligations honorably as Disini did. More than any one, the government should be fair.[23]

WHEREFORE, the Court GRANTS the petition and ANNULS Resolution 2007-031 dated July 19, 2007 of the Presidential Commission on Good Government and the Resolution dated August 16, 2007 of respondent Sandiganbayan in Civil Case 0013, Republic of the Philippines v. Herminio T. Disini, et al.

#### SO ORDERED.

Corona, C.J., Carpio, Carpio Morales, Nachura, Brion, and Del Castillo, JJ., concur.

Velasco, Jr., Villarama, Jr., and Perez, JJ., joins the dissent of J. Bersamin.

Leonardo-De Castro, and Peralta, JJ., no part

Bersamin, J., see dissenting opinion.

Mendoza, J., on leave.

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[1] Republic of the Philippines, et al. v. Westinghouse Electric Corporation, et al.

[2] Westinghouse International Projects Company, Westinghouse Electric S.A., Westinghouse Electric Corporation v. National Power Corporation, Republic of the Philippines; and Burns & Roe Enterprises v. National Power Corporation, Republic of the Philippines.

[3] Rollo, p. 33, par. 1.

[4] Id. at 34, par. 3.

[5] Civil Case 0013, Republic of the Philippines v. Herminio T. Disini, et al.

[6] Rollo, p. 66.

[7] Id. at 22-25, penned by Associate Justice Diosdado M. Peralta (now a member of this Court) and concurred in by then Presiding Justice Teresita J. Leonardo-De Castro (now a member of this Court) and Associate Justice Efren N. De La Cruz.

[8] Tanchanco v. Sandiganbayan, G.R. Nos. 141675-96, November 25, 2005, 476 SCRA 202, 229.

[9] Id. at 230.

[10] Rollo, p. 34, par. 2.

[11] Section 3(f), Rule 71, Rules of Court.

[12] Section 7, Rule 71, Rules of Court.

[13] G.R. No. 156829, June 8, 2004, 431 SCRA 415.

[14] Id. at 424-425.

[15] *People v. Godoy*, 312 Phil. 977, 1002 (1995).

[16] *Supra* note 8.

[17] *Republic v. Sandiganbayan*, G.R. Nos. 108292, 108368, 108548-49 & 108550, September 10, 1993, 226 SCRA 314, 325-326.

[18] *Arco Metal Products Co., Inc. v. Samahan ng mga Manggagawa sa Arco Metal-NAFLU (SAMARM-NAFLU)*, G.R. No. 170734, May 14, 2008, 554 SCRA 110, 121 (J. Brion, Separate Concurring Opinion).

[19] *Republic v. Sandiganbayan*, *supra* note 17, at 321-322.

[20] *Rollo*, p. 34, par. 3.

[21] *Frias v. San Diego-Sison*, G.R. No. 155223, April 3, 2007, 520 SCRA 244, 254.

[22] *Republic v. Sandiganbayan*, *supra* note 17, at 327.

[23] Id. at 330.

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## DISSENTING OPINION

### **BERSAMIN, J.:**

Today, the Court rules that the petitioner - a vital resource holding credible information sufficient and competent to establish a strong case against against Herminio T. Disini (Herminio) and Herminio's companies in the action pending before the Sandiganbayan - should not be compelled to stand as a witness in that action. The Court opines that the Government should not be allowed to "double-cross" the petitioner by compelling him to testify against Herminio and the latter's companies after he had performed his part under his agreement with the Government.

The decision inflicts a severe blow to the faltering effort of the Government to recover ill-gotten wealth from Herminio and his companies. I insist that the State's effort to recover ill-gotten wealth from whoever holds or hides it should not be obstructed or stymied. If there is going to be any "double cross," the victims will be the Government and the long-suffering Filipino people, not the petitioner, and only because the petitioner is now permitted to shirk from his obligation to testify truthfully in the action against Herminio and his companies.

I dissent.

