

ALFREDO J. NON, GLORIA VICTORIA C. YAP-TARUC, JOSEFINA PATRICIA A. MAGPALE-ASIRIT AND GERONIMO D. STA. ANA, PETITIONERS, VS. OFFICE OF THE OMBUDSMAN AND ALYANSA PARA SA BAGONG P...

G.R. No. 239168. September 15, 2020

Ponente: REYES, J. JR., J.

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REYES, J. JR., J.:

Before the Court is a Petition for Certiorari[1] assailing the 29 September 2017 Resolution[2] and the 20 April 2018 Order[3] of the Office of the Ombudsman (Ombudsman), respectively finding probable cause to hold petitioners Alfredo J. Non (Non), Gloria Victoria C. Yap-Taruc (Yap--Taruc), Josefina Patricia A. Magpale-Asirit (Magpale-Asirit), and Geronimo D. Sta. Ana (Sta. Ana; collectively, petitioners) - Commissioners of the Energy Regulatory Commission (ERC) for prosecution under Section 3(e)[4] of Republic Act (R.A.) No. 3019,[5] and denying reconsideration.

Antecedents

In 2001, the state enacted the Electric Power Industry Reform Act[6] (EPIRA) to ensure quality, reliable, secure, and affordable electric power supply in a regime of free and fair competition, and full public accountability. Thus, the ERC[7] came into being, vested with powers to enforce the said law and to issue rules and regulations for that purpose.[8] One of its principal mandates, as a regulatory body, is to ensure consumer protection and to enhance competitive operations within the electric power industry. It is specifically tasked to institutionalize a working methodology for setting transmission and distribution wheeling rates and retail rates for the captive market of a power distribution utility.[9]

On 4 November 2015, after a series of public consultations with power industry stakeholders,[10] the ERC issued Resolution No. 13, Series of 2015 (Resolution No. 13-2015).[11] The issuance proceeds from the directive[12] of the Department of Energy (DOE) to require all distribution utilities (DUs) to undergo a competitive selection process (CSP) in procuring power supply agreements (PSAs), as well as from a Joint Resolution[13] of the DOE and the ERC whereby the latter has committed to issue regulations requiring DUs to undertake CSP in securing supply agreements affecting the captive markets. The CSP requirement is seen to ensure transparency in the supply procurement of DUs and to provide opportunities to elicit the best price offers from suppliers.[14]

Power distribution utilities are entities responsible for billing the end-users of electric power supply. They transact with generation companies through power supply agreements that are, in turn, filed with and reviewed by the ERC to determine whether the retail rates are at their lowest and most efficient. Thus, Resolution No. 13 requires that as a precondition to an award of a supply agreement to a generation company, there has to be either a successful, transparent, and competitive selection process, or a direct negotiation where at least two CSPs have failed. A CSP is said to be successful when the DU has received two qualified bids from entities with which it is not prohibited from entering into a contract of power supply.[15]

At the time, the ERC has not yet issued the prescribed CSP guidelines, but distribution utilities have been allowed to adopt any accepted form of selection process subject only to the minimum terms of reference laid out in Resolution No. 13-2015.[16] Exempted from the CSP requirement are PSAs already filed with and pending review by the ERC at the time the Resolution took effect on 6 November 2015.[17]

A barrage of inquiries from different stakeholders were lodged before the ERC in the interim. Individually, they put forth their concerns on the legal implications of Resolution No. 13-2015 on PSAs already existing, up for renewal, and already executed. They also asked for clarification and guidance on what the acceptable forms of CSP could be applied, as well as possible exemptions from said requirement.[18]

Manila Electric Company (MERALCO) was among these stakeholders. In its letter dated 26 November 2015, it sought the ERC's approval of its request for exemption from the CSP requirement. The ERC, in a letter signed by Jose Vicente B. Salazar (Salazar), denied said request.

ERC Resolution No. 1, Series of 2016

On 15 March 2016, the ERC issued Resolution No. 1, Series of 2016 (Resolution No. 1-2016) which, although declaring to merely clarify[19] the effective date of Resolution No. 13-2015, actually extended the same from 6 November 2015 to 30 April 2016. The leeway was meant to be a transition period for the facilitation of the full implementation of Resolution No. 13-2015, such that all PSAs executed on or after the later date would be bound without exception to abide by the CSP requirement.

MERALCO allegedly entered into seven PSAs on 26 April 2016, and filed all of them with the ERC on the day before the new deadline.

Cases arising from ERC Resolution No. 1-2016

Believing that the ERC issued Resolution No. 1-2016 merely to unduly favor MERALCO, respondent Alyansa Para sa Bagong Pilipinas, Inc. (ABP) filed several cases against petitioners.

Petition for certiorari with the Court

In November 2016, ABP filed a petition for certiorari and prohibition before this Court against ERC, docketed as G.R. No. 227670. On 3 May 2019, the Court granted the petition and declared void ab initio the first paragraph of Section 4 of ERC Resolution No. 13-2015 (CSP Guidelines), and ERC Resolution No. 1-2016 (ERC Clarificatory Resolution).[20]

Complaint for violation of R.A. No. 3019 with the Ombudsman

On 24 November 2016, ABP also filed a verified Complaint[21] before the Ombudsman charging the ERC commissioners, petitioners herein, together with Chairman Salazar, with violation of Section 3(e) of R.A. No. 3019. It specifically alleged that the collective act of the ERC members in extending the implementation date of Resolution No. 13-2015 via Resolution No. 1-2016 was a mere ploy to accommodate MERALCO's sister companies and affiliates and allow them to bag lucrative PSAs without complying with the mandated CSP requirement. It noted that the seven PSAs filed by MERALCO in the interim were in fact deregulated and would prejudice the consuming public in the succeeding 20 years of overpriced power charges.

The complaint was docketed as OMB-C-C-16-0497 for the criminal aspect and OMB-C-A-16-0438 for the administrative aspect.

OMB-C-C-16-0497

On 29 September 2017, the Ombudsman found probable cause to indict petitioners and their co-respondent a quo, Salazar,[22] for violation of Section 3(e) of R.A. No. 3019 and directed the filing of the corresponding information in court.[23] Petitioners filed a Joint Motion for Reconsideration[24] and a Supplemental Motion for Reconsideration[25] which the Ombudsman denied in the assailed 20 April 2018 Order.[26]

From these Ombudsman issuances, petitioners Non, Yap-Taruc, Magpale-Asirit and Sta. Ana filed the present Petition for Certiorari, docketed as G.R. No. 239168.

Their co-respondent, Salazar, on the other hand, filed a separate petition docketed as G.R. No. 240288 against ABP and the Ombudsman raising the defense that he never approved Resolution No. 1-2016 in the first place. Said petition is still pending with the Court.

Meanwhile, on 7 June 2018, the criminal information against petitioners and Salazar was filed with the Regional Trial Court (RTC) of Pasig City.[27]

OMB-C-A-16-0438

In a Decision dated 29 September 2017, the Ombudsman found petitioners[28] guilty of Conduct Prejudicial to the Best Interest of the Service, aggravated by Simple Misconduct and Simple Neglect of Duty, for which they were meted the penalty of suspension for one year without pay.

Petitioners appealed to the CA with a prayer for temporary restraining order (TRO) which the CA granted on 9 February 2018. This prompted ABP to file a petition for certiorari with this Court, docketed as G.R. No. 237586 assailing the 9 February 2018 Resolution of the CA which granted a 60-day TRO on the Decision of the Ombudsman in OMB-C-A-16-0438.[29]

Deconsolidation of the cases

G.R. Nos. 239168 and 240288 were consolidated on 30 July 2018. These two cases, together with G.R. No. 237586 were further consolidated with G.R. No. 227670 on 17 October 2018.

On 15 January 2019, the Court deconsolidated the cases and returned to same original members in charge.

In the meantime, petitioners in G.R. No. 239168 filed an Urgent Motion for Issuance of TRO or Writ of Preliminary Injunction due to the filing of Information against them with the RTC of Pasig City. They alleged that they filed a motion to quash with the RTC arguing that R.A. No. 10660,[30] which directs that criminal cases within the RTC's jurisdiction involving public officials shall be tried in a judicial region other than where the official holds office, applies to them as they hold office in Pasig City. They reiterated this argument in their Supplemental Petition dated 20 September 2019.

On 28 January 2020, the Court re-docketed the Supplemental Petition dated 20 September 2019 as a separate petition, G.R. No. 251177.

Present Petition
G.R. No. 239168

From the 29 September 2017 Resolution[31] and the 20 April 2018 Order[32] of the Ombudsman in OMB-C-C-16-0497, petitioners filed the present Petition for Certiorari, docketed as G.R. No. 239168, attributing grave abuse of discretion amounting to excess in jurisdiction on the part of the Ombudsman (a) in finding probable cause for their indictment when said finding is not supported by substantial evidence; (b) in arrogating

unto herself the authority of declaring Resolution No. 1-2016 invalid, which could be done only by the Court; and (c) in proceeding to resolve the complaint despite the fact that the constitutionality of Resolution No. 1-2016 is still pending resolution before this Court.[33]

Told to comment, the Ombudsman remains unswayed in its finding and prays for the dismissal of this Petition.[34]

The Court's Ruling

We grant the petition.

The principle of non-interference
does not apply in this case

While the Court generally upholds the policy of non-interference when it comes to the Ombudsman's determination of the existence of probable cause and in deciding whether the Information should be filed, the Court will also not hesitate from wielding its power of review and correct actions that result to needless prosecution.

Both the Constitution and the Ombudsman Act of 1989 give the Ombudsman wide latitude to act on criminal complaints against public officials and government employees. Thus, the consistent policy of the Court has been to maintain non-interference in the determination of the Ombudsman of the existence of probable cause. As this Court is not a trier of facts, we give due deference to the sound judgment of the Ombudsman.[35]

Such policy is based not only on respect for the investigatory and prosecutory powers granted by the Constitution to the Ombudsman, but upon practicality as well.[36] Otherwise, a deluge of petitions seeking dismissal of investigatory proceedings conducted by the Ombudsman will grievously hamper the functions of the courts.[37]

Nevertheless, the Court is not precluded from reviewing the Ombudsman's action when there is a charge of grave abuse of discretion.[38] While as a rule, the determination of probable cause for the filing of information lies with the public prosecutors, it is equally settled that the aggrieved person charged for an offense, has the present recourse, a petition for certiorari under Rule 65 of the Rules of Court, to challenge the finding of probable cause on the ground of grave abuse of discretion.[39] Whenever there are allegations of grave abuse of discretion, the Ombudsman's act cannot escape judicial scrutiny under the Court's own constitutional power and duty to determine whether or not there has been grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the government.[40]

"There is grave abuse of discretion where power is exercised in an arbitrary, capricious; whimsical or despotic manner by reason of passion or personal hostility; patent and gross as to amount to evasion of positive duty or virtual refusal to perform a duty enjoined by law."[41] When the Ombudsman does not take essential facts into consideration in the determination of probable cause, we have ruled that such constitutes grave abuse of discretion.

This Court will not shirk from its duty to intervene upon proof of commission of grave abuse of discretion by the Ombudsman as we are not precluded from reviewing the Ombudsman's action when there is grave abuse of discretion, in which case the certiorari jurisdiction of the Court may exceptionally be invoked pursuant to Section 1, Article VIII of the Constitution.[42]

Cases have enumerated the exceptions to the general rule of non-interference. These are:

- When necessary to afford adequate protection to the constitutional rights of the accused;

- When necessary for the orderly administration of justice or to avoid oppression or multiplicity of actions;
- When there is a prejudicial question which is sub judice;
- When the acts of the officer are without or in excess of authority;
- Where the prosecution is under an invalid law, ordinance or regulation;
- When double jeopardy is clearly apparent;
- Where the court has no jurisdiction over the offense;
- Where it is a case of persecution rather than prosecution;
- Where the charges are manifestly false and motivated by the lust for vengeance;
- When there is clearly no prima facie case against the accused and motion to quash on that ground has been denied.[43] (Emphases supplied)

A review of the attendant circumstances shows that the present case falls under the exception.

Lack of probable cause

The Ombudsman found probable cause to indict herein petitioners for violation of Section 3(e) of R.A. No. 3019. We know that probable cause exists when the facts are sufficient to engender a well-founded belief that a crime has been committed and the respondent is probably guilty thereof.[44]

It should also be stressed, however, that to determine if the suspect is probably guilty of the offense, the elements of the crime charged should, in all reasonable likelihood, be present. This is based in the principle that every crime is defined by its elements, without which, there should be, at most, no criminal offense.[45]

There are three modes by which Section 3(e) of R.A. No. 3019 may be committed by a public officer: through manifest partiality, evident bad faith, or through gross inexcusable negligence.[46]

"Partiality" connotes bias which excites a disposition to see and report matters as they are wished for rather than as they are. "Bad faith" meanwhile does not simply connote bad judgment or negligence. It imputes a dishonest purpose or some moral obliquity and conscious doing of a wrong; a breach of sworn duty through some motive, or intent, or ill will, and partakes of the nature of a fraud. Finally, "gross negligence" refers to negligence characterized by the want of even slight care, acting or omitting to act in a situation where there is a duty to act, not inadvertently, but willfully and intentionally with a conscious indifference to consequences insofar as other persons may be affected. It is that omission of care which even inattentive and thoughtless men never fail to take on their own property.[47]

Here, the Ombudsman supported its finding of probable cause with this disquisition:

x x x [R]espondents acted with manifest partiality, evident bad faith or gross inexcusable negligence when they suspended the implementation of the required CSP, to accommodate the PSAs/PSCs of [distribution utilities] and [generation companies], particularly of MERALCO, thereby exempting them from the CSP mandated requirement.

The manifest partiality, evident bad faith or gross inexcusable negligence of respondents can be gleaned from the following documented chronological events:

1. On 20 October 2015, the ERC issued [Resolution No. 13-2015] with the provision that all PSAs and PSCs not filed with the ERC as of 06 November 2015 should already be covered by CSP as their Mandatory

Selection Process;

2. Thus, by 07 November 2015, the requirement that PSAs not filed with ERC as of said date should already be covered by CSP, already took effect [sic];

3. In a Letter dated 26 November 2015, MERALCO sought the permission of ERC to exempt their PSCs from the CSP requirement;

4. On 10 December 2015, the ERC, through Salazar's letter, denied MERALCO's request;

5. On 15 March 2016, ERC, through respondents, issued ERC [Resolution No. 1-2016], modifying the effectivity date of the Resolution from 07 November 2015 to 30 April 2016, thus, giving a window period for PSAs without CSPs to be filed from 15 March 2016 to 30 April 2016; [and]

6. On 29 April 2016, a day before the extended deadline of 30 April 2016, MERALCO filed seven PSAs that did not undergo the CSP requirement.

x x x x

Their non-implementation of the requirement of CSP cannot hide under the cloak of presumption of regularity in the performance of their official duties. There is sufficient evidence that respondents gave unwarranted benefits to MERALCO and other companies by exempting them from the coverage of the CSP requirement which was already in effect after 06 November 2015. The 45-day period gave MERALCO and other companies the opportunity to dispense with CSP. Their gross inexcusable negligence led to the circumvention of the government policy requiring CSP, and denied the consumers the opportunities to elicit the best price offers and other PSA terms and conditions from suppliers.[48]

It is clear therefore that the Ombudsman's finding of probable cause rests on the supposition that petitioners violated R.A. No. 3019 with the issuance of ERC Resolution No. 1-2016, which suspended the implementation of the CSP requirement. For the Ombudsman, the mere act of suspending the implementation of the CSP, shows that petitioners acted with manifest partiality, evident bad faith or gross and inexcusable negligence to accommodate the PSAs/Power Supply Contracts (PSCs) of DUs and generation companies, specifically, MERALCO. Stated differently, the premise is that since MERALCO benefited from Resolution No. 1-2016, then the subject resolution was, from the start, meant only to give an undue advantage to MERALCO, that is tantamount to a crime.

A perusal of Resolution No. 1-2016, however, would readily show that the ERC temporarily deferred the implementation of the CSP in order to ensure that there were suitable guidelines for its execution in light of the concerns raised by the power industry's various stakeholders. To quote:

WHEREAS, since the publication of the CSP [Guidelines] on 06 November 2015, the [ERC] has received several letters from stakeholders which raised issues on the constitutionality of the effectivity of the CSP [Guidelines], sought clarification on the implementation of the CSP and its applicability to the renewal and extension of PSAs, requested a determination of the accepted forms of CSP, and submitted grounds for exemption from its applicability, among others.

WHEREAS, after judicious study and due consideration of the different perspectives raised in the aforementioned letters, with the end in view of ensuring the successful implementation of the CSP for the benefit of consumers, DUs, and GenCos, the [ERC] has resolved to allow a period of transition for the full implementation of the CSP [Guidelines] and, as such, restates the effectivity date of the CSP [Guidelines] to a later date.

Among these stakeholders are: (1) SMC Global Power which requested, through a Letter dated 25 November

2015, that they be allowed to file their PSCs because the requirements imposed pursuant to the CSP implementations were non-existent when their PSCs were evaluated and signed;[49] (2) Philippine Rural Electric Cooperative Association, Inc., which requested for exemption from coverage of Department Circular No. DC2015-06-0008, via a Letter dated 1 December 2015;[50] (3) Agusan del Norte Electric Cooperative, Inc., which requested, per Letter dated 10 December 2015, confirmation that any extension of PSAs or Energy Supply Agreements previously approved is outside the scope of ERC Resolution No. 13-2015;[51] (4) Astronergy Development, which requested, through a Letter dated 15 December 2015, a meeting to discuss their situation following the issuance of Resolution No. 13-2015;[52] (5) Camarines Sur IV Electric Cooperative, Inc. and Unified Leyte Geothermal Energy, Inc., which requested for an extension to file their joint application for the approval of a PSA in their Letter dated 21 December 2015;[53] and (6) Aklan Electric Cooperative, Inc. which sent a letter dated 9 March 2016 inquiring about the CSP requirement.[54]

The presence of these other stakeholders with their respective concerns, weaken the reasoning that petitioners acted with manifest partiality or evident bad faith that is tantamount to a finding of probable cause. Indeed, Resolution No. 1-2016 was available to all industry players and electric cooperatives alike, not just to MERALCO.

A reading of Resolution No. 1-2016 would also show that not only did it extend the transition period, it also addressed pressing concerns affecting the impact of the CSP upon the power industry and resolved other matters that involved the other stakeholders, abovementioned. The issuance of the subject resolution was in the exercise of ERC's sound judgment as a regulator and pursuant to its mandate under the EPIRA to protect the public interest as it is affected by the rates and services of electric utilities and other providers of electric power. Thus, it cannot be classified as arbitrary, whimsical or capricious. The transition period, together with the clarifications provided in Resolution No. 1-2016, constitute a reasonable response to the various concerns posed by DUs, GenCos and electric cooperatives.

We note that in G.R. No. 227670, the Court, through the ponencia of Justice Carpio, declared that the issuance of Resolution No. 1-2016 was attended with grave abuse of discretion. It should be stressed, however, that said case centered on the constitutionality of Resolution No. 1-2016. Even though wrongful, the error of the concerned Commissioners in issuing Resolution No. 1-2016 should not be automatically deemed as criminal.

Power of the Court to order dismissal of the case

We acknowledge the opinions of our esteemed colleagues, Justice Leonen and Justice Zalameda. As they correctly pointed out, the Information in this case was already filed with the RTC of Pasig City. Thus, the RTC already acquired jurisdiction over the case.

A review of the events leading to the present petition would show that, petitioners filed on 29 May 2018 a petition before the Court praying that a TRO and/or Writ of Preliminary Injunction be issued in order to restrain the Ombudsman from filing the Information. The application however was not granted, thus, the Ombudsman proceeded in filing the Information against petitioners on 7 June 2018. The case was raffled to Branch 155 of RTC, Pasig and petitioners were arraigned on 21 November 2018.

Having determined, however, that the Ombudsman committed grave abuse of discretion in issuing the 29 September 2017 Resolution and 20 April 2018 Order which led to the filing of the Information with the trial court, we cannot subscribe to the proposition of our respected colleagues that we should refrain from resolving the instant petition on the ground that the trial court already acquired exclusive jurisdiction over the criminal case.

We have not hesitated in ordering the dismissal of a case already filed in court for want of probable cause.

In *Cabahug v. People*,^[55] we declared:

Judicial power of review includes the determination of whether there was grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the government.

x x x x

Certainly, this will not be the first time that we order the dismissal of a case filed before the Sandiganbayan for want of probable cause. In the case of *Fernando v. Sandiganbayan*, we justified our action as follows:

We emphasize at this point that the Court has a policy of non-interference in the Ombudsman's exercise of his constitutionally mandated powers. The overwhelming number of petitions brought to us questioning the filing by the Ombudsman of charges against them are invariably denied due course. Occasionally, however, there are rare cases when, for various reasons there has been a misapprehension of facts, we step in with our review power. This is one such case. (Emphases supplied and citations omitted)

This was reiterated in *Sistoza v. Desierto*^[56] where the Court categorically held that we can direct the Sandiganbayan to dismiss the criminal case filed against petitioner after finding that the Ombudsman wrongfully found probable cause against him. For want of a well-founded and reasonable ground to believe that petitioner violated Section 3(e), of R.A. No. 3019 or for want of probable cause, the Court ordered the Sandiganbayan to dismiss the criminal case against petitioner.

