

**SENATOR JINGGOY EJERCITO ESTRADA, PETITIONER, VS.
BERSAMIN, OFFICE OF THE OMBUDSMAN, FIELD INVESTIGATION
OFFICE, OFFICE OF THE OMBUDSMAN, NATIONAL BUREAU OF
INVESTIGATION AND AT...**

G.R. Nos. 212140-41. January 21, 2015

Ponente: CARPIO, J.

Read online (full-text search, related cases, audio case brief): <https://batas.org/library/g-r-nos-212140-41/>

CARPIO, J.:

It is a fundamental principle that the accused in a preliminary investigation has no right to cross-examine the witnesses which the complainant may present. Section 3, Rule 112 of the Rules of Court expressly provides that the respondent shall only have the right to submit a counter-affidavit, to examine all other evidence submitted by the complainant and, where the fiscal sets a hearing to propound clarificatory questions to the parties or their witnesses, to be afforded an opportunity to be present but without the right to examine or cross-examine.

- Paderanga v. Drilon[1]

This case is a Petition for Certiorari[2] with prayer for (1) the issuance of a temporary restraining order and/or Writ of Preliminary Injunction enjoining respondents Office of the Ombudsman (Ombudsman), Field Investigation Office (FIO) of the Ombudsman, National Bureau of Investigation (NBI), and Atty. Levito D. Baligod (Atty. Baligod) (collectively, respondents), from conducting further proceedings in OMB-C-C-13-03013 and OMB-C-C-13-0397 until the present Petition has been resolved with finality; and (2) this Court's declaration that petitioner Senator Jinggoy Ejercito Estrada (Sen. Estrada) was denied due process of law, and that the Order of the Ombudsman dated 27 March 2014 and the proceedings in OMB-C-C-13-03013 and OMB-C-C-13-0397 subsequent to and affected by the issuance of the challenged 27 March 2014 Order are void.

OMB-C-C-13-0313,[3] entitled National Bureau of Investigation and Atty. Levito D. Baligod v. Jose "Jinggoy" P. Ejercito Estrada, et al., refers to the complaint for Plunder as defined under Republic Act (RA) No. 7080, while OMB-C-C-13-0397,[4] entitled Field Investigation Office, Office of the Ombudsman v. Jose "Jinggoy" P. Ejercito-Estrada, et al., refers to the complaint for Plunder as defined under RA No. 7080 and for violation of Section 3(e) of RA No. 3019 (Anti-Graft and Corrupt Practices Act).

The Facts

On 25 November 2013, the Ombudsman served upon Sen. Estrada a copy of the complaint in OMB-C-C-13-0313, filed by the NBI and Atty. Baligod, which prayed, among others, that criminal proceedings for Plunder as defined in RA No. 7080 be conducted against Sen. Estrada. Sen. Estrada filed his counter-affidavit in OMB-C-C-13-0313 on 9 January 2014.

On 3 December 2013, the Ombudsman served upon Sen. Estrada a copy of the complaint in OMB-C-C-13-0397, filed by the FIO of the Ombudsman, which prayed, among others, that criminal proceedings for Plunder, as

defined in RA No. 7080, and for violation of Section 3(e) of RA No. 3019, be conducted against Sen. Estrada. Sen. Estrada filed his counter-affidavit in OMB-C-C-13-0397 on 16 January 2014.

Eighteen of Sen. Estrada's co-respondents in the two complaints filed their counter-affidavits between 9 December 2013 and 14 March 2014.[5]

On 20 March 2014, Sen. Estrada filed his Request to be Furnished with Copies of Counter-Affidavits of the Other Respondents, Affidavits of New Witnesses and Other Filings (Request) in OMB-C-C-13-0313. In his Request, Sen. Estrada asked for copies of the following documents:

(a)

Affidavit of [co-respondent] Ruby Tuason (Tuason);

(b)

Affidavit of [co-respondent] Dennis L. Cunanan (Cunanan);

(c)

Counter-Affidavit of [co-respondent] Gondelina G. Amata (Amata);

(d)

Counter-Affidavit of [co-respondent] Mario L. Relampagos (Relampagos);

(e)

Consolidated Reply of complainant NBI, if one had been filed; and

(f)

Affidavits/Counter-Affidavits/Pleadings/Filings filed by all the other respondents and/or additional witnesses for the Complainants.[6]

Sen. Estrada's request was made "[p]ursuant to the right of a respondent 'to examine the evidence submitted by the complainant which he may not have been furnished' (Section 3[b], Rule 112 of the Rules of Court) and to 'have access to the evidence on record' (Section 4[c], Rule II of the Rules of Procedure of the Office of the Ombudsman)."[7]

On 27 March 2014, the Ombudsman issued the assailed Order in OMB-C-C-13-0313. The pertinent portions of the assailed Order read:

This Office finds however finds [sic] that the foregoing provisions [pertaining to Section 3[b], Rule 112 of the Rules of Court and Section 4[c], Rule II of the Rules of Procedure of the Office of the Ombudsman] do not entitle respondent [Sen. Estrada] to be furnished all the filings of the respondents.

Rule 112 (3) (a) & (c) of the Rules of Court provides [sic]:

(a) The complaint shall state the address of the respondent and shall be accompanied by the affidavits of the complainant and his witnesses, as well as other supporting documents to establish probable cause ...

xxx xxx xxx

(c) Within ten (10) days from receipt of the subpoena with the complaint and supporting affidavits and documents, the respondent shall submit his counter-affidavit and that of his witnesses and other supporting documents relied upon for his defense. The counter-affidavits shall be subscribed and sworn to and certified as provided in paragraph (a) of this section, with copies thereof furnished by him to the complainant.

Further to quote the rule in furnishing copies of affidavits to parties under the Rules of Procedure of the Office of the Ombudsman [Section 4 of Rule II of Administrative Order No. 07 issued on April 10, 1990]:

- a) If the complaint is not under oath or is based only on official reports, the investigating officer shall require the complainant or supporting witnesses to execute affidavits to substantiate the complaints.
- b) After such affidavits have been secured, the investigating officer shall issue an order, attaching thereto a copy of the affidavits and other supporting documents, directing the respondents to submit, within ten (10) days from receipt thereof, his counter-affidavits and controverting evidence with proof of service thereof on the complainant. The complainant may file reply affidavits within ten (10) days after service of the counter-affidavits.

It can be gleaned from these aforecited provisions that this Office is required to furnish [Sen. Estrada] a copy of the Complaint and its supporting affidavits and documents; and this Office complied with this requirement when it furnished [Sen. Estrada] with the foregoing documents attached to the Orders to File Counter-Affidavit dated 19 November 2013 and 25 November 2013.

It is to be noted that there is no provision under this Office's Rules of Procedure which entitles respondent to be furnished all the filings by the other parties, e.g. the respondents. Ruby Tuason, Dennis Cunanan, Godelina G. Amata and Mario L. Relampagos themselves are all respondents in these cases. Under the Rules of Court as well as the Rules of Procedure of the Office of the Ombudsman, the respondents are only required to furnish their counter-affidavits and controverting evidence to the complainant, and not to the other respondents.

To reiterate, the rights of respondent [Sen.] Estrada in the conduct of the preliminary investigation depend on the rights granted to him by law and these cannot be based on whatever rights he believes [that] he is entitled to or those that may be derived from the phrase "due process of law."

Thus, this Office cannot grant his motion to be furnished with copies of all the filings by the other parties. Nevertheless, he should be furnished a copy of the Reply of complainant NBI as he is entitled thereto under the rules; however, as of this date, no Reply has been filed by complainant NBI.

WHEREFORE, respondent [Sen.] Estrada's Request to be Furnished with Copies of Counter-Affidavits of the Other Respondents, Affidavits of New Witnesses and Other Filings is DENIED. He is nevertheless entitled to be furnished a copy of the Reply if complainant opts to file such pleading.[8] (Emphases in the original)

On 28 March 2014, the Ombudsman issued in OMB-C-C-13-0313 and OMB-C-C-13-0397 a Joint Resolution[9] which found probable cause to indict Sen. Estrada and his co-respondents with one count of plunder and 11 counts of violation of Section 3(e) of RA No. 3019. Sen. Estrada filed a Motion for Reconsideration (of the Joint Resolution dated 28 March 2014) dated 7 April 2014. Sen. Estrada prayed for the issuance of a new resolution dismissing the charges against him.

Without filing a Motion for Reconsideration of the Ombudsman's 27 March 2014 Order denying his Request, Sen. Estrada filed the present Petition for Certiorari under Rule 65 and sought to annul and set aside the 27 March 2014 Order.

THE ARGUMENTS

Sen. Estrada raised the following grounds in his Petition:

THE OFFICE OF THE OMBUDSMAN, IN ISSUING THE CHALLENGED ORDER DATED 27 MARCH 2014, ACTED WITHOUT OR IN EXCESS OF ITS JURISDICTION OR WITH GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION AND VIOLATED SEN.

ESTRADA'S CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW.[10]

Sen. Estrada also claimed that under the circumstances, he has “no appeal or any other plain, speedy, and adequate remedy in the ordinary course of law, except through this Petition.”[11] Sen. Estrada applied for the issuance of a temporary restraining order and/or writ of preliminary injunction to restrain public respondents from conducting further proceedings in OMB-C-C-13-0313 and OMB-C-C-13-0397. Finally, Sen. Estrada asked for a judgment declaring that (a) he has been denied due process of law, and as a consequence thereof, (b) the Order dated 27 March 2014, as well as the proceedings in OMB-C-C-13-0313 and OMB-C-C-13-0397 subsequent to and affected by the issuance of the 27 March 2014 Order, are void.[12]

On the same date, 7 May 2014, the Ombudsman issued in OMB-C-C-13-0313 and OMB-C-C-13-0397 a Joint Order furnishing Sen. Estrada with the counter-affidavits of Tuason, Cunanan, Amata, Relampagos, Francisco Figura, Gregoria Buenaventura, and Alexis Sevidal, and directing him to comment thereon within a non-extendible period of five days from receipt of the order.

On 12 May 2014, Sen. Estrada filed before the Ombudsman a motion to suspend proceedings in OMB-C-C-13-0313 and OMB-C-C-13-0397 because the denial of his Request to be furnished copies of counter-affidavits of his co-respondents deprived him of his right to procedural due process, and he has filed the present Petition before this Court. The Ombudsman denied Sen. Estrada’s motion to suspend in an Order dated 15 May 2014. Sen. Estrada filed a motion for reconsideration of the Order dated 15 May 2014 but his motion was denied in an Order dated 3 June 2014.

As of 2 June 2014, the date of filing of the Ombudsman’s Comment to the present Petition, Sen. Estrada had not filed a comment on the counter-affidavits furnished to him. On 4 June 2014, the Ombudsman issued a Joint Order in OMB-C-C-13-0313 and OMB-C-C-13-0397 denying, among other motions filed by the other respondents, Sen. Estrada’s motion for reconsideration dated 7 April 2014. The pertinent portion of the 4 June 2014 Joint Order stated:

While it is true that Senator Estrada’s request for copies of Tuason, Cunanan, Amata, Relampagos, Figura, Buenaventura and Sevidal’s affidavits was denied by Order dated 27 March 2014 and before the promulgation of the assailed Joint Resolution, this Office thereafter re-evaluated the request and granted it by Order dated 7 May 2014 granting his request. Copies of the requested counter-affidavits were appended to the copy of the Order dated 7 May 2014 transmitted to Senator Estrada through counsel.

This Office, in fact, held in abeyance the disposition of the motions for reconsideration in this proceeding in light of its grant to Senator Estrada a period of five days from receipt of the 7 May 2014 Order to formally respond to the above-named co-respondents’ claims.

In view of the foregoing, this Office fails to see how Senator Estrada was deprived of his right to procedural due process.[13] (Emphasis supplied)

On 2 June 2014, the Ombudsman, the FIO, and the NBI (collectively, public respondents), through the Office of the Solicitor General, filed their Comment to the present Petition. The public respondents argued that:

I. PETITIONER [SEN. ESTRADA] WAS NOT DENIED DUE PROCESS OF LAW.

II. THE PETITION FOR CERTIORARI IS PROCEDURALLY INFIRM.

A. LITIS PENDENTIA EXISTS IN THIS CASE.

B. PETITIONER HAS A PLAIN, SPEEDY AND ADEQUATE REMEDY IN THE ORDINARY COURSE OF LAW.

III. PETITIONER IS NOT ENTITLED TO A WRIT OF PRELIMINARY INJUNCTION AND/OR TEMPORARY RESTRAINING ORDER.[14]

On 6 June 2014, Atty. Baligod filed his Comment to the present Petition. Atty. Baligod stated that Sen. Estrada's resort to a Petition for Certiorari under Rule 65 is improper. Sen. Estrada should have either filed a motion for reconsideration of the 27 March 2014 Order or incorporated the alleged irregularity in his motion for reconsideration of the 28 March 2014 Joint Resolution. There was also no violation of Sen. Estrada's right to due process because there is no rule which mandates that a respondent such as Sen. Estrada be furnished with copies of the submissions of his co-respondents.

On 16 June 2014, Sen. Estrada filed his Reply to the public respondents' Comment. Sen. Estrada insisted that he was denied due process. Although Sen. Estrada received copies of the counter-affidavits of Cunanan, Amata, Relampagos, Buenaventura, Figura, Sevidal, as well as one of Tuason's counter-affidavits, he claimed that he was not given the following documents:

- a) One other Counter-Affidavit of Ruby Tuason dated 21 February 2014;
- b) Counter-Affidavit of Sofia D. Cruz dated 31 January 2014;
- c) Counter-Affidavit of Evelyn Sugcang dated 11 February 2014;
- d) Two (2) Counter-Affidavits of Alan A. Javellana dated 06 February 2014;
- e) Counter-Affidavit of Victor Roman Cojamco Cacal dated 11 December 2013 (to the FIO Complaint);
- f) Counter-Affidavit of Victor Roman Cojamco Cacal dated 22 January 2014 (to the NBI Complaint);
- g) Two (2) counter-affidavits of Ma. Julie A. Villaralvo-Johnson both dated 14 March 2014;
- h) Counter-affidavit of Rhodora Bulatad Mendoza dated 06 March 2014;
- i) Counter-affidavit of Maria Ninez P. Guañizo dated 28 January 2014;
- j) Two (2) counter-affidavits of Marivic V. Jover both dated 09 December 2013; and
- k) Counter-affidavit of Francisco B. Figura dated 08 January 2014.

Sen. Estrada argues that the Petition is not rendered moot by the subsequent issuance of the 7 May 2014 Joint Order because there is a recurring violation of his right to due process. Sen. Estrada also insists that there is no forum shopping as the present Petition arose from an incident in the main proceeding, and that he has no other plain, speedy, and adequate remedy in the ordinary course of law. Finally, Sen. Estrada reiterates his application for the issuance of a temporary restraining order and/or writ of preliminary injunction to restrain public respondents from conducting further proceedings in OMB-C-C-13-0313 and OMB-C-C-13-0397.

This Court's Ruling

Considering the facts narrated above, the Ombudsman's denial in its 27 March 2014 Order of Sen. Estrada's Request did not constitute grave abuse of discretion. Indeed, the denial did not violate Sen. Estrada's constitutional right to due process.

First. There is no law or rule which requires the Ombudsman to furnish a respondent with copies of the counter-affidavits of his co-respondents.

We reproduce below Sections 3 and 4, Rule 112 of the Revised Rules of Criminal Procedure, as well as Rule II of Administrative Order No. 7, Rules of Procedure of the Office of the Ombudsman, for ready reference.

From the Revised Rules of Criminal Procedure, Rule 112: Preliminary Investigation

Section 3. Procedure. — The preliminary investigation shall be conducted in the following manner:

(a) The complaint shall state the address of the respondent and shall be accompanied by the affidavits of the complainant and his witnesses, as well as other supporting documents to establish probable cause. They shall be in such number of copies as there are respondents, plus two (2) copies for the official file. The affidavits shall be subscribed and sworn to before any prosecutor or government official authorized to administer oath, or, in their absence or unavailability, before a notary public, each of who must certify that he personally examined the affiants and that he is satisfied that they voluntarily executed and understood their affidavits.

(b) Within ten (10) days after the filing of the complaint, the investigating officer shall either dismiss it if he finds no ground to continue with the investigation, or issue a subpoena to the respondent attaching to it a copy of the complaint and its supporting affidavits and documents.

The respondent shall have the right to examine the evidence submitted by the complainant which he may not have been furnished and to copy them at his expense. If the evidence is voluminous, the complainant may be required to specify those which he intends to present against the respondent, and these shall be made available for examination or copying by the respondent at his expense.

Objects as evidence need not be furnished a party but shall be made available for examination, copying, or photographing at the expense of the requesting party.

(c) Within ten (10) days from receipt of the subpoena with the complaint and supporting affidavits and documents, the respondent shall submit his counter-affidavit and that of his witnesses and other supporting documents relied upon for his defense. The counter-affidavits shall be subscribed and sworn to and certified as provided in paragraph (a) of this section, with copies thereof furnished by him to the complainant. The respondent shall not be allowed to file a motion to dismiss in lieu of a counter-affidavit.

(d) If the respondent cannot be subpoenaed, or if subpoenaed, does not submit counter-affidavits within the ten (10) day period, the investigating officer shall resolve the complaint based on the evidence presented by the complainant.

(e) The investigating officer may set a hearing if there are facts and issues to be clarified from a party or a witness. The parties can be present at the hearing but without the right to examine or cross-examine. They may, however, submit to the investigating officer questions which may be asked to the party or witness concerned.

The hearing shall be held within ten (10) days from submission of the counter-affidavits and other documents or from the expiration of the period for their submission. It shall be terminated within five (5) days.

(f) Within ten (10) days after the investigation, the investigating officer shall determine whether or not there is sufficient ground to hold the respondent for trial.

Section 4. Resolution of investigating prosecutor and its review. — If the investigating prosecutor finds cause to hold the respondent for trial, he shall prepare the resolution and information. He shall certify under oath in the information that he, or as shown by the record, an authorized officer, has personally examined the complainant and his witnesses; that there is reasonable ground to believe that a crime has been committed and that the accused is probably guilty thereof; that the accused was informed of the complaint and of the evidence submitted against him; and that he was given an opportunity to submit controverting evidence. Otherwise, he shall recommend the dismissal of the complaint.

Within five (5) days from his resolution, he shall forward the record of the case to the provincial or city prosecutor or chief state prosecutor, or to the Ombudsman or his deputy in cases of offenses cognizable by the Sandiganbayan in the exercise of its original jurisdiction. They shall act on the resolution within ten (10) days

from their receipt thereof and shall immediately inform the parties of such action.

No complaint or information may be filed or dismissed by an investigating prosecutor without the prior written authority or approval of the provincial or city prosecutor or chief state prosecutor or the Ombudsman or his deputy.

Where the investigating prosecutor recommends the dismissal of the complaint but his recommendation is disapproved by the provincial or city prosecutor or chief state prosecutor or the Ombudsman or his deputy on the ground that a probable cause exists, the latter may, by himself, file the information against the respondent, or direct any other assistant prosecutor or state prosecutor to do so without conducting another preliminary investigation.

If upon petition by a proper party under such rules as the Department of Justice may prescribe or *motu proprio*, the Secretary of Justice reverses or modifies the resolution of the provincial or city prosecutor or chief state prosecutor, he shall direct the prosecutor concerned either to file the corresponding information without conducting another preliminary investigation, or to dismiss or move for dismissal of the complaint or information with notice to the parties. The same rule shall apply in preliminary investigations conducted by the officers of the Office of the Ombudsman.

From the Rules of Procedure of the Office of the Ombudsman, Administrative Order No. 7, Rule II: Procedure in Criminal Cases

Section 1. Grounds. — A criminal complaint may be brought for an offense in violation of R.A. 3019, as amended, R.A. 1379, as amended, R.A. 6713, Title VII, Chapter II, Section 2 of the Revised Penal Code, and for such other offenses committed by public officers and employees in relation to office.

Sec. 2. Evaluation. — Upon evaluating the complaint, the investigating officer shall recommend whether it may be:

- a) dismissed outright for want of palpable merit;
- b) referred to respondent for comment;
- c) indorsed to the proper government office or agency which has jurisdiction over the case;
- d) forwarded to the appropriate office or official for fact-finding investigation;
- e) referred for administrative adjudication; or
- f) subjected to a preliminary investigation.

Sec. 3. Preliminary investigation; who may conduct. — Preliminary investigation may be conducted by any of the following:

- 1) Ombudsman Investigators;
- 2) Special Prosecuting Officers;
- 3) Deputized Prosecutors;
- 4) Investigating Officials authorized by law to conduct preliminary investigations; or
- 5) Lawyers in the government service, so designated by the Ombudsman.