#### Antecedents

The petitioner assails the resolutions on August 16, 2007 and October 10, 2007 by the Sandiganbayan issued in Civil Case No. 0013 entitled *Republic of the Philippines v. Herminio T. Disini, et al.*,<sup>[1]</sup> as well as Resolution No. 2007-031 adopted by the PCGG,<sup>[2]</sup> alleging that the Sandiganbayan and PCGG thereby committed grave abuse of discretion amounting to lack or excess of jurisdiction. Essentially, the petitioner desires to stop PCGG from calling him as a witness against Herminio, a defendant in Civil Case No. 0013, or from compelling the petitioner to give testimony in any other case involving Herminio, on the ground that (a) the Immunity Agreement he had entered into with PCGG covered such testimony, and (b) he acted as an attorney on the matters of the proposed

testimony.

I submit that the Presidential Commission on Good Government (PCGG) validly revoked the Immunity Agreement between the Government and the petitioner, and that the Sandiganbayan correctly upheld the revocation by refusing to quash the subpoena issued to the petitioner to compel him to testify against Herminio and the latter's companies.

Before I state my reasons for my submission, let us look at the following background facts.

On February 16, 1989, the petitioner and the Government executed an Immunity Agreement,[3] whereby he agreed to appear and testify in Civil Case No. 88-5150 (entitled Republic of the Philippines, et al v. Westinghouse Electric Corporation, et al.) pending in the United States District Court for the District of New Jersey and in the arbitration proceedings No. 6404/BGD and No. 6423/BGD (entitled Westinghouse Electric Corporation v. National Power Corporation, Republic of the Philippines and Burns & Roe Enterprises v. National Power Corporation, Republic of the Philippines) in the International Chamber of Commerce Court of Arbitration.

The Immunity Agreement provided in its paragraph 1 that:

1. Jesus P. Disini agrees to appear and to testify truthfully in the civil matter captioned Republic of the Philippines, et al v. Westinghouse Electric Corporation, et al. (now pending as No. 88-5150 in the United States District Court for the District of New Jersey (or any jurisdiction to which it may be transferred) and in the arbitration proceedings captioned Westinghouse International Projects Company, Westinghouse Electric S.A., Westinghouse Electric Corporation v. National Power Corporation, Republic of the Philippines and Burns & Roe Enterprises vs National Power Corporation, Republic of the Philippines (now pending as Nos. 6401/BGD and 6423/BGD, respectively in the International Chamber of Commerce Court of Arbitration); to provide to the attorneys for the Republic of the Philippines all documents in his possession or under his control related to the subject matter of said action; to submit to interviews by those attorneys upon reasonable notice; to provide affidavits regarding his knowledge of the subject matter of said actions; and to cooperate truthfully with the Republic of the Philippines and its attorneys in the prosecution of this action, subject to the provision set forth in this paragraph and at paragraph 3, below. The parties acknowledge that the Republic of the Philippines is or may become a party to other proceedings relating to circumstances as to which Jesus P. Disini may have knowledge. The Republic of the Philippines by this instrument agrees that it shall not compel the testimony of Jesus P. Disini in any proceeding, domestic or foreign, other than this civil matter and these arbitration proceedings and, in the event this civil matter or any portion thereof is referred for arbitration, then and in that event, in said arbitration proceeding resulting from said reference.[4]

In return for the petitioner's undertaking, the Government ostensibly agreed not to compel his testimony in any proceeding, domestic or foreign, other than in the mentioned civil and arbitration cases. The Government further bound itself not to call him as a witness to testify in any case brought by the Government against Herminio. In that regard, paragraphs 2 and 3 of the Immunity Agreement stated:

2. The Republic of the Philippines agrees that it shall not institute, prosecute or maintain any criminal, civil or administrative proceeding, audit or investigation against Jesus P. Disini, for or in connection with any conduct directly or indirectly relating to or arising out of the construction of the Philippine Nuclear Power Plant in Bataan, Philippines or Jesus P. Disini's former employment by Herminio T. Disini or any company in which Herminio T. Disini owned any interest prior to July 1, 1984; or any claim or matter, civil, criminal or administrative, known or unknown, arising under the Internal Revenue Code of the Philippines which exists as of the date of this agreement; and it further agrees that it shall not use, directly or indirectly, against Jesus P. Disini, any information, lead or document obtained from him pursuant to this agreement.