Indeed, in the few occasions when there is evident misapprehension of facts, we set aside the policy of non-interference and step in armed with our power of review. When at the outset the evidence cannot sustain a prima facie case or that the existence of probable cause to form a sufficient belief as to the guilt of the accused cannot be ascertained, the prosecution must desist from inflicting on any person the trauma of going through a trial.^[57]

While it is the function of the Ombudsman to determine whether petitioners should be subjected to the expense, rigors and embarrassment of trial, the Ombudsman cannot do so arbitrarily. The seemingly exclusive and unilateral authority of the Ombudsman must be tempered by the Court when powers of prosecution are in danger of being used for persecution. Dismissing the case against the accused for palpable want of probable cause not only spares him of the expense, rigors and embarrassment of trial, but also prevents needless waste of the court's time and saves the precious resources of the government.^[58]

WHEREFORE, the petition is GRANTED. The 29 September 2017 Resolution and 20 April 2018 Order of the Office of the Ombudsman are hereby REVERSED and SET ASIDE. The Information against petitioners is hereby DISMISSED for lack of probable cause.

SO ORDERED.

Peralta, C. J., Gesmundo, Carandang, Lopez, and Delos Santos, JJ., concur.

Perlas-Bernabe, (Senior Associate Justice), Please see Concurring Opinion.

Leonen, J., See separate opinion.

Caguioa, J., See Concurring Opinion.

Hernando, J., I join concurring opinion of J. Bernabe.

Lazaro-Javier, J., Please See Concurring Opinion.

Inting, J., no part.

Zalameda, J., Please see Dissenting Opinion.

Gaerlan, J., I join the dissent of J. Zalameda.

Baltazar-Padilla, J., on sick leave.

[1] Under Rule 65 of the RULES OF COURT; rollo, pp. 3-35.

[2] Signed by Graft Investigation and Prosecution Officer II, Cezar M. Tirol II, id. at 37-51.

[3] Id. at 52-58.

[4] Sec. 3. Corrupt practices of public officers. In addition to acts or omissions of public officers already penalized by existing law, the following shall constitute corrupt practices of any public officer and are hereby declared to be unlawful:

x x x (e) Causing any undue injury to any party, including the Government, or giving any private party any unwarranted benefits, advantage or preference in the discharge of his official administrative or judicial functions through manifest partiality, evident bad faith or gross inexcusable negligence. This provision shall apply to officers and employees of offices or government corporations charged with the grant of licenses or permits or other concessions.

[5] THE ANTI-GRAFT AND CORRUPT PRACTICES ACT.

[6] Republic Act No. 9136, entitled AN ACT ORDAINING REFORMS IN THE ELECTRIC POWER INDUSTRY, AMENDING FOR THE PURPOSE CERTAIN LAWS AND FOR OTHER PURPOSES.

[7] The Commission replaced the Energy Regulatory Board.

[8] Id., Section 2.

[9] Section 7 of R.A. No. 9136.

[10] Per the Resolution No. 13 s. 2015, the ERC had posted a notice on its website directing interested parties to comment on the first and second draft of the rules governing power supply agreements. After making all inputs of record, the ERC then conducted a series of public consultations in February 2014 as well as focus group discussions in April of the same year.

[11] Signed by herein petitioners in their official capacity, as well as by the ERC Chairman, Jose Vicente B. Salazar.

[12] In Circular No. DC2015-06-0008. Sec. 3 thereof provides:

Sec. 3. Standard features in the conduct of CSP. After the effectivity of this Circular, all DUs shall procure PSAs only through CSP conducted through a Third Party duly recognized by the ERC and the DOE. In the case of the ECs, the Third Party shall also be duly recognized by the National Electrification Administration.

[13] Dated October 20, 2015.

[14] Final Whereas Clause of Resolution No. 13-2015.

[15] Resolution No. 13-2015, Sec. 1 and Sec. 3.

[16] Id. at Sec. 2. The terms of reference include: (a) Required/Contracted Capacity and/or Energy Volumes; (b) Generation Sources; (c) Method of Procurement for Fuel, if applicable; (d) Cooperation/Contract Period; (e) Tariff Structure Unbundled to Capacity Fees, Variable and Fixed Operating and Maintenance Fee, Fuel Fee and Others, including the derivation of each component. Base Fee Adjustment Formula, if any; (f) Form of Payment; (g) Penalties, if applicable; (h) If applicable, details regarding any transmission projects necessary to complement the proposed generation capacity; and (i) Other Key Parameters.

[17] Id. at Sec. 4.

[18] Rollo, pp. 162-191. Some of these letter-inquiries challenged the legality of Resolution No. 13-2015.

[19] Entitled, A RESOLUTION CLARIFYING THE EFFECTIVITY OF ERC RESOLUTION NO. 13, SERIES OF 2015.

[20] *Alyansa Para sa Bagang Pilipinas, Inc. v. Energy Regulatory Commission*, G.R. No. 227670, May 3, 2019.

[21] Rollo, pp. 59-79.

[22] Salazar filed a separate petition for certiorari before the Court, docketed as G.R. No. 240288.

[23] Rollo, pp. 49-50. The dispositive portion of the Resolution reads:

WHEREFORE, this Office finds probable cause to prosecute Jose Vicente Buenviaje Salazar, Gloria Victoria Cabales Yap-Taruc, Alfredo Jacinto Non, Josefina Patricia Almendras Magpale-Asirit, and Geronimo Delgado Sta. Ana for violation of Section 3(e) of Republic Act No. 3019, as amended. Let the corresponding Information be filed against them with the proper court.

SO ORDERED.

[24] Rollo, pp. 117-161.

[25] Id. at 192-196.

[26] Id. at 52-56. The dispositive portion reads:

WHEREFORE, the Motions for Reconsideration are DENIED.

SO ORDERED.

[27] Branch 155, rollo, pp. 844-846.

[28] Together with Salazar.

[29] *Alyansa Para sa Bagong Pilipinas, Inc., rep. by Noel G. Villones and Evelyn V. Jallorina v. Court of Appeals, Jose Vicente B. Salazar, Gloria Victoria C. Yap-Taruc, Alfredo J. Non*, G.R. No. 237586, rollo, pp. 3-4.

[30] AN ACT STRENGTHENING FURTHER THE FUNCTIONAL AND STRUCTURAL ORGANIZATION OF THE SANDIGANBAYAN, FURTHER AMENDING PRESIDENTIAL DECREE No. 1606, AS AMENDED, AND APPROPRIATING FUNDS THEREFOR.

[31] Signed by Graft Investigation and Prosecution Officer II, Cezar M. Tirol II.

[32] Rollo, p. 52-57.

[33] Id. at 10-11.

[34] The Comment was filed also in connection with G.R. No. 240288 (rollo, pp. 642-657). Note that the OSG filed a Manifestation and Motion on September 3, 2018 in which it made a preliminary assessment that the petition in G.R. No. 227670 is a prejudicial question in the resolution of the instant petition (rollo, pp. 265-292). It has not yet filed its Comment on the present petition. ABP also submitted its Comment on 17 December 2018, but only on Meralco's earlier Manifestation in G.R. No. 227670 (rollo, pp. 851-853).

[35] *Villarosa v. Ombudsman*, G.R. No. 221418, January 23, 2019.

[36] *Joson v. Office of the Ombudsman*, 816 Phil. 288, 320 (2017).

- [37] Villarosa v. Ombudsman, *supra*.
- [38] Estrada v. Office of the Ombudsman, G.R. Nos. 212761-62, July 31, 2018.
- [39] Crucillo v. Office of the Ombudsman, 552 Phil. 699, 713 (2007).
- [40] Casing v. Ombudsman, 687 Phil. 468, 476 (2012).
- [41] Sistazu v. Desierto, 437 Phil. 117, 129 (2002).
- [42] Crucillo v. Ombudsman, *supra* note 39, at 712-713.
- [43] Mendoza-Arce v. Office of the Ombudsman, 430 Phil. 101, 113 (2002).
- [44] Alberto v. Court of Appeals, 711 Phil. 530, 553 (2013).
- [45] *Id.* at 553-554.
- [46] Rivera v. People, G.R. No. 228154, October 16, 2019.
- [47] *Id.*
- [48] Rollo, pp. 44-45, 49.
- [49] *Id.* at 162-163.
- [50] *Id.* at 164.
- [51] *Id.* at 167-168.
- [52] *Id.* at 176-177.
- [53] *Id.* at 171-174.
- [54] *Id.* at 175.
- [55] 426 Phil. 490, 509-510 (2002).
- [56] *Supra* note 41.
- [57] See Cabahug v. People, *supra* note 55, at 509.
- [58] Jimenez v. Tolentino, Jr., 490 Phil. 367, 375-376 (2005).

CONCURRING OPINION

PERLAS-BERNABE, J.:

In the context of filing criminal charges, grave abuse of discretion exists in cases where the determination of probable cause is exercised in an arbitrary and despotic manner. There is probable cause "when the facts are sufficient to engender a well-founded belief that a crime has been committed and that the respondent is probably guilty thereof."^[1] "In order to engender a well--founded belief that a crime has been committed, and to determine if the suspect is probably guilty of the same, the elements of the crime charged should, in all reasonable likelihood, be present. This is based on the principle that every crime is defined by its elements, without which there should be, at the most, no criminal offense."^[2]

One of the essential elements^[3] to hold a person criminally liable under Section 3 (e) of Republic Act No. (RA)

3019 is the presence of manifest partiality, evident bad faith, or inexcusable negligence. There is "manifest partiality" when there is a clear, notorious, or plain inclination or predilection to favor one side or person rather than another.[4] On the other hand, "evident bad faith" connotes not only bad judgment but also palpably and patently fraudulent and dishonest purpose to do moral obliquity or conscious wrongdoing for some perverse motive or ill will. It contemplates a state of mind affirmatively operating with furtive design or with some motive or self-interest or ill will or for ulterior purposes.[5] Meanwhile, "gross negligence" is negligence characterized by the want of even slight care, acting or omitting to act in a situation where there is a duty to act, not inadvertently but willfully and intentionally with a conscious indifference to consequences in so far as other persons may be affected. It is the omission of that care which even inattentive and thoughtless men never fail to take on their own property.[6]

In this case, the Office of the Ombudsman's finding of probable case rests on the sweeping supposition that petitioners committed the crime of violation of RA 3019 by suspending, through the issuance of Energy Regulatory Commission (ERC) Resolution No. 1, Series of 2016 (Resolution No. 1, s. 2016), the implementation of the Competitive Selection Process requirement (CSP). By the solitary fact of suspending the implementation of the CSP, without anything more, the Ombudsman already jumped to the conclusion that petitioners acted with manifest partiality, evident bad faith, or gross inexcusable negligence to accommodate the Power Supply Agreements (PSAs)/Power Supply Contracts (PSCs) of distribution utilities and generation companies, particularly, MERALCO, viz.:

[R]espondents acted with manifest partiality, evident bad faith or gross inexcusable negligence when they suspended the implementation of the required CSP, to accommodate the PSAs/PSCs of [distribution utilities] and [generation companies], particularly Meralco, thereby exempting them from the CSP mandated requirement.

The manifest partiality, evident bad faith or gross inexcusable negligence of respondents can be gleaned from the following documented chronological events:

1. On 20 October 2015, the ERC issued Resolution No. 13, Series of 2015 [(Resolution No. 13, s. 2015)] with the provision that all PSAs and PSCs not filed with the ERC as of 06 November 2015 should already be covered by CSP as their Mandatory Selection Process;
2. Thus, by 07 November 2015, the requirement that PSAs not filed with ERC as of said date should already be covered by CSP, already took effect effect (sic);
3. In a Letter dated 26 November 2015, Meralco sought the permission of ERC to exempt their PSCs from the CSP requirement;
4. On 10 December 2015, the ERC, through Salazar's letter, denied Meralco's request;
5. On 15 March 2016, ERC, through respondents, issued Resolution No. 1, Series of 2016, modifying the effectivity date of the Resolution from 07 November 2015 to 30 April 2016, thus, giving a window period for PSAs without CSPs to be filed from 15 March 2016 to 30 April 2016;
6. On 29 April 2016, a day before the extended deadline of 30 April 2016, Meralco filed seven PSAs that did not undergo the CSP requirement.

x x x Their non-implementation of the requirement of CSP cannot hide under the cloak of presumption of regularity in the performance of their official duties. There is sufficient evidence that respondents gave unwarranted benefits to Meralco and other companies by exempting them from the coverage of the CSP requirement which was already in effect after 06 November 2015. The 45-day period gave Meralco and other companies the opportunity to dispense with CSP. Their gross inexcusable negligence led to the circumvention

of the government policy requiring CSP, and denied the consumers the opportunities to elicit the best price offers and other PSA terms and conditions from suppliers.[7]

Notably, the Ombudsman mentions that there is "sufficient evidence" that petitioners gave unwarranted benefits to MERALCO and other companies. However, after carefully scrutinizing its resolution, as well as poring over the records, there is not a single shred of evidence on record which would buttress this claim.

Instead, what the records show is that the ERC temporarily deferred the implementation of the CSP in order to ensure that there were suitable guidelines for its execution in light of the concerns raised by the power industry's various stakeholders. In fact, the ERC was actually forthright in mentioning these concerns in the whereas clauses of Resolution No. 1, s. 2016:

WHEREAS, since the publication of the CSP [Guidelines] on 06 November 2015, the [ERC] has received several letters from stakeholders which raised issues on the constitutionality of the effectivity of the CSP [Guidelines], sought clarification on the implementation of the CSP and its applicability to the renewal and extension of PSAs, requested a determination of the accepted forms of CSP, and submitted grounds for exemption from its applicability, among others.

WHEREAS, after judicious study and due consideration of the different perspectives raised in the aforementioned letters, with the end in view of ensuring the successful implementation of the CSP for the benefit of consumers, DUs, and GenCos, the [ERC] has resolved to allow a period of transition for the full implementation of the CSP [Guidelines] and, as such, restates the effectivity date of the CSP [Guidelines] to a later date[.][8]

As culled from the records, these letters include the following:

(a) Request of SMC Global Power that they be allowed to file their PSCs because the requirements imposed pursuant to the CSP implementation were non-existent when their PSCs were evaluated and signed, viz.:

Upon filing with the ERC, however, our counter-part counsel for the DUs and ECs (Dechavez & Evangelista Law Offices) informed us that even at the pre-filing stage, the ERC rejects applications which do not include the following: DUs/ECs Invitation to Participate and Submit Proposal, DUs/ECs' Terms of Reference, Proposals Received by the DU/EC, tender offers, DU/ECs Special Bids and Awards Committees (SBAC) Evaluation Report, DU Board Resolution confirming the approval of the SBAC Evaluation report and Notice of Award issued by the DU/EC.

It is significant to note that all of these requirements, even the creation of the SBAC, were non-existent when our PSCs were evaluated and signed. x x x

To this end, we respectfully request the consideration of the Honorable Commission to allow us to file, and for the Commission to accept, the applications for approval of the subject PSCs. In our case, mere filing is critical for us to achieve financial close for purposes of funding our power plant project.

The filing of the application will enable us to continue financing the Limay Phase 1 Project, Malita Project and proceed with Limay Phase 2 Project to augment the capacity in the Luzon and Mindanao Grids and prevent the projected shortage in 2017.[9]

(b) Request of Philippine Rural Electric Cooperative Association, Inc. for exemption from coverage of Department Circular No. DC2015-06-0008;[10]

(c) Request for confirmation of Agusan del Norte Electric Cooperative, Inc. that any extension of PSAs or Energy Supply Agreements previously approved is outside the scope of ERC Resolution No. 13, s. 2015, viz.:

The ESA, as amended and supplemented, will expire on 25 June 2016. Given the power shortage in Mindanao,

the insufficiency of the NPC/PSALM supply, taken together with the continuing demand growth of our end-users, we wish to exercise the option provided under the Amendment to the ESA to extend the Term of our Amended and Supplemented ESA with TMI x x x.

Relating this provision to Reso 13, we are of the impression that Reso 13 may not be strictly applied to ESA extensions, especially considering that the Honorable Commission has already meticulously scrutinized and approved TMI's Fixed O&M, Energy and Fuel Fees, as well as its asset base in determining the Capital Recovery Fee.

x x x x

Since Section 4 of the Resolution states that the CSP requirement shall not apply to PSAs (or ESAs) already filed with the ERC, we are of the understanding that an extension of an existing ESA, which is part of the provisions submitted to and has been approved by the ERC, albeit provisionally, is outside the coverage of the present Resolution. Hence, we intend to enter into an extension of our existing ESA with TMI, applying the same methodology and asset base as approved by the Honorable Commission in arriving at the rates. x x x[11]

(d) Reiteration by SMC Global Power of its request to the ERC to accept and allow the filing of their PSCs already signed prior to the issuance of ERC Resolution No. 13, s. 2015:

Further to our letter dated November 25, 2015, we would like to reiterate our request to the Honorable Commission En Banc to accept and allow the filing of Power Supply Contracts (PSC) already signed prior to its issuance Resolution No. 13, Series of 2015 "A Resolution Directing All Distribution Utilities (DUs) to Conduct Competitive Selection Process (CSP) in the Procurement of Their Supply to the Captive Market."

We wish to stress that in the event the subject PSCs cannot be filed, the Honorable Commission would effectively invalidate the same to the detriment of the contracting parties and the industry. It is significant to note that the Distribution Utilities (DU) and Electric Cooperatives (EC) have carefully evaluated and considered the most advantageous terms and conditions for its consumers prior to signing the subject PSCs.

x x x x

Meanwhile, another round of CSP may likely alter the terms of the contract that could prove to be disadvantageous to the DU or EC.

Considering the execution of the PSCs and the stage of their application process prior to the issuance of the CSP requirement, we beg the indulgence of the Honorable Commission En Banc to accept the subject PSCs and allow the filing thereof to proceed.[12]

(e) Request of Astronergy Development for a meeting to discuss their peculiar situation following the issuance of Resolution No. 13, s. 2015 in that, it impairs the contracts that were entered into in good faith:

We respectfully request a meeting with you at your earliest convenience, so that we can discuss our peculiar situation following the issuance of the Resolution. Our meeting objective is to understand your views regarding the retroactive application of the Resolution and further, to understand how to harmonize Resolution in light of the third party legal opinion we have attached herein for your consideration. Lastly, we hope to be allowed a brief opportunity to present and discuss our views on why the Commission's staff should interpret the Resolution in a manner that is consistent with the Commission's past written responses on RE to the Senate Energy Committee; and the Commission's related Decision relevant to our particular circumstances.

x x x x

Section 4 of the Resolution requires the DUs to conduct a CSP for PSAs that have not yet submitted its PSA with the ERC. We believe the result is a retroactive application of the Resolution that impairs our contracts that were entered into in good faith. This creates uncertainties, including the possible revision and rescission of

existing binding agreements, which our group of companies, and their shareholders and creditors, are greatly concerned about. There are also specific considerations with each DU: for each PSA we have executed since the application of the Resolution would potentially lead to losses and additional project delay. Any further delay (such as revisiting CSP) would result in a breach of contract for not meeting deadlines.[13]

(f) Request of Camarines Sur IV Electric Cooperative, Inc. and Unified Leyte Geothermal Energy, Inc. for an extension to file their joint application for the approval of a power supply agreement:

On 03 August 2015, CASURECO IV and San Miguel Energy Corporation ("SMEC") entered into a mutual agreement before this Honorable Commission to pre-terminate the Power Supply Contract dated 23 August 2013 between CASURECO IV and SMEC ("SMEC PSC"). As a result of the pre-termination of SMEC PSC, beginning 00:00H of 26 August 2015, SMEC ceased to supply power to CASURECO IV.

x x x Because CASURECO IV received no proposals for its power supply requirements, it began direct negotiations with ULGEI.

x x x x

Since CASURECO IV received such letter on 24 September 2015, CASURECO IV and ULGEI had until 23 November 2015 to file a joint- application for the approval of a power supply agreement. Due, however, to the extensive negotiations conducted to provide the Franchise Area a competitive and reliable supply of power, and since it will take time to prepare and finalize a power supply agreement, CASURECO IV and ULGEI requested this Honorable Commission for an additional thirty (30) days within which to file a joint-application, or until 23 December 2015.[14]

(g) Query of Aklan Electric Cooperative, Inc. regarding the CSP requirement:

We write to advance our queries pertaining to the Competitive Selection Process which is now part of the Power Supply Procurement requirements for all DUs. The related ERC Resolution No. 13 Series of 2015 was already in effect 15 days after its publication last October 20, 2015.

In the case of AKELCO where in previous years, two (2) Power Supply Contracts for base load requirements were already signed by both parties but were not filed with the ERC before the effectivity of the CSP. The queries are as follows:

1. If the Power Supply Contracts that were not filed due to non-compliance to CSP still binding?
2. What are the ERC's recommended modes of CSPs? Is the so-called "Price Challenge" or Swiss Challenge allowed? And,
3. Presuming that some of the stipulated provisions (i.e., date of initial delivery, base load demand requirements) in the said contracts cannot be met due to CSP requirement or already unacceptable to either of the party, can we still re-negotiate the provisions and at the same time introduce the ERC recommended terms of reference?[15]

To my mind, absent any other circumstance showing that some illicit interest was involved in the issuance of Resolution No. 1, s. 2016, the foregoing concerns of the various stakeholders of the power industry evince the good faith of petitioners and in turn, negate the existence of probable cause anent the element of manifest partiality or evident bad faith on their part.

Neither can it be said that the said resolution was issued with gross inexcusable negligence since, as may be seen from the varied opinions in G.R. No. 227670,[16] captioned as *Alyansa Para Sa Bagong Pilipinas, Inc. (ABP) v. ERC*, the matter regarding the propriety of extending the CSP requirement did not involve simple questions of law; hence, their eventual mistake in extending the CSP may be said to have been done in good faith.