Sec. 4. Procedure. — The preliminary investigation of cases falling under the jurisdiction of the Sandiganbayan and Regional Trial Courts shall be conducted in the manner prescribed in Section 3, Rule 112 of the Rules of Court, subject to the following provisions:

a) If the complaint is not under oath or is based only on official reports, the investigating officer shall require the complainant or supporting witnesses to execute affidavits to substantiate the complaints.

b) After such affidavits have been secured, the investigating officer shall issue an order, attaching thereto a copy of the affidavits and other supporting documents, directing the respondent to submit, within ten (10) days from receipt thereof, his counter-affidavits and controverting evidence with proof of service thereof on the complainant. The complainant may file reply affidavits within ten (10) days after service of the counter-affidavits.

c) If the respondent does not file a counter-affidavit, the investigating officer may consider the comment filed by him, if any, as his answer to the complaint. In any event, the respondent shall have access to the evidence on record.

d) No motion to dismiss shall be allowed except for lack of jurisdiction. Neither may a motion for a bill of particulars be entertained. If respondent desires any matter in the complainant's affidavit to be clarified, the particularization thereof may be done at the time of clarificatory questioning in the manner provided in paragraph (f) of this section.

e) If the respondent cannot be served with the order mentioned in paragraph 6 hereof, or having been served, does not comply therewith, the complaint shall be deemed submitted for resolution on the basis of the evidence on record.

f) If, after the filing of the requisite affidavits and their supporting evidences, there are facts material to the case which the investigating officer may need to be clarified on, he may conduct a clarificatory hearing during which the parties shall be afforded the opportunity to be present but without the right to examine or cross-examine the witness being questioned. Where the appearance of the parties or witnesses is impracticable, the clarificatory questioning may be conducted in writing, whereby the questions desired to be asked by the investigating officer or a party shall be reduced into writing and served on the witness concerned who shall be required to answer the same in writing and under oath.

g) Upon the termination of the preliminary investigation, the investigating officer shall forward the records of the case together with his resolution to the designated authorities for their appropriate action thereon.

No information may be filed and no complaint may be dismissed without the written authority or approval of the Ombudsman in cases falling within the jurisdiction of the Sandiganbayan, or of the proper Deputy Ombudsman in all other cases.

x x x x

Sec. 6. Notice to parties. — The parties shall be served with a copy of the resolution as finally approved by the Ombudsman or by the proper Deputy Ombudsman.

Sec. 7. Motion for reconsideration. — a) Only one (1) motion for reconsideration or reinvestigation of an approved order or resolution shall be allowed, the same to be filed within fifteen (15) days from notice thereof with the Office of the Ombudsman, or the proper deputy ombudsman as the case may be.

x x x x

b) The filing of a motion for reconsideration/reinvestigation shall not bar the filing of the corresponding Information in court on the basis of the finding of probable cause in the resolution subject of the motion. (Emphasis supplied)

Sen. Estrada claims that the denial of his Request for the counter-affidavits of his co-respondents violates his constitutional right to due process. Sen. Estrada, however, fails to specify a law or rule which states that it is a compulsory requirement of due process in a preliminary investigation that the Ombudsman furnish a respondent

with the counter-affidavits of his co-respondents. Neither Section 3(b), Rule 112 of the Revised Rules of Criminal Procedure nor Section 4(c), Rule II of the Rules of Procedure of the Office of the Ombudsman supports Sen. Estrada's claim.

What the Rules of Procedure of the Office of the Ombudsman require is for the Ombudsman to furnish the respondent with a copy of the complaint and the supporting affidavits and documents at the time the order to submit the counter-affidavit is issued to the respondent. This is clear from Section 4(b), Rule II of the Rules of Procedure of the Office of the Ombudsman when it states, "[a]fter such affidavits [of the complainant and his witnesses] have been secured, the investigating officer shall issue an order, attaching thereto a copy of the affidavits and other supporting documents, directing the respondent to submit, within ten (10) days from receipt thereof, his counter-affidavits x x x." At this point, there is still no counter-affidavit submitted by any respondent. Clearly, what Section 4(b) refers to are affidavits of the complainant and his witnesses, not the affidavits of the co-respondents. Obviously, the counter-affidavits of the co-respondents are not part of the supporting affidavits of the complainant. No grave abuse of discretion can thus be attributed to the Ombudsman for the issuance of the 27 March 2014 Order which denied Sen. Estrada's Request.

Although Section 4(c), Rule II of the Rules of Procedure of the Office of the Ombudsman provides that a respondent "shall have access to the evidence on record," this provision should be construed in relation to Section 4(a) and (b) of the same Rule, as well as to the Rules of Criminal Procedure. First, Section 4(a) states that "the investigating officer shall require the complainant or supporting witnesses to execute affidavits to substantiate the complaint." The "supporting witnesses" are the witnesses of the complainant, and do not refer to the co-respondents.

Second, Section 4(b) states that "the investigating officer shall issue an order attaching thereto a copy of the affidavits and all other supporting documents, directing the respondent" to submit his counter-affidavit. The affidavits referred to in Section 4(b) are the affidavits mentioned in Section 4(a). Clearly, the affidavits to be furnished to the respondent are the affidavits of the complainant and his supporting witnesses. The provision in the immediately succeeding Section 4(c) of the same Rule II that a respondent shall have "access to the evidence on record" does not stand alone, but should be read in relation to the provisions of Section 4(a and b) of the same Rule II requiring the investigating officer to furnish the respondent with the "affidavits and other supporting documents" submitted by "the complainant or supporting witnesses." Thus, a respondent's "access to evidence on record" in Section 4(c), Rule II of the Ombudsman's Rules of Procedure refers to the affidavits and supporting documents of "the complainant or supporting witnesses" in Section 4(a) of the same Rule II.

Third, Section 3(b), Rule 112 of the Revised Rules of Criminal Procedure provides that "[t]he respondent shall have the right to examine the evidence submitted by the complainant which he may not have been furnished and to copy them at his expense." A respondent's right to examine refers only to "the evidence submitted by the complainant."

Thus, whether under Rule 112 of the Revised Rules of Criminal Procedure or under Rule II of the Ombudsman's Rules of Procedure, there is no requirement whatsoever that the affidavits executed by the co-respondents should be furnished to a respondent.

Justice Velasco's dissent relies on the ruling in *Office of the Ombudsman v. Reyes* (Reyes case),^[15] an administrative case, in which a different set of rules of procedure and standards apply. Sen. Estrada's Petition, in contrast, involves the preliminary investigation stage in a criminal case. Rule III on the Procedure in Administrative Cases of the Rules of Procedure of the Office of the Ombudsman applies in the Reyes case, while Rule II on the Procedure in Criminal Cases of the Rules of Procedure of the Office of the Ombudsman applies in

Sen. Estrada's Petition. In both cases, the Rules of Court apply in a suppletory character or by analogy.[16]

In the Reyes case, the complainant Acero executed an affidavit against Reyes and Peñaloza, who were both employees of the Land Transportation Office. Peñaloza submitted his counter-affidavit, as well as those of his two witnesses. Reyes adopted his counter-affidavit in another case before the Ombudsman as it involved the same parties and the same incident. None of the parties appeared during the preliminary conference. Peñaloza waived his right to a formal investigation and was willing to submit the case for resolution based on the evidence on record. Peñaloza also submitted a counter-affidavit of his third witness. The Ombudsman found Reyes guilty of grave misconduct and dismissed him from the service. On the other hand, Peñaloza was found guilty of simple misconduct and penalized with suspension from office without pay for six months. This Court agreed with the Court of Appeals' finding that Reyes' right to due process was indeed violated. This Court remanded the records of the case to the Ombudsman, for two reasons: (1) Reyes should not have been meted the penalty of dismissal from the service when the evidence was not substantial, and (2) there was disregard of Reyes' right to due process because he was not furnished a copy of the counter-affidavits of Peñaloza and of Peñaloza's three witnesses. In the Reyes case, failure to furnish a copy of the counter-affidavits happened in the administrative proceedings on the merits, which resulted in Reyes' dismissal from the service. In Sen. Estrada's Petition, the denial of his Request happened during the preliminary investigation where the only issue is the existence of probable cause for the purpose of determining whether an information should be filed, and does not prevent Sen. Estrada from requesting a copy of the counter-affidavits of his co-respondents during the pre-trial or even during the trial.

We should remember to consider the differences in adjudicating cases, particularly an administrative case and a criminal case:

Any lawyer worth his salt knows that quanta of proof and adjective rules vary depending on whether the cases to which they are meant to apply are criminal, civil or administrative in character. In criminal actions, proof beyond reasonable doubt is required for conviction; in civil actions and proceedings, preponderance of evidence, as support for a judgment; and in administrative cases, substantial evidence, as basis for adjudication. In criminal and civil actions, application of the Rules of Court is called for, with more or less strictness. In administrative proceedings, however, the technical rules of pleading and procedure, and of evidence, are not strictly adhered to; they generally apply only suppletorily; indeed, in agrarian disputes application of the Rules of Court is actually prohibited.[17]

It should be underscored that the conduct of a preliminary investigation is only for the determination of probable cause, and "probable cause merely implies probability of guilt and should be determined in a summary manner. A preliminary investigation is not a part of the trial and it is only in a trial where an accused can demand the full exercise of his rights, such as the right to confront and cross-examine his accusers to establish his innocence." [18] Thus, the rights of a respondent in a preliminary investigation are limited to those granted by procedural law.

A preliminary investigation is defined as an inquiry or proceeding for the purpose of determining whether there is sufficient ground to engender a well founded belief that a crime cognizable by the Regional Trial Court has been committed and that the respondent is probably guilty thereof, and should be held for trial. The quantum of evidence now required in preliminary investigation is such evidence sufficient to "engender a well founded belief" as to the fact of the commission of a crime and the respondent's probable guilt thereof. A preliminary investigation 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. We are in accord with the state prosecutor's findings in the case at bar that there exists prima facie evidence of petitioner's involvement in the commission of the crime, it being sufficiently supported by the evidence presented and the facts obtaining therein.

Likewise devoid of cogency is petitioner's argument that the testimonies of Galarion and Hanopol are inadmissible as to him since he was not granted the opportunity of cross-examination.

It is a fundamental principle that the accused in a preliminary investigation has no right to cross-examine the witnesses which the complainant may present. Section 3, Rule 112 of the Rules of Court expressly provides that the respondent shall only have the right to submit a counter-affidavit, to examine all other evidence submitted by the complainant and, where the fiscal sets a hearing to propound clarificatory questions to the parties or their witnesses, to be afforded an opportunity to be present but without the right to examine or cross-examine. Thus, even if petitioner was not given the opportunity to cross-examine Galarion and Hanopol at the time they were presented to testify during the separate trial of the case against Galarion and Roxas, he cannot assert any legal right to cross-examine them at the preliminary investigation precisely because such right was never available to him. The admissibility or inadmissibility of said testimonies should be ventilated before the trial court during the trial proper and not in the preliminary investigation.

Furthermore, the technical rules on evidence are not binding on the fiscal who has jurisdiction and control over the conduct of a preliminary investigation. If by its very nature a preliminary investigation could be waived by the accused, we find no compelling justification for a strict application of the evidentiary rules. In addition, considering that under Section 8, Rule 112 of the Rules of Court, the record of the preliminary investigation does not form part of the record of the case in the Regional Trial Court, then the testimonies of Galarion and Hanopol may not be admitted by the trial court if not presented in evidence by the prosecuting fiscal. And, even if the prosecution does present such testimonies, petitioner can always object thereto and the trial court can rule on the admissibility thereof; or the petitioner can, during the trial, petition said court to compel the presentation of Galarion and Hanopol for purposes of cross-examination.[19] (Emphasis supplied)

Furthermore, in citing the Reyes case, Justice Velasco's dissent overlooked a vital portion of the Court of Appeals' reasoning. This Court quoted from the Court of Appeals' decision: "x x x [A]dmissions made by Peñaloza in his sworn statement are binding only on him. Res inter alios acta alteri nocere non debet. The rights of a party cannot be prejudiced by an act, declaration or omission of another." In OMB-C-C-13-0313 and OMB-C-C-13-0397, the admissions of Sen. Estrada's co-respondents can in no way prejudice Sen. Estrada. Even granting Justice Velasco's argument that the 28 March 2014 Joint Resolution in OMB-C-C-13-0313 and OMB-C-C-13-0397[20] mentioned the testimonies of Sen. Estrada's co-respondents like Tuason and Cunanan, their testimonies were merely corroborative of the testimonies of complainants' witnesses Benhur Luy, Marina Sula, and Merlina Suñas and were not mentioned in isolation from the testimonies of complainants' witnesses.

Moreover, the sufficiency of the evidence put forward by the Ombudsman against Sen. Estrada to establish its finding of probable cause in the 28 March 2014 Joint Resolution in OMB-C-C-13-0313 and OMB-C-C-13-0397 was judicially confirmed by the Sandiganbayan, when it examined the evidence, found probable cause, and issued a warrant of arrest against Sen. Estrada on 23 June 2014.

We likewise take exception to Justice Brion's assertion that "the due process standards that at the very least should be considered in the conduct of a preliminary investigation are those that this Court first articulated in *Ang Tibay v. Court of Industrial Relations* [Ang Tibay]."[21] Simply put, the Ang Tibay guidelines for administrative cases do not apply to preliminary investigations in criminal cases. An application of the Ang Tibay guidelines to preliminary investigations will have absurd and disastrous consequences.

Ang Tibay enumerated the constitutional requirements of due process, which Ang Tibay described as the "fundamental and essential requirements of due process in trials and investigations of an administrative character." [22] These requirements are "fundamental and essential" because without these, there is no due process as mandated by the Constitution. These "fundamental and essential requirements" cannot be taken away by legislation because they are part of constitutional due process. These "fundamental and essential requirements"

are:

- (1) The first of these rights is the right to a hearing, which includes the right of the party interested or affected to present his own case and submit evidence in support thereof. x x x.
- (2) Not only must the party be given an opportunity to present his case and adduce evidence tending to establish the rights which he asserts but the tribunal must consider the evidence presented. x x x.
- (3) “While the duty to deliberate does not impose the obligation to decide right, it does imply a necessity which cannot be disregarded, namely, that of having something to support its decision. A decision with absolutely nothing to support it is a nullity, x x x.”
- (4) Not only must there be some evidence to support a finding or conclusion, but the evidence must be “substantial.” “Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” x x x.
- (5) The decision must be rendered on the evidence presented at the hearing, or at least contained in the record and disclosed to the parties affected. x x x.
- (6) The Court of Industrial Relations or any of its judges, therefore, must act on its or his own independent consideration of the law and facts of the controversy, and not simply accept the views of a subordinate in arriving at a decision. x x x.
- (7) The Court of Industrial Relations should, in all controversial questions, render its decision in such a manner that the parties to the proceeding can know the various issues involved, and the reasons for the decisions rendered. The performance of this duty is inseparable from the authority conferred upon it.[23]

The guidelines set forth in *Ang Tibay* are further clarified in *GSIS v. CA*[24] (*GSIS*): “what *Ang Tibay* failed to explicitly state was, prescinding from the general principles governing due process, the requirement of an impartial tribunal which, needless to say, dictates that one called upon to resolve a dispute may not sit as judge and jury simultaneously, neither may he review his decision on appeal.”[25] The *GSIS* clarification affirms the non-applicability of the *Ang Tibay* guidelines to preliminary investigations in criminal cases: The investigating officer, which is the role that the Office of the Ombudsman plays in the investigation and prosecution of government personnel, will never be the impartial tribunal required in *Ang Tibay*, as amplified in *GSIS*. The purpose of the Office of the Ombudsman in conducting a preliminary investigation, after conducting its own fact-finding investigation, is to determine probable cause for filing an information, and not to make a final adjudication of the rights and obligations of the parties under the law, which is the purpose of the guidelines in *Ang Tibay*. The investigating officer investigates, determines probable cause, and prosecutes the criminal case after filing the corresponding information.

The purpose in determining probable cause is to make sure that the courts are not clogged with weak cases that will only be dismissed, as well as to spare a person from the travails of a needless prosecution.[26] The Ombudsman and the prosecution service under the control and supervision of the Secretary of the Department of Justice are inherently the fact-finder, investigator, hearing officer, judge and jury of the respondent in preliminary investigations. Obviously, this procedure cannot comply with *Ang Tibay*, as amplified in *GSIS*. However, there is nothing unconstitutional with this procedure because this is merely an Executive function, a part of the law enforcement process leading to trial in court where the requirements mandated in *Ang Tibay*, as amplified in *GSIS*, will apply. This has been the procedure under the 1935, 1973 and 1987 Constitutions. To now rule that *Ang Tibay*, as amplified in *GSIS*, should apply to preliminary investigations will mean that all past and present preliminary investigations are in gross violation of constitutional due process.

Moreover, a person under preliminary investigation, as Sen. Estrada is in the present case when he filed his

Request, is not yet an accused person, and hence cannot demand the full exercise of the rights of an accused person:

A finding of probable cause needs only to rest on evidence showing that more likely than not a crime has been committed and was committed by the suspects. Probable cause need not be based on clear and convincing evidence of guilt, neither on evidence establishing guilt beyond reasonable doubt and definitely, not on evidence establishing absolute certainty of guilt. As well put in *Brinegar v. United States*, while probable cause demands more than “bare suspicion,” it requires “less than evidence which would justify . . . conviction.” A finding of probable cause merely binds over the suspect to stand trial. It is not a pronouncement of guilt.

Considering the low quantum and quality of evidence needed to support a finding of probable cause, we also hold that the DOJ Panel did not gravely abuse its discretion in refusing to call the NBI witnesses for clarificatory questions. The decision to call witnesses for clarificatory questions is addressed to the sound discretion of the investigator and the investigator alone. If the evidence on hand already yields a probable cause, the investigator need not hold a clarificatory hearing. To repeat, probable cause merely implies probability of guilt and should be determined in a summary manner. Preliminary investigation is not a part of trial and it is only in a trial where an accused can demand the full exercise of his rights, such as the right to confront and cross-examine his accusers to establish his innocence. In the case at bar, the DOJ Panel correctly adjudged that enough evidence had been adduced to establish probable cause and clarificatory hearing was unnecessary.[27]

Justice J.B.L. Reyes, writing for the Court, emphatically declared in *Lozada v. Hernandez*,[28] that the “rights conferred upon accused persons to participate in preliminary investigations concerning themselves depend upon the provisions of law by which such rights are specifically secured, rather than upon the phrase ‘due process of law’.” This reiterates Justice Jose P. Laurel’s oft-quoted pronouncement in *Hashim v. Boncan*[29] that “the right to a preliminary investigation is statutory, not constitutional.” In short, the rights of a respondent in a preliminary investigation are merely statutory rights, not constitutional due process rights. An investigation to determine probable cause for the filing of an information does not initiate a criminal action so as to trigger into operation Section 14(2), Article III of the Constitution.[30] It is the filing of a complaint or information in court that initiates a criminal action.[31]

The rights to due process in administrative cases as prescribed in *Ang Tibay*, as amplified in *GSIS*, are granted by the Constitution; hence, these rights cannot be taken away by mere legislation. On the other hand, as repeatedly reiterated by this Court, the right to a preliminary investigation is merely a statutory right,[32] not part of the “fundamental and essential requirements” of due process as prescribed in *Ang Tibay* and amplified in *GSIS*. Thus, a preliminary investigation can be taken away by legislation. The constitutional right of an accused to confront the witnesses against him does not apply in preliminary investigations; nor will the absence of a preliminary investigation be an infringement of his right to confront the witnesses against him.[33] A preliminary investigation may be done away with entirely without infringing the constitutional right of an accused under the due process clause to a fair trial.[34]

The quantum of evidence needed in *Ang Tibay*, as amplified in *GSIS*, is greater than the evidence needed in a preliminary investigation to establish probable cause, or to establish the existence of a *prima facie* case that would warrant the prosecution of a case. *Ang Tibay* refers to “substantial evidence,” while the establishment of probable cause needs “only more than ‘bare suspicion,’ or ‘less than evidence which would justify . . . conviction’.” In the United States, from where we borrowed the concept of probable cause,[35] the prevailing definition of probable cause is this:

In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent

men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved.

“The substance of all the definitions” of probable cause “is a reasonable ground for belief of guilt.” *McCarthy v. De Armit*, 99 Pa. St. 63, 69, quoted with approval in the *Carroll* opinion. 267 U. S. at 161. And this “means less than evidence which would justify condemnation” or conviction, as Marshall, C. J., said for the Court more than a century ago in *Locke v. United States*, 7 Cranch 339, 348. Since Marshall’s time, at any rate, it has come to mean more than bare suspicion: Probable cause exists where “the facts and circumstances within their [the officers’] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that” an offense has been or is being committed. *Carroll v. United States*, 267 U. S. 132, 162.