3. Should the Republic of the Philippines name Herminio T. Disini a defendant in any of the above-referenced matters, or in any resulting arbitration proceeding, or any other proceeding ancillary to said matters, the

Republic of the Philippines shall not call Jesus P. Disini to testify as a witness in said matters on any claim brought by the Republic of the Philippines against Herminio T. Disini. Nothing herein shall affect Jesus P. Disini's obligation to provide truthful information or testimony.[5]

At the instance of the Government as the plaintiff in Civil Case No. 0013 entitled Republic of the Philippines v. Herminio T. Disini, Spouses Ferdinand and Imelda Marcos, and Rodolfo Jacob,[6] the Sandiganbayan issued a subpoena duces tecum and/or ad testificandum to compel the petitioner to appear and testify therein.

Instead of appearing on the scheduled date, the petitioner moved to quash the subpoena duces tecum and/or ad testificandum on March 6, 2007, invoking the Immunity Agreement. The Sandiganbayan ignored the petitioner's motion to quash, because the motion was not set for hearing.

The petitioner amended his motion to quash by setting it for hearing. He reiterated the arguments of his original motion.

The petitioner's failure to comply with the subpoena of the Sandiganbayan prompted PCGG to issue on July 19, 2007 its assailed Resolution No. 2007-031,[7] to wit:

NOW, THEREFORE, be it RESOLVED, as it is hereby RESOLVED, that the Immunity Agreement dated 16 February 1989 between Mr. Jesus P. Disini and the Republic of the Philippines, be, as it is hereby, REVOKED and NULLIFIED insofar as it prohibits the Republic of the Philippines from presenting Jesus P. Disini in cases brought against Herminio T. Disini in the Philippines.

RESOLVED, FURTHER, that copies of this resolution be furnished to Mr. Jesus P. Disini and the Honorable Sandiganbayan for their guidance.

On August 16, 2007, the Sandiganbayan denied the petitioner's amended motion to quash, holding:

It is evident that the Agreement dated February 16, 1989 is the only reason that Atty. Jesus Disini refuses to heed the subpoena issued him by the Court. He invokes the binding effect thereof on him, and especially on plaintiff and argues that the latter cannot now renege on its commitment after he had complied with the terms and conditions thereof. However, even by his own admission, the immunity granted to him was not absolute considering that the same agreement carried the qualification regarding Atty. Disini's obligation to provide truthful information or testimony which is not thereby affected. Thus, Section 3 thereof reads as follows:

3. Should the Republic of the Philippines name Herminio T. Disini a defendant in any of the above-reference matters, or in any resulting arbitration proceedings, or any other proceeding ancillary to said matters, the Republic of the Philippines shall not call Jesus P. Disini to testify as a witness in said matters on any claim brought by the Republic of the Philippines against Herminio Disini. Nothing herein shall affect Jesus Disini's obligation to provide truthful information or testimony. (emphasis supplied)

Even assuming that the said foregoing proviso in the immunity agreement prohibits plaintiff from calling on Jesus Disini to testify in any case brought by the Republic against Herminio Disini without any qualification, the same however, cannot be invoked nor be relied upon by Atty. Jesus Disini to quash the subpoena herein issued considering that the immunity granted was consummated only in February 1989, or long after the instant case was filed in 1987. Without any provision therein respecting retroactive application or making an exception to the instant case, the agreement cannot be the basis for immunity for cases that had already been filed before this Court. As it is, there is no such provision in the Immunity Agreement, hence, none could also be assumed and the presumption is that it can only apply prospectively to cases explicitly stated therein and not to those cases over which this Court had already acquired jurisdiction.

Moreover, in view of the revocation and nullification by the PCGG of Section 3 of the immunity agreement,

which is a power of the PCGG that Atty. Jesus Disini himself recognizes, there is no point of quashing the subpoena issued by the Court for him to testify in this case since he can already be compelled to testify sans any restrictions or qualifications.