Jurisprudence states that a "[m]istake upon a doubtful or difficult question of law may properly be the basis of good faith,"^[17] as in petitioners' mistaken extension of the CSP requirement, especially when considered with the fact that they were only prompted to suspend the implementation of the CSP in light of the pressing and legitimate queries coming from the various stakeholders in the power industry.

At this juncture, I find it apt to clarify that the eventual illegality of Resolution No. 1, s. 2016, as pronounced in the ponencia^[18] of retired Senior Associate Justice Antonio T. Carpio in G.R. No. 227670, does not - as it should not - automatically equate to a finding that there exists probable cause to hold those responsible for the void issuance criminally liable under Section 3 (e) of RA 3019. Clearly, a case to determine whether or not a particular government issuance is void for having been issued with grave abuse of discretion is different from a case to determine whether or not probable cause exists to prosecute a government official for violation of RA 3019. Not only are their purposes different, the legal parameters which the Court utilizes in these types of cases substantially vary. As earlier intimated, the determination of probable cause rises and falls on the ostensible presence of the imputed crime's elements. Thus, since the Ombudsman's finding of probable cause fails to adequately demonstrate the element of manifest partiality, evident bad faith, or gross inexcusable negligence which is integral to the charge of Section 3 (e), RA 3019 - the said finding was tainted with grave abuse of discretion. Accordingly, the present petition must be granted.

[1] *Alberto v. Court of Appeals*, 711 Phil. 530, 553 (2013).

[2] *Id.*

[3] The elements of violation of Section 3 (e) of RA 3019 are as follows: (a) that the accused must be a public officer discharging administrative, judicial, or official functions (or a private individual acting in conspiracy with such public officers); (b) that he acted with manifest partiality, evident bad faith, or inexcusable negligence; and (c) that his action caused any undue injury to any party, including the government, or giving any private party unwarranted benefits, advantage, or preference in the discharge of his function. (*Fuentes v. People*, 808 Phil. 586, 593 [2017]).

[4] *Id.* at 594.

[5] *Id.*

[6] *Id.* at 594-594, citing *Coloma v. Sandiganbayan*, 744 Phil. 214, 229 (2014).

[7] See ponencia, pp. 9-10.

[8] See Resolution No. 1, s. 2016.

[9] See Letter dated November 25, 2015 of SMC Global Power; rollo, pp. 162-163.

[10] See Letter dated December 1, 2015 of Philippine Rural Electric Cooperative Association, Inc.; *id.* at 164.

[11] See Letter dated December 10, 2015 of Agusan del Norte Electric Cooperative, Inc.; *id.* at 167-168.

[12] See Letter dated December 14, 2015 SMC Global Power; *id.* at 169-170.

[13] See Letter dated December 15, 2015 of Astronergy Development; *id.* at 176-177.

[14] See Letter dated December 21, 2015 of Camarines Sur IV Electric Cooperative, Inc. and Unified Leyte Geothermal Energy, Inc.; *id.* at 171-174.

[15] See Letter dated March 9, 2016 of Aklan Electric Cooperative, Inc.; id. at 175.

[16] See my Separate Concurring Opinion, Justice Alfredo Benjamin S. Caguioa's Dissenting Opinion, and Justice Andres Reyes, Jr.'s Dissenting Opinion in G.R. No. 227670.

[17] *Tio v. Abayata*, 578 Phil. 731, 747 (2008); citation omitted.

[18] Promulgated on May 3, 2019.

SEPARATE OPINION

LEONEN, J.:

A petition for certiorari is the appropriate remedy if the prosecution's finding of probable cause was made with grave abuse of discretion. However, before determining if there was any grave abuse of discretion, this Court must first determine if the petition was the "plain, speedy, and adequate remedy in the ordinary course of law[.]"[1] Once probable cause has been judicially determined, any petition questioning the executive determination of probable cause ceases to be the plain, speedy, and adequate remedy.

The controversy in this case arose from the Department of Energy's issuance of Circular No. DC2015-06-0008. This Circular provided that all distribution utilities shall procure power supply agreements only through a competitive selection process, conducted through a third party recognized by the Department of Energy and the Energy Regulatory Commission.[2] In view of this Circular, on November 4, 2015, the Energy Regulation Commission issued Resolution No. 13, Series of 2015, requiring a successful, transparent, and competitive selection process as a precondition to an award of a supply agreement. Direct negotiation was allowed only when the competitive selection process fails twice.[3]

The Resolution likewise exempted all power supply agreements already filed and pending review with the Energy Regulatory Commission by November 6, 2015, the date the Resolution would take effect.[4]

Manila Electric Company (Meralco) was among the stakeholders that requested to be exempted from the requirement of competitive selection process. This request was denied.[5]

On March 15, 2016, the Energy Regulatory Commission issued Resolution No. 1, Series of 2016, which extended the effectivity date of Resolution No. 13 from November 6, 2015 to April 30, 2016. The extension was allegedly meant to be a transition period for the full implementation of Resolution No. 13.[6]

Meralco allegedly entered into seven power supply agreements on April 26, 2016, and filed them all with the Energy Regulatory Commission on April 29, 2016, a day before the new effectivity date.[7]

Thus, before the Office of the Ombudsman, Alyansa Para sa Bagong Pilipinas, Inc. (Alyansa) filed a verified Complaint against the Chair and Commissioners of the Energy Regulatory Commission for violating Section 3(e)[8] of Republic Act No. 3019, or the Anti-Graft and Corrupt Practices Act. It alleged that the extension of Resolution No. 13's effectivity date was meant to allow Meralco to acquire lucrative power supply agreements without undergoing the competition selection process. It alleged that the agreements Meralco entered into and pending approval from the Energy Regulatory Commission would prejudice the public in the next 20 years due to overpriced power charges.[9]

Alyansa simultaneously filed a Petition for Certiorari and Prohibition before this Court, docketed as G.R. No. 227670.[10] It prayed that Resolution No. 1 be voided for having been issued with grave abuse of discretion.

In the meantime, the Office of the Ombudsman proceeded to investigate the Complaint filed before it. In a September 29, 2017 Resolution, it found probable cause to charge Energy Regulatory Commission Chair Jose Vicente Salazar, as with Commissioners Gloria Victoria C. Yap-Taruc, Alfredo J. Non, Josephina Patricia A. Magpale-Asirit, and Geronimo D. Sta. Ana (collectively, the Commissioners), for violating Section 3(e) of Republic Act No. 3019.[11]

The beleaguered Chair and Commissioners filed their Joint Motion for Reconsideration and Supplemental Motion for Reconsideration, but these were denied by the Office of the Ombudsman in an April 20, 2018 Order.[12] Subsequently, on June 7, 2018, an Information was filed against them before the Regional Trial Court of Pasig City.[13] They were later arraigned on November 21, 2018.[14]

Aggrieved, the Commissioners[15] filed this Petition for Certiorari, assailing the Office of the Ombudsman's finding of probable cause for allegedly being tainted with grave abuse of discretion. They claim that the finding was not supported by substantial evidence and that the constitutionality of Resolution No. 1 had yet to be determined in G.R. No. 227670, which had still been pending at the time this Petition was filed.[16]

On May 3, 2019, a ruling in G.R. No. 227670 was rendered. Granting Alyansa's Petition, this Court declared, among others, that Resolution No. 1 was void for being tainted with grave abuse of discretion.[17]

Here, the majority resolved to grant the Commissioners' Petition. In so ruling, it opined that while this Court generally exercises a policy of non-interference with the Office of the Ombudsman's finding of probable cause, it can still review such finding if it is alleged to be tainted with grave abuse of discretion.[18] The majority then explained that while G.R. No. 227670 later nullified Resolution No. 1, this is not enough basis to find probable cause to charge petitioners with violation of Section 3(e) of Republic Act No. 3019.[19]

While I agree that a petition for certiorari is appropriate when the finding of probable cause is made with grave abuse of discretion, this Court must first determine if the petition filed was procedurally sound. It must be, under the Rules of Court, the "plain, speedy, and adequate remedy in the ordinary course of law[.]"[20]

Here, petitioners had been charged[21] and arraigned.[22] The Regional Trial Court of Pasig City has already assumed jurisdiction over the case. Any question on the finding of probable cause should have been addressed to its sound discretion. Filing the present Petition for Certiorari before this Court, therefore, was not the "plain, speedy, and adequate remedy" contemplated by the Rules.

I

The Constitution grants the Office of the Ombudsman a wide latitude to act on criminal complaints against government officers and employees.[23] Republic Act No. 6770, or the Ombudsman Act of 1989, was enacted as a statutory reinforcement of its mandate as the protectors of the people. The Office of the Ombudsman is an independent constitutional body "beholden to no one," and "acts as the champion of the people and the preserver of the integrity of the public service." [24] Giving "respect for the investigatory and prosecutory powers granted by the Constitution to the Office of the Ombudsman[.]"[25] this Court has adopted, as a general rule, a policy of non-interference with its prosecutorial discretion.

Another reason for this Court's policy of non-interference is that the determination of probable cause is highly factual in nature.[26] It requires the examination of the "existence of such facts and circumstances as would excite the belief, in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he [or she] was prosecuted." [27] In *Dichaves v. Office of the Ombudsman*: [28]

The Office of the Ombudsman is armed with the power to investigate. It is, therefore, in a better position to assess the strengths or weaknesses of the evidence on hand needed to make a finding of probable cause. As this Court is not a trier of facts, we defer to the sound judgment of the Ombudsman.[29] (Citation omitted)

Deference to the factual findings of prosecutorial bodies also serves a practical purpose:

[T]he functions of the courts will be grievously hampered by innumerable petitions assailing the dismissal of investigatory proceedings conducted by the Office of the Ombudsman with regard to complaints filed before it, in much the same way that the courts would be extremely swamped if they could be compelled to review the exercise of discretion on the part of the fiscals or prosecuting attorneys each time they decide to file an information in court or dismiss a complaint by a private complaint.[30]

This policy of non-interference, however, is a general rule. This Court will generally defer to the Office of the Ombudsman's finding of probable cause, except when the findings were arrived at with grave abuse of discretion.[31] Conversely, mere errors of judgment are not sufficient. A petitioner must show that the Office of the Ombudsman acted in an "arbitrary and despotic manner because of passion or personal hostility." [32] In *Reyes v. Office of the Ombudsman*: [33]

[D]isagreement with the Ombudsman's findings is not enough to constitute grave abuse of discretion. It is settled:

An act of a court or tribunal may constitute grave abuse of discretion when the same is performed in a capricious or whimsical exercise of judgment amounting to lack of jurisdiction. The abuse of discretion must be so patent and gross as to amount to an evasion of positive duty, or to a virtual refusal to perform a duty enjoined by law, as where the power is exercised in an arbitrary and despotic manner because of passion or personal hostility.

Thus, for this Petition to prosper, petitioner would have to show this Court that the Ombudsman conducted the preliminary investigation in such a way that amounted to a virtual refusal to perform a duty under the law.[34]

Here, the Office of the Ombudsman's assailed Resolution does not indicate any capricious or arbitrary exercise of power, and nor does it show a virtual refusal to perform a duty. On the contrary, its findings appear to have been arrived at objectively, with due regard to the evidence on hand:

[R]espondents acted with manifest partiality, evident bad faith or gross inexcusable negligence when they suspended the implementation of the required CSP, to accommodate the PSAs/PSCs of DUs and GenCos, particularly of Meralco, thereby exempting them from the CSP mandated requirement.

The manifest partiality, evident bad faith or gross inexcusable negligence of respondents can be gleaned from the following documented chronological events:

....

The justifications given by respondents in not implementing the CSP requirement are untenable. The requirement for CSP as mandated by EPIRA, DOE and ERC, cannot be reasonably stopped by the requests for clarification, exception and/or exemption from CSP from numerous industry participants, especially when the stakeholders were already heard in extensive consultations conducted by the ERC. Respondents themselves bared in the "WHEREAS CLAUSES" of the 2015 CSP Resolution that stakeholders have been informed, heard and consulted about the CSP, thus:

....

Furthermore, the CSP is an acknowledged mechanism to make the cost of PSAs more reasonable. Hence, accommodating companies' request to be exempted from CSP was a deviation from respondents' duty to promote public interest through the CSP requirement. The gross inexcusable negligence of respondents

benefitted 38 more companies who were able to enter into PSAs and file them with ERC without complying with the CSP requirement.

....

Respondents, in their exercise of their official regulatory functions, have given unwarranted benefits, advantage or preference to MERALCO and other companies. Under the CSP Resolution, said companies were not qualified to file their PSAs for being non-compliant with the CSP requirement. But respondents' failure to recognize the effects of the suspension of the implementation of CSP gave said companies the concession to file their PSAs and PSCs without having to comply with the CSP policy.[35]

These findings are evidentiary. Any error requires the review of evidence, something that is usually done during trial. In *Drilon v. Court of Appeals*:[36]

Probable cause should be determined in a summary but scrupulous manner to prevent material damage to a potential accused's constitutional right of liberty and the guarantees of freedom and fair play. The preliminary investigation is not the occasion for the full and exhaustive display of the parties' evidence. It is for the presentation of such evidence as may engender a well-grounded belief that an offense has been committed and that the accused is probably guilty thereof. It is a means of discovering the persons who may be reasonably charged with a crime. The validity and merits of a party's defense and accusation, as well as admissibility of testimonies and evidence, are better ventilated during trial proper than at the preliminary investigation level.[37]

Thus, the finding of probable cause may only be reviewed when there is reason to believe that it was arrived at in a capricious, whimsical, arbitrary, and despotic manner. The mere exercise of prosecutorial discretion, when done within the bounds of law and the rules of procedure, should not be subject to this Court's review. Excessive interference in matters that are distinctly prosecutorial may result in contradictory rulings based on the same set of facts, as what happened in this case. The majority here stated that Resolution No. 1 was issued with "sound judgment":

The issuance of the subject resolution was in the exercise of ERC's sound judgment as a regulator and pursuant to its mandate under the EPIRA to protect the public interest as it is affected by the rates and services of electric utilities and other providers of electric power. Thus, it cannot be classified as arbitrary, whimsical or capricious. The transition period, together with the clarifications provided in Resolution No. 1, constitute a reasonable response to the various concerns posed by DUs, GenCos and electric cooperatives.[38]

This is in direct contradiction to the ruling in G.R. No. 227670, *Alyansa Para sa Bagong Pilipinas v. Energy Regulatory Commission*,[39] where this Court found that Resolution No. 1 was issued with grave abuse of discretion:

The issuance of the ERC Clarificatory Resolution was attended with grave abuse of discretion amounting to lack or excess of jurisdiction for the following reasons:

(1) Postponing the effectivity of CSP from 30 June 2015 to 7 November 2015, and again postponing the effectivity of CSP from 7 November 2015 to 30 April 2016, or a total of 305 days, allowed DUs nationwide to avoid the mandatory CSP;

(2) Postponing the effectivity of CSP effectively freezes for at least 20 years the DOE-mandated CSP to the great prejudice of the public. The purpose of CSP is to compel DUs to purchase their electric power at a transparent, reasonable, and least-cost basis, since this cost is entirely passed on to consumers. The ERC's postponement unconscionably placed this public purpose in deep freeze for at least 20 years.

Indisputably, the ERC committed grave abuse of discretion amounting to lack or excess of jurisdiction when

the ERC postponed the effectivity of CSP. The postponement effectively prevented for at least 20 years the enforcement of a mechanism intended to ensure "transparent and reasonable prices in a regime of free and fair competition," as mandated by law under EPIRA, a mechanism implemented in the 2015 DOE Circular which took effect on 30 June 2015.[40]

I agree with the majority that a finding of grave abuse of discretion does not equate to a finding of probable cause. However, at the very least, this Court should remain consistent. The majority's statement makes it appear as if there could have been no probable cause to charge petitioners since the assailed Resolution was not issued with grave abuse of discretion.

Incidentally, Justice Alfred Caguioa (Justice Caguioa) concurs with the majority and points out that "the Court cannot, under the guise of non- interference, abdicate its solemn duty 'to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government,' including the Ombudsman." [41]

This Court does not have the exclusive jurisdiction to determine grave abuse of discretion on findings of probable cause. This jurisdiction, by reason of judicial efficiency and the doctrine of hierarchy of courts, is concurrent with other courts. *People v. Cuaresma*[42] explains:

This Court's original jurisdiction to issue writs of certiorari (as well as prohibition, mandamus, quo warranto, habeas corpus and injunction) is not exclusive. It is shared by this Court with Regional Trial Courts (formerly Courts of First Instance), which may issue the writ, enforceable in any part of their respective regions. It is also shared by this Court, and by the Regional Trial Court, with the Court of Appeals (formerly, Intermediate Appellate Court), although prior to the effectivity of Batas Pambansa Bilang 129 on August 14, 1981, the latter's competence to issue the extraordinary writs was restricted to those "in aid of its appellate jurisdiction." This concurrence of jurisdiction is not, however, to be taken as according to parties seeking any of the writs an absolute, unrestrained freedom of choice of the court to which application therefor will be directed. There is after all a hierarchy of courts. That hierarchy is determinative of the venue of appeals, and should also serve as a general determinant of the appropriate forum for petitions for the extraordinary writs. A becoming regard for that judicial hierarchy most certainly indicates that petitions for the issuance of extraordinary writs against first level ("inferior") courts should be filed with the Regional Trial Court, and those against the latter, with the Court of Appeals. A direct invocation of the Supreme Court's original jurisdiction to issue these writs should be allowed only when there are special and important reasons therefor, clearly and specifically set out in the petition. This is established policy. It is a policy that is necessary to prevent inordinate demands upon the Court's time and attention which are better devoted to those matters within its exclusive jurisdiction, and to prevent further over-crowding of the Court's docket. Indeed, the removal of the restriction on the jurisdiction of the Court of Appeals in this regard - resulting from the deletion of the qualifying phrase, "in aid of its appellate jurisdiction" - was evidently intended precisely to relieve this Court pro tanto of the burden of dealing with applications for the extraordinary writs which, but for the expansion of the Appellate Court's corresponding jurisdiction, would have had to be filed with it.[43] (Citations omitted)

Diocese of Bacolod v. Commission on Elections[44] further refines this concept and discusses:

The doctrine that requires respect for the hierarchy of courts was created by this court to ensure that every level of the judiciary performs its designated roles in an effective and efficient manner. Trial courts do not only determine the facts from the evaluation of the evidence presented before them. They are likewise competent to determine issues of law which may include the validity of an ordinance, statute, or even an executive issuance in relation to the Constitution. To effectively perform these functions, they are territorially organized into regions and then into branches. Their writs generally reach within those territorial boundaries. Necessarily, they mostly perform the all-important task of inferring the facts from the evidence as these are physically presented before them. In many instances, the facts occur within their territorial jurisdiction, which properly

present the 'actual case' that makes ripe a determination of the constitutionality of such action. The consequences, of course, would be national in scope. There are, however, some cases where resort to courts at their level would not be practical considering their decisions could still be appealed before the higher courts, such as the Court of Appeals.

The Court of Appeals is primarily designed as an appellate court that reviews the determination of facts and law made by the trial courts. It is collegiate in nature. This nature ensures more standpoints in the review of the actions of the trial court. But the Court of Appeals also has original jurisdiction over most special civil actions. Unlike the trial courts, its writs can have a nationwide scope. It is competent to determine facts and, ideally, should act on constitutional issues that may not necessarily be novel unless there are factual questions to determine.

This court, on the other hand, leads the judiciary by breaking new ground or further reiterating - in the light of new circumstances or in the light of some confusions of bench or bar - existing precedents. Rather than a court of first instance or as a repetition of the actions of the Court of Appeals, this court promulgates these doctrinal devices in order that it truly performs that role.[45] (Citation omitted)

We must be careful to distinguish between special civil actions filed under Rule 65 of the Rules of Court and those special civil actions which invoke this Court's power of judicial review under Article VIII, Section 1 of the Constitution. These are two different remedies.

A petition under Rule 65 is limited only to the review of judicial and quasi-judicial acts.[46] Meanwhile, the action under Article VIII, Section 1-the one that Justice Caguioa cites-involves constitutional questions and generally refers to another constitutional organ's actions. It requires prima facie showing that a government branch or instrumentality has gravely abused its discretion. This Court, by its constitutional power to relax its own rules of procedure and by reason of efficiency, allowed Rule 65 to be used in petitions that invoke this expanded jurisdiction.[47]

This Court is not a trier of facts. Its finding of grave abuse of discretion made in its original jurisdiction should only be in cases where the material facts are not contested.[48] This is antithetical to the inherently factual nature of determining probable cause. Thus, the policy of non-interference requires this Court to intervene only in situations where the material facts are not contested and there has been a capricious, whimsical, and arbitrary refusal to perform one's duty according to the law.