These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community’s protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers’ whim or caprice.[36]

In the Philippines, there are four instances in the Revised Rules of Criminal Procedure where probable cause is needed to be established:

- (1) In Sections 1 and 3 of Rule 112: By the investigating officer, to determine whether there is sufficient ground to engender a well-founded belief that a crime has been committed and the respondent is probably guilty thereof, and should be held for trial. A preliminary investigation is required before the filing of a complaint or information for an offense where the penalty prescribed by law is at least four years, two months and one day without regard to the fine;
- (2) In Sections 6 and 9 of Rule 112: By the judge, to determine whether a warrant of arrest or a commitment order, if the accused has already been arrested, shall be issued and that there is a necessity of placing the respondent under immediate custody in order not to frustrate the ends of justice;
- (3) In Section 5(b) of Rule 113: By a peace officer or a private person making a warrantless arrest when an offense has just been committed, and he has probable cause to believe based on personal knowledge of facts or circumstances that the person to be arrested has committed it; and
- (4) In Section 4 of Rule 126: By the judge, to determine whether a search warrant shall be issued, and only upon probable cause in connection with one specific offense 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 things to be seized which may be anywhere in the Philippines.

In all these instances, the evidence necessary to establish probable cause is based only on the likelihood, or probability, of guilt. Justice Brion, in the recent case of *Unilever Philippines, Inc. v. Tan*[37] (*Unilever*), stated:

The determination of probable cause needs only to rest on evidence showing that more likely than not, a crime has been committed and there is enough reason to believe that it was committed by the accused. It need not be based on clear and convincing evidence of guilt, neither on evidence establishing absolute certainty of guilt. What is merely required is “probability of guilt.” Its determination, too, does not call for the application of rules or standards of proof that a judgment of conviction requires after trial on the merits. Thus, in concluding that there is probable cause, it suffices that it is believed that the act or omission complained of constitutes the very offense charged.

It is also important to stress that the determination of probable cause does not depend on the validity or merits of a party's accusation or defense or on the admissibility or veracity of testimonies presented. As previously discussed, these matters are better ventilated during the trial proper of the case. As held in *Metropolitan Bank & Trust Company v. Gonzales*:

Probable cause has been defined as 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 was prosecuted. x x x. The term does not mean "actual or positive cause" nor does it import absolute certainty. It is merely based on opinion and reasonable belief. Thus, a finding of probable cause does not require an inquiry into whether there is sufficient evidence to procure a conviction. It is enough that it is believed that the act or omission complained of constitutes the offense charged. Precisely, there is a trial for the reception of evidence of the prosecution in support of the charge. (Boldfacing and italicization supplied)

Justice Brion's pronouncement in *Unilever* that "the determination of probable cause does not depend on the validity or merits of a party's accusation or defense or on the admissibility or veracity of testimonies presented" correctly recognizes the doctrine in the United States that the determination of probable cause can rest partially, or even entirely, on hearsay evidence, as long as the person making the hearsay statement is credible. In *United States v. Ventresca*,^[38] the United States Supreme Court held:

While a warrant may issue only upon a finding of "probable cause," this Court has long held that "the term 'probable cause' . . . means less than evidence which would justify condemnation," *Locke v. United States*, 7 Cranch 339, 11 U.S. 348, and that a finding of "probable cause" may rest upon evidence which is not legally competent in a criminal trial. *Draper v. United States*, 358 U.S. 307, 358 U.S. 311. As the Court stated in *Brinegar v. United States*, 338 U.S. 160, 173, "There is a large difference between the two things to be proved (guilt and probable cause), as well as between the tribunals which determine them, and therefore a like difference in the quanta and modes of proof required to establish them." Thus, hearsay may be the basis for issuance of the warrant "so long as there . . . [is] a substantial basis for crediting the hearsay." *Jones v. United States*, supra, at 362 U.S. 272. And, in *Aguilar*, we recognized that "an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant," so long as the magistrate is "informed of some of the underlying circumstances" supporting the affiant's conclusions and his belief that any informant involved "whose identity need not be disclosed . . ." was "credible" or his information "reliable." *Aguilar v. Texas*, supra, at 378 U.S. 114. (Emphasis supplied)

Thus, probable cause can be established with hearsay evidence, as long as there is substantial basis for crediting the hearsay. Hearsay evidence is admissible in determining probable cause in a preliminary investigation because such investigation is merely preliminary, and does not finally adjudicate rights and obligations of parties. However, in administrative cases, where rights and obligations are finally adjudicated, what is required is "substantial evidence" which cannot rest entirely or even partially on hearsay evidence. Substantial basis is not the same as substantial evidence because substantial evidence excludes hearsay evidence while substantial basis can include hearsay evidence. To require the application of *Ang Tibay*, as amplified in *GSIS*, in preliminary investigations will change the quantum of evidence required in determining probable cause from evidence of likelihood or probability of guilt to substantial evidence of guilt.

It is, moreover, necessary to distinguish between the constitutionally guaranteed rights of an accused and the right to a preliminary investigation. To treat them the same will lead to absurd and disastrous consequences. All pending criminal cases in all courts throughout the country will have to be remanded to the preliminary investigation level because none of these will satisfy *Ang Tibay*, as amplified in *GSIS*. Preliminary investigations are conducted by prosecutors, who are the same officials who will determine probable cause and prosecute the cases in court. The prosecutor is hardly the impartial tribunal contemplated in *Ang Tibay*, as amplified in *GSIS*. A

reinvestigation by an investigating officer outside of the prosecution service will be necessary if Ang Tibay, as amplified in GSIS, were to be applied. This will require a new legislation. In the meantime, all pending criminal cases in all courts will have to be remanded for reinvestigation, to proceed only when a new law is in place. To require Ang Tibay, as amplified in GSIS, to apply to preliminary investigation will necessarily change the concept of preliminary investigation as we know it now. Applying the constitutional due process in Ang Tibay, as amplified in GSIS, to preliminary investigation will necessarily require the application of the rights of an accused in Section 14(2), Article III of the 1987 Constitution. This means that the respondent can demand an actual hearing and the right to cross-examine the witnesses against him, rights which are not afforded at present to a respondent in a preliminary investigation.

The application of Ang Tibay, as amplified in GSIS, is not limited to those with pending preliminary investigations but even to those convicted by final judgment and already serving their sentences. The rule is well-settled that a judicial decision applies retroactively if it has a beneficial effect on a person convicted by final judgment even if he is already serving his sentence, provided that he is not a habitual criminal.[39] This Court retains its control over a case “until the full satisfaction of the final judgment conformably with established legal processes.”[40] Applying Ang Tibay, as amplified in GSIS, to preliminary investigations will result in thousands of prisoners, convicted by final judgment, being set free from prison.

Second. Sen. Estrada’s present Petition for Certiorari is premature.

Justice Velasco’s dissent prefers that Sen. Estrada not “be subjected to the rigors of a criminal prosecution in court” because there is “a pending question regarding the Ombudsman’s grave abuse of its discretion preceding the finding of a probable cause to indict him.” Restated bluntly, Justice Velasco’s dissent would like this Court to conclude that the mere filing of the present Petition for Certiorari questioning the Ombudsman’s denial of Sen. Estrada’s Request should have, by itself, voided all proceedings related to the present case.

Although it is true that, in its 27 March 2014 Order, the Ombudsman denied Sen. Estrada’s Request, the Ombudsman subsequently reconsidered its Order. On 7 May 2014, the same date that Sen. Estrada filed the present Petition, the Ombudsman issued a Joint Order in OMB-C-C-13-0313 and OMB-C-C-13-0397 that furnished Sen. Estrada with the counter-affidavits of Ruby Tuason, Dennis Cunanan, Godelina Amata, Mario Relampagos, Francisco Figura, Gregoria Buenaventura, and Alexis Sevidal, and directed him to comment within a non-extendible period of five days from receipt of said Order. Sen. Estrada did not file any comment, as noted in the 4 June 2014 Joint Order of the Ombudsman.

On 4 June 2014, the Ombudsman issued another Joint Order and denied Sen. Estrada’s Motion for Reconsideration of its 28 March 2014 Joint Resolution which found probable cause to indict Sen. Estrada and his co-respondents with one count of plunder and 11 counts of violation of Section 3(e), Republic Act No. 3019. In this 4 June 2014 Joint Order, the Ombudsman stated that “[t]his Office, in fact, held in abeyance the disposition of motions for reconsideration in this proceeding in light of its grant to Senator Estrada a period of five days from receipt of the 7 May 2014 Order to formally respond to the above-named respondents’ claims.”

We underscore Sen. Estrada’s procedural omission. Sen. Estrada did not file any pleading, much less a motion for reconsideration, to the 27 March 2014 Order in OMB-C-C-13-0313. Sen. Estrada immediately proceeded to file this Petition for Certiorari before this Court. Sen. Estrada’s resort to a petition for certiorari before this Court stands in stark contrast to his filing of his 7 April 2014 Motion for Reconsideration of the 28 March 2014 Joint Resolution finding probable cause. The present Petition for Certiorari is premature.

A motion for reconsideration allows the public respondent an opportunity to correct its factual and legal errors. Sen. Estrada, however, failed to present a compelling reason that the present Petition falls under the

exceptions[41] to the general rule that the filing of a motion for reconsideration is required prior to the filing of a petition for certiorari. This Court has reiterated in numerous decisions that a motion for reconsideration is mandatory before the filing of a petition for certiorari.[42]

Justice Velasco's dissent faults the majority for their refusal to apply the Reyes case to the present Petition. Justice Velasco's dissent insists that "this Court cannot neglect to emphasize that, despite the variance in the quanta of evidence required, a uniform observance of the singular concept of due process is indispensable in all proceedings."

As we try to follow Justice Velasco's insistence, we direct Justice Velasco and those who join him in his dissent to this Court's ruling in *Ruivivar v. Office of the Ombudsman (Ruivivar)*,[43] wherein we stated that "[t]he law can no longer help one who had been given ample opportunity to be heard but who did not take full advantage of the proffered chance."

The *Ruivivar* case, like the *Reyes*[44] case, was also an administrative case before the Ombudsman. The Ombudsman found petitioner Rachel Beatriz Ruivivar administratively liable for discourtesy in the course of her official functions and imposed on her the penalty of reprimand. Petitioner filed a motion for reconsideration of the decision on the ground that she was not furnished copies of the affidavits of the private respondent's witnesses. The Ombudsman subsequently ordered that petitioner be furnished with copies of the counter-affidavits of private respondent's witnesses, and that petitioner should "file, within ten (10) days from receipt of this Order, such pleading which she may deem fit under the circumstances." Petitioner received copies of the affidavits, and simply filed a manifestation where she maintained that her receipt of the affidavits did not alter the deprivation of her right to due process or cure the irregularity in the Ombudsman's decision to penalize her.

In *Ruivivar*, petitioner received the affidavits of the private respondent's witnesses after the Ombudsman rendered a decision against her. We disposed of petitioner's deprivation of due process claim in this manner:

The CA Decision dismissed the petition for certiorari on the ground that the petitioner failed to exhaust all the administrative remedies available to her before the Ombudsman. This ruling is legally correct as exhaustion of administrative remedies is a requisite for the filing of a petition for certiorari. Other than this legal significance, however, the ruling necessarily carries the direct and immediate implication that the petitioner has been granted the opportunity to be heard and has refused to avail of this opportunity; hence, she cannot claim denial of due process. In the words of the CA ruling itself: "Petitioner was given the opportunity by public respondent to rebut the affidavits submitted by private respondent. . . and had a speedy and adequate administrative remedy but she failed to avail thereof for reasons only known to her."

For a fuller appreciation of our above conclusion, we clarify that although they are separate and distinct concepts, exhaustion of administrative remedies and due process embody linked and related principles. The "exhaustion" principle applies when the ruling court or tribunal is not given the opportunity to re-examine its findings and conclusions because of an available opportunity that a party seeking recourse against the court or the tribunal's ruling omitted to take. Under the concept of "due process," on the other hand, a violation occurs when a court or tribunal rules against a party without giving him or her the opportunity to be heard. Thus, the exhaustion principle is based on the perspective of the ruling court or tribunal, while due process is considered from the point of view of the litigating party against whom a ruling was made. The commonality they share is in the same "opportunity" that underlies both. In the context of the present case, the available opportunity to consider and appreciate the petitioner's counter-statement of facts was denied the Ombudsman; hence, the petitioner is barred from seeking recourse at the CA because the ground she would invoke was not considered at all at the Ombudsman level. At the same time, the petitioner – who had the same opportunity to rebut the belatedly-furnished affidavits of the private respondent's witnesses – was not denied and cannot now claim denial of due process because she did not take advantage of the opportunity opened to her at the Ombudsman

level.

The records show that the petitioner duly filed a motion for reconsideration on due process grounds (i.e., for the private respondent's failure to furnish her copies of the affidavits of witnesses) and on questions relating to the appreciation of the evidence on record. The Ombudsman acted on this motion by issuing its Order of January 17, 2003 belatedly furnishing her with copies of the private respondent's witnesses, together with the "directive to file, within ten (10) days from receipt of this Order, such pleading which she may deem fit under the circumstances."

Given this opportunity to act on the belatedly-furnished affidavits, the petitioner simply chose to file a "Manifestation" where she took the position that "The order of the Ombudsman dated 17 January 2003 supplying her with the affidavits of the complainant does not cure the 04 November 2002 order," and on this basis prayed that the Ombudsman's decision "be reconsidered and the complaint dismissed for lack of merit."

For her part, the private respondent filed a Comment/Opposition to Motion for Reconsideration dated 27 January 2003 and prayed for the denial of the petitioner's motion.

In the February 12, 2003 Order, the Ombudsman denied the petitioner's motion for reconsideration after finding no basis to alter or modify its ruling. Significantly, the Ombudsman fully discussed in this Order the due process significance of the petitioner's failure to adequately respond to the belatedly-furnished affidavits. The Ombudsman said:

"Undoubtedly, the respondent herein has been furnished by this Office with copies of the affidavits, which she claims she has not received. Furthermore, the respondent has been given the opportunity to present her side relative thereto, however, she chose not to submit countervailing evidence or argument. The respondent, therefore (sic), cannot claim denial of due process for purposes of assailing the Decision issued in the present case. On this score, the Supreme Court held in the case of *People v. Acot*, 232 SCRA 406, that "a party cannot feign denial of due process where he had the opportunity to present his side". This becomes all the more important since, as correctly pointed out by the complainant, the decision issued in the present case is deemed final and unappealable pursuant to Section 27 of Republic Act 6770, and Section 7, Rule III of Administrative Order No. 07. Despite the clear provisions of the law and the rules, the respondent herein was given the opportunity not normally accorded, to present her side, but she opted not to do so which is evidently fatal to her cause." [emphasis supplied].

Under these circumstances, we cannot help but recognize that the petitioner's cause is a lost one, not only for her failure to exhaust her available administrative remedy, but also on due process grounds. The law can no longer help one who had been given ample opportunity to be heard but who did not take full advantage of the proffered chance.[45]

Ruivivar applies with even greater force to the present Petition because here the affidavits of Sen. Estrada's co-respondents were furnished to him before the Ombudsman rendered her 4 June 2014 Joint Order. In Ruivivar, the affidavits were furnished after the Ombudsman issued a decision.

Justice Velasco's dissent cites the cases of *Tatad v. Sandiganbayan*[46] (*Tatad*) and *Duterte v. Sandiganbayan*[47] (*Duterte*) in an attempt to prop up its stand. A careful reading of these cases, however, would show that they do not stand on all fours with the present case. In *Tatad*, this Court ruled that "the inordinate delay in terminating the preliminary investigation and filing the information [by the Tanodbayan] in the present case is violative of the constitutionally guaranteed right of the petitioner to due process and to a speedy disposition of the cases against him." [48] The Tanodbayan took almost three years to terminate the preliminary investigation, despite Presidential Decree No. 911's prescription of a ten-day period for the prosecutor to resolve a case under preliminary investigation. We ruled similarly in *Duterte*, where the petitioners were merely asked to comment and were not asked to file counter-affidavits as is the proper procedure in a preliminary investigation. Moreover, in *Duterte*, the

Ombudsman took four years to terminate its preliminary investigation.

As we follow the reasoning in Justice Velasco's dissent, it becomes more apparent that Sen. Estrada's present Petition for Certiorari is premature for lack of filing of a motion for reconsideration before the Ombudsman. When the Ombudsman gave Sen. Estrada copies of the counter-affidavits and even waited for the lapse of the given period for the filing of his comment, Sen. Estrada failed to avail of the opportunity to be heard due to his own fault. Thus, Sen. Estrada's failure cannot in any way be construed as violation of due process by the Ombudsman, much less of grave abuse of discretion. Sen. Estrada has not filed any comment, and still chooses not to.

Third. Sen. Estrada's present Petition for Certiorari constitutes forum shopping and should be summarily dismissed.

In his verification and certification of non-forum shopping in the present petition filed on 7 May 2014, Sen. Estrada stated:

3.1 I, however, disclose that I have filed a Motion for Reconsideration dated 07 April 2014 in OMB-C-C-13-0313 and OMB-C-C-13-0397, raising as sole issue the finding of probable cause in the Joint Resolution dated 28 March 2014.

Such Motion for Reconsideration has yet to be resolved by the Office of the Ombudsman.[49] (Emphasis supplied)

Sen. Estrada's Motion for Reconsideration of the 28 March 2014 Joint Resolution prayed that the Ombudsman reconsider and issue a new resolution dismissing the charges against him. However, in this Motion for Reconsideration, Sen. Estrada assailed the Ombudsman's 27 March 2014 Joint Order denying his Request, and that such denial is a violation of his right to due process.

8. It is respectfully submitted that the Ombudsman violated the foregoing rule [Rule 112, Section 4 of the Rules of Court] and principles. A reading of the Joint Resolution will reveal that various pieces of evidence which Senator Estrada was not furnished with – hence, depriving him of the opportunity to controvert the same – were heavily considered by the Ombudsman in finding probable cause to charge him with Plunder and with violations of Section 3(e) of R.A. No. 3019.

x x x x

11. Notably, under dated 20 March 2014, Senator Estrada filed a "Request to be Furnished with Copies of Counter-Affidavits of the Other Respondents, Affidavits of New Witnesses and Other Filings," pursuant to the right of a respondent "to examine the evidence submitted by the complainant which he may not have been furnished" (Section 3[b], Rule 112 of the Rules of Court), and to "have access to the evidence on record" (Section 4[c], Rule II of the Rules of Procedure of the Office of the Ombudsman).

However, notwithstanding the gravity of the offenses leveled against Senator Estrada and the law's vigilance in protecting the rights of an accused, the Special Panel of Investigators, in an Order dated 27 March 2014, unceremoniously denied the request on the ground that "there is no provision under this Office's Rules of Procedure which entitles respondent to be furnished all the filings by the other parties x x x x." (Order dated 27 March 2013, p. 3)

As such, Senator Estrada was not properly apprised of the evidence offered against him, which were eventually made the bases of the Ombudsman's finding of probable cause.[50]

The Ombudsman denied Sen. Estrada's Motion for Reconsideration in its 4 June 2014 Joint Order. Clearly, Sen. Estrada expressly raised in his Motion for Reconsideration with the Ombudsman the violation of his right to due

process, the same issue he is raising in this petition.

In the verification and certification of non-forum shopping attached to his petition docketed as G.R. Nos. 212761-62 filed on 23 June 2014, Sen. Estrada disclosed the pendency of the present petition, as well as those before the Sandiganbayan for the determination of the existence of probable cause. In his petition in G.R. Nos. 212761-62, Sen. Estrada again mentioned the Ombudsman's 27 March 2014 Joint Order denying his Request.

17. Sen. Estrada was shocked not only at the Office of the Ombudsman's finding of probable cause, which he maintains is without legal or factual basis, but also that such finding of probable cause was premised on evidence not disclosed to him, including those subject of his Request to be Furnished with Copies of Counter-Affidavits of the Other Respondents, Affidavits of New Witnesses and Other Filings dated 20 March 2014.

In particular, the Office of the Ombudsman used as basis for the Joint Resolution the following documents -

- Alexis G. Sevidal's Counter-Affidavits dated 15 January and 24 February 2014;
- Dennis L. Cunanan's Counter-Affidavits both dated 20 February 2014;
- Francisco B. Figura's Counter-Affidavit dated 08 January 2014;
- Ruby Tuason's Counter-Affidavits both dated 21 February 2014;
- Gregoria G. Buenaventura's Counter-Affidavit dated 06 March 2014; and
- Philippine Daily Inquirer Online Edition news article entitled "Benhur Luy upstages Napoles in Senate Hearing" by Norman Bordadora and TJ Borgonio, published on 06 March 2014,

none of which were ever furnished Sen. Estrada prior to the issuance of the challenged Joint Resolution, despite written request.

x x x x

II

THE OFFICE OF THE OMBUDSMAN, IN ISSUING THE CHALLENGED JOINT RESOLUTION DATED 28 MARCH 2014 AND CHALLENGED JOINT ORDER DATED 04 JUNE 2014, NOT ONLY ACTED WITHOUT OR IN EXCESS OF ITS JURISDICTION OR WITH GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION, BUT ALSO VIOLATED SEN. ESTRADA'S CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW AND TO EQUAL PROTECTION OF THE LAWS.

x x x x

2.17 x x x x

Notably, in its Joint Order dated 07 May 2014, the Office of the Ombudsman even arbitrarily limited the filing of Sen. Estrada's comment to the voluminous documents comprising the documents it furnished Sen. Estrada to a "non-extendible" period of five (5) days, making it virtually impossible for Sen. Estrada to adequately study the charges leveled against him and intelligently respond to them. The Joint Order also failed to disclose the existence of other counter-affidavits and failed to furnish Sen. Estrada copies of such counter-affidavits.[51]

Sen. Estrada has not been candid with this Court. His claim that the finding of probable cause was the "sole issue" he raised before the Ombudsman in his Motion for Reconsideration dated 7 April 2014 is obviously false.