WHEREFORE, in view of the foregoing, the Amended Motion to Quash Subpoena filed by Atty. Jesus Disini and all related motions to quash that he filed are hereby denied for lack of merit.

### **SO ORDERED.[8]**

The petitioner sought the reconsideration of the resolution, but the Sandiganbayan denied his motion for reconsideration on October 10, 2007 through the second assailed resolution.[9]

Hence, on December 4, 2007, the petitioner commenced this special civil action, contending that the denial of his motion to quash constituted a clear grave abuse of discretion amounting to an excess or lack of jurisdiction on the part of the Sandiganbayan.

#### **Parties' Positions**

The petitioner insists that the Sandiganbayan erroneously interpreted the last sentence of paragraph 3 of the Immunity Agreement to mean that the Government could opt to forego its undertaking not to call him as a witness in connection with any claim brought by the Government against Herminio; that such interpretation defeated the very essence of paragraph 3 as a reciprocal exchange between him and the Government; and that paragraph 3 should not be read in isolation from the rest of the agreement, but should be construed as referring to his reciprocal obligation to testify truthfully in the cases mentioned in paragraph 1 of the Immunity Agreement.

He argues that PCGG through its Resolution No. 2007-031 could not unilaterally revoke the Immunity Agreement, being a contract mutually entered into between him and the Government; that Resolution No. 2007-031 was void for violating the principle of mutuality of contracts; that the fact that Civil Case No. 0013 was filed prior to the execution of the Immunity Agreement and before the cases enumerated therein had been filed did not exclude Civil Case No. 0013 from coverage in light of the last two sentences of paragraph 1; that paragraph 3 also extended the concession in favor of the petitioner to "any claim brought by the Republic of the Philippines against Herminio T. Disini"; that the Immunity Agreement contemplated the claims already filed against Herminio prior to its execution (including Civil Case No. 0013); that he was further disqualified from testifying in Civil Case No. 0013 regarding matters learned in confidence from Herminio, who was also then his client; that he acceded to paragraph 3 of the Immunity Agreement precisely because he needed to protect the privileged communication made to him by Herminio as his client; and that his employment as a lawyer working for Herminio necessarily included Herminio's availment of his legal knowledge and advice whenever called for.

The Government counters that the Sandiganbayan correctly interpreted the plain meaning of the clear and unambiguous terms of the Immunity Agreement; that PCGG was justified in revoking paragraph 3 of the Immunity Agreement, as it was contrary to public policy; that the Supreme Court has time and again acknowledged that the recovery of ill-gotten wealth is not only a State policy (Executive Order No. 1, Section 2(a)), but also a duty on its part (*Tanchanco v. Sandiganbayan*, 476 SCRA 202 [2005] and *BASECO v. PCGG*, 150 SCRA 181 [1987]); and that the 1987 Constitution (Section 15, Article XI) even provides that "the right of the State to recover properties unlawfully acquired by public officials or employees, from them or from their nominees, transferees, shall not be barred by prescription, laches or estoppel."

The Government points out that the petitioner himself acknowledged, in his reply dated July 10, 2007[10] filed in the Sandiganbayan, the authority of PCGG to repudiate the Immunity Agreement, stating in paragraph 19 of the reply[11] that only PCGG en banc could repudiate it; and that the petitioner was thus estopped from challenging

PCGG's authority to nullify paragraph 3 of the Immunity Agreement.

The Government maintains that the Sandiganbayan correctly found the Immunity Agreement to apply prospectively to the cases specifically enumerated therein, in the absence of any express provision giving it retroactive effect.

The Government submits that the petitioner's claim that the attorney-client privilege precluded him from testifying in Civil Case No. 0013 was belied by the admission in his affidavit dated February 22, 1989 that his knowledge of Herminio's transactions was not acquired in his capacity as a lawyer of Herminio but as an executive of Herdis Group Inc., a company co-owned by Herminio and former President Ferdinand Marcos.