Where the trial court has found probable cause to issue a warrant of arrest and has arraigned the accused, any question as to the propriety of the trial court's acts should be addressed to its sound discretion. Owing to the trial court's concurrent jurisdiction, actions under Rule 65 may still be properly filed before the trial courts, which may have better competence than this Court to address the factual issues. These questions can likewise be properly raised as defenses before the trial court that arraigned the accused. "[T]he trial court must consider that trial is always available after arraignment and is a forum for the accused as much as it is for the prosecution to carefully examine the merits of the case." [49]

In any case, the finding of probable cause does not require a finding of guilt beyond reasonable doubt. It merely requires:

... the existence of such facts and circumstances as would lead a person of ordinary caution and prudence to entertain an honest and strong suspicion that the person charged is guilty of the crime subject of the investigation. Being based merely on opinion and reasonable belief, it does not import absolute certainty. Probable cause need not be based on clear and convincing evidence of guilt, as the investigating officer acts upon reasonable belief. Probable cause implies probability of guilt and requires more than bare suspicion but less than evidence which would justify a conviction.[50] (Citations omitted)

Considering that probable cause merely requires a probability of guilt, and not the absolute certainty of it, a review of its determination requires no less than a showing of grave abuse of discretion. This is usually done through a petition for certiorari under Rule 65[51] of the Rules of Court. Parties are always too quick to assume that their petitions will be entertained once they state the litany of acts alleged to be grave abuse of discretion. These parties forget that before delving into the substantial requirements of the petition, they must first prove that "there is no appeal, or any plain, speedy, and adequate remedy in the ordinary course of law[.]"[52]

Once probable cause has been judicially determined, any petition that questions the executive determination of probable cause ceases to be the plain, speedy, and adequate remedy available to the parties.

II

It is settled that there are two stages in the determination of probable cause: first, an executive determination, done by the prosecutor in a preliminary investigation; and second, a judicial determination.[53]

The statutory basis for the executive determination of probable cause is found in the Rules of Court,[54] Republic Act No. 6770,[55] and various issuances by the Department of Justice.[56] Meanwhile, the judicial determination of probable cause is guided by the Bill of Rights of the Constitution:

SECTION 2. The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures of whatever nature and for any purpose shall be inviolable, and no search warrant or warrant of arrest shall issue except upon probable cause to be determined personally by the judge after examination under oath or affirmation of the complainant and the witnesses he may produce, and particularly describing the place to be searched and the persons or things to be seized.[57]

Although they may rely on the same evidence and case records, the prosecutor's finding of probable cause is not the same as the trial court's finding of probable cause. *People v. Castillo*[58] explains:

There are two kinds of determination of probable cause: executive and judicial. The executive determination of probable cause is one made during preliminary investigation. It is a function that properly pertains to the public prosecutor who is given a broad discretion to determine whether probable cause exists and to charge those whom he believes to have committed the crime as defined by law and thus should be held for trial. Otherwise stated, such official has the quasi-judicial authority to determine whether or not a criminal case must be filed in court. Whether or not that function has been correctly discharged by the public prosecutor, i.e., whether or not he has made a correct ascertainment of the existence of probable cause in a case, is a matter that the trial court itself does not and may not be compelled to pass upon.

The judicial determination of probable cause, on the other hand, is one made by the judge to ascertain whether a warrant of arrest should be issued against the accused. The judge must satisfy himself that based on the evidence submitted, there is necessity for placing the accused under custody in order not to frustrate the ends of justice. If the judge finds no probable cause, the judge cannot be forced to issue the arrest warrant.[59]

The trial court arrives at a finding independently of the prosecutor's findings. It cannot just blindly accept the prosecutor's conclusions that there was probable cause to issue a warrant of arrest. In *Ho v. People*: [60]

Lest we be too repetitive, we only wish to emphasize three vital matters once more: First, as held in *Inting*, the determination of probable cause by the prosecutor is for a purpose different from that which is to be made by the judge. Whether there is reasonable ground to believe that the accused is guilty of the offense charged and should be held for trial is what the prosecutor passes upon. The judge, on the other hand, determines whether a warrant of arrest should be issued against the accused, i.e. whether there is a necessity for placing him under immediate custody in order not to frustrate the ends of justice. Thus, even if both should base their findings on one and the same proceeding or evidence, there should be no confusion as to their distinct objectives.

Second, since their objectives are different, the judge cannot rely solely on the report of the prosecutor in finding probable cause to justify the issuance of a warrant of arrest. Obviously and understandably, the contents of the prosecutor's report will support his own conclusion that there is reason to charge the accused of an offense and hold him for trial. However, the judge must decide independently. Hence, he must have supporting evidence, other than the prosecutor's bare report, upon which to legally sustain his own findings on the existence (or nonexistence) of probable cause to issue an arrest order. This responsibility of determining personally and independently the existence or nonexistence of probable cause is lodged in him by no less than the most basic law of the land. Parenthetically, the prosecutor could ease the burden of the judge and speed up the litigation process by forwarding to the latter not only the information and his bare resolution finding probable cause, but also so much of the records and the evidence on hand as to enable His Honor to make his personal and separate judicial finding on whether to issue a warrant of arrest.

Lastly, it is not required that the complete or entire records of the case during the preliminary investigation be submitted to and examined by the judge. We do not intend to unduly burden trial courts by obliging them to examine the complete records of every case all the time simply for the purpose of ordering the arrest of an accused. What is required, rather, is that the judge must have sufficient supporting documents (such as the complaint, affidavits, counter-affidavits, sworn statements of witnesses or transcripts of stenographic notes, if any) upon which to make his independent judgment or, at the very least, upon which to verify the findings of the prosecutor as to the existence of probable cause. The point is: he cannot rely solely and entirely on the prosecutor's recommendation, as Respondent Court did in this case. Although the prosecutor enjoys the legal presumption of regularity in the performance of his official duties and functions, which in turn gives his report the presumption of accuracy, the Constitution, we repeat, commands the judge to personally determine probable cause in the issuance of warrants of arrest. This Court has consistently held that a judge fails in his bounden duty if he relies merely on the certification or the report of the investigating officer.[61]

If the prosecutor finds probable cause, an information is filed in court. Once the information has been filed, the court acquires full jurisdiction over the case.[62] Any question on the finding of probable cause, therefore, must be addressed to its sound discretion. In *Crespo v. Mogul*:[63]

The rule therefore in this jurisdiction is that once a complaint or information is filed in Court any disposition of the case as its dismissal or the conviction or acquittal of the accused rests in the sound discretion of the Court. Although the fiscal retains the direction and control of the prosecution of criminal cases even while the case is already in Court he cannot impose his opinion on the trial court. The Court is the best and sole judge on what to do with the case before it. The determination of the case is within its exclusive jurisdiction and competence. A motion to dismiss the case filed by the fiscal should be addressed to the Court who has the option to grant or deny the same. It does not matter if this is done before or after the arraignment of the accused or that the motion was filed after a reinvestigation or upon instructions of the Secretary of Justice who reviewed the records of the investigation.[64]

Even after the information is filed, a slew of other remedies is still available to the accused prior to arraignment. The accused may file a petition for review with the Secretary of Justice assailing the prosecutor's resolution finding probable cause. If the Secretary of Justice reverses the prosecutor's findings, they can move to dismiss the information.[65] The trial court then has the discretion whether to dismiss the information or to proceed with the case. Its refusal to dismiss the case may also be subject to a petition for certiorari under Rule 65. Meanwhile, filing the petition for review before the Secretary of Justice also effectively suspends the arraignment.[66] If the trial court refuses to suspend the arraignment despite the pendency of the petition for review, the accused may also file a certiorari action under Rule 65.

The accused may also move to quash the information based on the grounds stated under Rule 117, Section 3[67] of the Rules of Court. The denial of a motion to quash, however, is merely interlocutory and cannot be subject to a certiorari petition under Rule 65. The arguments in the motion to quash, however, can still be raised as defenses

during trial. Should there be intervening actions by higher courts, as in this case, the accused may also file, apart from the motion to quash, a motion to dismiss based on the tenor of the intervening decision. Also, after evidence has been offered by the prosecution, it can likewise file a demurrer to evidence.

When properly filed, these remedies may in effect dismiss the information, the same relief that is often brought before this Court in certiorari actions questioning the determination of probable cause. Thus, to satisfy the requirement that there should be no other plain, speedy, and adequate remedy, the petitioners should show that the reliefs they seek from this Court are the same ones previously denied by the lower courts.

In this case, the trial court arraigned petitioners on November 21, 2018,[68] which means that it had already found probable cause to issue the warrants of arrest against them. Probable cause has already been judicially determined. The prudent course of action was to proceed to trial.

In *De Lima v. Reyes*,[69] this Court dismissed a petition for review on certiorari questioning the Secretary of Justice's finding of probable cause against the accused for being moot, as probable cause had already been judicially determined:

Here, the trial court has already determined, independently of any finding or recommendation by the First Panel or the Second Panel, that probable cause exists to cause the issuance of the warrant of arrest against respondent. Probable cause has been judicially determined. Jurisdiction over the case, therefore, has transferred to the trial court. A petition for certiorari questioning the validity of the preliminary investigation in any other venue has been rendered moot by the issuance of the warrant of arrest and the conduct of arraignment.

The Court of Appeals should have dismissed the Petition for Certiorari filed before them when the trial court issued its warrant of arrest. Since the trial court has already acquired jurisdiction over the case and the existence of probable cause has been judicially determined, a petition for certiorari questioning the conduct of the preliminary investigation ceases to be the "plain, speedy, and adequate remedy" provided by law. Since this Petition for Review is an appeal from a moot Petition for Certiorari, it must also be rendered moot.

The prudent course of action at this stage would be to proceed to trial. Respondent, however, is not without remedies. He may still file any appropriate action before the trial court or question any alleged irregularity in the preliminary investigation during pre-trial.[70]

I understand that there is some hesitation with such a drastic pronouncement, since "[t]he purpose of a preliminary investigation is to secure the innocent against hasty, malicious and oppressive prosecution, and to protect [them] from an open and public accusation of crime, from the trouble, expense and anxiety of a public trial, and also to protect the state from useless and expensive trials." [71] This Court, however, should be mindful enough to distinguish between fishing expeditions and legitimate investigations done to protect the public trust.

A judicial determination of probable cause does not always result in a warrant of arrest. A complaint may very well be dismissed outright if it does not show sufficient evidence to engender a reasonable belief that a crime had probably been committed. Entertaining these kinds of petitions only shows how little trust this Court has in the trial courts' and the Sandiganbayan's abilities to determine if a criminal suit was malicious or oppressive.

We should refrain from making our own determination of probable cause whenever petitions of this nature are filed before us. Preliminary investigations are evidentiary in nature. We should not delve into intricate factual matters and make our own factual assumptions at our level. This Court's determination should be purely procedural-whether the petition before us was the plain, speedy, and adequate remedy provided by law.

The policy of non-interference in exclusively prosecutorial matters is grounded on sound reasoning. This Court should have enough confidence in our lower courts to weed out unnecessary prosecutions and useless trials. A

petition for certiorari before this Court is not always the proper remedy to question the finding of probable cause. The petitioner must prove that the finding of probable cause was done in a capricious, whimsical, arbitrary, and despotic manner. Anything less than grave abuse of discretion should be dismissed.

ACCORDINGLY, I vote to DISMISS the Petition.

[1] RULES OF COURT, Rule 65, sec. 1.

[2] Ponencia, p. 2.

[3] Id.

[4] Id. at 3. *Alyansa Para sa Bagong Pilipinas v. Energy Regulatory Commission*, G.R. No. 227670, May 3, 2019, <<https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/65064>> [Per J. Carpio, En Banc], however, states that the effectivity date of the Department of Energy Circular was June 30, 2015. When the Energy Regulatory Commission issued the Competitive Selection Process Guidelines, the effectivity date was reset to November 7, 2015.

[5] Id.

[6] Id.

[7] Id. at 4.

[8] Republic Act No. 3019 (1960), sec. 3 provides:

SECTION 3. Corrupt practices of public officers. - In addition to acts or omissions of public officers already penalized by existing law, the following shall constitute corrupt practices of any public officer and are hereby declared to be unlawful:

....

(e) Causing any undue injury to any party, including the Government, or giving any private party any unwarranted benefits, advantage or preference in the discharge of his official, administrative or judicial functions through manifest partiality, evident bad faith or gross inexcusable negligence. This provision shall apply to officers and employees of offices or government corporations charged with the grant of licenses or permits or other concessions.

[9] Ponencia, p. 4.

[10] *Alyansa Para sa Bagong Pilipinas v. Energy Regulatory Commission*, G.R. No. 227670, May 3, 2019, <<https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/65064>> [Per J. Carpio, En Banc].

[11] Ponencia, pp. 4-5.

[12] Id. at 5.

[13] Id.

[14] See J. Zalameda, Dissenting Opinion, p. 9.

[15] Chair Jose Vicente Salazar filed a separate Petition for Certiorari before this Court, docketed as G.R. No. 240288. There is no explanation why these cases were not consolidated.

[16] Ponencia, p. 6.

[17] *Alyansa Para sa Bagong Pilipinas v. Energy Regulatory Commission*, G.R. No. 227670, May 3, 2019, <<https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/65064>> [Per J. Carpio, En Banc].

[18] *Id.* at 7.

[19] *Id.* at 16-17.

[20] RULES OF COURT, Rule 65, sec. 1.

[21] Ponencia, p. 5.

[22] See J. Zalameda, Dissenting Opinion, p. 9.

[23] CONST., art XI, sec. 12 provides:

SECTION 12. The Ombudsman and his Deputies, as protectors of the people, shall act promptly on complaints filed in any form or manner against public officials or employees of the Government, or any subdivision, agency or instrumentality thereof, including government-owned or controlled corporations, and shall, in appropriate cases, notify the complainants of the action taken and the result thereof.

[24] *Presidential Ad Hoc Fact-Finding Committee on Behest Loans v. Desierto*, 415 Phil. 145, 151 (2001) [Per J. Pardo, En Banc].

[25] *Republic v. Desierto*, 541 Phil. 57, 67 (2007) [Per J. Azcuna, First Division].

[26] *People v. Court of Appeals*, 361 Phil. 401, 410-413 (1999) [Per J. Panganiban, Third Division].

[27] *Pilapil v. Sandiganbayan*, 293 Phil. 368, 381-382 (1993) [Per J. Nocon, En Banc].

[28] 802 Phil. 564 (2016) [Per J. Leonen, Second Division].

[29] *Id.* at 590.

[30] *Republic v. Desierto*, 541 Phil. 57, 67-68 (2007) [Per J. Azcuna, First Division].

[31] CONST., art. VIII, sec. 1.

[32] *Reyes v. Office of the Ombudsman*, 810 Phil. 106, 115 (2017) [Per J. Leonen, Second Division].

[33] 810 Phil. 106 (2017) [Per J. Leonen, Second Division].

[34] *Id.* at 115 citing *Angeles v. Secretary of Justice*, 503 Phil. 93, 100 (2005) [Per J. Carpio, First Division].

[35] Rollo, pp. 44-49 as cited in J. Zalameda's Dissenting Opinion, p. 3.

[36] 327 Phil. 916 (1996) [Per J. Romero, Second Division].

[37] *Id.* at 923 citing *Salonga v. Cruz Paño*, 219 Phil. 402 (1985) [Per J. Gutierrez, Jr., En Banc]; *Hashim v. Boncan*, 71 Phil. 216 (1941) [Per J. Laurel, En Banc]; *Paderanga v. Drilon*, 273 Phil. 290 (1991) [Per J. Regalado, En Banc]; and J. Francisco, Concurring Opinion in *Webb v. De Leon*, 317 Phil. 758, 809-811 (1995) [Per J. Puno, Second Division].

[38] Ponencia, pp. 11-12.

[39] G.R. No. 227670, May 3, 2019, <<https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/65064>> [Per J. Carpio, En Banc].

[40] *Id.*

[41] J. Caguioa, Concurring Opinion, pp. 2-3 citing CONST., art. VIII, sec. 1.

[42] 254 Phil. 418 (1989) [Per J. Narvasa, First Division].

[43] Id. at 426-427.

[44] 751 Phil. 301 (2015) [Per J. Leonen, En Banc].

[45] Id. at 329-330.

[46] See J. Leonen, Concurring Opinion in *Inmates of the New Bilibid Prison v. De Lima*, G.R. Nos. 212719 and 214637, June 25, 2019, <<https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/65257>> [Per J. Peralta, En Banc] citing *Association of Medical Clinics for Overseas Workers, Inc. (AMCOW) v. GCC Approved Medical Centers Association, Inc.*, 802 Phil. 116, 142 (2016) [Per J. Brion, En Banc].

[47] See *GSIS Family Bank Employees Union v. Villanueva*, G.R. No. 210773, January 23, 2019, <<https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/64921>> [Per J. Leonen, Third Division] citing *Association of Medical Clinics for Overseas Workers, Inc. (AMCOW) v. GCC Approved Medical Centers Association, Inc.*, 802 Phil. 116, 142 (2016) [Per J. Brion, En Banc].

[48] See J. Leonen, Separate Opinion in *Gios-Samar, Inc. v. Department of Transportation and Communications*, G.R. No. 217158, March 12, 2019, <<https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/64970>> [Per J. Jardeleza, En Banc].

[49] *Personal Collection Direct Selling v. Carandang*, 820 Phil. 706, 722 (2017) [Per J. Leonen, Third Division].

[50] *Chan v. Secretary of Justice*, 572 Phil. 118, 132 (2008) [Per J. Nachura, Third Division].

[51] RULES OF COURT, Rule 65, sec. 1 provides:

SECTION I. Petition for certiorari. - When any tribunal, board or officer exercising judicial or quasi-judicial functions has acted without or in excess its or his jurisdiction, or with grave abuse of discretion amounting to lack or excess of jurisdiction, and there is no appeal, or any plain, speedy, and adequate remedy in the ordinary course of law, a person aggrieved thereby may file a verified petition in the proper court, alleging the facts with certainty and praying that judgment be rendered annulling or modifying the proceedings of such tribunal, board or officer, and granting such incidental reliefs as law and justice may require.

[52] RULES OF COURT, Rule 65, sec. 1.

[53] *People v. Castillo*, 607 Phil. 754 (2009) [Per J. Quisumbing, Second Division].

[54] See RULES OF COUR, Rule 112.

[55] The Ombudsman Act of 1989.

[56] The most common being the 2000 National Prosecution Service Rules on Appeal.

[57] CONST., art. III, sec. 2.

[58] 607 Phil. 754 (2009) [Per J. Quisumbing, Second Division].

[59] Id. at 764-765 citing *Paderanga v. Drilon*, 273 Phil. 290, 296 (1991) [Per J. Regalado, En Banc]; *Roberts, Jr. v. Court of Appeals*, 324 Phil. 568, 620-621 (1996) [Per J. Davide, Jr., En Banc]; *Ho v. People*, 345 Phil. 597, 611 (1997) [Per J. Panganiban, En Banc]; and *People and Dy v. Court Appeals*, 361 Phil. 401 (1999) [Per J. Panganiban, Third Division].

[60] 345 Phil. 597 (1997) [Per J. Panganiban, En Banc].

[61] Id. at 611-612 citing RULES OF COURT, Rule 112, sec. 6(b) and J. Puno, Dissenting Opinion in Roberts Jr. v. Court of Appeals, 324 Phil. 568 (1996) [Per J. Davide, Jr., En Banc].

[62] See People v. Castillo, 607 Phil. 754 (2009) [Per J. Quisumbing, Second Division].

[63] 235 Phil. 465 (1987) [Per J. Gancayco, En Banc].

[64] Id. at 476.

[65] See RULES OF COURT, Rule 112, sec. 4.

[66] See RULES OF COURT, Rule 116, sec. 11.

[67] RULES OF COURT, Rule 117, sec. 3 provides:

SECTION 3. Grounds. - The accused may move to quash the complaint or information on any of the following grounds:

- (a) That the facts charged do not constitute an offense;
- (b) That the court trying the case has no jurisdiction over the offense charged;
- (c) That the court trying the case has no jurisdiction over the person of the accused;
- (d) That the officer who filed the information had no authority to do so;
- (e) That it does not conform substantially to the prescribed form;
- (f) That more than one offense is charged except when a single punishment for various offenses is prescribed by law;
- (g) That the criminal action or liability has been extinguished;
- (h) That it contains averments which, if true, would constitute a legal excuse or justification; and
- (i) That the accused has been previously convicted or acquitted of the offense charged, or the case against him was dismissed or otherwise terminated without his express consent.

[68] See J. Zalameda, Dissenting Opinion, p. 9.

[69] 776 Phil. 623 (2016) [Per J. Leonen, Second Division].

[70] Id. at 652-653 citing RULES OF COURT, Rule 65, sec. 1.

[71] Salonga v. Hon. Paño, 219 Phil. 402, 428 (1985) [Per J. Gutierrez, Jr., En Banc].

CONCURRING OPINION

CAGUIOA, J.:

I concur with the ponencia in granting the petition, reversing and setting aside the September 29, 2017 Resolution and April 20, 2018 Order of the Ombudsman, and directing the dismissal of the Information. The ponencia is absolutely correct in finding that the Ombudsman committed grave abuse of discretion when it found the existence of probable cause that petitioners violated Section 3(e) of Republic Act (R.A.) No. 3019.[1]

To my mind, this case highlights the need for the prosecutorial arms of the State to carefully balance the need to prosecute criminal offenses, on the one hand, and the duty to protect the innocent from baseless suits, especially when innocent public officers are involved, on the other.

At the very heart of a preliminary investigation is the duty to secure the innocent against hasty, malicious and oppressive prosecution, and to protect them from an open and public accusation of a crime, from the trouble, expense and anxiety of a public trial. Indeed, the Ombudsman has this duty, as well as the duty to protect the State from useless and expensive trial. As the Court held in *Baylon v. Office of the Ombudsman*[2] (Baylon):

Agencies tasked with the preliminary investigation and prosecution of crimes must always be wary of undertones of political harassment. They should never forget that the purpose of a preliminary investigation is to secure the innocent against hasty, malicious and oppressive prosecution, and to protect one from an open and public accusation of a crime, from the trouble, expense and anxiety of a public trial, and also to protect the State from useless and expensive trial. It is, therefore, imperative upon such agencies to relieve any person from the trauma of going through a trial once it is ascertained that the evidence is insufficient to sustain a *prima facie* case or that no probable cause exists to form a sufficient belief as to the guilt of the accused.[3]

The Ombudsman's grave abuse of discretion in this case is starkly evident when it found the existence of probable cause even if no proof at all was presented of the elements of Section 3(e) of R.A. No. 3019.