Moreover, even though Sen. Estrada acknowledged his receipt of the Ombudsman's 4 June 2014 Joint Order which denied his motion for reconsideration of the 28 March 2014 Joint Resolution, Sen. Estrada did not mention that the 4 June 2014 Joint Order stated that the Ombudsman "held in abeyance the disposition of the motions for reconsideration in this proceeding in light of its grant to [Sen. Estrada] a period of five days from receipt of the 7 May 2014 [Joint] Order to formally respond to the above-named co-respondent's claims."

Sen. Estrada claims that his rights were violated but he flouts the rules himself.

The rule against forum shopping is not limited to the fulfillment of the requisites of *litis pendentia*.^[52] To determine whether a party violated the rule against forum shopping, the most important factor to ask is whether the elements of *litis pendentia* are present, or whether a final judgment in one case will amount to *res judicata* in another.^[53] Undergirding the principle of *litis pendentia* is the theory that a party is not allowed to vex another more than once regarding the same subject matter and for the same cause of action. This theory is founded on the public policy that the same matter should not be the subject of controversy in court more than once in order that possible conflicting judgments may be avoided, for the sake of the stability in the rights and status of persons.^[54]

x x x [D]espite the fact that what the petitioners filed was a petition for certiorari, a recourse that – in the usual course and because of its nature and purpose – is not covered by the rule on forum shopping. The exception from the forum shopping rule, however, is true only where a petition for certiorari is properly or regularly invoked in the usual course; the exception does not apply when the relief sought, through a petition for certiorari, is still pending with or has as yet to be decided by the respondent court, tribunal or body exercising judicial or quasi-judicial body, e.g., a motion for reconsideration of the order assailed via a petition for certiorari under Rule 65, as in the present case. This conclusion is supported and strengthened by Section 1, Rule 65 of the Revised Rules of Court which provides that the availability of a remedy in the ordinary course of law precludes the filing of a petition for certiorari; under this rule, the petition's dismissal is the necessary consequence if recourse to Rule 65 is prematurely taken.

To be sure, the simultaneous remedies the petitioners sought could result in possible conflicting rulings, or at the very least, to complicated situations, between the RTC and the Court of Appeals. An extreme possible result is for the appellate court to confirm that the RTC decision is meritorious, yet the RTC may at the same time reconsider its ruling and recall its order of dismissal. In this eventuality, the result is the affirmation of the decision that the court *quo* has backtracked on. Other permutations depending on the rulings of the two courts and the timing of these rulings are possible. In every case, our justice system suffers as this kind of sharp practice opens the system to the possibility of manipulation; to uncertainties when conflict of rulings arise; and at least to vexation for complications other than conflict of rulings. Thus, it matters not that ultimately the Court of Appeals may completely agree with the RTC; what the rule on forum shopping addresses are the possibility and the actuality of its harmful effects on our judicial system.^[55]

Sen. Estrada resorted to simultaneous remedies by filing this Petition alleging violation of due process by the Ombudsman even as his Motion for Reconsideration raising the very same issue remained pending with the Ombudsman. This is plain and simple forum shopping, warranting outright dismissal of this Petition.

SUMMARY

The Ombudsman, in furnishing Sen. Estrada a copy of the complaint and its supporting affidavits and documents, fully complied with Sections 3 and 4 of Rule 112 of the Revised Rules of Criminal Procedure, and Section 4, Rule II of the Rules of Procedure of the Office of the Ombudsman, Administrative Order No. 7. Both the Revised Rules of Criminal Procedure and the Rules of Procedure of the Office of the Ombudsman require the investigating officer to furnish the respondent with copies of the affidavits of the complainant and affidavits of his supporting

witnesses. Neither of these Rules require the investigating officer to furnish the respondent with copies of the affidavits of his co-respondents. The right of the respondent is only “to examine the evidence submitted by the complainant,” as expressly stated in Section 3(b), Rule 112 of the Revised Rules of Criminal Procedure. This Court has unequivocally ruled in *Paderanga* that “Section 3, Rule 112 of the Revised Rules of Criminal Procedure expressly provides that the respondent shall only have the right to submit a counter-affidavit, to examine all other evidence submitted by the complainant and, where the fiscal sets a hearing to propound clarificatory questions to the parties or their witnesses, to be afforded an opportunity to be present but without the right to examine or cross-examine.” Moreover, Section 4 (a, b and c) of Rule II of the Ombudsman’s Rule of Procedure, read together, only require the investigating officer to furnish the respondent with copies of the affidavits of the complainant and his supporting witnesses. There is no law or rule requiring the investigating officer to furnish the respondent with copies of the affidavits of his co-respondents.

In the 7 May 2014 Joint Order, the Ombudsman went beyond legal duty and even furnished Sen. Estrada with copies of the counter-affidavits of his co-respondents whom he specifically named, as well as the counter-affidavits of some of other co-respondents. In the 4 June 2014 Joint Order, the Ombudsman even held in abeyance the disposition of the motions for reconsideration because the Ombudsman granted Sen. Estrada five days from receipt of the 7 May 2014 Joint Order to formally respond to the claims made by his co-respondents. The Ombudsman faithfully complied with the existing Rules on preliminary investigation and even accommodated Sen. Estrada beyond what the Rules required. Thus, the Ombudsman could not be faulted with grave abuse of discretion. Since this is a Petition for Certiorari under Rule 65, the Petition fails in the absence of grave abuse of discretion on the part of the Ombudsman.

The constitutional due process requirements mandated in *Ang Tibay*, as amplified in *GSIS*, are not applicable to preliminary investigations which are creations of statutory law giving rise to mere statutory rights. A law can abolish preliminary investigations without running afoul with the constitutional requirements of due process as prescribed in *Ang Tibay*, as amplified in *GSIS*. The present procedures for preliminary investigations do not comply, and were never intended to comply, with *Ang Tibay*, as amplified in *GSIS*. Preliminary investigations do not adjudicate with finality rights and obligations of parties, while administrative investigations governed by *Ang Tibay*, as amplified in *GSIS*, so adjudicate. *Ang Tibay*, as amplified in *GSIS*, requires substantial evidence for a decision against the respondent in the administrative case. In preliminary investigations, only likelihood or probability of guilt is required. To apply *Ang Tibay*, as amplified in *GSIS*, to preliminary investigations will change the quantum of evidence required to establish probable cause. The respondent in an administrative case governed by *Ang Tibay*, as amplified in *GSIS*, has the right to an actual hearing and to cross-examine the witnesses against him. In preliminary investigations, the respondent has no such rights.

Also, in an administrative case governed by *Ang Tibay*, as amplified in *GSIS*, the hearing officer must be impartial and cannot be the fact-finder, investigator, and hearing officer at the same time. In preliminary investigations, the same public officer may be the investigator and hearing officer at the same time, or the fact-finder, investigator and hearing officer may be under the control and supervision of the same public officer, like the Ombudsman or Secretary of Justice. This explains why *Ang Tibay*, as amplified in *GSIS*, does not apply to preliminary investigations. To now declare that the guidelines in *Ang Tibay*, as amplified in *GSIS*, are fundamental and essential requirements in preliminary investigations will render all past and present preliminary investigations invalid for violation of constitutional due process. This will mean remanding for reinvestigation all criminal cases now pending in all courts throughout the country. No preliminary investigation can proceed until a new law designates a public officer, outside of the prosecution service, to determine probable cause. Moreover, those serving sentences by final judgment would have to be released from prison because their conviction violated constitutional due process.

Sen. Estrada did not file a Motion for Reconsideration of the 27 March 2014 Order in OMB-C-C-13-0313 denying his Request, which is the subject of the present Petition. He should have filed a Motion for Reconsideration, in the same manner that he filed a Motion for Reconsideration of the 15 May 2014 Order denying his motion to suspend proceedings. The unquestioned rule in this jurisdiction is that certiorari will lie only if there is no appeal or any other plain, speedy and adequate remedy in the ordinary course of law against the acts of the public respondent.[56] The plain, speedy and adequate remedy expressly provided by law is a Motion for Reconsideration of the 27 March 2014 Order of the Ombudsman. Sen. Estrada's failure to file a Motion for Reconsideration renders this Petition premature.

Sen. Estrada also raised in this Petition the same issue he raised in his Motion for Reconsideration of the 28 March 2014 Joint Resolution of the Ombudsman finding probable cause. While his Motion for Reconsideration of the 28 March 2014 Joint Resolution was pending, Sen. Estrada did not wait for the resolution of the Ombudsman and instead proceeded to file the present Petition for Certiorari. The Ombudsman issued a Joint Order on 4 June 2014 and specifically addressed the issue that Sen. Estrada is raising in this Petition. Thus, Sen. Estrada's present Petition for Certiorari is not only premature, it also constitutes forum shopping.

WHEREFORE, we DISMISS the Petition for Certiorari in G.R. Nos. 212140-41.

SO ORDERED.

Sereno, (Chief Justice), Peralta, Del Castillo, Villarama, Jr., Perez, Mendoza, Reyes, Perlas-Bernabe, and Jardeleza, JJ., concur.

Velasco, Jr., J., I register my Dissenting Opinion.

Leonardo-De Castro, J., I join the Dissent of Justice Velasco.

Brion, J.,[*] Justice Brion left his vote; see his Dissenting Opinion.

Bersamin, J., I join the Dissent of J. Velasco.

Leonen, J., I concur see separate opinion.

[*] On official leave.

[1] 273 Phil. 290, 299 (1991). Emphasis supplied.

[2] Under Rule 65 of the 1997 Rules of Civil Procedure.

[3] OMB-C-C-13-0313 charges the following respondents:

1. Jose "Jinggoy" P. Ejercito Estrada, Senator of the Republic of the Philippines;
2. Janet Lim Napoles, private respondent;
3. Pauline Therese Mary C. Labayen, Deputy Chief of Staff, Office of Sen. Estrada;
4. Ruby Tuason, private respondent;
5. Alan A. Javellana, President, National Agribusiness Corporation (NABCOR);
6. Gondelina G. Amata, President, National Livelihood Development Corporation (NLDC);
7. Antonio Y. Ortiz, Director General, Technology Resource Center (TRC);
8. Mylene T. Encarnacion, private respondent, President, Countrywide Agri and Rural Economic and Development Foundation, Inc. (CARED);

9. John Raymund S. De Asis, private respondent, President, Kaupdanan Para sa Mangunguma Foundation, Inc. (KPMFI);
10. Dennis L. Cunanan, Deputy Director General, TRC;
11. Victor Roman Cojamco Cacal, Paralegal, NABCOR;
12. Romulo M. Relevo, employee, NABCOR;
13. Maria Ninez P. Guañizo, bookkeeper, officer-in-charge, Accounting Division, NABCOR;
14. Ma. Julie Asor Villalarvo-Johnson, chief accountant, NABCOR;
15. Rhodora Butalad Mendoza, Director for Financial Management Services and Vice President for Administration and Finance, NABCOR;
16. Gregoria G. Buenaventura, employee, NLDC;
17. Alexis Gagni Sevidal, Director IV, NLDC;
18. Sofia Daing Cruz, Chief Financial Specialist, NLDC/Project Management Assistant IV, NLDC;
19. Chita Chua Jalandoni, Department Manager III, NLDC;
20. Francisco Baldoza Figura, employee, TRC;
21. Marivic V. Jover, chief accountant, TRC;
22. Mario L. Relampagos, Undersecretary for Operations, Department of Budget and Management (DBM);
- 23-25. Rosario Nuñez (aka Leah), Lalaine Paule (aka Lalaine), Marilou Bare (Malou), employees at the Office of the Undersecretary for Operations, DBM; and
26. John and Jane Does

[4] OMB-C-C-13-0397 charges the following respondents for Plunder and Violation of Sec. 3(e) of RA 3019:

1. Jose “Jinggoy” P. Ejercito Estrada, Senator of the Republic of the Philippines;
2. Pauline Therese Mary C. Labayen, Director IV/Deputy Chief of Staff, Office of Sen. Estrada;
3. Antonio Y. Ortiz, Director General, TRC;
4. Alan Alunan Javellana, President, NABCOR;
5. Victor Roman Cacal, Paralegal, NABCOR;
6. Maria Ninez P. Guañizo, bookkeeper, officer-in-charge, Accounting Division, NABCOR;
7. Romulo M. Relevo, employee, NABCOR;
8. Ma. Julie Asor Villalarvo-Johnson, chief accountant, NABCOR;
9. Rhodora Butalad Mendoza, Director, NABCOR;
10. Ma. Rosalinda Lacsamana, Director III, TRC;
11. Marivic V. Jover, Accountant III, TRC;
12. Dennis L. Cunanan, Deputy Director General, TRC;

13. Evelyn Sucgang, employee, NLDC;
14. Chita Chua Jalandoni, Department Manager III, NLDC;
15. Emmanuel Alexis G. Sevidal, Director IV, NLDC;
16. Sofia D. Cruz, Chief Financial Specialist, NLDC; and
17. Janet Lim Napoles, private respondent.

[5] These were Tuason, Amata, Buenaventura, Sevidal, Cruz; Sucgang, Javellana, Cacal, Villalarvo- Johnson, Mendoza, Guañizo, Cunanan, Jover, Figura, Nuñez, Paule, Bare, and Relampagos.

[6] Rollo, p. 745.

[7] Id.

[8] Id. at 34-36. Signed by M.A. Christian O. Uy, Graft Investigation and Prosecution Officer IV, Chairperson, Special Panel of Investigators per Office Order No. 349, Series of 2013.

[9] Id. at 579-698. Approved and signed by Ombudsman Conchita Carpio Morales; signed by M.A. Christian O. Uy, Graft Investigation and Prosecution Officer IV, Chairperson, with Ruth Laura A. Mella, Graft Investigation and Prosecution Officer II, Francisca M. Serfino, Graft Investigation and Prosecution Officer II, Anna Francesca M. Limbo, Graft Investigation and Prosecution Officer II, and Jasmine Ann B. Gapatan, Graft Investigation and Prosecution Officer I, as members of the Special Panel of Investigators per Office Order No. 349, Series of 2013.

[10] Id. at 9.

[11] Id. at 3.

[12] Id. at 27-28.

[13] Joint Order, OMB-C-C-13-0313 and OMB-C-C-13-0397, p. 20.

[14] Id. at 769. Signed by Francis H. Jardeleza, Solicitor General (now Associate Justice of this Court); Karl B. Miranda, Assistant Solicitor General; Noel Cezar T. Segovia, Senior State Solicitor; Lester O. Fiel, State Solicitor; Omar M. Diaz, State Solicitor; Michael Geronimo R. Gomez, Associate Solicitor; Irene Marie P. Qua, Associate Solicitor; Patrick Joseph S. Tapales, Associate Solicitor; Ronald John B. Decano, Associate Solicitor; and Alexis Ian P. Dela Cruz, Attorney II.

[15] G.R. No. 170512, 5 October 2011, 658 SCRA 626.

[16] Sec. 3, Rule V of the Rules of Procedure of the Office of the Ombudsman reads:

Section 3. Rules of Court, application. – In all matters not covered by these rules, the Rules of Court shall apply in a suppletory manner, or by analogy whenever practicable and convenient.

[17] Manila Electric Company v. NLRC, et al., G.R. No. L-60054, 2 July 1991, 198 SCRA 681, 682. Citations omitted.

[18] Webb v. Hon. De Leon, 317 Phil. 758 (1995).

[19] Supra note 1, at 299-300.

[20] <http://www.ombudsman.gov.ph/docs/pressreleases/Senator%20Estrada.pdf> (last accessed 7 September 2014).

[21] The citation for Ang Tibay is 69 Phil. 635 (1940).

[22] Id. at 641-642.

[23] Id. at 642-644. Citations omitted

[24] 357 Phil. 511 (1998).

[25] Id. at 533.

[26] See *Ledesma v. Court of Appeals*, 344 Phil. 207 (1997). See also *United States v. Grant and Kennedy*, 18 Phil. 122 (1910).

[27] *Webb v. Hon. De Leon*, supra note 18, at 789. Emphasis supplied.

[28] *Lozada v. Hernandez, etc., et al.*, 92 Phil. 1051, 1053 (1953).

[29] 71 Phil. 216 (1941).

[30] In all criminal prosecutions, the accused shall be presumed innocent until the contrary is proved, and shall enjoy the right to be heard by himself and counsel, to be informed of the nature and cause of the accusation against him, to have a speedy, impartial, and public trial, to meet the witnesses face to face, and to have compulsory process to secure the attendance of witnesses and the production of evidence in his behalf. However, after arraignment, trial may proceed notwithstanding the absence of the accused provided that he has been duly notified and his failure to appear is unjustifiable.

[31] *Crespo v. Judge Mogul*, 235 Phil. 465 (1987).

[32] *Mariñas v. Hon. Siochi, etc., et al.*, 191 Phil. 698, 718 (1981).

[33] See *Dequito v. Arellano*, 81 Phil. 128, 130 (1948), citing 32 CJS 456.

[34] *Bustos v. Lucero*, 81 Phil. 640, 644 (1948).

[35] The Fourth Amendment of the United States Constitution reads: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." See also *Ocampo v. United States*, 234 U.S. 91 (1914).

[36] *Brinegar v. United States*, 338 U.S. 160, 175-176 (1949).

[37] G.R. No. 179367, 29 January 2014, 715 SCRA 36, 49-50. Citations omitted.

[38] 380 U.S. 102, 107-108 (1965).

[39] See *People v. Delos Santos*, 386 Phil. 121 (2000). See also *People v. Garcia*, 346 Phil. 475 (1997).

[40] *People v. Gallo*, 374 Phil. 59 (1999). See also *Echegaray v. Secretary of Justice*, 361 Phil. 73 (1999); *Bachrach Corporation v. Court of Appeals*, 357 Phil. 483 (1998); *Lee v. De Guzman*, G.R. No. 90926, 187 SCRA 276, 6 July 1990; *Philippine Veterans Bank v. Intermediate Appellate Court*, 258-A Phil. 424 (1989); *Sps. Lipana v. Development Bank of Rizal*, 238 Phil. 246 (1987); *Candelario v. Cañizares*, 114 Phil. 672 (1962).

[41] As enumerated in *Tan v. CA*, 341 Phil. 570, 576-578 (1997), the exceptions are:

(a) where the order is a patent nullity, as where the Court a quo had no jurisdiction;

(b) where the questions raised in the certiorari proceeding have been duly raised and passed upon by the lower

court, or are the same as those raised and passed upon in the lower court;

(c) where there is an urgent necessity for the resolution of the question and any further delay would prejudice the interests of the Government or of the petitioner or the subject matter of the action is perishable;

(d) where, under the circumstances, a motion for reconsideration would be useless;

(e) where petitioner was deprived of due process and there is extreme urgency for relief;

(f) where, in a criminal case, relief from an order of arrest is urgent and the granting of such relief by the trial Court is improbable;

(g) where the proceedings in the lower court are a nullity for lack of due process;

(h) where the proceedings was ex parte or in which the petitioner had no opportunity to object; and (i) where the issue raised is one purely of law or where public interest is involved. (Citations omitted)

[42] Delos Reyes v. Flores, 628 Phil. 170 (2010); Cervantes v. Court of Appeals, 512 Phil. 210 (2005); Flores v. Sangguniang Panlalawigan of Pampanga, 492 Phil. 377 (2005). See also Bokingo v. Court of Appeals, 523 Phil. 186 (2006); Yao v. Perello, 460 Phil. 658 (2003).

[43] 587 Phil. 100 (2008).

[44] G.R. No. 170512, 5 October 2011, 658 SCRA 626.

[45] Supra note 43, at 113-116. Emphases in the original; citations omitted.

[46] 242 Phil. 563 (1988).

[47] 352 Phil. 557 (1998).

[48] Supra note 46, at 576.

[49] Rollo, p. 30.

[50] Id. at 789-791.

[51] Petition for Certiorari, G.R. Nos. 212761-62, 20 June 2014, pp. 9-10, 13, 53.

[52] For *litis pendencia* to lie, the following requisites must be satisfied:

1. Identity of parties or representation in both cases;
2. Identity of rights asserted and relief prayed for;
3. The relief must be founded on the same facts and the same basis; and
4. Identity of the two preceding particulars should be such that any judgment, which may be rendered in the other action, will, regardless of which party is successful, amount to *res judicata* on the action under consideration. *Sherwill Development Corporation v. Sitio Sto. Niño Residents Association, Inc.*, 500 Phil. 288, 301 (2005), citing *Sps. Tirona v. Alejo*, 419 Phil. 285 (2001), further citing *Tourist Duty Free Shops, Inc. v. Sandiganbayan*, 380 Phil. 328 (2000).