In reply, the petitioner insisted that the Immunity Agreement did not violate public policy; that Executive Orders No. 14 and No. 14-A expressly allowed the power to grant immunity to PCGG; that the concession vested in him under the Immunity Agreement did not prevent the Government from prosecuting Herminio in order to recover the ill-gotten wealth of the Marcoses; that the Government already presented several pieces of evidence and witnesses against Herminio in Civil Case No. 0013; that the Government cannot validly revoke the Immunity Agreement after having benefited from petitioner's testimony in several cases in Geneva, Switzerland and in the United States of America; that it is a well-settled rule that a compromise becomes binding upon the parties upon its perfection and has the effect and authority of *res judicata* even if not judicially approved; and that the Constitutional provision preventing the State from being estopped by the acts of its agents applies only to irregular acts of its officials, not to the Immunity Agreement which was freely executed between the parties.

Issue

Can PCGG compel the petitioner to testify against Herminio in Civil Case No. 0013 and in all other cases filed by the Government against him?

Submission

As I made clear at the outset, the petition lacks merit.

A.

PCGG validly issued Resolution No. 2007-031  
revoking and nullifying Paragraph 3  
of the Immunity Agreement

Section 5 of Executive Order No. 14 vests in PCGG the authority to grant immunity from criminal prosecution, to wit:

Section 5. The Presidential Commission on Good Government is authorized to grant immunity from criminal prosecution to any person who provides information or testifies in any investigation conducted by such Commission to establish the unlawful manner in which any respondent, defendant or accused has acquired or accumulated the property or properties in question in any case where such information or testimony is necessary to ascertain or prove the latter's guilt or his civil liability. The immunity thereby granted shall be continued to protect the witness who repeats such testimony before the Sandiganbayan when required to do so by the latter or by the Commission.

Aside from its aforementioned statutory authority to grant immunity from criminal prosecution, PCGG has the authority to grant civil immunity to anyone who aids the Government in its efforts to recover all ill-gotten wealth.[12] In exchange for the immunity from civil or criminal prosecution given by the Government, the grantee should agree to testify and to give up his right to remain silent.[13] Thus, paragraph 2 of the Immunity Agreement granted the petitioner immunity from civil and criminal prosecution in exchange for his undertaking to

testify truthfully in the civil and arbitration cases pending before the U.S. District Court and the International Chamber of Commerce Court of Arbitration. The Government respected its undertaking and refrained from prosecuting him.

Now, however, the petitioner is invoking not just his immunity from civil and criminal prosecution, but his immunity from testifying against Herminio pursuant to paragraph 3 of the Immunity Agreement.

It is grossly wrong and unfair to sustain the petitioner.

Firstly: The grant of immunity from testifying against Herminio pursuant to paragraph 3 contravened the essential purpose behind PCGG's establishment as explicitly embodied in Executive Order No. 1, thus:

Section 2. The Commission shall be charged with the task of assisting the President in regard to the following matters:

a) The recovery of all ill-gotten wealth accumulated by former President Ferdinand E. Marcos, his immediate family, relatives, subordinates and close associates, whether located in the Philippines or abroad, including the takeover or sequestration of all business enterprises and entities owned or controlled by them during his administration, directly or through nominees, by taking undue advantage of their public office and/or using their powers, authority influence, connections or relationship.

xxx

The objective of PCGG's granting immunity from civil or criminal prosecution has been to encourage individuals to divulge their knowledge of the unlawful acquisition of Government property without fear of self-incrimination, in order to enable the Government to recover illegally acquired assets as soon as possible. In direct contrast, the immunity granted under paragraph 3 prevented the petitioner from disclosing any knowledge he might have regarding Herminio, a crony of the Marcoses. Considering that his affidavit dated February 22, 1989[14] and his supplemental affidavit dated March 1, 1989[15] revealed that the petitioner had been privy to the various business transactions between Herminio, who had conducted business through Herdis Group, Inc., and former President Marcos, who had owned two-thirds of Herdis Group, Inc., the petitioner's refusal to testify because of paragraph 3 would effectively deprive the Government of the opportunity to successfully prosecute Herminio and his companies in the actions already pending in the Sandiganbayan since 1987 yet.