Courts and the prosecutorial arms of the State ought to bear in mind that our penal laws on corrupt public officials are meant to enhance, instead of stifle, public service. If every mistake, error, or oversight is met with criminal prosecution, then no one would ever dare take on the responsibility of serving in the government. We cannot continue to weaponize each little misstep lest we lose even the good people in government.[4]

Lack of elements of Section 3 (e) of
R.A. No. 3019

The elements of a violation of Section 3(e) of R.A. No. 3019 are:

- (1) the offender is a public officer;
- (2) the act was done in the discharge of the public officer's official, administrative or judicial functions;
- (3) the act was done through manifest partiality, evident bad faith, or gross inexcusable negligence; and
- (4) the public officer caused any undue injury to any party, including the Government, or gave any unwarranted benefits, advantage or preference.[5]

Petitioners are public officers who acted in the discharge of their official functions, thus the presence of the first two elements above are present. The third and fourth elements, however, are completely absent in the case at bar.

While it is true that finding probable cause is a prosecutorial prerogative, the Court cannot, under the guise of non-interference, abdicate its solemn duty "to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government,"[6] including the Ombudsman. Stated differently, one of the known exceptions to the rule on non-interference with respect to the Ombudsman's determination of probable cause is when there is grave abuse in the exercise of its discretion.[7]

More important than the conventional adherence to rules of procedure is the right of persons to be free from unwarranted and vexatious prosecution.[8] Thus, the general rule that the Court does not interfere with the discretion of the Ombudsman to determine the existence of probable cause has several settled exceptions in jurisprudence,[9] including grave abuse of discretion.

In *Baylon*, the Court ruled that the Ombudsman committed grave abuse of discretion because an Information was filed against therein petitioner for violation of Section 3(e), R.A. No. 3019 despite the lack of probable cause. In the case, the Court emphatically pointed out that some essential elements of the offense charged were missing;

hence, the Ombudsman's resolution finding probable cause against therein petitioner was reversed and set aside and the Sandiganbayan was ordered to dismiss the criminal case.

In the same vein, the Court in *Venus v. Desierto*[10] set aside the Ombudsman's finding of probable cause because of the absence of a prima facie case. The case involved a public officer, Eriberto L. Venus (Venus), who was charged with the violation of Section 3(e) of R.A. No. 3019. In a petition for prohibition under Rule 65, Venus assailed among others, the filing of an Information against him based on the alleged existence of bad faith on his part, and argued that the facts did not make out even a prima facie case for violation of Section 3(e) of R.A. No. 3019. The Court examined the facts and eventually ruled that the finding of bad faith, and thus probable cause, by the Ombudsman was unsupported. In any event, to be liable under the law, "evident" bad faith must be shown. There being no bad faith to speak of in the first place, there was no reasonable ground to believe that Venus had violated the law. Hence, the Court ordered the dismissal of the criminal case in the Sandiganbayan for want of probable cause.

Significantly, in the Court's discussion explaining its reasons for ordering the dismissal of the case, it cautioned the agencies tasked with the preliminary investigation and prosecution of crimes to be wary of undertones of political harassment. Further, the Court emphasized that these agencies were duty-bound to relieve any person from the trauma of going through a trial after ascertaining that the evidence was insufficient to sustain a prima facie case or that no probable cause existed to form a sufficient belief as to the guilt of the accused.

As will be shown below, the Ombudsman gravely abused its discretion in finding probable cause against petitioners despite the absence of the third and fourth elements in accordance with the above jurisprudential rulings.

Lack of the third element: Manifest partiality, or evident bad faith, or gross inexcusable negligence

In *Sison v. People*,[11] it was held that "[t]he third element of Section 3(e) of [R.A. No.] 3019 may be committed in three ways, i.e., through manifest partiality, evident bad faith or gross inexcusable negligence." [12]

A perusal of the complaint filed against the Energy Regulatory Commission (ERC) Commissioners, however, reveals that there was absolutely no substantiation at all (i.e., no reference to any proof or evidence) of its accusation that the restatement of the effectivity date of the competitive selection process (CSP) requirement was done with "manifest partiality, evident bad faith, or gross inexcusable negligence." All that the complaint did was make blanket claims that the issuance of Resolution No. 1, series of 2016[13] (Resolution No. 1) was meant to favor Manila Electric Company (MERALCO) and its sister companies, as there was allegedly "no visible valid reason"[14] for the ERC Commissioners to extend the effectivity of the CSP requirement. The complaint thus appears only to hint that the issuance of Resolution No. 1 was done with manifest partiality in favor of MERALCO.

Manifest partiality, however, is defined in jurisprudence as "clear, notorious, or plain inclination or predilection to favor one side or person rather than another." [15] Viewed from this definition, it is quite clear that there could not be any reasonable belief that Resolution No. 1 was issued with manifest partiality. To repeat, there was absolutely no proof submitted to establish this point. In contrast, the ERC Commissioners submitted a considerable amount of evidence establishing the contrary.

In one of the Whereas Clauses of Resolution No. 1 itself, there is mention of the letters for clarification received

by the ERC from various stakeholders. It reads:

WHEREAS, since the publication of the CSP Resolution on 06 November 2015, the Commission has received several letters from stakeholders which raised issues on the constitutionality of the effectivity of the CSP Resolution; sought clarification on the implementation of the CSP and its applicability to the renewal and extension of PSAs, as requested a determination of the accepted forms of CSP, and submitted grounds for exemption from its applicability, among others.[16]

The letters referred to in the above Whereas Clause were submitted by petitioners as attachments in their Joint Counter-Affidavit dated February 1, 2017 and again in their Motion for Reconsideration dated December 27, 2017 before the Ombudsman. Some of these letters include:

- In a November 25, 2015 letter, SMC Global Power requested that it be allowed to file its Power Supply Contracts (PSCs) because the requirements imposed pursuant to the CSP implementation were non-existent when their PSCs were evaluated and signed:

Upon filing with the ERC, however, our counter-part counsel for the DUs and the ECs (Dechavez & Evangelista Law Offices) informed us that even at the pre-filing stage, the ERC rejects applications which do not include the following: DUs/ECs Invitation to Participate and Submit Proposal, DUs/ECs' Terms of Reference, Proposals Received by the DU/EC, tender offers, DU/ECs Special Bids and Awards Committees (SBAC) Evaluation Report, DU Board Resolution confirming the approval of the SBAC Evaluation report and Notice of Award issued by the DU/EC.

It is significant to note that all of these requirements, even the creation of the SBAC, were non-existent when our PSCs were evaluated and signed. x x x

To this end, we respectfully request the consideration of the Honorable Commission to allow us to file, and for the Commission to accept, the applications for approval of the subject PSCs. In our case, mere filing is critical for us to achieve financial close for purposes of funding our power plant project.

The filing of the application will enable us to continue financing the Limay Phase 1 Project, Malita Project and proceed with Limay Phase 2 Project to augment the capacity in the Luzon and Mindanao Grids and prevent the projected shortage in 2017.[17]

- In another letter dated December 14, 2015 letter, SMC Global Power, reiterated its request above for the acceptance and approval of its PSCs that were signed prior to the issuance of ERC Resolution No. 13:

Further to our letter dated November 25, 2015, we would like to reiterate our request to the Honorable Commission En Banc to accept and allow the filing of Power Supply Contracts (PSC) already signed prior to its issuance Resolution No. 13, Series of 2015 "A Resolution Directing All Distribution Utilities (DUs) to Conduct Competitive Selection Process (CSP) in the Procurement of Their Supply to the Captive Market."

We wish to stress that in the event the subject PSCs cannot be filed, the Honorable Commission would effectively invalidate the same to the detriment of the contracting parties and the industry. It is significant to note that Distribution Utilities (DU) and Electric Cooperatives (EC) have carefully evaluated and considered the most advantageous terms and conditions for its consumers prior to signing the subject PSCs.

x x x x

Meanwhile, another round of CSP may likely alter the terms of the contract that could prove to be disadvantageous to the DU or EC.

Considering the execution of the PSCs and the stage of their application process prior to the issuance of the CSP requirement, we beg the indulgence of the Honorable Commission En Banc to accept the subject PSCs

and allow the filing thereof to proceed.[18]

- In a December 1, 2015 letter, Philippine Rural Electric Cooperative Association, Inc. (PHILRECA) requested for exemption from coverage of Department Circular No. DC2015-06-0008:

May we respectfully furnish you a copy of the PHILRECA Board Resolution No. 10-23-2015 "Resolution Requesting the Department of Energy and the Energy Regulatory Commission (ERC) to exempt the Southern Philippines Power Corporation (SPPC) and Western Mindanao Power Corporation (WMPC) from the coverage of Department Circular No. DC2015-06-0008".[19]

In the Board Resolution, PHILRECA stated that "Mindanao is currently experiencing power shortage and the Electric Cooperatives (ECs) to undergo the competitive selection process in order to enter into a contract with these two (2) power plants will further aggravate the power situation in Mindanao." [20]

- In a December 10, 2015 letter, Agusan del Norte Electric Cooperative, Inc. (ANECO), asked for confirmation that any extension of PSAs or Energy Supply Agreements (ESAs) previously approved is outside the scope of ERC Resolution No. 13:

The ESA, as amended and supplemented, will expire on 25 June 2016. Given the power shortage in Mindanao, the insufficiency of the NPC/PSALM supply, taken together with the continuing demand growth of our end-users, we wish to exercise the option provided under the Amendment to the ESA to extend the Term of our Agreement and Supplemented ESA with TMI x x x:

x x x x

Relating to this provision to Reso 13, we are of the impression that Reso 13 may not be strictly applied to ESA extensions, especially considering that the Honorable Commission has already meticulously scrutinized and approved TMI's Fixed and O&M, Energy and Fuel Fees, as well as its asset base in determining the Capital Recovery Fee.

x x x x

Since Section 4 of the Resolution states that the CSP requirement shall not apply to PSAs (or ESAs) already filed with the ERC, we are of the understanding that an extension of an existing ESA, which is part of the provisions submitted to and has been approved by the ERC, albeit provisionally, is outside the coverage of the present Resolution. Hence, we intend to enter into an extension of our existing ESA with TMI, applying the same methodology and asset base as approved by the Honorable Commission in arriving at the rates.[21]

- In a December 21, 2015 letter of Camarines Sur IV Electric Cooperative, Inc. (CASURECO) and Unified Leyte Geothermal Energy, Inc. (ULGEI), they asked for an extension to file their joint application:

On 03 August 2015, CASURECO IV and San Miguel Energy Corporation (SMEC) entered into a mutual agreement before this Honorable Commission to pre-terminate the Power Supply Contract dated 23 August 2013 between CASURECO IV and SMEC. As a result of the pre-termination of SMEC PSC, beginning 00:00H of 26 August 2015, SMEC ceased to supply power to CASURECO IV. x x x

x x x x

x x x Because CASURECO IV received no proposals for its power supply requirements, it began direct negotiations with ULGEI. x x x

x x x x

Since CASURECO IV received such letter on 24 September 2015, CASURECO IV and ULGEI had until 23 November 2015 to file a joint application for the approval of a power supply agreement. Due, however, to the

extensive negotiations conducted to provide the Franchise Area a competitive and reliable supply of power, and since it will take time to prepare and finalize a power supply agreement, CASURECO IV and ULGI requested this Honorable Commission for an additional thirty (30) days within which to file a joint application, or until 23 December 2015.[22]

- In a March 9, 2016 letter of Aklan Electric Cooperative Inc. (AKELCO), it posed some queries regarding the CSP requirement:

We write to advance our queries pertaining to the Competitive Selection Process which is now part of the Power Supply Procurement requirements for all DUs. The related ERC Resolution No. 13 Series of 2015 was already in effect 15 days after its publication last October 20, 2015.

In the case of AKELCO where in previous years, two (2) Power Supply Contracts for base load requirements were already signed by both parties but were not filed with the ERC before the effectivity of the CSP. The queries are as follows:

- If the Power Supply Contracts that were not filed due to non-compliance to CSP still binding?
- What are the ERC's recommended mode of CSPs? Is the so-called "Price Challenge" or Swiss Challenge allowed? and
- Presuming that some of the stipulated provisions (i.e. date of initial delivery, base load demand requirements) in the said contracts cannot be met due to CSP requirement or already unacceptable to either of the party, can we still renegotiate the provisions and at the same time introduce the ERC recommended terms of reference?[23]

- In a December 15, 2015 letter of Astronergy Development, it raised the issue of impairment of contracts:

We respectfully request a meeting with you at your earliest convenience, so that we can discuss our peculiar situation following the issuance of the Resolution. Our meeting objective is to understand your view regarding the retroactive application of the Resolution and further, to understand how to harmonize [the] Resolution in light of the third party legal opinion we have attached herein for your consideration. Lastly, we hope to be allowed a brief opportunity to present and discuss our views on why the Commission's staff should interpret the Resolution in a manner that is consistent with the Commission's past written responses on RE to the Senate Energy Committee; and the Commission's related Decision relevant to our particular circumstances.

x x x x

Section 4 of the Resolution requires the DUs to conduct a CSP for PSAs that have not yet submitted its PSA with the ERC. We believe the result is a retroactive application of the Resolution that impairs our contracts that were entered into in good faith. This creates uncertainties, including the possible revision and rescission of existing binding agreements, which our group of companies, and their shareholders and creditors, are greatly concerned about. There are also specific considerations with each DU: for each PSA we have executed since the application of the Resolution would potentially lead to losses and additional project delay. Any further delay (such as revisiting CSP) would result in a breach of contract for not meeting deadlines.[24]

Even the Department of Energy (DOE) itself recognized the reasonable and legitimate concerns when it endorsed one letter to the ERC. On January 18 2016, the DOE endorsed for the ERC's consideration to allow Abra Electric Corporation (ABRECO) to directly negotiate with a power supplier, albeit without following the CSP requirement.[25] The DOE explained that the said request for endorsement was made in consideration of ABRECO's situation as an ailing electric cooperative and to prevent its vulnerability to volatile wholesale electricity spot market (WESM) prices given that its supply is sourced from it.[26]

Another fact that negates the existence of any manifest partiality by the ERC Commissioners in favor of

MERALCO is the ERC's denial of MERALCO's request for exemption from the CSP requirement. Even the Ombudsman itself, in the Resolution in question, acknowledged that ERC had denied MERALCO's request on December 10, 2015.[27]

Lastly, the complaint lamented that, as a consequence of the issuance of Resolution No. 1, MERALCO was able to submit to ERC, for its approval, seven[28] Power Supply Agreements (PSAs) that did not go through CSP. In the same breath, however, the Ombudsman noted that there were "38 more companies who were able to enter into PSAs and file them with ERC without complying with the CSP requirement." [29]

Given the foregoing, it is thus worth asking: how could there be manifest partiality in favor of MERALCO when it was not just the said company who sought clarification/exemption from the CSP requirement? How could there be manifest partiality when the ERC itself denied MERALCO's request for exemption? How could there be manifest partiality when the perceived benefit, if there even was any, was enjoyed not just by MERALCO but by 38 more companies?

To reiterate, "manifest partiality" requires that there be a clear, notorious, or plain inclination or predilection to favor one side or person rather than another.[30] It is abundantly clear from the foregoing discussion that the evidence or proof that had been submitted by the ERC Commissioners, not to mention the recitals of Resolution No. 1 itself, showed that there was no manifest partiality to favor one side, i.e. MERALCO.

The same is true with respect to the Ombudsman's "finding" of gross inexcusable negligence and evident bad faith in its Resolution: its existence is not supported by any evidence.

To recall, the Ombudsman's Resolution states that "[t]he gross inexcusable negligence of [the ERC Commissioners] benefitted 38 more companies who were able to enter into PSAs and file them with ERC without complying with the CSP requirement." [31]

On the other hand, for evident bad faith, the Ombudsman merely made the following blanket statement:

The manifest partiality, evident bad faith or gross inexcusable negligence of respondents can be gleaned from the following documented chronological events:

- On 20 October 2015, the ERC issued Resolution No. 13, Series of 2015 with the provision that all PSAs and PSCs not filed with the ERC as of 06 November 2015 should already be covered by CSP as their Mandatory Selection Process;
- Thus, by 07 November 2015, the requirement that PSAs not filed with ERC as of said date should already be covered by CSP, already took effect (sic);
- In a Letter dated 26 November 2015, Meralco sought the permission of ERC to exempt their PSCs from CSP requirement;
- On 10 December 2015, the ERC, through Salazar's letter, denied MERALCO's request;
- On 15 March 2016, ERC, through respondents, issued Resolution No. 1, Series of 2016, modifying the effectivity of the Resolution from 07 November 2015 to 30 April 2016, thus, giving a window period for PSAs without CSPs to be filed from 15 March 2016 to 30 April 2016;
- On 29 April 2016, a day before the extended deadline of 30 April 2016, Meralco filed seven PSAs that did not undergo the CSP requirement.[32] (*Italics and underscoring omitted*)

Based on jurisprudence, "gross inexcusable negligence" refers to negligence characterized by the want of even the slightest care, acting or omitting to act in a situation where there is a duty to act, not inadvertently but willfully

and intentionally, with conscious indifference to consequences insofar as other persons may be affected.[33]

However, apart from the use in passing of the term "gross inexcusable negligence," there is absolutely no factual allegation or any logical explanation in the Resolution supporting the conclusion that the ERC Commissioners can be held guilty of gross inexcusable negligence.

The same is true for the Ombudsman's conclusion of the existence of evident bad faith. Evident bad faith "connotes not only bad judgment but also palpably and patently fraudulent and dishonest purpose to do moral obliquity or conscious wrongdoing for some perverse motive or ill will." [34] It "contemplates a state of mind affirmatively operating with furtive design or with some motive or self-interest or ill will or for ulterior purpose[s]." [35] Simply put, it partakes of the nature of fraud. [36]

The presence of evident bad faith requires that the accused acted with a malicious motive or intent, or ill will. It is not enough that the accused violated a provision of law. To constitute evident bad faith, it must be proven that the accused acted with fraudulent intent. [37]

As explained by the Court in *Sistoza v. Desierto* (*Sistoza*), [38] "mere bad faith or partiality and negligence per se are not enough for one to be held liable under the law since the act of bad faith or partiality must in the first place be evident or manifest." [39]

Because evident bad faith entails manifest deliberate intent on the part of the accused to do wrong or to cause damage, it must be shown that the accused was "spurred by any corrupt motive." [40] Mistakes, therefore, no matter how patently clear, committed by a public officer are not actionable "absent any clear showing that they were motivated by malice or gross negligence amounting to bad faith." [41]

In the present case, much like with the other modes of committing the third element, there is absolutely no proof to prove the existence of bad faith. If there is not even an iota of bad faith exhibited here, then how could there be evident bad faith?

More importantly, there could be no evident bad faith on the part of the ERC Commissioners in issuing Resolution No. 1 because it is quite evident from the chronology of events outlined by the Ombudsman itself that they believed, in good faith, that they possessed powers granted under the Electric Power Industry Reform Act of 2001 (EPIRA) to issue Resolution No. 1.

There is good faith in this case because not only is there a presumption that official duty has been regularly performed, [42] but also because mistakes committed upon a doubtful or difficult question of law may be the basis of good faith. [43] Considering that even members of the Court differed [44] in their opinions as regards the extent of ERC's - and its Commissioners' powers, the question is thus undoubtedly a difficult question of law, which is certainly basis of the Commissioners' good faith.

Clear from the foregoing, therefore, is that there could be no evident bad faith that can be ascribed to the ERC Commissioners.

Absence of the fourth element: Causing undue injury to any party, or giving any private party any unwarranted benefit

With regard to the fourth element, the Court held in *Santiago v. Garchitorena* [45] that there are "two ways of violating Section 3(e) of R.A. No. 3019. These are: (a) by causing any undue injury to any party, including the Government; and (b) by giving any private party any unwarranted benefit, advantage or preference." [46] Similar

to the third element, the last element of either causing undue injury to any party or giving any private party any unwarranted advantage or benefit is likewise absent.

The Ombudsman, in its Resolution finding probable cause against the ERC Commissioners, ruled that the element was present, ratiocinating as follows:

Respondents, in the exercise of their official regulatory functions, have given unwarranted benefits, advantage or preference to MERALCO and other companies. Under the CSP Resolution, said companies were not qualified to file their PSAs for being non-compliant with the CSP requirement. But respondents' failure to recognize the effects of the suspension of the implementation of CSP gave said companies the concession to file their PSAs and PSCs without having to comply with the CSP policy.

They committed the offense in connection with the duty to promote competition as mandated by the EPIRA and to implement CSP as required by several DOE and ERC Resolutions. In performing their duty, they issued [Resolution No. 1], purportedly to pursue the government's policy of infusing competition and implementing CSP in PSAs and PSCs, but which, as evidence shows, digresses from said policies to favor companies.[47]

This is sheer grave abuse of discretion.