[53] *Madara v. Perello*, 584 Phil. 613, 629 (2008).

[54] *Sps. Tirona v. Alejo*, 419 Phil. 285, 303 (2001).

[55] Supra note 53, at 629-630. Boldfacing supplied; italicization in the original.

[56] Interiorient Maritime Enterprises, Inc. v. NLRC, 330 Phil. 493, 502 (1996).

DISSENTING OPINION

VELASCO, JR., J.:

The majority has decided to dismiss the petition for certiorari under Rule 65 of the Rules of Court filed by Sen. Jinggoy Ejercito Estrada assailing and seeking to annul the Office of the Ombudsman's Order dated March 27, 2014 in OMB-C-C-13-0313 and entitled "National Bureau of Investigation and Atty. Levito Baligod v. Jose 'Jinggoy' P. Ejercito Estrada, et al."

I cannot find myself agreeing with my distinguished colleagues and so register my dissent.

The Antecedents

In OMB-C-C-13-0313, a preliminary investigation conducted on the complaint filed by the National Bureau of Investigation (NBI) and Atty. Levito Baligod (Atty. Baligod), petitioner Sen. Jinggoy Ejercito Estrada (Sen. Estrada), along with several others, was charged with Plunder. Similarly, in OMB-C-C-13-0397, petitioner was charged with the offenses of Plunder and violation of Republic Act No. (RA) 3019, or the Anti-Graft and Corrupt Practices Act,[1] in the complaint filed by the Field Investigation Office-Office of the Ombudsman (OMB-FIO). Both preliminary investigations pertain to the alleged anomalous scheme behind the implementation of several government projects funded from the Priority Development Assistance Fund (PDAF) of several members of the legislature.

In compliance with the Ombudsman's Orders, Sen. Estrada submitted, as required, a Counter-Affidavit dated January 8, 2014 to the NBI complaint, and a Counter-Affidavit dated January 16, 2014 in response to the OMB-FIO complaint.

In the meantime, Sen. Estrada's co-respondents named in the adverted complaints filed their respective counter-affidavits, to wit:

1)

Ruby Tuason (Tuason) – Two (2) Counter-Affidavits both dated February 21, 2014;

2)

Gondelina Amata (Amata) – Counter-Affidavit dated December 26, 2013 to the OMB-FIO Complaint and Counter-Affidavit dated January 20, 2014 to the NBI Complaint;

3)

Gregoria Buenaventura (Buenaventura) – Counter-Affidavit dated March 6, 2014;

4)

Alexis Sevidal (Sevidal) – Counter-Affidavit dated January 15, 2014 to the NBI Complaint and Counter-Affidavit dated February 24, 2014 to the OMB-FIO Complaint;

5)

Sofia D. Cruz (Cruz) – Counter-Affidavit dated January 31, 2014;

6)

Evelyn Sucgang (Sucgang) – Counter-Affidavit dated February 11, 2014;

7)

Alan Javellana (Javellana) – Two (2) Counter-Affidavits dated February 6, 2014;

8)

Victor Roman CojamcoCacal (Cacal) – Counter-Affidavit dated December 11, 2013 to the OMB-FIO Complaint and Counter-Affidavit dated January 22, 2014 to the NBI Complaint;

9)

Ma. Julie A. Villalarvo-Johnson (Johnson) – Two (2) Counter-Affidavits dated March 14, 2014;

10)

RhodoraBulatad Mendoza (Mendoza) – Counter-Affidavit dated March 6, 2014;

11)

Maria Ninez P. Guañizo (Guañizo) – Counter-Affidavit dated January 28, 2014;

12)

Dennis L. Cunanan (Cunanan) – Two (2) Counter-Affidavits dated February 20, 2014;

13)

Marivic V. Jover (Jover) – Two (2) Counter-Affidavits dated December 9, 2013;

14)

Francisco B. Figura (Figura) – Counter-Affidavit dated January 8, 2014;

15)

Rosario Nuñez (Nuñez), LalainePaule (Paule) and Marilou Bare (Bare) –Joint Counter-Affidavit dated December 13, 2013; and

16)

Mario L. Relampagos (Relampagos)– Counter-Affidavit dated December 13, 2013.

Alleging that media reports suggested that his co-respondents and several witnesses made reference in their respective affidavits to his purported participation in the so-called “PDAF scam,” Sen. Estrada then filed in OMB-C-C-13-0313 a Request to be Furnished with Copies of Counter-Affidavits of the Other Respondents, Affidavits of New Witnesses and Other Filings dated March 20, 2014 (Request) so that he may be able to fully refute the allegations against him, if he finds the need to do so. Specifically, Sen. Estrada requested to be furnished with copies of the following:

a)

Affidavit of Ruby Tuason;

b)

Affidavit of Dennis L. Cunanan;

c)

Counter-Affidavit of Gondelina G. Amata;

d)

Counter-Affidavit of Mario L. Relampagos;

e)

Consolidated Reply of the NBI, if one had been filed; and

f)

Affidavit/Counter-Affidavits/Pleadings/Filings filed by all the other respondents and/or additional witnesses for the Complainants.

In the assailed Order dated March 27, 2014, the Office of the Ombudsman denied Sen. Estrada's Request for the stated reason that his rights as a respondent in the preliminary investigations depend on the rights granted him by law, and that the Rules of Court and Administrative Order (AO) No. 7, or the Rules of Procedure of the Office of the Ombudsman, only require respondents to furnish their counter-affidavits to the complainant, and not to their co-respondents. Hence, the Ombudsman concluded that Sen. Estrada is not entitled, as a matter of right, to copies of the affidavits of his co-respondents.

The next day, March 28, 2014, the Ombudsman issued a Joint Resolution in OMB-C-C-13-0313 and OMB-C-C-13-0397 finding probable cause to indict Sen. Estrada with one (1) count of Plunder and eleven (11) counts of violation of Section 3(e) of RA 3019. Sen. Estrada would allege that the Ombudsman used as basis for its Joint Resolution the following documents and papers that were not furnished to him:

1)

Sevidal's Counter-Affidavits dated January 15 and February 24, 2014;

2)

Cunanan's Counter-Affidavits both dated February 20, 2014;

3)

Figura's Counter-Affidavit dated January 8, 2014;

4)

Tuason's Affidavits both dated February 21, 2014;

5)

Buenaventura's Counter-Affidavit dated March 6, 2014; and

6)

Philippine Daily Inquirer Online Edition news article entitled "BenhurLuy upstages Napoles in Senate Hearing" by Norman Bordadora and TJ Borgonio, published on May 6, 2014.

Sen. Estrada received both the March 27, 2014 Order and March 28, 2014 Joint Resolution on April 1, 2014.

On April 7, 2014, Sen. Estrada interposed a Motion for Reconsideration seeking the reversal of the adverted Joint Resolution finding probable cause against him.

On May 7, 2014, Sen. Estrada filed with this Court a petition for certiorari assailing the March 27, 2014 Order of

the Ombudsman and praying in the main that this Court render judgment declaring (a) that he has been denied due process as a consequence of the issuance of the March 27, 2014 Order, and (b) that the March 27, 2014 Order, as well as the proceedings in OMB-C-C-13-0313 and OMB-C-C-13-0397 subsequent to and affected by the issuance of the challenged Order, are null and void. Sen. Estrada also prayed for the issuance of a temporary restraining order (TRO) and/or writ of preliminary injunction to enjoin the Office of the Ombudsman from conducting any further proceedings in OMB-C-C-13-0313 and OMB-C-C-13-0397 until his petition is resolved by the Court. In a Motion dated June 27, 2014, Sen. Estrada moved for the conversion of his application for the issuance of a TRO and/or Writ of Preliminary Injunction into that for the issuance of a Status Quo Ante Order and return the parties to the last peaceable uncontested status which preceded the present controversy or immediately after the issuance of the Order dated March 27, 2014.

On even date, the Ombudsman issued in OMB-C-C-13-0313 and OMB-C-C-13-0397 a Joint Order dated May 7, 2014 furnishing petitioner with the counter-affidavits of Tuason, Cunanan, Amata, Relampagos, Figura, Buenaventura, and Sevidal, and directing him to comment thereon within a non-extendible period of five (5) days from receipt of said Order. Records do not show whether or not petitioner filed a comment on the said counter-affidavits.

Sen. Estrada claims in his petition that he was denied due process of law when the Ombudsman refused to furnish him with copies of the affidavits of his co-respondents. He posits in fine that, consequent to the Ombudsman's refusal, he was not afforded sufficient opportunity to answer the charges against him contrary to the Rules of Court, the Rules of Procedure of the Ombudsman, and several rulings of this Court applying the due process clause in administrative cases.

Traversing petitioner's above posture, respondents aver in their respective comments[2] to the first petition that Sen. Estrada was in fact furnished with the documents he requested per the May 7, 2014 Joint Order of the Ombudsman. Further, respondents contend that the present petition for certiorari filed by Sen. Estrada is procedurally infirm as he has a plain, speedy and adequate remedy—the motion for reconsideration he filed to question the March 28, 2014 Joint Resolution of the Ombudsman. As a corollary point, the respondents add that Sen. Estrada's petition violates the rule against forum shopping, Sen. Estrada having presented the same arguments in his motion for reconsideration of the March 28, 2014 Joint Resolution filed with the Ombudsman.

Parenthetically, following his receipt of a copy of the Office of the Ombudsman's Joint Order dated June 4, 2014 denying his Motion for Reconsideration (of the Joint Resolution dated March 28, 2014), Sen. Estrada filed another petition for certiorari before this Court, docketed as G.R. No. 212761-62.

The Issue

The main issue in the petition at bar centers on whether the denial via the Ombudsman's Order of March 27, 2014 of petitioner's plea embodied in his Request constitutes, under the premises, grave abuse of discretion.[3]

The Majority's Decision

The ponencia of Justice Carpio denies the petition on the following grounds:

1)

There is supposedly no law or rule which requires the Ombudsman to furnish a respondent with copies of the counter-affidavits of his co-respondents;

2)

Sen. Estrada's present recourse is allegedly premature; and

3)

Sen. Estrada's petition purportedly constitutes forum shopping that should be summarily dismissed.

My Dissent

I do not agree with the conclusions reached by the majority for basic reasons to be discussed shortly. But first, a consideration of the relevant procedural concerns raised by the respondents and sustained by the ponencia.

Petitioner's motion for reconsideration against the Joint Resolution is not a plain, speedy, and adequate remedy.

Under Section 1, Rule 65 of the Rules of Court, a petition for certiorari is only available if "there is no appeal, nor any plain, speedy, and adequate remedy in the ordinary course of law." In the instant case, Sen. Estrada admits to not filing a motion for reconsideration against the assailed March 27, 2014 Order, but claims that he had no chance to do so as the Order was almost simultaneously served with the March 28, 2014 probable cause finding Joint Resolution. Respondents, on the other hand, counter that the bare fact that Sen. Estrada filed a motion for reconsideration of the March 28, 2014 Joint Resolution shows that a "plain, speedy, and adequate remedy" was available to him. Sen. Estrada cannot, therefore, avail of the extraordinary remedy of certiorari, so respondents argue.

I cannot acquiesce with respondents' assertion that the motion for reconsideration to the Joint Resolution finding probable cause to indict petitioner is, vis-à-vis the denial Order of March 27, 2014, equivalent to the "plain, speedy, and adequate remedy" under Rule 65. This Court has defined such remedy as "[one] which (would) equally (be) beneficial, speedy and sufficient not merely a remedy which at some time in the future will bring about a revival of the judgment xxx complained of in the certiorari proceeding, but a remedy which will promptly relieve the petitioner from the injurious effects of that judgment and the acts of the inferior court or tribunal' concerned." [4] This in turn could only mean that only such remedy that can enjoin the immediate enforceability of the assailed order can preclude the availability of the remedy under Rule 65 of the Rules of Court. Notably, Section 7(b) of the Rules of Procedure of the Office of Ombudsman is categorical that even a motion for reconsideration to an issuance finding probable cause cannot bar the filing of the information:

Section 7. Motion for Reconsideration –xxx xxx xxx

b) The filing of a motion for reconsideration/reinvestigation shall not bar the filing of the corresponding information in Court on the basis of the finding of probable cause in the resolution subject of the motion.[5]

Hence, Sen. Estrada may very well be subjected to the rigors of a criminal prosecution in court even if there is a pending question regarding the Ombudsman's grave abuse of its discretion preceding the finding of a probable cause to indict him. His motion for reconsideration to the Joint Resolution is clearly not the "plain, speedy, and adequate remedy in the ordinary course of law" that can bar a Rule 65 recourse to question the propriety of the Ombudsman's refusal to furnish him copies of the affidavits of his co-respondents. Otherwise stated, Sen. Estrada's present recourse is not premature.

The concurrence of the present petition and the motion for reconsideration filed with the Ombudsman does not amount to forum shopping.

The majority, however, maintains that petitioner's filing of the present petition while his motion for reconsideration to the joint resolution was pending, constitutes a violation of the rule against forum shopping. The majority maintains that Sen. Estrada's motion for reconsideration before the Office of the Ombudsman supposedly contained the same arguments he raised in the petition at bar.

There is a violation of the rule against forum shopping when the requisites for the existence of *litis pendentia* are

present.[6] Thus, there is forum shopping when the following requisites concur: (1) identity of parties in both actions; (2) identity of rights asserted and reliefs prayed for, the reliefs being founded on the same facts; and (3) any judgment that may be rendered in the pending case, regardless of which party is successful, would amount to *res judicata* in the other case.[7] I submit that there is no subsistence of these elements in the present case, as the majority posits.

As to the first requisite, it is obvious that the Office of the Ombudsman, the main respondent in this petition, is not a party in the case where the motion for reconsideration was filed by Sen. Estrada. The required identity of parties is, therefore, not present.

The role of the Office of the Ombudsman, as a respondent in this certiorari proceeding, is not only relevant in the determination of the existence of the first requisite. It is also indicative of the absence of the second requisite.

In his petition for certiorari, Sen. Estrada bewails the alleged grave abuse of discretion of the Office of Ombudsman in denying his request to be furnished with copies of the affidavits of his co-respondents. Hence, petitioner prays that the denying Order and all proceedings subsequent to the issuance of the Order be considered null and void. On the other hand, the motion for reconsideration thus interposed with the Office of Ombudsman by Sen. Estrada contends that the former erred in finding probable cause to indict him for plunder and violation of RA 3019, as the evidence against him does not support such finding. He further prayed in his motion for reconsideration the reversal of the Ombudsman's finding of probable cause. Clearly, there is no identity of rights asserted and reliefs prayed between the petition before the Court and the motion for reconsideration filed before the Office of the Ombudsman. The second requisite of *litis pendencia* does not exist.

The difference in the reliefs prayed for in the petition at bar and the motion for reconsideration filed with the Office of the Ombudsman argues against the presence of the third requisite. For a denial of petitioner's motion for reconsideration by the Ombudsman would not affect the resolution of the present petition. Similarly, a favorable resolution of the present controversy would not dictate the Ombudsman to rule one way or the other in the determination of probable cause to indict petitioner for plunder or violation of RA 3019. As the certiorari proceedings before this Court is exclusively concerned with the Ombudsman's grave abuse of discretion in denying the petitioner his constitutional right to due process, a definitive ruling herein would not amount to *res judicata* that would preclude a finding of probable cause in the preliminary investigation, if that be the case. On a similar note, the resolution of the motion for reconsideration does not bar the present petition. Obviously, the third requisite is likewise absent.

The petition is not mooted by the May 7, 2014 Order.

It is, however, argued that the present recourse has been rendered moot by the Ombudsman's issuance of its Joint Resolution dated May 7, 2014 furnishing Sen. Estrada with copies of the counter-affidavits of Tuason, Cunanan, Amata, Relampagos, Figura, Buenaventura and Sevidal. Such argument is specious failing as it does to properly appreciate the rights asserted by petitioner, i.e., the right to be furnished the evidence against him and the right to controvert such evidence before a finding of probable cause is rendered against him. In this case, the fact still remains that petitioner was not given copies of incriminatory affidavits before a finding of probable cause to indict him was rendered. As a necessary corollary, he was not given sufficient opportunity to answer these allegations before a resolution to indict him was issued.

Further, it bears to stress at this point that the same Order gave Sen. Estrada only a five-day non-extendible period within which to reply or comment to the counter-affidavits of his co-respondents. Clearly, the Order furnishing Sen. Estrada with the counter-affidavits not only came too late, it did not provide him with adequate opportunity to rebut the allegations against him before the Office of the Ombudsman actually decided to indict him. Hence,

the full measure of the due process protection was not accorded to him. The May 7, 2014 Order cannot, therefore, cancel the Office of the Ombudsman's commission of grave abuse of discretion in trifling with, and neglecting to observe, Sen. Estrada's constitutional right to due process.

It is true that, in the past, the Court has allowed the belated disclosure by the Ombudsman to a respondent of affidavits containing incriminating allegations against him. This may possibly be the reason why the Ombudsman deviated from the spirit of due process, which, at its minimum, is to allow a respondent prior notice and afford him sufficient opportunity to be heard before a decision is rendered against him. This cannot be further tolerated. A decision to indict a person must not only be based on probable cause but also with due regard to the constitutional rights of the parties to due process.

Relying on the case of *Ruivivar v. Office of the Ombudsman*,^[8] the majority maintains that petitioner's right to due process had not been violated, as the Office of the Ombudsman belatedly furnished him with some of the affidavits that he requested on May 7, 2014, before the said Office rendered its June 4, 2014 Joint Order.

It is worthy to note that Sen. Estrada requested that he be furnished with "affidavit/counter-affidavits/pleadings/filings filed by all the other respondents and/or additional witnesses for the complainants." Yet, Sen. Estrada was only furnished with the affidavits of seven (7) of his co-respondents. His request to be given copies of the affidavits of the other nine (9) respondents, thus, remains unheeded by respondent Ombudsman. Clearly, the fact of the deprivation of due process still remains and not mooted by the Ombudsman's overdue and partial volte-face. And, unlike in *Ruivivar*, the Office of the Ombudsman did not furnish the petitioner with all the documents he requested, leaving him in the dark as to the entire gamut of the charges against him.

Further, in *Ruivivar*, petitioner *Ruivivar's* motion for reconsideration that prompted the Ombudsman to furnish her with copies of the affidavits of private respondent's witnesses came after the Decision was issued by the Ombudsman. Meanwhile, in this case, Sen. Estrada's request was submitted before the Ombudsman issued its probable cause finding resolution. Clearly, the Office of the Ombudsman had all the opportunity to comply with the requirements of due process prior to issuing its March 28, 2014 Joint Resolution, but cavalierly disregarded them. It may be rightfully conceded that its May 7, 2014 Order is nothing but an afterthought and a vain attempt to remedy the violation of petitioner's constitutional right to due process. By then, petitioner's constitutional right to due process—to be given the opportunity to be heard and have a decision rendered based on evidence disclosed to him—had already been violated. It cannot be remedied by an insufficient and belated reconsideration of petitioner's request. What is more, it seems that the doctrine laid down in *Ruivivar* is not consistent with the essence of the due process: to be heard before a decision is rendered.

This Court has time and again declared that the "moot and academic" principle is not a magical formula that automatically dissuades courts in resolving a case.^[9] A court may take cognizance of otherwise moot and academic cases, if it finds that (a) there is a grave violation of the Constitution; (b) the situation is of exceptional character and paramount public interest is involved; (c) the constitutional issue raised requires formulation of controlling principles to guide the bench, the bar, and the public; and (d) the case is capable of repetition yet evading review.^[10]

Thus, even assuming *arguendo* that the present petition is mooted by the Ombudsman's May 7, 2014 Joint Resolution, it is unquestionable that considering the notoriety of the petitioner and the grave violation of the Constitution he asserts, the majority should have availed itself of the irresistible opportunity to set a controlling guideline on the right of a respondent to be furnished, upon reasonable demand, of all evidence used against him during a preliminary investigation before a resolution thereon is issued.

Respondent Ombudsman committed grave abuse of discretion when it disregarded Sen. Estrada's right to a disclosure of all the evidence against him in the preliminary investigation.