We must not ignore that Section 15, Article XI of the 1987 Constitution expressly provides: "The right of the State to recover properties unlawfully acquired by public officials or employees from them or from their nominees, or transferees, shall not be barred by prescription, laches or estoppel." In revoking and nullifying paragraph 3, PCGG simply acknowledged paragraph 3's inherent inefficaciousness under this constitutional edict. The petitioner cannot consequently invoke estoppel to prevent PCGG from issuing Resolution No. 2007-031.

Secondly: In upholding the revocation by PCGG of the immunity of the petitioner from testifying against Herminio and his companies, the Sandiganbayan cited three grounds in its assailed resolution of August 16, 2007[16] for rejecting the petitioner's motion to quash, namely:

(a) The petitioner himself had admitted that the immunity thereby granted to him was not absolute due to the qualification prescribing his obligation to provide truthful information or testimony; hence, he could not argue that the Government could not call him as a witness by virtue of his having already complied with the terms and conditions of the Immunity Agreement;

(b) Assuming that the immunity was unqualified, the Immunity Agreement, which had been consummated only in February 16, 1989, did not apply retroactively to Civil Action No. 0013 which had been pending since 1987 in the absence of any provision for retroactive application or making any exception. The Immunity

Agreement could apply only prospectively to the cases explicitly enumerated therein, not to cases over which the Sandiganbayan had already acquired jurisdiction; and

(c) There was no point in quashing the subpoena issued to the petitioner, considering that the petitioner himself recognized the power of PCGG to revoke and nullify paragraph 3 of the Immunity Agreement.

The Sandiganbayan was correct, and should be sustained.

In the first place, even the petitioner conceded that his immunity under paragraph 3 was not absolute, but was subject of the qualification that he should provide truthful information or testimony. As such, PCGG's revocation of the qualified immunity could not be successfully challenged.

Moreover, his own admission barred the petitioner from assailing PCGG's authority to repudiate paragraph 3. He had acknowledged PCGG's authority to repudiate the Immunity Agreement in paragraph 19 of his reply dated July 10, 2007,[17] which he had personally signed and submitted to the Sandiganbayan,[18] as follows:

xxx

19. The immunity agreement of undersigned having been approved by the PCGG en banc in accordance with its rules, only the Commission en banc could repudiate the agreement. The lawyers of plaintiff could not on their own strike down the agreement. xxx[19]

xxx

Lastly, the language and intent of paragraph 3, viz:

xxx

3. Should the Republic of the Philippines name Herminio T. Disini a defendant in any of the above-referenced matters, or in any resulting arbitration proceeding, or any other proceeding ancillary to said matters, the Republic of the Philippines shall not call Jesus P. Disini to testify as a witness in said matters on any claim brought by the Republic of the Philippines against Herminio T. Disini. Nothing herein shall affect Jesus P. Disini's obligation to provide truthful information or testimony.[20]

xxx

plainly indicate the prospective application of paragraph 3, that is, the immunity applied only to cases filed against Herminio after February 16, 1989, not to those already pending as of said date.

Thirdly: The petitioner cannot also validly plead that the mutuality of contracts prohibited the revocation of paragraph 3. Although parties to an agreement are free to enter into whatever terms they deem proper, and that entering into a compromise agreement necessarily contemplates mutual concessions and mutual gains to put an end to litigation,[21] it is still indispensable that such terms be not contrary to law, morals, good customs, public order, or public policy.[22] However, paragraph 3 was contrary to the State's policy on the urgent need to recover all the illegally acquired wealth amassed by President Marcos, his immediate family, relatives, and close associates; [23] hence, it was void and inefficacious. Needless to stress, such policy was the reason why paragraph 3 carried the qualification, viz:

xxx Nothing herein shall affect Jesus P. Disini's obligation to provide truthful information or testimony.

## **B.**

Attorney-Client privilege did not disqualify petitioner from testifying against Herminio

The petitioner's other contention, that the attorney-client privilege disqualified him from testifying against Herminio, has no merit.