First of all, the element of "unwarranted benefits" must be understood in the context of corruption. As I stated at length in my Concurring Opinion in *Villarosa v. People*:^[48]

As its name implies, and as what can be gleaned from the deliberations of Congress, RA 3019 was crafted as an anti-graft and corruption measure. At the heart of the acts punishable under RA 3019 is corruption. As explained by one of the sponsors of the law, Senator Arturo M. Tolentino, "[w]hile we are trying to penalize, the main idea of the bill is graft and corrupt practices. x x x Well, the idea of graft is the one emphasized." ^[49] Graft entails the acquisition of gain in dishonest ways.^[50]

Hence, in saying that a public officer gave "unwarranted benefits, advantage or preference," it is not enough that the benefits, advantage, or preference was obtained in transgression of laws, rules, and regulations. Such benefits must have been given by the public officer to the private party with corrupt intent, a dishonest design, or some unethical interest. This is in alignment with the spirit of RA 3019, which centers on the concept of graft.

I recognize that this is not the understanding under the current state of jurisprudence. Jurisprudence has defined the term "unwarranted" as simply lacking adequate or official support; unjustified; unauthorized or without justification or adequate reason. "Advantage" means a more favorable or improved position or condition; benefit, profit or gain of any kind; benefit from some course of action. "Preference" signifies priority or higher evaluation or desirability; choice or estimation above another.^[51] The term "private party" may be used to refer to persons other than those holding public office,^[52] which may either be a private person or a public officer acting in a private capacity to protect his personal interest.^[53]

Thus, under current jurisprudence, in order to be found guilty for giving any unwarranted benefit, advantage, or preference, it is enough that the public officer has given an unauthorized or unjustified favor or benefit to another, in the exercise of his official, administrative or judicial functions.^[54] By giving any private party unwarranted benefit, advantage, or preference, damage is not required. It suffices that the public officer has given unjustified favor or benefit to another in the exercise of his official functions.^[55] Proof of the extent or quantum of damage is not even essential, it being sufficient that the injury suffered or benefit received could be perceived to be substantial enough and not merely negligible.^[56]

I respectfully submit, and evidently the majority agrees, that it is high time for the Court to revisit this line of reasoning.

The foregoing understanding of "unwarranted benefit, advantage, or preference" is too broad that every single misstep committed by public officers that result in benefits to private parties falls under the definition and would thus possibly be criminally punishable. Every little error-no matter how minor - would satisfy the fourth element as the threshold is simply that the benefit be "unjustified," "unauthorized," or "without justification." For instance, a contract awarded in good faith based on an interpretation of the law that would later on be judicially declared incorrect would be sufficient basis for affirming the existence of the fourth element, which may lead to the incarceration of a public officer simply because a private party received a benefit "without justification," yet was revealed to be so only in hindsight.

While it is true that public office is a public trust, the Court is called upon to likewise play its part in not interpreting the laws to effectively be a disincentive to individuals in joining the public service. It is simply absurd to criminally punish every minute mistake that incidentally caused a benefit to private parties even when these acts were not done with corrupt intent.[57] (Emphasis and underscoring supplied)

In this case, as discussed, there is absolutely no proof that the incidental benefits received by the companies - if there is any at all - was linked to, or rooted in, any corrupt intent.

Second, the Court must view the actions of the ERC within the context of the process of approval of PSAs. The mere filing of an application for the approval of a PSA does not equate to an approval of the PSA. There is no guarantee that the ERC would eventually approve the same. PSAs themselves are bilateral power supply contracts that are made subject to review by the ERC precisely to promote true market competition and prevent harmful monopoly and market power abuse.[58]

Thus, prior to the approval of the PSA, the PSA could not affect the consumers, as the distribution utilities (DUs) and the power producers (or Generation Companies or "GenCos") cannot implement the PSA without the ERC's approval. In the same manner that the consumers are not affected, the DUs and the GenCos cannot benefit from a PSA that has yet to be approved by the ERC.

As I discussed in my Dissenting Opinion in *Alyansa Para sa Bagong Pilipinas v. Energy Regulatory Commission*[59] (*Alyansa*), to get the approval of the ERC, the applicant must submit documents and agreements as listed in Rule 20 B, Section 2 of ERC Rules,[60] which include, among others, their Articles of Incorporation, Certificate of Registration from the Securities and Exchange Commission, Certificate of Registration from the Board of Investments, the Power Supply Agreement itself (including an Executive Summary, Sources of Funds, Purchased Power Rate, etc.), and many other documents to show the financial and economic impact of the transaction to the DUs, GenCos and the consumers.

The application has to likewise comply with pre-filing requirements,[61] jurisdictional requirements of publication and notice to all affected parties,[62] pre-trial,[63] and public hearings[64] where the applicant presents its witnesses, who will be subject to cross-examination, re-direct examination, and re-cross examination.[65]

It is only then that the ERC issues a decision on the application after the reception of evidence and compliance with the foregoing requirements.[66]

In the interim, parties may request for provisional authority together with their application for approval of their PSA. The ERC resolves these requests within 75 days from the filing of the application, and if it issues a provisional authority, the ERC is mandated to start the hearing on the application within 30 days from the issuance of the provisional authority.[67] The ERC then resolves the application within 12 months from the issuance of the provisional authority.[68]

The foregoing shows that a PSA will have no impact on consumers unless the ERC has issued a provisional authority or when it approves the application.

There is therefore no basis for the Ombudsman's holding that "there is sufficient evidence that [petitioners] gave unwarranted benefits to Meralco and other companies by exempting them from the coverage of the CSP requirement." [69] There is likewise no basis in the Ombudsman ruling that "[petitioners'] gross inexcusable negligence led to the circumvention of the government policy requiring CSP, and denied the consumers the opportunities to elicit the best price offers and other PSA terms and conditions from suppliers." [70] To be sure, all these are mere unwarranted conjectures.

The ERC, as the industry's independent regulatory body, possesses sufficient powers, as granted to it by the EPIRA, to disapprove or reject a PSA, even without the CSP requirement, if, in its discretion, the PSA would not allow the relevant player in the industry to supply electricity in the least cost manner. As I pointed out in my Dissenting Opinion in *Alyansa*:

Prior to the CSP requirement, DUs would secure their supply of electricity by entering into bilateral contracts with GenCos and the choice of which GenCo to have business with - or from which it will get their supply - rested on the sole discretion of the DUs. This did not mean, however, that prior to the CSP requirement, the DUs had unbridled discretion on the price of electricity to impose on consumers. Far from it. The EPIRA itself provides that DUs "shall have the obligation to supply electricity in the least cost manner to [their] captive market, subject to the collection of retail rate duly approved by the ERC." Further, the ERC was empowered by the EPIRA to review "bilateral power supply contracts" entered into by DUs, and to likewise impose price controls and order the disgorgement of excess profits where, for instance, the DU is found to be engaged in market power abuse or anti-competitive behavior.

x x x x

Indeed, the EPIRA was passed as far back as 2001, or 18 years ago, and the DOE and ERC only conceptualized the CSP in recent years. Throughout the years that the EPIRA was already in effect, and while there was still no CSP requirement in place, the ERC had been continuously doing its mandate of regulating the industry - particularly the DUs - to ensure that the prices passed on to the consumers are at a reasonable cost. [71] (Emphasis and underscoring in the original; citations omitted)

The ERC Commissioners likewise did not cause any party undue injury. According to jurisprudence, "undue injury" as an element of Section 3(e) of R.A. No. 3019 is akin to the concept of actual damages in civil law, and must thus be quantified with certainty. In *Llorente v. Sandiganbayan*, [72] the Court explained:

This point is well-taken. Unlike in actions for torts, undue injury in Sec. 3[e] cannot be presumed even after a wrong or a violation of a right has been established. Its existence must be proven as one of the elements of the crime. In fact, the causing of undue injury or the giving of any unwarranted benefits, advantage or preference through manifest partiality, evident bad faith or gross inexcusable negligence constitutes the very act punished under this section. Thus, it is required that the undue injury be specified, quantified and proven to the point of moral certainty.

In jurisprudence, "undue injury" is consistently interpreted as "actual damage." Undue has been defined as "more than necessary, not proper, [or] illegal;" and injury as "any wrong or damage done to another, either in his person, rights, reputation or property[; that is, the] invasion of any legally protected interest of another." Actual damage, in the context of these definitions, is akin to that in civil law.

In turn, actual or compensatory damages is defined by Article 2199 of the Civil Code as follows:

Art. 2199. Except as provided by law or by stipulation, one is entitled to an adequate compensation only for such pecuniary loss suffered by him as he has duly proved. Such compensation is referred to as actual or

compensatory damages.

Fundamental in the law on damages is that one injured by a breach of a contract, or by a wrongful or negligent act or omission shall have a fair and just compensation commensurate to the loss sustained as a consequence of the defendant's act. Actual pecuniary compensation is awarded as a general rule, except where the circumstances warrant the allowance of other kinds of damages. Actual damages are primarily intended to simply make good or replace the loss caused by the wrong.

Furthermore, damages must not only be capable of proof, but must be actually proven with a reasonable degree of certainty. They cannot be based on flimsy and non-substantial evidence or upon speculation, conjecture or guesswork. They cannot include speculative damages which are too remote to be included in an accurate estimate of the loss or injury.[73] (Emphasis and underscoring supplied; citations omitted)

The foregoing was affirmed in the case of *Pecho v. Sandiganbayan*,[74] where the Court en banc said:

Secondly, the third requisite of Section 3(e), viz., "causing undue injury to any party, including the government," could only mean actual injury or damage which must be established by evidence, the word causing is the present participle of the word cause. As a verb, the latter means "to be the cause or occasion of; to effect as an agent; to bring about; to bring into existence; to make[;] to induce; to compel." The word undue means "more than necessary; not proper; illegal." And the word injury means "any wrong or damage done to another, either in his person, rights, reputation or property. The invasion of any legally protected interest of another." Taken together, proof of actual injury or damage is required.[75] (Emphasis and underscoring supplied; citations omitted)

Here, the records are bereft of any showing that any party - whether the government or any private party - suffered any actual damage or injury. To stress anew, there could be no injury to any party as the PSAs submitted during the period of extension had not been approved.

As the ERC Commissioners clearly did not give any party unwarranted advantages or benefits, or caused any party undue injury, it is without doubt therefore that the fourth element of Section 3(e) of R.A. No. 3019 is not present in this case.

Given the foregoing, it is thus grave abuse of discretion amounting to lack or excess of jurisdiction for the Ombudsman to still find probable cause against the ERC Commissioners despite the evident absence of two of the four elements of the crime charged.

In his Dissenting Opinion, while Associate Justice Marvic Mario Victor F. Leonen (Justice Leonen) concedes that the Court will only interfere when the finding of probable cause was arrived at with grave abuse of discretion,[76] he posits that the Ombudsman did not commit grave abuse of discretion here as it arrived at its conclusion "objectively, with due regard to the evidence on hand." [77]

I respectfully disagree.

As threshed out above, there was, in fact, no evidence presented or relied upon by which any neutral person could conclude that there was probable cause. To repeat, the Ombudsman's findings were conjectures and failed to consider the process of arriving at PSAs and that the extension addressed concerns of numerous stakeholders. To my mind, in determining the existence of grave abuse of discretion, the Court is charged to take a look at whether there is evidence to support such finding of the Ombudsman. If the issue pertains to the weighing of evidence - that is, when evidence is presented and there is doubt as to whether the Ombudsman assessed them correctly as proving the existence of the elements of the offense - then a petition for certiorari is not the proper remedy. However, when the records show the absolute lack of evidence to support the Ombudsman's conclusion, then such

conclusion was arrived at with grave abuse of discretion and may be subject of a petition for certiorari.

The case of *Villarosa v. Ombudsman*[78] aptly defines and describes grave abuse of discretion and how it may be shown, viz.:

Grave abuse of discretion implies a capricious and whimsical exercise of judgment tantamount to lack of jurisdiction. The Ombudsman's exercise of power must have been done in an arbitrary or despotic manner which must be so patent and gross as to amount to an evasion of a positive duty or a virtual refusal to perform the duty enjoined by law.

For the present petition to prosper, petitioners must show this Court that the Ombudsman conducted the preliminary investigation in such a way that amounted to a virtual refusal to perform a duty mandated by law, which petitioners have failed to do.[79]

In relation to this, *Sistoza* states that "[w]hen the Ombudsman does not take essential facts into consideration in the determination of probable cause, it has been ruled that he gravely abuses his discretion." [80]

Here, because the Ombudsman found probable cause to charge Non, et al. with violating Section 3 (e) of R.A. No. 3019 despite the lack of evidence supporting the existence of the elements of the offense, it is clear that the Ombudsman committed grave abuse of discretion.

A final word

At this juncture, it is well to point out that I am aware that the Court had already held in *Alyansa* that the issuance of Resolution No. 1 was attended with grave abuse of discretion. As I maintain my dissent therein - because, to my mind, EPIRA grants the ERC sufficient powers to set the effectivity of the CSP requirement - it is equally worth mentioning that a finding of probable cause is not a necessary consequence of a finding of grave abuse of discretion. Assuming *arguendo* that the ERC, through its Commissioners, erred in "restating" the effectivity of the CSP requirement, this error does not, and should not, mean that the Commissioners should automatically be criminally indicted for such error. Stated differently, errors in the performance of duty should not automatically merit criminal prosecution especially where, as here, no one suffered any undue injury as a result of the error.

For the foregoing reasons, I join the ponencia in granting the petition.

[1] ANTI-GRAFT AND CORRUPT PRACTICES ACT, dated August 17, 1960.

[2] G.R. No. 142738, December 14, 2001, 372 SCRA 437.

[3] *Baylon v. Office of the Ombudsman*; id. at 438; citing *Venus v. Desierto*, 358 Phil. 675, 699-700 (1998).

[4] Concurring Opinion of Justice Caguioa in *Villarosa v. People*, G.R. Nos. 233155-63, June 23, 2020.

[5] *Sison v. People*, G.R. Nos. 170339 & 170398-403, March 9, 2010, 614 SCRA 670, 679.

[6] CONSTITUTION, Art. VIII, Sec. 1.

[7] *Baylon v. Office of the Ombudsman*, supra note 2 at 448.

[8] *Posadas v. Ombudsman*, G.R. No. 131492, September 29, 2000, 341 SCRA 388, 400.

[9] See *Posadas v. Ombudsman*, id. at 397.

[10] See note 3.

[11] *Supra* note 5.

[12] *Id.* at 679.

[13] A RESOLUTION CLARIFYING THE EFFECTIVITY OF ERC RESOLUTION NO. 13, SERIES OF 2015, issued on March 15, 2016.

[14] *Rollo*, Vol. I, p. 65.

[15] *Albert v. Sandiganbayan*, G.R. No. 164015, February 26, 2009, 580 SCRA 279, 290.

[16] Seventh Whereas Clause, Resolution No. 1.

[17] *Rollo*, Vol. I, p. 163.

[18] *Id.* at 169-170.

[19] *Id.* at 164.

[20] *Id.* at 165; emphasis and underscoring supplied.

[21] *Id.* at 167-168.

[22] *Id.* at 171-172.

[23] *Id.* at 175.

[24] *Id.* at 176-177.

[25] *Id.* at 178.

[26] *Id.*

[27] *Id.* at 45.

[28] See *id.* at 63-64.

[29] *Id.* at 48. Italics in the original.

[30] *Albert v. Sandiganbayan*, *supra* note 15.

[31] *Rollo*, Vol. I, p. 48. Italics in the original.

[32] *Id.* at 44-45.

[33] *Sanchez v. People*, G.R. No. 187340, August 14, 2013, 703 SCRA 586, 593.

[34] *Albert v. Sandiganbayan*, *supra* note 15.

[35] *Id.*

[36] *Fonacier v. Sandiganbayan*, G.R. Nos. L-50691, L-52263, L-52766, L-52821, L-53350, L-53397, L-53417 & L-53520, December 5, 1994, 238 SCRA 655, 687.

[37] Concurring Opinion of Justice Caguioa in *Villarosa v. People*, *supra* note 4.

[38] G.R. No. 144784, September 3, 2002, 388 SCRA 307.

[39] *Id.* at 324. Italics in the original.

- [40] Republic v. Desierto, G.R. No. 131397, January 31, 2006, 481 SCRA 153, 161.
- [41] Collantes v. Marcelo, G.R. Nos. 167006-07, August 14, 2007, 530 SCRA 142, 155.
- [42] RULES OF COURT, Rule 131, Sec. 3(m).
- [43] CIVIL CODE, Art. 526.
- [44] See Dissenting Opinions of Justices Alfredo Benjamin S. Caguioa and Andres B. Reyes, Jr. in *Alyansa para sa Bagong Pilipinas, Inc. v. Energy Regulatory Commission*, G.R. No. 227670, May 3, 2019, accessed at <<https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/65064>>.
- [45] G.R. No. 109266, December 2, 1993, 228 SCRA 214.
- [46] Id. at 222.
- [47] Rollo, Vol. I, pp. 48-49.
- [48] Supra note 4.
- [49] Senate Deliberations of R.A. No. 3019 dated July 1960; underscoring supplied.
- [50] BLACK'S LAW DICTIONARY 794 (9[th] ed. 2009).
- [51] Cabrera v. Sandiganbayan, 484 Phil. 350, 364 (2004).
- [52] Bautista v. Sandiganbayan, 387 Phil. 872, 884 (2000).
- [53] Ambil, Jr. v. Sandiganbayan, 669 Phil. 32 (2011).
- [54] Gallego v. Sandiganbayan, 201 Phil. 379, 384 (1982).
- [55] Supra note 5.
- [56] Soriquez v. Sandiganbayan (Fifth Division), 510 Phil. 709, 718 (2005).
- [57] Concurring Opinion of Justice Caguioa in *Villarosa v. People*, supra note 4.
- [58] Republic Act No. 9136, otherwise known as Electric Power Industry Reform Act (EPIRA), Section 45.
- [59] Supra note 44.
- [60] ERC RULES OF PRACTICE AND PROCEDURE, Rule 20 B, Sec. 2.
- [61] Id. at Rule 6.
- [62] Id.
- [63] Id. at Rule 16, Sec. 1.
- [64] Id. at Rule 18, Sec. 1.
- [65] Id. at Rule 18.
- [66] Id. at Rule 20 B.
- [67] Id. at Rule 14, Sec. 3.
- [68] Id.

[69] Ponencia, p. 10

[70] Id.

[71] Dissenting Opinion of Justice Caguioa in *Alyansa para sa Bagong Pilipinas, Inc. v. Energy Regulatory Commission*, supra note 44, citing Sections 23 and 45 of the EPIRA.

[72] G.R. No. 122166, March 11, 1998, 287 SCRA 382.

[73] Id. at 399-400.

[74] G.R. No. 111399, November 14, 1994, 238 SCRA 116.

[75] Id. at 133.

[76] Dissenting Opinion of Justice Leonen, p. 5.

[77] Id.

[78] *Villarosa v. Ombudsman*, G.R. No. 221418, January 23, 2019, accessed at <<https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/64916>>.

[79] Id.

[80] *Sistoza v. Desierto*, supra note 38 at 323-324.

CONCURRING OPINION

LAZARO-JAVIER, J.:

Respondent Office of the Ombudsman (OMB) found probable cause to charge petitioners with violation of Section 3(e) of Republic Act No. 3019 (RA 3019). This offense involves "causing any undue injury to any party, including the Government, or giving any private party, any unwarranted benefits, advantage or preference in the discharge of his official administrative or judicial functions through manifest partiality, evident bad faith or gross inexcusable negligence...."

The finding of probable cause stems from these circumstances:

- On October 20, 2015, Jose Vicente Salazar and petitioners, collectively as Chairperson and members of the Energy Regulatory Commission (ERC), issued Resolution No. 13, series of 2015 providing, among others, that all power supply agreements (PSAs) and power service contracts (PSCs) not filed with the ERC as of November 6, 2015 should already be covered by the mandatory competitive selection process (CSP).
- As a result, the CSP took effect on November 7, 2015.
- By Letter dated November 26, 2015, Manila Electric Company (MERALCO) sought ERC's permission to exempt their PSCs from the CSP requirement.
- On December 10, 2015, ERC Chairperson Salazar denied MERALCO's request.
- On March 15, 2016, ERC Chairperson Salazar and petitioners collectively issued Resolution No. 1, series of 2016 modifying the effectivity date of the CSP from November 7, 2015 to April 3, 2016.
- Resolution No. 1 resulted in giving an additional window period for PSAs without CSPs to be filed from March 15, 2016 to April 30, 2016.

- On April 29, 2016, a day before the extended deadline, MERALCO filed seven (7) PSAs that did not undergo the CSP requirement.

Notably, in G.R. No. 227670 entitled *Alyansa Para Sa Bagong Pilipinas Inc. v. Energy Regulatory Commission et al.*, the Court had nullified Resolution No. 1. The Court struck it down not because of the alleged shenanigans that motivated its issuance but because ERC did not have the power to issue Resolution No. 1 since it was bound to observe Department of Energy Circular No. 15 which fixed the effectivity date of the CSP on June 30, 2015 and not beyond.

The OMB asserted that the extension granted under Resolution No. 1 gave unwarranted benefits to MERALCO and other power distribution companies by exempting them from the coverage of the CSP requirement which if not for Resolution No. 1 would have already taken effect after November 6, 2015. The OMB concluded that the extension of the deadline for compliance with the CSP gave MERALCO and other companies precisely that opportunity to dispense with this requirement, and as a result, led to the circumvention of the government policy requiring the CSP, denying power consumers the opportunities to elicit the best price offers and other PSA terms and conditions from suppliers.