A preliminary investigation is a safeguard intended to protect individuals from an abuse of the overwhelming prosecutorial power of the state. It spells for a citizen the difference between months, if not years, of agonizing trial and jail term, on one hand, and peace of mind and liberty on the other hand.[11] In *Uy v. Office of the Ombudsman*,[12] We ruled:

A preliminary investigation is held before an accused is placed on trial to secure the innocent against hasty, malicious, and oppressive prosecution; to protect him from an open and public accusation of a crime, as well as from the trouble, expenses, and anxiety of a public trial. It is also intended to protect the state from having to conduct useless and expensive trials. While the right is statutory rather than constitutional, it is a component of due process in administering criminal justice. The right to have a preliminary investigation conducted before being bound for trial and before being exposed to the risk of incarceration and penalty is not a mere formal or technical right; it is a substantive right. To deny the accused's claim to a preliminary investigation is to deprive him of the full measure of his right to due process.[13]

Thus, this Court had characterized a preliminary investigation as a substantive right forming part of due process in criminal justice;[14]and, contrary to Justice Leonen's position, it is not merely a technical requirement that can be done away or hastily conducted by state agencies. As eloquently put by Justice Brion, "to be sure, criminal justice rights cannot be substantive at the custodial investigation stage, only to be less than this at preliminary investigation, and then return to its substantive character when criminal trial starts."

In *Yusop v. Hon. Sandiganbayan*,[15]this Court emphasized the substantive aspect of preliminary investigation and its crucial role in the criminal justice system:

We stress that the right to preliminary investigation is substantive, not merely formal or technical. To deny it to petitioner would deprive him of the full measure of his right to due process. Hence, preliminary investigation with regard to him must be conducted.

xxx xxx xxx

In any event, even the Ombudsman agrees that petitioner was deprived of this right and believes that the basic rudiments of due process are complied with. For its part, the Sandiganbayan opted to remain silent when asked by this Court to comment on the Petition.[16]

Furthermore, a preliminary investigation is not a one-sided affair; it takes on adversarial quality[17] where the due process rights of both the state and the respondents must be considered. It is not merely intended to serve the purpose of the prosecution. Rather, its purpose is to secure the innocent against hasty, malicious and oppressive prosecution, and to protect him from an open and public accusation of a crime, from the trouble, expenses and anxiety of public trial.[18] At the same time, it is designed to protect the state from having to conduct useless and expensive trials.[19] In *Larranaga v. Court of Appeals*,[20]this Court elucidated, thus:

Fairness dictates that the request of petitioner for a chance to be heard in a capital offense case should have been granted by the Cebu City prosecutor. In *Webb vs. de Leon*, we emphasized that "attuned to the times, our Rules have discarded the pure inquisitorial system of preliminary investigation. Instead, Rule 112 installed a quasi-judicial type of preliminary investigation conducted by one whose high duty is to be fair and impartial." As this Court emphasized in *Rolito Go vs. Court of Appeals*, "the right to have a preliminary investigation conducted before being bound over for trial for a criminal offense and hence formally at risk of incarceration or some other penalty, is not a mere formal or technical right; it is a substantive right." xxx[21]

As such, preliminary investigations must be scrupulously conducted so that the constitutional right to liberty of a

potential accused can be protected from any material damage.[22] This Court said so in *Gerken v. Quintos*,[23] thus:

It is hardly necessary to recall that those who find themselves in the meshes of the criminal justice system are entitled to preliminary investigation in order to secure those who are innocent against hasty, malicious, and oppressive prosecution and protect them from the inconvenience, expense, trouble, and stress of defending themselves in the course of a formal trial. The right to a preliminary investigation is a substantive right, a denial of which constitutes a deprivation of the accused's right to due process. Such deprivation of the right to due process is aggravated where the accused is detained without bail for his provisional liberty. Accordingly, it is important that those charged with the duty of conducting preliminary investigations do so scrupulously in accordance with the procedure provided in the Revised Rules of Criminal Procedure.[24]

In this case, a careful observance of the procedure outlined in Rule II of AO No. 7, otherwise known as the Rules of Procedure of the Office of the Ombudsman is, therefore, imperative. Section 4, Rule II of AO No. 7 provides that the respondent in a preliminary investigation shall have access to the evidence on record, viz:

Sec. 4. Procedure. – The preliminary investigation of cases falling under the jurisdiction of the Sandiganbayan and Regional Trial Courts shall be conducted in the manner prescribed in Section 3, Rule 112 of the Rules of Court, subject to the following provisions:

(a) If the complaint is not under oath or is based solely on official reports, the investigating officer shall require the complainant or supporting witnesses to execute affidavits to substantiate the complaints.

(b) After such affidavit have been secured, the investigating officer shall issue an order, attaching thereto a copy of the affidavits and other supporting documents, directing the respondents to submit, within ten (10) days from receipt thereof, his counter-affidavits and controverting evidence with proof of service thereof on the complainant. The complainants may file reply affidavits within (10) days after service of the counter-affidavits.

(c) If the respondent does not file a counter-affidavit. The investigating officer may consider the comment filed by him, if any, as his answer to the complaint. In any event, the respondent shall have access to the evidence on record.[25]

In construing the foregoing provision, however, the Ombudsman is of the view that the respondent's, the petitioner's in this case, access is limited only to the documents submitted by the complainant, and not his co-respondents. Thus, in its March 27, 2014 Order denying Sen. Estrada's request to be furnished with copies of the affidavits of his co-respondents, respondent Ombudsman held:

This Office finds however finds (sic) that the foregoing provisions do not entitle respondent to be furnished all the filings of the respondents.

xxx xxx xxx

It is to be noted that there is no provision under this Office's Rules of Procedure which entitles respondent to be furnished all the filings by the other parties, eg. the respondents. Ruby Tuason, Dennis Cunanan, Godelina G. Amata and Mario L. Relampagos themselves are all respondents in these cases. Under the Rules of Court as well as the Rules of Procedure of the Office of the Ombudsman, the respondents are only required to furnish their counter-affidavits and controverting evidence to the complainant, and not to the other respondents.

Unfortunately, the majority has subscribed to the Ombudsman's position maintaining that Sections 3 and 4 of Rule 112 of the Rules of Court[26] only require that a respondent be furnished with the copies of the affidavits of the complainant and the complainant's supporting witnesses, and not the affidavits of his co-respondents.

Certainly, the majority has neglected to consider that AO No. 7 or the Rules of Procedure of the Office of the

Ombudsman prevails over the provisions of the Rules of Court in investigations conducted by the Ombudsman. This is plain and unmistakable from Section 3, Rule V of AO No. 7, which states that the Rules of Court shall apply only in a suppletory character and only in matters not provided by the Office of the Ombudsman's own rules:

Section 3. Rules of Court, application. – In all matters not provided in these rules, the Rules of Court shall apply in a suppletory character, or by analogy whenever practicable and convenient.[27]

As Section 4(c) of AO No. 7, or the Office of the Ombudsman's very own Rules of Procedure, clearly provides that a respondent shall have access to all the "evidence on record" without discriminating as to the origin thereof and regardless of whether such evidence came from the complainant or another respondent, the provisions of the Rules of Court supposedly limiting a respondent's access to the affidavits of the complaint only is not applicable to investigations conducted by the Ombudsman. Put piquantly, this restrictive misconstruction of Sections 3 and 4 of the Rules of Court cannot be applied to Sen. Estrada to deprive him of his right to due process clearly spelled out in AO No. 7.

In fact, a proper and harmonious understanding of Sections 3 and 4 of the Rules of Court vis-à-vis Section 4 (c) of AO No. 7 will reveal that the common denominator of these provisions is the principle that a respondent in a preliminary investigation be afforded sufficient opportunity to present controverting evidence before a judgment in that proceeding is rendered against him. Hence, a respondent in a preliminary investigation cannot be denied copies of the counter-affidavits of his co-respondents should they contain evidence that will likely incriminate him for the crimes ascribed to him.

Indeed, while the documents withheld by the Office of the Ombudsman may have been submitted by Sen. Estrada's co-respondents, they constitute evidence against him, not unlike the affidavits of the complainants. Sen. Estrada, therefore, had the right to be given copies thereof and an opportunity to controvert the allegations contained therein pursuant to Section 4 (c) of AO No. 7.

More than the provisions of either procedural rules, this Court cannot neglect the constitutional precept underpinning these rules that "no person shall be deprived of life, liberty, or property without due process of law." [28] The essence of due process permeating the rules governing criminal proceedings is that the respondent must be afforded the right to be heard before a decision is rendered against him. This right must necessarily be predicated on the opportunity to know all the allegations against him, be they contained in the affidavits of the complainant or of another respondent.

A respondent in a preliminary investigation cannot, therefore, be denied copies of the counter-affidavits of his co-respondents should they contain evidence that will likely incriminate him for the crimes charged. In other words, it behooves the Office of the Ombudsman to treat a respondent's counter-affidavit containing incriminating allegations against a co-respondent as partaking the nature of a complaint-affidavit, insofar as the implicated respondent is concerned. Thus, it is my opinion that the Office of the Ombudsman should follow the same procedure observed when a complaint is first lodged with it, i.e., furnish a copy to the respondent incriminated in the counter-affidavit and give him sufficient time to answer the allegations contained therein. It need not wait for a request or a motion from the implicated respondent to be given copies of the affidavits containing the allegations against him. A request or motion to be furnished made by the respondent alluded to in the counter-affidavits makes the performance of such duty by the Office of the Ombudsman more urgent.

In the seminal case of *AngTibay v. Court of Industrial Relations*, [29] this Court identified the primary rights that must be respected in administrative proceedings in accordance with the due process of law. Not the least of which rights is that the decision must be rendered on evidence disclosed to the parties affected, viz:

(5) The decision must be rendered on the evidence presented at the hearing, or at least contained in the record and disclosed to the parties affected. (Interstate Commerce Commission vs. L. & N. R. Co., 227 U.S. 88, 33 S. Ct. 185, 57 Law. ed. 431.) Only by confining the administrative tribunal to the evidence disclosed to the parties, can the latter be protected in their right to know and meet the case against them.xxx[30]

Thus, in *Office of Ombudsman v. Reyes*,^[31] this Court set aside the decision of the Ombudsman that was based on the counter-affidavits of therein respondent Reyes' co-respondents that were not furnished to him before the Ombudsman rendered his decision. The Court held:

In the main, the evidence submitted by the parties in OMB-MIN-ADM-01-170 consisted of their sworn statements, as well as that of their witnesses. In the affidavit of Acero, he categorically identified both Reyes and Peñaloza as the persons who had the prerogative to reconsider his failed examination, provided that he paid an additional amount on top of the legal fees. For his part, Peñaloza ostensibly admitted the charge of Acero in his counter-affidavit but he incriminated Reyes therein as the mastermind of the illicit activity complained of

Reyes faults petitioner for placing too much reliance on the counter-affidavit of Peñaloza, as well as the affidavits of Amper and Valdehueza. Reyes claims that he was not furnished a copy of the said documents before petitioner rendered its Decision dated September 24, 2001. Reyes, thus, argues that his right to due process was violated. Petitioner, on the other hand, counters that Reyes was afforded due process since he was given all the opportunities to be heard, as well as the opportunity to file a motion for reconsideration of petitioner's adverse decision.

On this point, the Court finds merit in Reyes' contention.

xxx xxx xxx

Moreover, *Department of Health v. Camposano* restates the guidelines laid down in *AngTibay v. Court of Industrial Relations* that due process in administrative proceedings requires compliance with the following cardinal principles: (1) the respondents' right to a hearing, which includes the right to present one's case and submit supporting evidence, must be observed; (2) the tribunal must consider the evidence presented; (3) the decision must have some basis to support itself; (4) there must be substantial evidence; (5) the decision must be rendered on the evidence presented at the hearing, or at least contained in the record and disclosed to the parties affected; (6) in arriving at a decision, the tribunal must have acted on its own consideration of the law and the facts of the controversy and must not have simply accepted the views of a subordinate; and (7) the decision must be rendered in such manner that respondents would know the reasons for it and the various issues involved.

In the present case, the fifth requirement stated above was not complied with. Reyes was not properly apprised of the evidence offered against him, which were eventually made the bases of petitioner's decision that found him guilty of grave misconduct.^[32]

It is true that, in this case, the failure to furnish copies of the counter-affidavits happened in a preliminary investigation, and not in an administrative proceeding as what happened in *Reyes*. There is likewise no gainsaying that the quanta of proof and adjective rules between a preliminary investigation and an administrative proceeding differ. In fact, "[i]n administrative proceedings... the technical rules of pleading and procedure, and of evidence, are not strictly adhered to; they apply only suppletorily."^[33]

Yet, it must be noted that despite the procedural leniency allowed in administrative proceedings, Reyes still required that the respondent be furnished with copies of the affidavits of his co-respondent to give him "a fair opportunity to squarely and intelligently answer the accusations therein or to offer any rebuttal evidence thereto." Again, Reyes was rendered in a case where at stake was, at worst, only the right of the respondent to hold a public

office.

In the present case, Sen. Estrada is not only on the brink of losing his right to hold public office but also of being dragged to an open and public trial for a serious crime where he may not only lose his office and good name, but also his liberty, which, based on the hierarchy of constitutionally protected rights, is second only to life itself.[34] In a very real sense, the observance of due process is even more imperative in the present case.

In fact, this Court in *Uy v. Office of Ombudsman*[35] applied the standards of “administrative” due process outlined in *AngTibay* to the conduct of preliminary investigation by the Ombudsman. Wrote this Court in *Uy*:

[A]s in a court proceeding (albeit with appropriate adjustments because it is essentially still an administrative proceeding in which the prosecutor or investigating officer is a quasi-judicial officer by the nature of his functions), a preliminary investigation is subject to the requirements of both substantive and procedural due process. This view may be less strict in its formulation than what we held in *Cojuangco, Jr. vs. PCGG, et al.* when we said:

xxx xxx xxx

In light of the due process requirement, the standards that at the very least assume great materiality and significance are those enunciated in the leading case of *AngTibay v. Court of Industrial Relations*. This case instructively tells us - in defining the basic due process safeguards in administrative proceedings - that the decision (by an administrative body) must be rendered on the evidence presented at the hearing, or at least contained in the record and disclosed to the parties affected; only by confining the administrative tribunal to the evidence disclosed to the parties, can the latter be protected in their right to know and meet the case against them; it should not, however, detract from the tribunal's duty to actively see that the law is enforced, and for that purpose, to use the authorized legal methods of securing evidence and informing itself of facts material and relevant to the controversy.

Mindful of these considerations, we hold that the petitioner's right to due process has been violated.[36]

It must be emphasized that, despite the variance in the quanta of evidence required, a uniform observance of the singular concept of due process is indispensable in all proceedings. In *Garcia v. Molina*,[37] this Court held, thus:

The cardinal precept is that where there is a violation of basic constitutional rights, courts are ousted from their jurisdiction. The violation of a party's right to due process raises a serious jurisdictional issue which cannot be glossed over or disregarded at will. Where the denial of the fundamental right to due process is apparent, a decision rendered in disregard of that right is void for lack of jurisdiction. This rule is equally true in quasi-judicial and administrative proceedings, for the constitutional guarantee that no man shall be deprived of life, liberty, or property without due process is unqualified by the type of proceedings (whether judicial or administrative) where he stands to lose the same.[38]

To be sure, a preliminary investigation is not part of trial and the respondent is not given the right to confront and cross-examine his accusers. Nonetheless, a preliminary investigation is an essential component part of due process in criminal justice. A respondent cannot, therefore, be deprived of the most basic right to be informed and to be heard before an unfavorable resolution is made against him. The fact that, in a preliminary investigation, a respondent is not given the right to confront nor to cross-examine does not mean that the respondent is likewise divested of the rights to be informed of the allegations against him and to present countervailing evidence thereto. These two sets of rights are starkly different.

In this case, it is not disputed that the March 27, 2014 Order denying Sen. Estrada's Request was issued a day before the Ombudsman rendered the Joint Resolution finding probable cause to indict him. The Joint Resolution notably contains reference to the counter-affidavits that were not disclosed at that time to Sen. Estrada. There is,

therefore, no gainsaying that the Office of the Ombudsman violated its duty to inform the respondent of all allegations against him. In the process, Sen. Estrada was not afforded sufficient opportunity to know and refute the allegations against him before the Ombudsman acted on those allegations.

The immortal cry of Themistocles: “Strike! But hear me first!” distills the essence of due process. It is, thus, indispensable that the respondent is given “the opportunity to be heard, logically preconditioned on prior notice, before judgment is rendered.”[39] As Sen. Estrada was not given copies of counter-affidavits containing allegations against him and afforded a chance to refute these allegations before the Joint Resolution to indict him was rendered, he was clearly denied his right to the due process of law.

The majority, however, suggests that I have overlooked the Court of Appeal’s reasoning in Reyes that, pursuant to the doctrine of *res inter alios acta alteri nocere non debet*, the respondent cannot be prejudiced by the declaration of his co-respondent. Justice Carpio then concludes that “[i]n OMB-C-C-13-0313 and OMB-C-C-13-0397, the admissions of Sen. Estrada’s co-respondents can in no way prejudice Sen. Estrada.”

Clearly, the majority ignores the obvious fact that Sen. Estrada had already been prejudiced by the affidavits of his co-respondents that were not furnished to him. The majority Decision pays no heed to the fact that the Joint Resolution of the Office of the Ombudsman precisely invoked the counter-affidavits of Sen. Estrada’s co-respondents that were not furnished to him. To recall, the March 28, 2014 Joint Resolution of the Office of the Ombudsman contains reference to the counter-affidavits that were not theretofor disclosed to Sen. Estrada. In finding probable cause to indict Sen. Estrada, respondent Office of the Ombudsman quoted from the withheld counter-affidavits of respondents Tuason,[40] Cunanan,[41] Figura,[42] Buenaventura,[43] and Sevidal.[44] Thus, to state that “the admissions of Sen. Estrada’s co-respondents can in no way prejudice Sen. Estrada” is clearly at war with the facts of the case.

With that, the suggestion that a thorough consideration of jurisprudence must be made before they are used as basis for this Court’s decisions is appreciated. Contrary to what the majority Decision suggests, the Court of Appeals’ disquisition quoted in Reyes did not go unnoticed but was simply deemed irrelevant in the present case. In fact, the application of the *res inter alios acta* doctrine was not even considered by this Court in Reyes; it was simply a part of the narration of the factual antecedents. Hence, a discussion of the doctrine in the present controversy is even more unnecessary.

The right to the disclosure of the evidence against a party prior to the issuance of a judgment against him is, to reiterate, a vital component of the due process of law, a clear disregard of such right constitutes grave abuse of discretion. As this Court has held, grave abuse of discretion exists when a tribunal violates the Constitution or grossly disregards the law or existing jurisprudence.[45] In other words, once a deprivation of a constitutional right is shown to exist, the tribunal that rendered the decision or resolution is deemed ousted of jurisdiction.[46] As the Court held in *Montoya v. Varilla*[47]--

The cardinal precept is that where there is a violation of basic constitutional rights, courts are ousted from their jurisdiction. The violation of a party’s right to due process raises a serious jurisdictional issue which cannot be glossed over or disregarded at will. Where the denial of the fundamental right of due process is apparent, a decision rendered in disregard of that right is void for lack of jurisdiction.[48]

Given the foregoing perspective, the issuance of the corrective writ of certiorari is warranted in the present controversy.

Effect of irregularity of preliminary investigation.

On one hand, a case for the total nullification of the proceedings, including the filing of the dismissal of the

Information filed and the quashal of the arrest warrants, may be made. On the other, a position has been advanced that the irregularity of the preliminary investigation is remedied by the issuance of the arrest warrant, so that a deprivation of the due process during the preliminary investigation is irrelevant.

Between these two extremes, it is my considered view that the irregularity at the preliminary investigation stage arising from a violation of the due process rights of the respondent warrants a reinvestigation and the suspension of the proceedings in court where an information has already been filed.

The grave abuse of discretion committed by the Office of the Ombudsman in its conduct of the preliminary investigation cannot divest the Sandiganbayan of the jurisdiction over the case considering that Informations had already been filed, as in fact a warrant of arrest had already been issued in connection therewith.[49] It is a familiar doctrine that the irregularity in, or even absence of, a preliminary investigation is not a ground for the deprivation of the court of its jurisdiction. So it was that in *Pilapil v. Sandiganbayan*,[50] the Court held, thus:

We are not persuaded. The lack of jurisdiction contemplated in Section 3(b), Rule 117 of the Revised Rules of Court refers to the lack of any law conferring upon the court the power to inquire into the facts, to apply the law and to declare the punishment for an offense in a regular course of judicial proceeding. When the court has jurisdiction, as in this case, any irregularity in the exercise of that power is not a ground for a motion to quash. Reason is not wanting for this view. Lack of jurisdiction is not waivable but absence of preliminary investigation is waivable. In fact, it is frequently waived.[51]

On the other hand, it is erroneous to simply disregard the violation of the due process of law during the preliminary investigation as irrelevant and without any significant effect. Such stance will only serve to “legitimize the deprivation of due process and to permit the Government to benefit from its own wrong or culpable omission and effectively dilute important rights of accused persons well-nigh to the vanishing point.”[52] Thus, I submit that the proper recourse to be taken under the premises is the suspension of the proceedings in the Sandiganbayan and the immediate remand of the case to the Office of the Ombudsman[53] so that Sen. Estrada, if he opts to, can file his counter-affidavit and controverting evidence to all the counter-affidavits containing incriminating allegations against him.