For the attorney-client privilege to apply, the following requisites must be present:

- Relationship of lawyer and client;
- Communication made by the client to the attorney, or advice given by the latter to the former;
- Communication or advice must have been made confidentially.
- Such communication must have been made in the course of professional employment.[24]

An examination of the petitioner's situation indicates that he did not establish the concurrence of the requisites.

To begin with, the petitioner's contention that his employment necessarily included the rendering of legal advice to Herminio as his employer deserves scant consideration, mainly because it was not substantiated. The relationship between the petitioner and Herminio was one between an employee and his employer; hence, no lawyer-client relationship existed between them. On the contrary, the petitioner himself admitted in his affidavits dated February 22, 1989 and March 18, 1989 that his personal knowledge of Herminio's business operations had been acquired by virtue of his employment as an executive in Herminio's companies from May 1971 to July 1984.

It is axiomatic that the party asserting the privilege carries the burden of proving that the privilege applies.[25] Thus, the petitioner's mere assertion of the attorney-client privilege was not enough.[26]

That the petitioner was a lawyer did not automatically mean that the communications of Herminio to him (or vice versa) were covered by the attorney-client privilege. The petitioner was a mere employee of Herminio or of his companies, not their retained counsel. A communication is not privileged only because it is made by or to a person who happens to be a lawyer.[27] There are many cases, indeed, in which attorneys are employed in transacting business, not properly professional, and where the business may be transacted by another agent. In such cases, the fact that the agent sustains the character of an attorney does not protect the communications attending the transactions with the privilege; hence, the communications may be testified to by him as by any other agent.[28]

And, secondly, assuming that he then acted as a lawyer of Herminio, the petitioner did not show that the communications between him and Herminio had been made in confidence by a client to a lawyer, or that the communications had been specifically made in the course of a professional relationship between them. The lawyer-client privilege cannot be extended to communications made to a corporate secretary and general counsel where there is no evidence which hat he is wearing when he receives the communications.[29] Moreover, the privilege does not apply where the legal services are so intertwined with the business activities that a clearer distinction between the two is impossible to discern.[30]

It is worth pointing out that evidentiary and testimonial privileges, being exceptions to the general rule, are not lightly created or expansively construed, because they are in derogation of the search for truth. It is appropriate to recognize privilege only to a very limited extent, such that permitting a refusal to testify or excluding relevant evidence has the public good transcending normally the predominant principle of utilizing all rational means for ascertaining truth.[31]

C.

Sandiganbayan and PCGG were  
not guilty of grave abuse of discretion

The following requisites must concur in order that the petition for certiorari may prosper, namely: (a) that the writ is directed against a tribunal, a board, or any officer exercising judicial or quasi-judicial functions; (b) such tribunal, board, or officer has acted without or in excess of jurisdiction, or with grave abuse of discretion amounting to lack or excess of jurisdiction; and (c) there is no appeal, or any plain, speedy and adequate remedy in the ordinary course of law. [32] Without jurisdiction means that the tribunal, board, or officer acted with absolute lack of authority. There is excess of jurisdiction when the public respondent transcends its power or acts without any statutory authority. Grave abuse of discretion implies such capricious and whimsical exercise of judgment as to be equivalent to lack or excess of jurisdiction; otherwise stated, power is exercised in an arbitrary or despotic manner by reason of passion, prejudice, or personal hostility; and such exercise is so patent or so gross as to amount to an evasion of a positive duty or to a virtual refusal either to perform the duty enjoined or to act at all in contemplation of law. [33]

Certiorari does not lie. The Sandiganbayan committed no grave abuse of discretion in issuing its assailed resolutions dated August 16, 2007 and October 10, 2007, which were correct and in accord with the Constitution and the pertinent law.

ACCORDINGLY, I vote to dismiss the petition for certiorari and prohibition for lack of merit.

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[1] Penned by Associate Justice Diosdado M. Peralta (now a member of the Court), with Presiding Justice Teresita J. Leonardo-De Castro (now a member of the Court) and Associate Justice Efren N. dela Cruz, concurring; rollo, at pp. 22-25 and 27-32.