Petitioners vehemently deny that Resolution No. 1 was passed specifically to favor MERALCO. They assert that it was intended to provide a transition period to facilitate the full implementation of Resolution No. 13 so that all PSAs executed on or after the later date would be bound without exemption to abide by the CSP requirement. This was after several industry participants, MERALCO being just one of them, and electric cooperatives wrote ERC letters-inquiries about the impact of Resolution No. 13 to existing PSAs, PSAs for renewal, and negotiated PSAs, the specific mechanics of and exemptions from, CSP.

There is no debate that the determination of probable cause for the filing of a criminal information lies with our public prosecutors. But it is equally true that persons indicted for an offense have the present recourse to challenge the finding of probable cause against them.

The test is not the correctness of the prosecutor's determination but whether the determination was an exercise of grave abuse of discretion. The test for the review of a prosecutor's determination of probable cause is reasonableness, just as the test for the determination of probable cause itself is whether a reasonable person could conclude that a crime has been committed and the individual or individuals being held therefor is or are probably the perpetrators of the crime.

A standard of correctness requires correct answers - issues lend themselves to one specific, particular result. On the other hand, a standard of reasonableness gives rise to a number of possible, reasonable conclusions, and as a result, this standard affords a margin of appreciation to the decision-maker within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and the outcomes or decisions themselves.

Reasonableness is to be assessed not only in terms of whether there exist justification, transparency, and intelligibility within the decision-making process, but also whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. Where there is more than one possible interpretation of the events or circumstances, a public prosecutor must be guided by the elements of the offense charged, the reasonableness of competing interpretations, and whether an interpretation will result in an anomaly or a contradiction.

The logical implication to be drawn from the assailed Resolution and Order is that the OMB pegged the gold standard of PSA and PSC terms and conditions upon the CSP requirement. Yet, ironically, those persons

responsible for the institution of the CSP requirement, herein petitioners, are the ones being indicted for violation of Section 3(e) of RA 3019 when they merely postponed its effectivity and enforceability by a number of days.

Alyansa noted that:

Lest we forget, the ERC is expressly mandated in Section 43 (o) of the EPIRA of "ensuring that the x x x pass through of bulk purchase cost by distributors is transparent." The ERC's postponement of CSP twice, totalling 305 days and enabling 90 PSAs in various areas of the country to avoid CSP for at least 20 years, directly and glaringly violates this express mandate of the ERC, resulting in the non-transparent, secretive fixing of prices for bulk purchases of electricity, to the great prejudice of the 95 million Filipinos living in this country as well as the millions of business enterprises operating in this country. This ERC action is a most extreme instance of grave abuse of discretion, amounting to lack or excess of jurisdiction, warranting the strong condemnation by this Court and the annulment of the ERC's action.

In his Dissent, Justice Caguioa, however, emphasized that "[i]ndeed, the EPIRA was passed as far back as 2001, or 18 years ago, and the DOE and ERC only conceptualized the CSP in recent years." Hence, petitioners cannot only be the ones criminally responsible - if we are to apply fairly the Ombudsman's logic in the determination of probable cause.

To sustain the assailed Resolution and Order is to single out petitioners for criminal prosecution when there are definitely those others in the ERC who did not even care to consider imposing the CSP as a requirement. It is downright unfair and a misuse of the criminal apparatus to run after petitioners because they sought to postpone the CSP requirement, but let others formerly with the ERC off the hook when they did nothing about requiring and implementing the CSP. We should not treat differently those who are situated alike.

If we are to be consistent in following the reasons of the OMB in directing the petitioners' indictment, the ERC officers who had not done anything to impose and require the CSP for eighteen (18) or nineteen (19) years must also be charged for sitting idly on the CSP requirement, because having failed to do so they also benefitted the industry players and electric cooperatives by exempting them from this alleged gold standard.

To recall, there are seven (7) circumstances to support the charge against petitioners, of which at least four (4) form the foundation for the accusation against petitioners: (i) MERALCO's request for exemption from the CSP requirement; (ii) denial of the request for exemption; (iii) issuance of Resolution No. 1 extending the deferment of the CSP requirement; and (iv) MERALCO's filing of PSAs that took advantage of the deferral under Resolution No. 1.

But not even one (1) of these circumstances comes out as a smoking gun to reasonably support the inference that (i) petitioners acted with manifest partiality, evident bad faith or gross inexcusable negligence to favor MERALCO; (ii) petitioners caused any undue injury to the public in terms of electricity charges; and (iii) petitioners gave MERALCO any unwarranted benefits, advantage or preference. Indeed, based alone on these circumstances, without more, it is quite a leap in logic to conclude that petitioners favored MERALCO with unwarranted benefits, and in the process, harmed the public in terms of unfavourable electricity charges.

This determination of probable cause does not fall within a range of possible, acceptable outcomes defensible in respect of the facts and law. As stated, where there is more than one possible interpretation of the events or circumstances, a public prosecutor must be guided by the elements of the offense charged. The OMB's determination of probable cause was not guided by the elements of Section 3 (e) of RA 3019. The finding of probable cause was at best speculative; as it was not based on facts and law. Consider:

One. Resolution No. 1 is reasonable as it was issued to address pressing concerns affecting the impact of the CSP upon the power industry. It did not just extend the transition period to allow every stakeholder to speak to the

various issues, but also resolved several other things impacting the stakeholders, for example, clarify certain compliance requirements on the forms of CSP and resolve how PSAs with provisions allowing automatic renewal or extension of their terms would be dealt with.

In his Dissent, Justice Caguioa aptly summarized the factual context that spurred the need for issuing Resolution No. 1. He said that the issuance of Resolution No. 1 was in the exercise of ERC's sound judgment as a regulator and pursuant to its mandate under the EPIRA to "protect the public interest as it is affected by the rates and services of electric utilities and other providers of electric power." In the exercise of its regulatory powers, the ERC's restatement of the effectivity date of the CSP implementation is clearly valid. The creation of the transition period was done in good faith and was neither whimsical nor capricious. It was prompted by the ERC's receipt of numerous letters from stakeholders posing various concerns. These concerns were recognized to be reasonable and legitimate by the DOE itself as shown by the act of the DOE of endorsing one of these letters to the ERC. On January 18, 2016, the DOE endorsed for the ERC's consideration to allow Abra Electric Cooperative (ABRECO) to directly negotiate with a power supplier, albeit without following the CSP requirement. According to the DOE, the request for endorsement was made in consideration of ABRECO's situation as an ailing electric cooperative and to prevent its vulnerability to volatile wholesale electricity spot market (WESM) prices given that its supply is sourced from it. This letter is a recognition by the DOE that the power of whether to exempt an entity from the CSP is lodged solely with the ERC.

Further, Justice Caguioa opined that the ERC reasonably deemed it necessary to restate the effectivity of the CSP implementation. Hence, the effectivity date of the CSP implementation was restated from November 7, 2015 to April 30, 2016, creating a transition period of five (5) months. This transition period was deemed by the ERC enough to allow the completion of the PSAs or those already executed but not yet filed and to prohibit PSAs which were still too early in the negotiation or so far from execution. The ERC granted a period of transition in order to avoid the risk of inconsistency in resolving the individual requests for exemptions sought by DUs, GenCos, and electric cooperatives, while, at the same time, ensuring a steady electric supply for the period covered by the different calls for the CSP exemption. Further, as regulator, ERC had full knowledge and complete sense of the difficulty of adding a new requirement to an application for the approval of a PSA when the DUs and the GenCos had already executed their PSAs. As a matter of fact, requiring a CSP would most likely have resulted in the undoing of heavily and lengthily negotiated and executed agreements over which many computations and projections had already been done.

Justice Caguioa, too, keenly noted that Resolution No. 1 did not only restate the effectivity date of the CSP implementation but it also addressed certain concerns raised by these stakeholders. The ERC clarified certain compliance requirements on the other forms of CSP as provided in Resolution No. 13 and resolved that the PSAs with provisions allowing automatic renewal or extension of their term, whether such renewal or extension requires the intervention of the parties, may have one (1) automatic renewal or extension for a period not exceeding one (1) year from the end of their respective terms, provided that these PSAs were approved by the ERC before the effectivity of Resolution No. 1.

Justice Caguioa, thus, concluded that the issuance of Resolution No. 1 cannot be classified as arbitrary, whimsical, or capricious. The establishment of a transition period, together with the clarifications provided in Resolution No. 1, constitutes a reasonable well thought-out response to the various concerns posed by DUs, GenCos, and electric cooperatives.

Another dissenter in G.R. No. 227670 was Associate Justice (now retired) Andres B. Reyes, Jr. who likewise cited the factual bases for the issuance of Resolution No. 1:

In this instance, the ERC has sufficiently established that "restating" the effectivity of ERC Resolution No. 13

at a later date is not exercised whimsically or capriciously. Neither is it an arbitrary exercise of power by reason of passion or hostility. Indeed, its issuance is clearly not without basis. In fact, the Court finds that the ratiocination put forth by the Office of the Solicitor General (OSG) is reasonable to justify ERC's action.

First, the implementation of ERC Resolution No. 13 caused an avalanche of concerns and confusion from the stakeholders of the industry regarding the actual implementation of the provisions of the resolution, so much so that a multitude of DUs, mostly electric cooperatives, sought for an exemption from the guidelines in the resolution. There was a real possibility that the implementation of ERC Resolution No. 13 would invariably render nugatory the already pending negotiations among the DUs and generation companies. This fact is proven from the letters sent by SMC Global Power dated November 25, 2015 and December 14, 2015, Philippine Rural Electric Cooperative Association, Inc. dated December 1, 2015, Agusan Del Norte Electric Cooperative, Inc. dated December 10, 2015, Camarines Sur IV Electric Cooperative, Inc. dated December 21, 2015, and Aldan Electric Cooperative, Inc. dated March 9, 2016.

A reading of these letters confronted the ERC with probabilities of discontinuance in the financing of projects during their implementation stage, aggravation of power shortages, confusion of ERC Resolution No. 13's applicability on PSAs already filed with the ERC, disenfranchisement of Power Supply Contracts (PSCs) which have already been signed but were still unfiled to the ERC prior to the effectivity of ERC Resolution No. 13, and the reality of the necessity of sufficient period within which to complete the applications which are still governed by the rules prior to ERC Resolution No. 13.

All these concerns were presented to the ERC, which then, by its mandate, acted accordingly. There is wisdom in the OSG's assertion that by granting a period of transition, the ERC would avoid the risk of inconsistency in resolving individual requests for exemptions sought by the DUs, generation companies, and electric cooperatives, while at the same time, it would secure the steady supply of electricity for the same period.

Justice Caguioa described Resolution No. 1 as a "reasonable well thought-out response to the various concerns posed by Distribution Utilities (DUs), Generation Companies (GenCos) and electric cooperatives which arose from the immediate implementation of the CSP," for creating a "transition period" for compliance with the CSP requirement. The original period of implementation was characterized as an "untimely and unrealistic immediate imposition of a requirement that could not be reasonably be complied with" Petitioners' exercise of discretion was described as having been done in "good faith, or on the basis of its interpretation of the powers granted to [petitioners as ERC members] by the EPIRA."

Note that the Dissents of both Justice Caguioa and Justice Reyes in G.R. No. 227670 are being cited here not for the purpose of overturning the already settled doctrine that the ERC did not have the power to amend the effectivity date of the CSP. Rather, the Dissents are brought to fore to buttress the claim that Resolution No. 1 was issued in good faith and as a reasonable and calibrated response to the legitimate concerns of industry players and electric cooperatives, not just of MERALCO as claimed by the OMB, and to make way for the efficient and smooth implementation of the CSP.

Two. The PSAs endorsed by MERALCO have not been approved, much less, implemented. ERC has yet to approve the PSAs through an expensive, tedious, and exhaustive process. Approval of the PSAs and PSCs is not automatic simply because the applicants have filed their respective applications with the ERC. Hence, it cannot be inferred that the public has been unduly harmed by the mere submission of the PSAs and PSCs to the ERC. The Ombudsman's claim of undue harm, again, is speculative. At any rate, Justice Caguioa explained the tedious process that PSAs go through before the same may be approved and enforced, beginning with the filing of the applicant's Articles of Incorporation and other supporting documents numbering sixteen (16) altogether to the pre-trial and public hearings which include the presentation of evidence subject to cross-examination, re-direct examination, and re-cross examination.

Justice Caguioa also pointed out that the CSP is merely a tool and only one of the mechanisms to ensure the low cost of electricity. I fully agree with Justice Caguioa's submission that:

It is therefore premature, if not outrightly erroneous, to claim that the executions of the PSAs during the transition period have placed the CSP into "deep freeze" for the duration of the PSAs, and that the public will be prejudiced. During the transition period provided by Resolution No. 1, and even before the implementation of the CSP, the ERC, in compliance with its mandate under the EPIRA, has the power - nay, the duty - to ensure that any bilateral power supply contracts entered into by the DUs will be consistent with their mandate that they supply electricity to their captive market in the least cost manner.

x x x Thus, with or without the CSP, the public is protected from practices that harm them or that would result in market increases arising from non-competitive practices. x x x

Three. Resolution No. 1 was available to all industry players and electric cooperatives alike. It was not limited to MERALCO. This is evident not only from the text of Resolution No. 1 but from the reasons that impelled petitioners to issue Resolution No. 1 - to provide a transition period for the facilitation of the full and encompassing implementation of Resolution No. 13, and to allow several industry participants, MERALCO being just one of them, and electric cooperatives to adjust to the impact of Resolution No. 13 to existing PSAs, PSAs for renewal, and negotiated PSAs, the specific mechanics of the CSP, and the ground rules for exemptions from the CSP, if any.

No evidence of any circumstance was referred to by the OMB to negate this specific intention in the issuance of Resolution No. 1. It was not shown that any or all of petitioners went out of his or her way to meet with any MERALCO representative. There was no letter, text, or communication of any kind to establish any contact, illicit or licit, prior to Resolution No. 1 or after, between petitioners or anyone of them and MERALCO.

The net effect of extending the waiting period prior to the implementation of the CSP was merely to revert to the protocols that have been established and used since 2001. From that year till today, no one in the power industry was ever indicted for using these protocols. Justice Caguioa clarified in his Dissent in G.R. No. 227670 how these prior-CSP protocols worked and we need not repeat it here.

In fine, it cannot be reasonably concluded that petitioners acted with manifest partiality, evident bad faith or gross inexcusable negligence, to favor MERALCO or any other industry player or electric cooperative, when Chairperson Salazar and petitioners issued Resolution No. 1 to extend the transition period prior to the CSP.

Four. Where there is more than one possible interpretation of the events or circumstances, a public prosecutor must be guided by the reasonableness of competing interpretations, and whether an interpretation will result in an anomaly or a contradiction.

In sum, what the OMB has against petitioners in terms of probable cause is only a jump in logic that neither the law nor the facts can support. Its determination of probable cause against petitioners is based on prejudice and speculation a conjecture that comes from the premise that just because MERALCO benefitted from Resolution No. 1, the latter was from the start meant only to give an undue and criminal benefit or advantage to MERALCO. This is an incomplete, nay unreasonable analysis of Resolution No. 1. To be able to reasonably conclude that petitioners violated Section 3 (e) of RA 3019 requires delving on several times more than seven circumstances that the OMB has utilized in its determination of probable cause. The complexity of the issues was not lost during the deliberations in G.R. No. 227670. Quoting again from Justice Caguioa's Dissent, viz.:

At the outset, it should be pointed out that the present case contains several factual matters that are not cognizable by the Court, and which should be threshed out before the appropriate forum. Whether the moving of the effective date of the CSP effectively puts the requirement into a "deep freeze," as maintained by the

ponencia, is a factual matter that cannot intelligently be resolved by the Court. As to whether the restatement of the effectivity date of the CSP affected, or will continue to affect, the supply of electricity for the entire country is another matter that should be properly ventilated before a court equipped to receive evidence. As well, the problems that the DUs faced in the immediate effectivity of the requirement - which led them to seek exemption from the CSP requirement, and which later on prompted the ERC to issue Resolution No. 1 - are also better appreciated in the context of actual evidence. In addition, whether the restatement of the effectivity date of the CSP was reasonable, or effective in guaranteeing the steady supply of electricity for the entire country is a factual matter that demands the presentation of evidence. All these factual matters need to be addressed before the Court can even begin to determine whether the ERC's act of issuing Resolution No. 1 can be considered to have been tainted with grave abuse of discretion amounting to lack or excess of jurisdiction.

If probable cause were to be based on a premise such as the one used by the OMB, decision-makers (especially judges) would be in danger of being indicted for violation of Section 3(e) of RA 3019, because in general, the nature of their job is to rule for one party against another. The interpretation made by the OMB in determining probable cause has and will result in such an unfair outcome and is therefore unreasonable. Verily, therefore, the action of the OMB to initiate a criminal action against petitioners does not fall within the range of possible, acceptable outcomes defensible in respect of the facts and law.

ACCORDINGLY, I vote to grant the petition and order the dismissal of the Information against petitioners for lack of probable cause and to set aside all criminal processes, including the warrants of arrest issued on each of them.

DISSENTING OPINION

ZALAMEDA, J.:

Petitioners ascribe grave abuse of discretion on the part of the Office of the Ombudsman (the Ombudsman) when it rendered the assailed Resolution dated 29 September 2017 and Order dated 20 April 2018, ultimately allowing for the filing of charges against petitioners for violation of Sec. 3(e) of Republic Act No. (RA) 3019. Necessarily, in determining whether the Ombudsman committed grave abuse of discretion amounting to lack or excess of jurisdiction, this Court have to review the Ombudsman's finding of probable cause against petitioners.

As a general rule, this Court does not interfere with the Ombudsman's exercise of its constitutional mandate. Both the Constitution^[1] and RA 6770^[2] give the Ombudsman wide latitude to act on criminal complaints against public officials and government employees thereby giving rise to the rule on non-interference, which is based on the respect for the investigatory and prosecutorial powers of the Ombudsman.^[3]

More importantly, the determination of probable cause for the purpose of filing an information in court is essentially an executive function. The State's self-preserving power to prosecute violators of its penal laws is a necessary component of the Executive's power and responsibility to faithfully execute the laws of the land.^[4]

To justify judicial intrusion into what is fundamentally an executive domain, petitioners have the burden of proving that the Ombudsman committed grave abuse of discretion. Petitioners are duty-bound to demonstrate how the Ombudsman acted in an arbitrary and despotic manner by reason of passion or personal hostility; and it must be so patent and gross as to amount to an evasion or to a unilateral refusal to perform the duty enjoined or to act in contemplation of law, before judicial relief from a discretionary prosecutorial action may be obtained.^[5] However, petitioners' arguments in this case failed to overcome their burden.

Petitioners' main contention is that the Ombudsman's decision to indict them for violation of Sec. 3(e) of RA 3019

was tainted with grave abuse of discretion since the elements of the offense are wanting and not supported by evidence. Yet, a perusal of the assailed issuances readily negates this argument. Contrary to petitioners' claim, the Ombudsman identified pertinent facts and evaluated them against the three (3) constitutive elements[6] of the offense charged. The decision to indict petitioners was reached after a painstaking review of the facts and evidence, a valid exercise of the Ombudsman's discretion. For reference, the relevant portion of the Ombudsman's discussion is reproduced, as follows:

The first element is present, respondents being all public officers of ERC at the time material to the charges, x x x

On the second element, respondents acted with manifest partiality, evident bad faith or gross inexcusable negligence when they suspended the implementation of the required CSP, to accommodate the PSAs/PSCs of DUs and GenCos, particularly of Meralco, thereby exempting them from the CSP mandated requirement.

The manifest partiality, evident bad faith or gross inexcusable negligence of respondents can be gleaned from the following documented chronological events:

x x x x

The justifications given by respondents in not implementing the CSP requirement are untenable. The requirement for CSP as mandated by EPIRA, DOE and ERC, cannot be reasonably stopped by the requests for clarification, exception and/or exemption from CSP from numerous industry participants, especially when the stakeholders were already heard in extensive consultations conducted by the ERC. Respondents themselves bared in the "WHEREAS CLAUSES" of the 2015 CSP Resolution that stakeholders have been informed, heard and consulted about the CSP, thus:

x x x x

Furthermore, the CSP is an acknowledged mechanism to make the cost of PSAs more reasonable. Hence, accommodating companies' request to be exempted from CSP was a deviation from respondents' duty to promote public interest through the CSP requirement. The gross inexcusable negligence of respondents benefitted 38 more companies who were able to enter into PSAs and file them with ERC without complying with the CSP requirement.

x x x x

The third element is also present.

Respondents, in their exercise of their official regulatory functions, have given unwarranted benefits, advantage or preference to MERALCO and other companies. Under the CSP Resolution, said companies were not qualified to file their PSAs for being non-compliant with the CSP requirement. But respondents' failure to recognize the effects of the suspension of the implementation of CSP gave said companies the concession to file their PSAs and PSCs without having to comply with the CSP policy.[7] (Emphasis supplied)

It must be emphasized that there are three (3) modes by which Sec. 3(e) of RA 3019 may be committed, namely, through "manifest partiality," "evident bad faith," or "gross inexcusable negligence." [8] As can be gleaned from the above excerpt, the Ombudsman did not limit its finding to just one mode, but discussed how petitioners' actuations related to the recognized modes for committing the offense charged. Thus, in my perspective, the Ombudsman "covered all the bases" before it reached the conclusion that there was probable cause to indict petitioners.