The jurisdiction acquired by the trial court upon the filing of an information, as recognized in *Crespo v. Mogul*,[54] is not negated by such suspension of the proceedings or the reinvestigation by the Ombudsman. Surely, this Court’s pronouncements in *Crespo* was not intended to curb the power of this Court to supervise lower courts and ensure that the rights of the accused are respected and protected against the all-encompassing powers of the State.

The fine balance recognizing the jurisdiction of the trial court and the right of a respondent to a reinvestigation has been observed in several cases. In *Matalam v. Sandiganbayan*,[55] the petitioner who was not afforded a chance to fully present his evidence during the preliminary investigation stage was afforded a reinvestigation, thus:

It is settled that the preliminary investigation proper, i.e., the determination of whether there is reasonable ground to believe that the accused is guilty of the offense charged and should be subjected to the expense, rigors and embarrassment of trial, is the function of the prosecution.

....Accordingly, finding that petitioner was not given the chance to fully present his evidence on the amended information which contained a substantial amendment, a new preliminary investigation is in order.

xxx xxx xxx

Finally, as to petitioner’s prayer that the Amended Information be quashed and dismissed, the same cannot be

ordered. The absence or incompleteness of a preliminary investigation does not warrant the quashal or dismissal of the information. Neither does it affect the court's jurisdiction over the case or impair the validity of the information or otherwise render it defective. The court shall hold in abeyance the proceedings on such information and order the remand of the case for preliminary investigation or completion thereof.[56]

A similar disposition was made in *Torralba v. Sandiganbayan*[57] where the Court held:

The incomplete preliminary investigation in this case, however, does not warrant the quashal of the information, nor should it obliterate the proceedings already had. Neither is the court's jurisdiction nor validity of an information adversely affected by deficiencies in the preliminary investigation. Instead, the Sandiganbayan is to hold in abeyance any further proceedings therein and to remand the case to the Office of the Ombudsman for the completion of the preliminary investigation, the outcome of which shall then be indorsed to Sandiganbayan for its appropriate action.

This course of action was also taken by the Court in a catena of other cases including *Go v. Court of Appeals*,[58] *Yusop v. Sandiganbayan*,[59] *Rodis, Sr. v. Sandiganbayan*,[60] and *Agustin v. People*. [61]

It might be argued that such recourse will only be circuitous and might simply be postponing the inevitable. Surely, it will hold the conduct of the case. But where the rights of an individual are concerned, the end does not justify the means. To be sure, "society has particular interest in bringing swift prosecutions." [62] Nonetheless, the constitutional rights of citizens cannot be sacrificed at the altar of speed and expediency. As enunciated in *Brocka v. Enrile*,[63] the Court cannot, and will not, sanction procedural shortcuts that forsake due process in our quest for the speedy disposition of cases. The Court held:

We do not begrudge the zeal that may characterize a public official's prosecution of criminal offenders. We, however, believe that this should not be a license to run roughshod over a citizen's basic constitutional rights, such as due process, or manipulate the law to suit dictatorial tendencies.

xxx xxx xxx

Constitutional rights must be upheld at all costs, for this gesture is the true sign of democracy. These may not be set aside to satisfy perceived illusory visions of national grandeur.: and

In the case of *J. Salonga v. Cruz Paño*, We point out:

"Infinitely more important than conventional adherence to general rules of criminal procedure is respect for the citizen's right to be free not only from arbitrary arrest and punishment but also from unwarranted and vexatious prosecution . . ." (G.R. No. L-59524, February 18, 1985, 134 SCRA 438-at p. 448).[64]

Indeed, the prime goal of our criminal justice system remains to be the achievement of justice under a rule of law. This ideal can only be attained if the Ombudsman, and the prosecutorial arm of the government for that matter, ensures the conduct of a proper, thorough, and meticulous preliminary investigation. The frustration caused by a suspension of the proceedings in the Sandiganbayan to allow the Office of the Ombudsman to correct its error cannot equal the despair of the deprivation of the rights of a person under the Constitution.

Thus, I submit that the Office of the Ombudsman should be ordered to take a second look at the facts of the case after Sen. Estrada is given copies of all the documents he requested and a sufficient chance to controvert, if so minded, all the allegations against him.

For all the foregoing, I vote to partially GRANT the Petition in G.R. No. 212140-4, to SET ASIDE the assailed March 27, 2014 Order, and to ORDER the immediate REMAND to the Office of the Ombudsman of OMB-C-C-13-0313 and OMB-C-C-13-0397 so that Sen. Estrada will be furnished all the documents subject of his Request dated March 20, 2014 and be allowed a period of fifteen (15) days to comment thereon. Further, I

vote that the Sandiganbayan should be ORDERED to SUSPEND the proceedings in SB-14-CRM-0239 and SB-14-CRM-0256 to SB-14-CRM-0266 until the conclusion of the reinvestigation.

[1] Specifically, Sen. Estrada was charged with violation of Section 3(e) of RA 3019 which penalizes the following:

(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.

[2] Public respondents Office of the Ombudsman and its Field Office Investigation Office, and the National Bureau of Investigation filed their Comment dated May 30, 2014 on June 2, 2014. Meanwhile, respondent Atty. Levito D. Baligod filed his Comment dated June 5, 2014 on June 6, 2014.

[3] For perspective, it is proper to lay stress on two critical issuances of the Office of the Ombudsman: (1) March 27, 2014 Order in OMB-C-C-13-0313 denying Sen. Estrada's Request to be furnished with copies of his co-respondents' counter-affidavits; and (2) Joint Resolution dated March 28, 2014 in OMB-C-C-13-0313 and OMB-C-C-13-0397 finding probable cause to indict him for plunder and graft and corrupt practices.

[4] *Okada v. Security Pacific Assurance Corporation*, G.R. No. 164344, December 23, 2008, 575 SCRA 124, 142 citing *Conti v. Court of Appeals*, G.R. No. 134441, May 19, 1999, 307 SCRA 486, 195; underscoring supplied.

[5] Emphasis supplied.

[6] *Municipality of Taguig v. Court of Appeals*, G.R. NO.142619, September 13, 2005, 506 Phil. 567 (2005).

[7] *Sps. Marasigan and Leal v. Chevron Phils., Inc.*, G.R. No. 184015, February 08, 2012, 665 SCRA 499, 511.

[8] G.R. No. 165012, September 16, 2008, 565 SCRA 324.

[9] *Province of North Cotabato v. Government of the Republic of the Philippines Peace Panel on Ancestral Domain (GRP)*, G.R. No. 183591, October 14, 2008, 568 SCRA 402, 460.

[10] *David v. Macapagal-Arroyo*, G.R. No. 171396, May 3, 2006, 489 SCRA 160 citing *Province of Batangas v. Romulo*, G.R. No. 152774, May 27, 2004, 429 SCRA 736; *Lacson v. Perez*, 410 Phil. 78 (2001); *Albaña v. Comelec*, 478 Phil. 941 (2004); *Chief Supt. Acop v. Guingona Jr.*, 433 Phil. 62 (2002); *SANLAKAS v. Executive Secretary Reyes*, 466 Phil. 482 (2004).

[11] G.R. No. 199082,199085, and 199118, September 18, 2012, 681 SCRA 181.

[12] G.R. Nos. 156399-400, June 27, 2008, 556 SCRA 73.

[13] *Ibid* at pp. 93-94. Emphasis supplied.

[14] *Ibid* citing *Ladlad v. Velasco*, G.R. Nos. 170270-72, June 1, 2007, 523 SCRA 318, 344. See also *Duterte v. Sandiganbayan*, G.R. No. 130191, April 27, 1998.

[15] G.R. No. 138859-60, February 22, 2001.

[16] Emphasis and underscoring supplied.

[17] *Duterte v. Sandiganbayan*, G.R. No. 130191, April 27, 1998.

[18] Ibid citing *Tandoc v. Resultan*, 175 SCRA 37 (1989).

[19] Id. citing *Doromal v. Sandiganbayan*, 177 SCRA 354 (1980); *Go v. Court of Appeals*, 206 SCRA 138 (1992).

[20] G.R. No. 130644, October 27, 1997 citing *Webb v. De Leon*, 247 SCRA 652, 687 and *Rolito Go v. Court of Appeals*, G.R. No. 101837 February 11, 1992.

[21] Citing *Webb*

[22] *Sales v. Sandiganbayan*, G.R. No. 143802, November 16, 2001, 369 SCRA 293, 302.

[23] A.M. No. MTJ-02-1441, July 31, 2002, 386 SCRA 520.

[24] Emphasis supplied.

[25] Emphasis supplied.

[26] Sec.3.Procedure. – The preliminary investigation shall be conducted in the following manner:

(a) The complaint shall state the address of the respondent and shall be accompanied by the affidavit of the complainant and his witnesses, as well as other supporting documents to establish probable cause. They shall be in such number of copies as there are respondents, plus two (2) copies for the official file. The affidavit shall be subscribed and sworn to before any prosecutor or government official authorized under oath, or, in their absence or unavailability, before a notary public, each of whom must certify that he personally examined the affiants and that he is satisfied that they voluntarily executed and understood their affidavits.

(b) Within ten (10) days after the filing of the complaint, the investigating officer shall either dismiss it if he finds no ground to continue with the investigation, or issue a subpoena to the respondent attaching to it a copy of the complaint and its supporting affidavits and documents.

The respondent shall have the right to examine the evidence submitted by the complainant which he may not have been furnished and to copy them at his expense. If the evidence is voluminous, the complainant may be required to specify those which he intends to present against the respondent, and these shall be made available for examination or copying by the respondent at his expense.

Objects as evidence shall not be furnished a party but shall be made available for examination, copying or photographing at the expense of the requesting party.

(c) Within ten (10) days from receipt of the subpoena with the complaint and supporting affidavits and documents, the respondent shall submit his counter-affidavit and that of his witnesses and other supporting documents relied upon for his defense. The counter-affidavits shall be subscribed and sworn to and certified as provided in paragraph (a) of this section, with copies thereof furnished by him to the complainant. The respondent shall not be allowed to file a motion to dismiss in lieu of counter-affidavit.

xxx xxx xxx

Sec. 4. Resolution of investigating prosecutor and its review. – If the investigating prosecutor finds cause to hold the respondent for trial, he shall prepare the resolution and information. He shall certify under oath in the information that he, or as shown by the record, an authorized officer, has personally examined the complaint and his witnesses; that there is reasonable ground to believe that a crime has been committed and that the accused is probably guilty thereof; that the accused was informed of the complaint and of the evidence submitted against him; and that he was given an opportunity to submit controverting evidence. Otherwise, he shall recommend the

dismissal of the complaint.

[27] Emphasis supplied.

[28] Section 1, Article III of the 1987 Constitution.

[29] 69 Phil. 635 (1940).

[30] Emphasis supplied.

[31] G.R. No. 170512, October 5, 2011, 658 SCRA 626.

[32] Ibid at pp. 639-641; emphasis and italicization supplied.

[33] Dissenting Opinion, p. 13.

[34] Secretary of Lantion, *infra*.

[35] G.R. Nos. 156399-400, June 27, 2008.

[36] Emphasis supplied.

[37] G.R. Nos. 157383 and 174137, August 10, 2010, 627 SCRA 540.

[38] Ibid at p. 554. Emphasis and underscoring supplied.

[39] Republic v. Caguioa, G.R. No. 174385, February 20, 2013, 691 SCRA 306, 319.

[40] Joint Resolution, pp. 57-58, 69, 79-80.

[41] Joint Resolution, pp. 58, 82-83, 85-86.

[42] Joint Resolution, p. 85.

[43] Joint Resolution, pp. 86-87.

[44] Joint Resolution, p. 87.

[45] Fernandez v. COMELEC, 535 Phil. 122, 126 (2006); Republic v. Caguioa, G.R. No. 174385, February 20, 2013, 691 SCRA 306.

[46] Gumabon v. Director of the Bureau of Prisons, G.R. No.L-30026, January 30, 1971, 37 SCRA 420, 427; Aducayen v. Flores, G.R. No.L-30370, May 25, 1973, 51 SCRA 78, 79.

[47] G.R. No. 180146, December 18, 2008, 574 SCRA 831.

[48] Ibid at p. 843 citing State Prosecutors v. Muro, Adm. Matter No. RTJ-92-876, 19 September 1994, 236 SCRA 505, 522-523; see also Paulin v. Gimenez, G.R. No. 103323, 21 January 1993, 217 SCRA 386, 39. Emphasis supplied.

[49] See Pilapil v. Sandiganbayan, G.R. No. 101978, April 7, 1993, 221 SCRA 349 and Tagayuma v. Lastrilla, G.R. No. L-17801, August 30, 1962, 5 SCRA 937.

[50] Pilapil v. Sandiganbayan, G.R. No. 101978, April 7, 1993, 221 SCRA 349.

[51] Ibid at pp. 355-35.

[52] Go v. Court of Appeals, G.R. No. 101837, February 11, 1992, 206 SCRA 138, 162. See also Yusop v. Sandiganbayan, G.R. Nos. 138859-60, February 22, 2001.

[53] See *Arroyo v. Department of Justice*, G.R. No. 199082, 199085, and 199118, September 18, 2012, 681 SCRA 181 citing *Raro v. Sandiganbayan*, G.R. No. 108431, July 14, 2000, 335 SCRA 581; *Socrates v. Sandiganbayan*, G.R. Nos. 116259-60, February 20, 1996, 253 SCRA 773, 792; *Pilapil v. Sandiganbayan*, G.R. No. 101978, April 7, 1993, 221 SCRA 349, 355.

[54] G.R. No. L-53373, June 30, 1987.

[55] G.R. No. 165751, April 12, 2005.

[56] Emphasis supplied.

[57] G.R. No. 101421 February 10, 1994.

[58] G.R. No. 101837, February 11, 1992, 206 SCRA 138, 162.

[59] G.R. Nos. 138859-60, February 22, 2001.

[60] G.R. Nos. 71404-09 October 26, 1988.

[61] G.R. No. 158211, August 31, 2004.

[62] *Ibid* citing *Uy v. Adriano*, G.R. No. 159098, October 27, 2006, 505 SCRA 625, 647.

[63] G.R. No. 69863-65, December 10, 1990, 192 SCRA 183.

[64] *Ibid* at pp. 189-190.

DISSENTING OPINION

BRION, J.:

I dissent to reflect my objections to the ponencia's conclusions and reasoning; it is particularly mistaken on a very critical point – the nature and extent of the respondent's due process rights during preliminary investigation. This Dissent registers as well other points that I believe should be discussed and addressed.

The petition's main issue is whether the denial via the Ombudsman's March 27, 2014 Order of petitioner Senator Jinggoy Ejercito Estrada's plea embodied in his Request constitutes, under the premises, grave abuse of discretion." This is and should be the proper approach in resolving this case.

Factual Antecedents

I recite hereunder the major incidents of the case to provide the full flavor and a fuller understanding of what transpired in this case.

On the complaint filed by the National Bureau of Investigation (NBI) and Atty. Levito Baligod, the Ombudsman conducted a preliminary investigation against Estrada, et. al.[1] for violation of Republic Act (RA) No. 7080 (Anti-Plunder Law). The investigation proceeding was docketed as OMB-C-C-13-0313.

On a subsequent complaint filed by the Field Investigation Office-Office of the Ombudsman (FIO),[2] the Ombudsman conducted another preliminary investigation against Estrada for violation of R.A. No. 3019 (Anti-Graft and Corrupt Practices Act). The preliminary investigation proceeding was docketed as OMB-C-C-13-0397.

Estrada received his copy of each of the two complaints, in OMB-C-C-13-0313 and OMB-C-C-13-0397, on

November 25, 2013 and December 3, 2013, respectively. In compliance with the Ombudsman's directive, Estrada filed his Counter-Affidavits on January 8 and 16, 2014.[3]

Estrada's co-respondents, on the other hand, filed their respective counter-affidavits between December 9, 2013 and March 14, 2014, specifically:

- Marivic V. Jover – Two (2) Counter-Affidavits dated December 9, 2013;
- Victor Roman Cojamco Cacal – Counter-Affidavit dated December 11, 2013 (to the FIO Complaint) and Counter-Affidavit dated January 22, 2014 (to the NBI Complaint);
- Rosario Nuñez, Lalaine Paule and Marilou Bare – Joint Counter-Affidavit dated December 13, 2013;
- Mario L. Relampagos – Counter-Affidavit dated December 13, 2013;
- Gondelina G. Amata – Counter-Affidavit dated December 26, 2013 (to the FIO Complaint) and Counter-Affidavit dated January 20, 2014 (to the NBI Complaint);
- Francisco B. Figura – Counter-Affidavit dated January 8, 2014;
- Alexis Sevidal – Counter-Affidavit dated January 15, 2014 (to the NBI Complaint) and Counter-Affidavit dated February 24, 2014 (to the FIO Complaint);
- Maria Niñez P. Guañizo – Counter-Affidavit dated January 28, 2014;
- Sofia D. Cruz – Counter-Affidavit dated January 31, 2014;
- Allan Javellana – Two (2) Counter-Affidavits dated February 6, 2014;
- Evelyn Suggang – Counter-Affidavit dated February 11, 2014;
- Dennis L. Cunanan – Two (2) Counter-Affidavits dated February 20, 2014;
- Ruby Tuason – Two (2) Counter-Affidavits both dated February 21, 2014;
- Gregoria Buenaventura – Counter-Affidavit dated March 6, 2014;
- Rhodora Bulatad Mendoza – Counter-Affidavit dated March 6, 2014; and
- Ma. Julie A. Villaralvo-Johnson – Two (2) Counter-Affidavits dated March 14, 2014.

Meanwhile, Estrada received information that his co-respondents' affidavits and submissions made reference to his purported participation in the so-called "PDAF Scam." Thus, he filed a motion – his March 20, 2014 Request – to fully allow him to refute the allegations against him, if needed. Estrada particularly asked for the following documents (requested documents):

- Counter-affidavit of Ruby Tuason;
- Counter-affidavit of Dennis L. Cunanan;
- Counter-Affidavit of Gondelina G. Amata;
- Counter-Affidavit of Mario L. Relampagos;
- Consolidated Reply of the NBI, if one had been filed; and
- Affidavit/Counter-Affidavits/Pleadings/Filings filed by all the other respondents and/or additional witnesses for the Complainants.

The Ombudsman's March 27, 2014 Order ("Denial of Request Order")

The Ombudsman denied Estrada's Request on the reasoning that his rights as a respondent in the preliminary investigation depend on the rights granted him by law. The Ombudsman pointed out that the law, the Rules of Court and Administrative Order No. 7 (Rules of Procedure of the Ombudsman) only require the respondents to furnish their counter-affidavits to the complaint. The Ombudsman concluded that Estrada is not entitled, as a matter of right, to copies of his co-respondents' counter-affidavits.

On March 28, 2014, the Ombudsman issued its Joint Resolution in OMB-C-C-13-0313 and OMB-C-C-13-0397 finding probable cause to indict Estrada, et. al. with one (1) count of Plunder and eleven (11) counts of violation of Section 3(e) of R.A. No. 3019. For convenience, this Ombudsman action is referred to as the "Probable Cause Resolution."

Significantly, Estrada received copy of the Ombudsman's March 27, 2014 Denial of Request Order and the March 28, 2014 Probable Cause Resolution on April 1, 2014.

On April 7, 2014, he moved for the reconsideration of the March 28, 2014 Probable Cause Resolution.

On May 7, 2014, Estrada filed the present petition for certiorari, to question, among others, the Ombudsman's March 27, 2014 Denial of Request Order. Also on the same day, May 7, 2014, the Ombudsman issued a Joint Order furnishing Estrada with copies of some of the requested counter-affidavits.

On May 15, 2014, the Ombudsman denied Estrada's motion to suspend the proceedings pending the Court's resolution of his present petition.

On June 4, 2014, the Ombudsman denied Estrada's motion for reconsideration of the March 28, 2014 Probable Cause Resolution.

On June 6, 2014,[4] the Ombudsman filed before the Sandiganbayan the Informations against Estrada, et. al., charging them with violation of the Plunder and Anti-Graft laws. The cases are docketed as SB-14-CRM-0239 and SB-14-CRM-0256 to SB-14-CRM-0266.

Estrada's Petition

Estrada assails, on grounds of grave abuse of discretion and violation of his right to due process under the Constitution, the following issuances of the Ombudsman: (1) the March 27, 2014 Denial of Request Order; and (2) the Resolution of March 28, 2014 finding probable cause against him.

He prays that the Court declares: (1) that he has been denied due process as a consequence of the March 27, 2014 Denial of Request Order; and (2) the nullity of the March 27, 2014 Denial of Request Order, as well as the proceedings in OMB-C-C-13-0313 and OMB-C-C-13-0397 (subsequent to and affected by the issuance of the March 27, 2014 Denial of Request Order). He likewise asks the Court for a temporary restraining order (TRO) and/or preliminary injunction to restrain the Ombudsman from further proceeding in the case.