[2] Rollo, at p. 66.

[3] Id., at pp.33-35.

[4] Id., pp. 33-34.

[5] Id., p. 34.

[6] Denominated as an action for reconveyance, reversion, accounting, restitution and damages commenced by the PCGG on July 23, 1987.

[7] Supra, at Note 2.

[8] Rollo, at pp. 24-25.

[9] Id., at pp. 27-32.

[10] Id., at pp. 70-78.

[11] Id., at p. 76.

[12] Republic. v. Sandiganbayan, G..R. No. 84895, May 4, 1989, 173 SCRA 72.

[13] Section 5, Executive Order No. 14; Mapa, Jr. v. Sandiganbayan, G..R. No. 100295, April 26, 1994, 231 SCRA 783.

[14] Rollo, at pp.79-81.

[15] Id., at pp. 82-92.

[16] Id., at pp. 24-25.

[17] *Id.*, at pp. 70-78.

[18] *Id.*, at p. 78.

[19] *Id.*, at p. 78.

[20] *Id.*, p. 34.

[21] *Philippine Journalists, Inc. v. National Labor Relations Commission*, G..R. No. 166421, September 5, 2006, 501 SCRA 75.

[22] Article 1306, Civil Code; *Air Transportation Office (ATO) v. Gopuco, Jr.*, G..R. No.158563, June 30, 2005, 462 SCRA 544; *LL and Company Development and Agro-Industrial Corporation v. Huang Chao Chun*, G..R. No. 142378, March 7, 2002, 378 SCRA 612.

[23] Whereas clauses of Executive Order No. 1, February 28, 1986; *Bataan Shipyard & Engineering Co., Inc. v. Presidential Commission on Good Government*, G..R. No. L-75885, May 27, 1987, 150 SCRA 181.

[24] Sec. 24, Rule 130, Rules of Court; 5 Herrera, *Remedial Law*, (1999) p. 325.

[25] *Ramcar, Inc. v. Garcia*, G..R. No.L-16997, April 25, 1962, 4 SCRA 1087, 1088; *U.S. v. Landof*, 591 F.2d 36, 38; 81 Am. Jur. 2d Witnesses § 345.

[26] *Mercado v. Vitriolo*, Adm. Case No. 5108, May 26, 2005, 459 SCRA 1, 12.

[27] *Diversified Industries, Inc., v. Meredith*, 572 F. 2d 596, August 9, 1977.

[28] Wigmore, *Evidence*, McNaughton rev., 1961, p. 572, citing *Hatton v. Robinson*, 1833, 31 Mass. (14 Pick.) 416, 422.

[29] *Bankers Ins. Co. v. Florida Dept. Ins.*, Fla. App. 2000, 755 So. 2D 729, 730.

[30] *Chicago Title Insurance Co. v. Superior Court*, 507, 515, 174, Cal.App.3D 1142.

[31] *In Re Grand Jury Subpoena Duces Tecum*, 112 F. 3d 910, May 2, 1997.

[32] Section 1, Rule 65, 1997 Rules of Civil Procedure; *De los Santos v. Court of Appeals*, G..R. No. 169498, December 11, 2008, 573 SCRA 690; *Camacho v. Coresis, Jr.*, G.R. No. 134372, August 22, 2002, 387 SCRA 628.

[33] *Republic v. Sandiganbayan*, G..R. No. 129406, March 6, 2006, 484 SCRA 119; *Sarigumba v. Sandiganbayan*, G..R. Nos. 154239-41, February 16, 2005, 451 SCRA 533; *Angara v. Fedman Development Corporation*, G.R. No. 156822, October 18, 2004, 440 SCRA 467; *People v. Court of Appeals*, G..R. No. 144332, June 10, 2004, 431 SCRA 610; *Litton Mills, Inc. v. Galleon Trader, Inc.*, G.R. No. L-40867, July 26, 1988, 163 SCRA 489; *Duero v. Court of Appeals*, G.R. No. 131282, January 4, 2002, 373 SCRA 11.

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