Indeed, probable cause does not signify absolute certainty but only reasonable belief, to wit:

Probable cause has been defined as the existence of such facts and circumstances as would lead a person of

ordinary caution and prudence to entertain an honest and strong suspicion that the person charged is guilty of the crime subject of the investigation. Being based merely on opinion and reasonable belief, it does not import absolute certainty. Probable cause need not be based on clear and convincing evidence of guilt, as the investigating officer acts upon reasonable belief. Probable cause implies probability of guilt and requires more than bare suspicion, but less than evidence which would justify conviction.[9] (Emphasis supplied)

Moreover, the finding of probable cause merely signifies that the suspect is to stand trial for the charges. It is not a pronouncement of guilt.[10] Thus, a finding of probable cause need only rest on evidence showing that more likely than not a crime has been committed and was committed by the suspects.[11]

For purposes of probable cause to file an information for the offense charged, I find that the Court's definition of "unwarranted benefits" is broad enough to more likely cover petitioners' actuations.

The word "unwarranted" means lacking adequate or official support; unjustified; unauthorized or without justification or adequate reason. "Advantage" means a more favorable or improved position or condition; benefit, profit or gain of any kind; benefit from some course of action. "Preference" signifies priority or higher evaluation or desirability; choice or estimation above another.[12] The fact that the implementation of the CSP requirement was suspended twice, allowing for MERALCO and other companies to secure power supply agreements without the benefit of a CSP, supports a preliminary finding of the presence of the element of unwarranted benefit.

At any rate, the definitive finding of the presence or absence of the elements of the offense is a matter of evidence. Such finding is evidentiary in nature and consists of matters of defense, the truth of which can be passed upon after a full-blown trial on the merits. The validity and merit of a party's allegation or defense, as well as the admissibility of testimonies and evidence, are also better ventilated at the trial proper than at the preliminary investigation level.[13] Accordingly, the issue of whether MERALCO and the other companies received unwarranted benefits, or whether petitioners acted in bad faith, with manifest partiality, or through gross inexcusable negligence would be conclusively determined, not in the preliminary investigation, but during trial.

A preliminary investigation is essentially inquisitorial. It is often the only means of discovering the persons who may be seasonably charged with a crime, allowing the prosecutor to prepare his complaint or information. It does not place the persons against whom it is taken in jeopardy. It is not the occasion for the full and exhaustive display of the parties' evidence; it is for the presentation of such evidence only as may engender a well-grounded belief that an offense has been committed and that the accused is probably guilty thereof.[14]

Further, assailing the Ombudsman's finding of probable cause on the ground of grave abuse of discretion raises questions of fact, which does not fall within the ambit of this Court's jurisdiction especially in an application for the extraordinary writ of certiorari where neither questions of fact nor even of law are entertained.[15]

This is not a case where there is a glaring absence of any of the elements of the offense charged demonstrating that the prosecutor acted in an arbitrary and despotic manner by reason of passion or personal hostility. On the contrary, petitioners' conduct actually engenders more suspicion that the elements of RA 3019 are present and thus, satisfy the requirement of probable cause. Petitioners may have good reasons for the suspension of the CSP requirement, but those reasons are a matter of defense and best left to the trial court's evaluation after trial.

Absent a clear showing that the Ombudsman committed grave abuse of discretion amounting to lack or excess of jurisdiction in the issuance of its Resolution dated 29 September 2017 and Order dated 20 April 2018, the Court cannot depart from the policy of non-interference. Lest it be forgotten, the Information against petitioners had already been filed before the Regional Trial Court (RTC) of Pasig City during the pendency of this case. Its disposition now rests on the trial court's sound discretion. Although the prosecuting officer retains direction and control over the prosecution of the criminal case, he or she cannot impose any opinion on the trial court. The

determination, conduct, and evaluation of the case lies within the exclusive jurisdiction of the trial court. For these reasons, this Court should have refrained from resolving the issues raised by petitioners. By refusing to bend the policy of non-interference, we are respecting the exclusive jurisdiction of the court trying the case and avoiding any pronouncement which would preempt its independent assessment. Undoubtedly, a determination by this Court of the existence or non-existence of probable cause would affect the resolution by the trial court of the matter still pending before it.

Surprisingly, this Court even went further, directing the dismissal of this Information already filed before the trial court. On this score, I wish to offer some discussion on the order to dismiss the Information where the trial court has already taken cognizance of the criminal case, if only to serve as a guide for future similar cases.

To recall, the Office of the Ombudsman's determination of the existence of probable cause during a preliminary investigation is an executive function, which is different from the judicial determination of probable cause. The executive determination of probable cause, is undertaken by either the public prosecutor or the Ombudsman for the purpose of determining whether an information charging an accused should be filed. On the other hand, judicial determination of probable cause is the process for the judge to determine whether a warrant of arrest should be issued. Once the public prosecutor or the Ombudsman determines probable cause and files the case before the trial court or the Sandiganbayan, the judge will make a judicial determination of probable cause to determine if a warrant of arrest should be issued against the accused.[16]

The difference between the two (2) modes of determining probable cause was discussed in *People v. Castillo*,[17] viz:

x x x The executive determination of probable cause is one made during preliminary investigation. It is a function that properly pertains to the public prosecutor who is given a broad discretion to determine whether probable cause exists and to charge those whom he believes to have committed the crime as defined by law and thus should be held for trial. Otherwise stated, such official has the quasi-judicial authority to determine whether or not a criminal case must be filed in court. Whether or not that function has been correctly discharged by the public prosecutor, i.e., whether or not he has made a correct ascertainment of the existence of probable cause in a case, is a matter that the trial court itself does not and may not be compelled to pass upon.

The judicial determination of probable cause, on the other hand, is one made by the judge to ascertain whether a warrant of arrest should be issued against the accused. The judge must satisfy himself that based on the evidence submitted, there is necessity for placing the accused under custody in order not to frustrate the ends of justice. If the judge finds no probable cause, the judge cannot be forced to issue the arrest warrant.

x x x x

Thus, absent a finding that an information is invalid on its face or that the prosecutor committed manifest error or grave abuse of discretion, a judge's determination of probable cause is limited only to the judicial kind or for the purpose of deciding whether the arrest warrants should be issued against the accused.

Hence, aside from the prosecutor's determination of probable cause, a judge will also make his or her own independent finding of whether probable cause exists to order the arrest of the accused and proceed with trial. This is evident from Section 5(a) of Rule 112 of the Rules of Criminal Procedure, which gives the trial court three (3) options upon the filing of the criminal information: (1) dismiss the case if the evidence on record clearly failed to establish probable cause; (2) issue a warrant of arrest if it finds probable cause; or (3) order the prosecutor to present additional evidence within five days from notice in case of doubt as to the existence of probable cause, viz:

Section 5. When warrant of arrest may issue. - (a) By the Regional Trial Court. - Within ten (10) days from the filing of the complaint or information, the judge shall personally evaluate the resolution of the prosecutor and its supporting evidence. He may immediately dismiss the case if the evidence on record clearly fails to establish probable cause. If he finds probable cause, he shall issue a warrant of arrest, or a commitment order if the accused has already been arrested pursuant to a warrant issued by the judge who conducted the preliminary investigation or when the complaint or information was filed pursuant to section 7 of this Rule. In case of doubt on the existence of probable cause, the judge may order the prosecutor to present additional evidence within five (5) days from notice and the issue must be resolved by the court within thirty (30) days from the filing of the complaint or information.[18]

Probable cause ceases once the court acquires jurisdiction over the case. The court's broad control over the direction of the case was explained in *De Lima v. Reyes*,[19] to wit:

The filing of a complaint or information in Court initiates a criminal action. The Court thereby acquires jurisdiction over the case, which is the authority to hear and determine the case. When after the filing of the complaint or information a warrant for the arrest of the accused is issued by the trial court and the accused either voluntarily submitted himself to the Court or was duly arrested, the Court thereby acquired jurisdiction over the person of the accused.

The preliminary investigation conducted by the fiscal for the purpose of determining whether a prima facie case exists warranting the prosecution of the accused is terminated upon the filing of the information in the proper court. In turn, as above stated, the filing of said information sets in motion the criminal action against the accused in Court. Should the fiscal find it proper to conduct a reinvestigation of the case, at such stage, the permission of the Court must be secured. After such reinvestigation the finding and recommendations of the fiscal should be submitted to the Court for appropriate action. While it is true that the fiscal has the quasi-judicial discretion to determine whether or not a criminal case should be filed in court or not, once the case had already been brought to Court whatever disposition the fiscal may feel should be proper in the case thereafter should be addressed for the consideration of the Court, the only qualification is that the action of the Court must not impair the substantial rights of the accused or the right of the People to due process of law.

Whether the accused had been arraigned or not and whether it was due to a reinvestigation by the fiscal or a review by the Secretary of Justice whereby a motion to dismiss was submitted to the Court, the Court in the exercise of its discretion may grant the motion or deny it and require that the trial on the merits proceed for the proper determination of the case.

x x x x

The rule therefore in this jurisdiction is that once a complaint or information is filed in Court, any disposition of the case as to its dismissal or the conviction or acquittal of the accused rests in the sound discretion of the Court. x x x (Emphasis supplied)

Considering petitioners have already been arraigned on 21 November 2018,[20] the disposition of the case should have stayed within the sound discretion of the trial court if not for the ensuing dismissal ordered by this Court. Any action from this Court should have been limited to directing the Ombudsman to withdraw the Information by filing the appropriate motion with the trial court instead of this Court dismissing the Information against petitioners for lack of probable cause. For one, it gives the impression of ordering the trial court to dismiss the Information, which impinges upon its own discretion.

Noteworthy, too, is that petitioners are not at all seeking for this particular relief, to wit:

WHEREFORE, it is respectfully prayed that this Honorable Court (1) GIVE DUE COURSE to this petition, before considering it on its merits, (2) ISSUE A TEMPORARY RESTRAINING ORDER AND/OR WRIT OF

PRELIMINARY INJUNCTION restraining the Ombudsman and anyone acting in her behalf, from filing an Information for violation of Section 3(e) RA No. 3019 against the petitioners with the Sandiganbayan, and thereafter, (3) GRANT THE PETITION by declaring as void the Resolution dated September 29, 2017 and the Order dated April 20, 2018 of the Ombudsman and DISMISSING OMB-C-C-16-0497 for lack of probable cause.[21]

Petitioners are only assailing the executive finding of probable cause against them by the Ombudsman; their main prayer in their petition does not even involve the dismissal of the criminal case already filed in court. And, for this Court to order its dismissal preempts any exercise of jurisdiction by the trial court over the criminal case. To be sure, the decision whether to dismiss the case or not rests on the sound discretion of the trial court where the Information was filed.[22]

Admittedly, this Court has, in previous instances, quashed an Information or even directly dismissed a criminal case pending before a court even if the solitary issue for resolution was the alleged error of the prosecutor or the Ombudsman in determining probable cause. However, those cases are not on all fours with the present case, either as to the stage of the criminal proceeding or the prayer of the petitioner/s.

In *Brocka v. Enrile*,[23] *Brocka, et al.*, came before the Court to permanently enjoin the City Fiscal of Quezon City from investigating charges of "Inciting to Sedition" filed against them. The Court granted their prayer after determining that a sham preliminary investigation for a second charge was hastily conducted in order to keep *Brocka, et al.*, in detention.

Meanwhile, in *Venus v. Desierto*,[24] *Eriberto L. Venus (Venus)*, prayed not only for the reversal of the Ombudsman's finding of probable cause, but also for the Information against him to be set aside. The Sandiganbayan previously allowed Venus to file a motion for reconsideration directly with the Office of the Special Prosecutor. The Special Prosecutor recommended the dismissal of the case, but the Ombudsman did not heed the recommendation. After the Sandiganbayan had set the arraignment, the Court issued a temporary restraining order halting the proceedings. The Court eventually ordered the Sandiganbayan to dismiss the criminal case upon finding the absence of probable cause for the crime charged.

This Court's pronouncement in *Baylon v. Office of the Ombudsman*[25] is also instructive. In that case, the Sandiganbayan ordered the Ombudsman to conduct a reinvestigation of the case and suspended proceedings pending review. By doing so, the Sandiganbayan deferred to the Ombudsman's authority to reinvestigate the case. The Ombudsman, however, sustained its finding of probable cause and denied the motion for reconsideration of therein petitioner, Dr. Baylon, who assailed "the decision of the Ombudsman for having been issued with grave abuse of discretion." In his petition, Dr. Baylon "prays that the Sandiganbayan be enjoined from further proceedings in the criminal case." Upon finding of a lack of probable cause, this Court ordered the Sandiganbayan to dismiss the criminal case against Dr. Baylon and his co-accused.

Much like in *Venus* and in *Baylon*, the Sandiganbayan in *Sistoza v. Desierto*,[26] deferred to the authority of the Ombudsman when it granted a reinvestigation upon motion of therein petitioner. Before resolving the case, this Court also issued a temporary restraining order to enjoin the Sandiganbayan from conducting further proceedings in the criminal case against petitioner *Sistoza*.

Meanwhile, in *Roy III v. Ombudsman*,[27] *Jose M. Roy III* asserted that the temporary restraining order or a writ of preliminary injunction issued, restraining the filing of an information against him, as well as the issuances of the Ombudsman, be reversed and set aside for being issued with grave abuse of discretion amounting to lack or excess of jurisdiction. However, it seems the criminal proceedings against him had yet to commence when he filed the petition before this Court as he prayed that the filing of an Information against him be restrained. Later,

he also prayed for the issuance of a writ of certiorari setting aside and terminating any proceedings before the Sandiganbayan relative to his case. After finding the utter lack of probable cause as similarly found and recommended by the Office of the Solicitor General, this Court granted the petition, reversed the ruling of the Ombudsman, and dismissed the criminal case against Jose M. Roy III before the Sandiganbayan.

Other cases where this Court dismissed the Information or directly dismissed the criminal case consist of an action assailing issuances rendered by the very court trying the criminal case.

In *Fernando v. Sandiganbayan*,^[28] the subjects of the case were the two orders of the Sandiganbayan which denied the motion to defer arraignment and set the date for the arraignment of petitioners therein. Although called upon to determine whether the Ombudsman correctly found a *prima facie* case against therein petitioners, this Court held that the scope of its review necessarily involved examining whether the Sandiganbayan gravely abused its discretion in the exercise of judicial powers when it issued the assailed orders.

Similarly, this Court ordered the Sandiganbayan to dismiss the pertinent criminal case in *Cabahug v. People*.^[29] After the Ombudsman charged Susana Cabahug (Cabahug) with violation of Sec. 3(e) of RA 3019, she filed with the Sandiganbayan a Motion for Re-determination of Existence of Probable cause, which the latter denied. The case eventually reached this Court when Cabahug filed a "petition for Certiorari and/or Prohibition with Preliminary Injunction and/or Temporary Restraining Order assailing two (2) Orders of the Sandiganbayan in Criminal Case No. 23458."

Comparably, in *Principio v. Barrientos*,^[30] this Court ordered the RTC to dismiss the criminal case involving therein petitioner Herminio C. Principio (Principio) for want of probable cause. That particular appeal stemmed from the RTC's denial of Principio's motion to dismiss/motion to quash, which was elevated to the Court of Appeals via petition for certiorari.

Since this Court, in resolving the above cases, determined whether there was grave abuse of discretion or whether there was error on the part of the issuing body, specifically either the trial court or the Sandiganbayan, then the actions specifically filed before this Court in the said cases may be utilized to stop the trial court from exercising its judicial power. However, the same does not hold true for the present case wherein the assailed issuances were rendered by the Ombudsman without any prayer pertaining to the proceedings before the RTC. Hence, the certiorari action in the case at bar is limited to reviewing the Ombudsman's acts and cannot transcend to another court's exercise of its own powers. Otherwise stated, if the trial court (or the Sandiganbayan) has jurisdiction over the person and subject matter of the controversy, a petition for certiorari, which does not impute grave abuse of discretion on any of the trial court's (or Sandiganbayan's) issuances, will not lie to stop it from exercising judicial power.

The foregoing discussion certainly does not mean that this Court cannot dismiss an Information or even dismiss the criminal case upon finding of a lack of probable cause. My concern rests upon the apparent limits of herein petitioner's certiorari action as I have expounded in my disquisition above.

Ultimately, it must be stressed that this Court's judicial power under Section 1, Article VIII^[31] of the Constitution is sufficiently broad and wide but it is not limitless. There are still certain standards, most of which have been set by this Court itself, that must be fulfilled in the exercise of this Court's awesome power of review. For certiorari actions, our beacon is Section 65 of the Rules of Court, which specifically states:

SECTION 1. Petition for Certiorari. - When any tribunal, board or officer exercising judicial or quasi-judicial functions has acted without or in excess of its or his jurisdiction, or with grave abuse of discretion amounting to lack or excess of jurisdiction, and there is no appeal, or any plain, speedy, and adequate remedy in the ordinary course of law, a person aggrieved thereby may file a verified petition in the proper court, alleging the

facts with certainty and praying that judgment be rendered annulling or modifying the proceedings of such tribunal, board or officer, and granting such incidental reliefs as law and justice may require. (Emphasis supplied)

Petitioners must therefore invoke this Court's power and specifically ask for the reliefs they seek as stated in the rule instead of this Court volunteering reliefs outside the limits of the action. We cannot be so eager to exercise its powers and prerogatives at every turn, especially in a case where petitioners are asking for the application of an exception to a general principle, which by its innate nature, calls for a restrictive treatment.

This Court certainly has judicial discretion to decide matters relevant to a case, but it must only touch upon collateral matters within the scope of an action and incorporated by issues clearly brought before it. Indeed, this Court should always take caution not to make hasty generalizations at the expense of our well-entrenched doctrines.

ACCORDINGLY, I vote for the DISMISSAL of the present Petition.

[1] Art XI, Sec. 12 of the 1987 Constitution provides:

SECTION 12. The Ombudsman and his Deputies, as protectors of the people, shall act promptly on complaints filed in any form or manner against public officials or employees of the Government, or any subdivision, agency or instrumentality thereof, including government-owned or controlled corporations, and shall, in appropriate cases, notify the complainants of the action taken and the result thereof.

[2] The Ombudsman Act of 1989.

[3] See *Dichaves v. Office of the Ombudsman*, G.R. Nos. 206310-11, 07 December 2016; 802 Phil. 564 (2016).

[4] See *Information Technology Foundation of the Philippines v. Commission on Elections*, G.R. Nos. 159139 & 174777, 06 June 2017; 810 Phil. 400 (2017).

[5] See *Elma v. Jacobi*, G.R. No. 155996, 27 June 2012; 689 Phil. 307 (2012).

[6] The elements of violation of Section 3 (e) of RA 3019 are as follows: (a) that the accused must be a public officer discharging administrative, judicial, or official functions (or a private individual acting in conspiracy with such public officers); (b) that he acted with manifest partiality, evident bad faith, or inexcusable negligence; and (c) that his action caused any undue injury to any party, including the government, or gave any private party unwarranted benefits, advantage, or preference in the discharge of his functions. (*Ferrer, Jr. v. People*, G.R. No. 240209, 10 June 2019)

[7] *Rollo*, pp. 44-49.

[8] *Albert v. Sandiganbayan*, G.R. No. 164015, 26 February 2009; 580 SCRA 279, 290.

[9] *Pineda-Ng v. People*, G.R. No. 189533, 15 November 2010; 649 Phil. 225 (2010).

[10] *Gonzalez v. Hongkong & Shanghai Banking Corp.*, G.R. No. 164904, 19 October 2007; 562 Phil. 841 (2007).

[11] *Presidential Ad-Hoc Fact-Finding Committee on Behest Loans v. Desierto*, G.R. No. 136225, 23 April 2008; 575 Phil. 468 (2008).

[12] *Rivera v. People*, G.R. Nos. 156577, 156587 & 156749, 03 December 2014; 749 Phil. 124 (2014).

[13] Estrada v. Office of the Ombudsman, G.R. Nos. 212761-62, 213473-74 & 213538-39, 31 July 2018.

[14] Olivarez v. Sandiganbayan, G.R. No. 118533, 04 October 1995; 319 Phil. 45 (1995).

[15] Id.

[16] See Reyes v. Ombudsman, G.R. Nos. 212593-94, 213163-78, 213540-41, 213542-43, 215880-94 & 213475-76, 15 March 2016; Estrada v. Office of the Ombudsman, G.R. Nos. 212761-62, 213473-74 & 213538-39, 31 July 2018.

[17] G.R. No. 171188, 19 June 2009; 607 Phil. 754 (2009).

[18] Formerly Section 6. The former Section 5 (Resolution of investigating judge and its review) was deleted per A.M. No. 05-8-26-SC, 03 October 2005.

[19] G.R. No. 209330, 11 January 2016; 776 Phil. 623 (2016).

[20] Rollo, p. 880.

[21] Id., at p. 32.

[22] Chan v. Secretary of Justice, G.R. No. 147065, 14 March 2008; 572 Phil. 118 (2008).

[23] G.R. Nos. 69863-65, 10 December 1990; 270 Phil. 271 (1990).

[24] G.R. No. 130319, 21 October 1998; 358 Phil. 675 (1998).

[25] Baylon v. Office of the Ombudsman, G.R. No. 142738, 14 December 2001; 423 Phil. 705 (2001).

[26] G.R. No. 144784, 03 2002; 437 Phil. 117 (2002).

[27] G.R. No. 225718, 04 March 2020.

[28] G.R. No. 96182, 96183, 19 August 1992; 287 Phil. 753 (1992).

[29] G.R. No. 132816, 05 February 2002; 426 Phil. 490 (2002).

[30] G.R. No. 167025, 19 2005; 514 Phil. 799 (2005).

[31] SECTION 1. The judicial power shall be vested in one Supreme Court and in such lower courts as may be established by law.

Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.

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