Estrada argues, in the main, that the Ombudsman denied him due process of law when the latter refused to furnish him with copies of the requested documents. Particularly, he contends that the Ombudsman's refusal:

First, violated Section 4(c), Rule II of the Ombudsman Rules of Procedure (or the right to "have access to the evidence on record") and Section 3(a) and (b), Rule 112 of the Rules of Court (or the right to "examine the evidence submitted by the complainant which he may not have been furnished"); and

Second, contravened established Court rulings and the Constitution's due process clause. He points out that the requested documents touch on the charges against him; to deny him access to these documents, as the

Ombudsman did, is to deny him the full measure of his due process rights.

The Ombudsman's Comment

The Ombudsman, in defense, contends that:

First, Estrada's certiorari petition is procedurally infirm as he has a plain, speedy, and adequate remedy – i.e., the motion for reconsideration he filed addressing the Ombudsman's March 28, 2014 Probable Cause Resolution;

Second, Estrada violated the rule against forum shopping as the arguments raised in this petition are essentially the same as those he presented in his motion for reconsideration of the March 28, 2014 Probable Cause Resolution.

Third and last, it had, in fact, already furnished Estrada with copies of the requested documents on May 7, 2014.

My Conclusion and Reasons

Preliminary Considerations

Estrada essentially challenges the Ombudsman's March 27, 2014 Order denying his Request to be furnished copies of his co-respondents' affidavits and other documents, and posits that the Ombudsman's order should be declared null and void. He comes to this Court via this petition for certiorari under Rule 65 of the Rules of Court.

In a Rule 65 petition, the scope of the Court's review is limited to the question: whether the order by the tribunal, board or officer exercising judicial or quasi-judicial functions was rendered without or in excess of jurisdiction, or with grave abuse of discretion amounting to lack or excess of jurisdiction.

Grave abuse of discretion is defined as such "capricious and whimsical exercise of judgment as is equivalent to lack of jurisdiction, or [an] exercise of power in an arbitrary and despotic manner by reason of passion or hostility, or an exercise of judgment so patent and gross as to amount to an evasion of a positive duty or to a virtual refusal to perform the duty enjoined by law, or to act in manner not in contemplation of law." [5]

Under the simplified terms of Estrada's petition that I summed up above, at the core of the present controversy is clearly the regularity – viewed from the context of accepted due process standards – of the Ombudsman's conduct when it acted as a tribunal exercising quasi-judicial functions in the preliminary investigation of OMB-C-C-13-0313 and OMB-C-C-13-0397.

Estrada's petition must fail if the Ombudsman complied with the basic requirements of due process and the prevailing rules and jurisprudence on preliminary investigations. The Court must then recognize the Ombudsman's acts to be proper and within its jurisdiction.

Estrada's petition, however, must succeed, based on his arguments and within the limitations of his prayer, if the Ombudsman indeed defied these rules and existing jurisprudence. The grant of the petition based on the asserted violations in effect recognizes that, in acting as it did in OMB-C-C-13-0313 and OMB-C-C-13-0397, the Ombudsman gravely abused its discretion and thereby acted in excess of its jurisdiction.

A. On the procedural objections

1. Propriety of a Rule 65 petition in assailing the Ombudsman's March 27, 2014 Denial of Request Order

The circumstances obtaining in this case, in my view, support the finding that the certiorari petition is the most appropriate remedy available to Estrada. Contrary to the Ombudsman's position, a motion for reconsideration addressing the Ombudsman's March 27, 2014 Denial of Request Order would and could not have been the plain, speedy and adequate remedy available to Estrada. Neither could the Ombudsman's disposition of Estrada's then

pending motion for reconsideration of the March 28, 2014 Probable Cause Resolution, have remedied the due process denial caused by the March 27, 2014 Denial of Request Order.

I support these conclusions with the following reasons.

First, the sequence of the events – from the Ombudsman’s March 27, 2014 Denial of Request Order up to the filing of this petition – did not and could not have afforded Estrada sufficient opportunity to timely seek a plain, speedy and adequate remedy other than his present recourse to this Court for an extraordinary writ of certiorari.

For clarity, I draw attention to the sequence of events that transpired that rendered any other plain, speedy and adequate remedy, unavailable:

- Ø Estrada filed with the Ombudsman his Request for copies of his co-respondents’ affidavits and submissions on March 20, 2014;
- Ø the Ombudsman denied his Request thru the March 27, 2014 Denial of Request Order;
- Ø on March 28, 2014, the Ombudsman issued its Probable Cause Resolution;
- Ø Estrada received a copy of the March 27, 2014 Denial of Request Order only on April 1, 2014;
- Ø also on April 1, 2014, Estrada received his copy of the March 28, 2014 Probable Cause Resolution;
- Ø on April 7, 2014, Estrada moved for the reconsideration of the Ombudsman’s March 28, 2014 Probable Cause Resolution;
- Ø on May 7, 2014, Estrada filed the present petition to question the Denial of Request Order of March 27, 2014;
- Ø also on May 7, 2014, the Ombudsman furnished Estrada, albeit partially, with copy of the requested documents; and
- Ø on June 6, 2014, Information Nos. SB-14-CRM-0239 and SB-14-CRM-0256 to SB-14-CRM-0266 against Estrada, among others, were filed with the Sandiganbayan.

A critical point in this sequence of events is the Request that Estrada filed on March 20, 2014. Estrada filed this Request after learning from media reports that some of his co-respondents made reference in their respective counter-affidavits to his purported participation in the “PDAF scam.”

Very obviously, Estrada considered these documents vital (as I likewise find them to be), given their strong evidentiary weight the Ombudsman gave these documents. Thus, copies of these documents should likewise have been given to him to allow him to adequately prepare his defense against the charges laid.

Under these developments, Estrada plainly filed his Request to contest the allegations, documents or evidence adverse to him that he was not aware of. His move finds support under Section 4, Rule II of the Ombudsman Rules in relation with Section 3, Rule 112 of the Rules of Court, which provide that the respondent shall “have access to the evidence on record.”

The effect on Estrada’s cause of these submissions is glaring as they were the evidence largely used to support the Ombudsman’s probable cause finding.

To reiterate, the series of events shows that Estrada’s purpose in making his Request was effectively negated when the Ombudsman, on March 28, 2014, found probable cause to indict him based largely on evidence that had not been furnished to him.

This violation – prior to and independently of the probable cause finding – occurred when the Ombudsman refused to grant him access to his requested documents and proceeded to find probable cause based largely on these requested documents. Worse, Estrada did not even know of the denial of his Request at the time the probable cause finding was made and thus could not have contested it through a timely motion for reconsideration.

A motion for reconsideration addressing the March 27, 2014 Denial of Request Order, even if granted, could not have changed the fact that the finding of probable cause on March 28, 2014 was largely one-sided, given that it partly relied on the allegations in the requested documents that were not available to Estrada.

More importantly, a motion for reconsideration could not have erased the violation of his due process right caused by the finding of probable cause without hearing his defense against his co-respondents' allegations.

Second, a motion for reconsideration, under the attendant circumstances was not an appropriate remedy: it would have been useless anyway as Estrada had already been deprived of his due process right and the most urgent relief was called for.

While it is true that, as a rule, a motion for reconsideration must – as an indispensable condition – be filed before an aggrieved party may resort to the extraordinary writ of certiorari, this established rule is not without exception.

Jurisprudence has recognized instances when the filing of a petition for certiorari is proper notwithstanding the failure to file a motion for reconsideration. These instances include the situation when a motion for reconsideration would be useless, and when the petitioner had been deprived of his due process rights and relief was urgently needed.[6]

Likewise clear from the series of events in this case is the conclusion that a motion for reconsideration from the March 27, 2014 Denial of Request Order would have been useless anyway given that the Ombudsman already found probable cause to indict him on March 28, 2014 or four (4) days before Estrada even learned of the Ombudsman's denial of his Request.

Thus, even if he had filed a motion for reconsideration from the March 27, 2014 Denial of Request Order and awaited its resolution by the Ombudsman, the Ombudsman's finding of probable cause would still have stood and Information Nos. SB-14-CRM-0239 and SB-14-CRM-0256 to SB-14-CRM-0266 would still have been filed before the Sandiganbayan.

Section 7(b), Rule II of the Ombudsman's Rules provides that the filing of a motion for reconsideration to the finding of probable cause cannot bar the filing of the Information; a motion for reconsideration to an order denying the lesser request for documents cannot but have the same effect.

More importantly, the violations of due process rights in this case – committed through the March 27, 2014 denial of Estrada's Request and the Ombudsman's subsequent finding of probable cause – necessarily result in the Ombudsman's failure to hear and fully appreciate Estrada's defenses or possible defenses against his co-respondents' allegations. This kind of situation should support the need for immediate resort to the remedy of a writ of certiorari as a motion for reconsideration could not have prevented the filing of Information in court – the consequence of the violation of Estrada's due process rights.

2. Concurrence of the present Rule 65 petition and Estrada's motion for reconsideration to the March 28, 2014 Probable Cause Resolution before the Ombudsman

I likewise find that Estrada did not commit forum shopping when he filed the present petition.

Forum shopping exists when the elements of *litis pendentia* are present. To determine whether prohibited forum

shopping transpired, the existence of *litis pendentia* is imperative, i.e., an action must already be pending when a second action is filed. This pendency requires the identity of parties in both actions; identity, likewise of the rights asserted and the reliefs prayed for, as the reliefs are founded on the same facts; and the resulting judgment, regardless of which party is successful, would amount to *res judicata* in the other case.[7]

From this perspective, Estrada's motion for reconsideration before the Ombudsman did not and could not have led to the existence of *litis pendentia* that would give rise to prohibited forum shopping. For one, the parties involved in Estrada's motion for reconsideration (to the Ombudsman's March 28, 2014 Probable Cause Resolution) are different from those in the present petition, i.e., Estrada and the NBI and FIO in the former, and Estrada and the Ombudsman in the latter.

Additionally, the rights asserted and the reliefs prayed for are likewise entirely different. In the motion for reconsideration, what Estrada assailed was the Ombudsman's finding of probable cause; he essentially asked the latter to set aside these findings for lack of factual and legal bases. In the present petition, what Estrada assails is the validity of the Ombudsman's denial of his Request and essentially asks the Court to "set aside the March 27, 2014 Order and all proceedings subsequent to and affected by [this] Order" for violation of his due process rights guaranteed under the Constitution.

Finally, any decision that the Ombudsman might arrive at (or had in fact arrived at in its June 4, 2014 Order) in the motion for reconsideration would not have the effect of *res judicata* on the present petition.

A resolution of Estrada's motion for reconsideration goes into the probable cause findings of the Ombudsman or on the existence (or absence) of such facts and circumstances sufficient to engender a well-founded belief that Estrada committed the charges against him and thus should be held for trial. A resolution of the present petition, in contrast, goes into the validity, viewed from the accepted due process standards, of the Ombudsman's denial of Estrada's Request.

Based on these reasons, I find that Estrada's motion for reconsideration did not and could not have constituted *res judicata* to the present petition as to preclude the Court from resolving the issues to their full conclusion.

3. Effect of the Ombudsman's May 7, 2014 Order on Estrada's present petition assailing the March 27, 2014 Denial of Request Order

In its May 7, 2014 Order, the Ombudsman furnished Estrada with copies of the counter-affidavits of Tuason, Cunanan, Amata, Relampagos, Figura, Buenaventura and Sevidal. Based on this move, the Ombudsman now argues that the May 7, 2014 Order rendered moot Estrada's petition as this Order, in effect, already achieved what Estrada sought in his Request.

The Ombudsman's argument on this point would have been correct had it furnished, via the May 7, 2014 Order, Estrada with copies of all the documents subject of his Request. An issue or a case becomes moot and academic when it ceases to present a justiciable controversy so that a determination thereof would be without practical use and value. In such cases, there is no actual substantial relief to which the petitioner would be entitled and which would be negated by the dismissal of the petition.[8] The furnishing of all the requested documents would have achieved precisely what Estrada sought for in this petition.

The facts, however, glaringly reveal the flaw in this argument – the Ombudsman's compliance was only partial. As the events showed, the Ombudsman furnished Estrada with copies of the affidavits of only seven of his co-respondents. The Ombudsman has yet to furnish Estrada with copies of the affidavits of the other nine co-respondents that, viewed from the degree of their relevance to Estrada's cause, would have been indispensable as these formed part of the records from where the Ombudsman drew the conclusion that probable cause existed.

Thus, by these facts alone, the May 7, 2014 Order did not and could not have rendered moot Estrada's petition. The copies of the affidavits of only seven of his co-respondents did not satisfy Estrada's Request.

Apart from this reason, I find that the May 7, 2014 Order indeed could not have rendered Estrada's petition moot in view of the Ombudsman's March 28, 2014 Resolution finding probable cause against Estrada.

At the time the Ombudsman partially complied with Estrada's Request, Estrada's due process rights sought to be protected by this Request (which I shall separately discuss below) had already been violated. Thus, a compliance with the Request, whether partially or fully, could and can no longer erase the adverse consequences of its initial denial.

B. On the petition's merits

I find that the Ombudsman clearly gravely abused its discretion and thereby acted:

- (1) without or in excess of jurisdiction in issuing the March 27, 2014 Denial of Request Order; and
- (2) irregularly, subsequent to its March 27, 2014 Denial of Request Order, in proceeding in OMB-C-C-13-0313 and OMB-C-C-13-0397.

To support these conclusions, let me first discuss some of the underlying precepts touching on the issues at hand.

1. Preliminary Investigation: Nature and Purpose

A preliminary investigation is an inquiry or proceeding to determine whether sufficient ground exists to engender a well-founded belief that a crime has been committed, that the respondent is probably guilty of this crime, and should be held for trial.[9]

The process has been put in place before any trial can take place "to secure the innocent against hasty, malicious and oppressive prosecution and to protect him from an open and public accusation of a crime, from the trouble, expenses and anxiety of a public trial, and also to protect the State from useless and expensive prosecutions." [10]

Thus, a preliminary investigation is not simply a process plucked out of the blue to be part of the criminal justice process; it reflects a policy with specific purposes and objectives, all of which are relevant to the orderly working of society and should thus be closely followed.

Significantly, no constitutional provision expressly mentions or defines a preliminary investigation. In this sense, it is not one of those specifically guaranteed fundamental rights under the Bill of Rights.[11] Rather than an express constitutional origin, preliminary investigation traces its roots to statute.[12] But this status is not reason enough to simply look at the Rules of Court and from its bare wording literally decide what the process means.

To give the process full substance and meaning, the rules establishing preliminary investigation as a process must be read in the context in which they operate. These rules cannot and should not be viewed and treated in isolation and dissociated from the whole criminal justice process, particularly, from the body of constitutional rights expressly guaranteed to those perceived, suspected or formally accused to have run afoul of society's criminal laws.

Note that under the Constitution, from the police custodial investigation to the criminal trial, are rights guaranteed to the individual against State action as the State is the active party in these trials; it stands for the People of the Philippines and prosecutes the case, i.e., seeks the filing of the criminal Information and the conviction of the accused, in behalf of the People and against the individual.

A necessary starting point in considering how preliminary investigation and its set of rights are to be viewed is the

mother of rights under the Bill of Rights – the Due Process Clause under Section 1: “[n]o person shall be deprived of life, liberty or property without due process of law.” This guarantee, no less, lies at the bedrock of preliminary investigation process as life, liberty and property all stand to be affected by State action in the criminal justice process.

Interestingly, under the Constitution, actual and active protection starts at the earliest stage when an individual – the specific concern of the Bill of Rights and whom this part of the Constitution particularly secures against State action – becomes potentially exposed to harm from an all-powerful State. The Constitution describes the trigger point of this protection to be at the “investigation for the commission of an offense.”

Jurisprudence holds that this point occurs when the process ceases to be purely a police investigation and crosses over to the custodial investigation stage, i.e., when the investigation becomes accusatory.[13] At that point, Section 12 of the Bill of Rights is triggered and the individual under investigation becomes entitled to remain silent and to have competent and independent counsel.

Section 14 further provides for additional guarantees, among them, its own due process clause relating to criminal offenses; the presumption of innocence; the right to counsel; right to information on the nature and cause of accusation; the right to speedy, impartial and public trial, including the right to meet the witnesses face to face, and the right to secure the attendance of witnesses and the production of documents.

In between the police custodial investigation (or its substitute proceeding) and the trial itself, is the intermediate preliminary investigation stage where the proceedings are already accusatory and the individual must show that the State claim that probable cause exists has no basis. This stage, to be sure, is not spelled out in the Constitution and both the process and the guarantees are provided only by statutes.[14] Nevertheless, the protection afforded – if indeed the individual is to be afforded protection from State action – should be real so that its denial is no less an infringement of the constitutional due process clause.[15]

This consequence must necessarily follow because the due process right during preliminary investigation is substantive, not merely formal or technical, and is a component part of the due process rights in the criminal justice system[16] that begins at the accusatory police investigation level. To be sure, criminal justice rights cannot be substantive at the custodial investigation stage, only to be less than this at preliminary investigation, and then return to its substantive character when criminal trial starts.

Additionally, the rights during preliminary investigation are not merely implied rights because preliminary investigation is not mentioned in the Constitution. They are very real rights, granted and guaranteed as they are by law.

In short, to deny preliminary investigation rights to a person undergoing this process would deprive him of the full measure of his right to due process.[17] This was the case when due process started under England’s Magna Carta in 1215,[18] and should be true now: “no man shall be taken or imprisoned...but by the lawful judgment of his peers or by the law of the land [per legem terrae].”

In *Torralba v. Lim*,[19] the Court, reiterating *Go v. Court of Appeals*,[20] declared that “[w]hile that right is statutory rather than constitutional in its fundament, since it has in fact been established by statute, it is a component part of due process in criminal justice. The right to have a preliminary investigation conducted before being bound over to trial for a criminal offense, and hence formally at risk of incarceration or some other penalty, is not a mere formal or technical right; it is a substantive right.”

In *Uy v. Office of the Ombudsman*,[21] the Court held that a preliminary investigation – while still essentially an administrative proceeding where the investigating officer exercises preliminary investigation powers that are

quasi-judicial in nature – is subject to the requirements of both substantive and procedural due process that exists in court proceedings. While the rigorous standards of a criminal trial is not required, it cannot be denied that “[s]ufficient proof of the guilt of the accused must be adduced so that when the case is tried, the trial court may not be bound as a matter of law to order an acquittal.”[22]

2. Governing rules on the conduct of preliminary investigation proceedings

At present, the right to preliminary investigation is provided, in the main, by Rule 112 of the Rules of Court, and, in particular, as applied to proceedings conducted by the Ombudsman, by Section 4, Rule II of the Ombudsman Rules in relation with R.A. No. 6770 (the Ombudsman Law).[23]

The provisions of the Rules of Court pertinent to the issue in the present case are Section 3(b) and (c), of Rule 112[24] which provide:

(b) Within ten (10) days after the filing of the complaint, the investigating officer shall either dismiss it if he finds no ground to continue with the investigation, or issue a subpoena to the respondent attaching to it a copy of the complaint and its supporting affidavits and documents.

The respondent shall have the right to examine the evidence submitted by the complainant which he may not have been furnished and to copy them at his expense. If the evidence is voluminous, the complainant may be required to specify those which he intends to present against the respondent, and these shall be made available for examination or copying by the respondent at his expense.

Objects as evidence need not be furnished a party but shall be made available for examination, copying, or photographing at the expense of the requesting party.

(c) Within ten (10) days from receipt of the subpoena with the complaint and supporting affidavits and documents, the respondent shall submit his counter-affidavit and that of his witnesses and other supporting documents relied upon for his defense. The counter-affidavits shall be subscribed and sworn to and certified as provided in paragraph (a) of this section, with copies thereof furnished by him to the complainant. The respondent shall not be allowed to file a motion to dismiss in lieu of a counter-affidavit.

On the other hand, Section 4(a) and (b), Rule II of the Rules of Procedure of the Office of the Ombudsman (Ombudsman Rules) provide:

Sec. 4. PROCEDURE. — Preliminary investigation of cases falling under the jurisdiction of the Sandiganbayan and Regional Trial Courts shall be conducted in the manner prescribed in Section 3, Rule 112 of the Rules of Court, subject to the following provisions:

a) If the complaint is not under oath or is based only on official reports, the investigating officer shall require the complainant or supporting witnesses to execute affidavits to substantiate the complaints.

b) After such affidavits have been secured, the investigating officer shall issue an order, attaching thereto a copy of the affidavits and other supporting documents, directing the respondent to submit, within ten (10) days from receipt thereof, his counter-affidavits and controverting evidence with proof of service thereof on the complainant. The complainant may file reply affidavits within ten (10) days after service of the counter-affidavits.

3. Estrada’s Request viewed in the context of a preliminary investigation proceeding

The ponencia advances the view that Estrada’s Request is not supported by Rule 112 of the Rules of Court, nor by Section 4, Rule II of the Ombudsman Rules.

I disagree with this view as the ponencia forgets the most fundamental rule in construing provisions of statutes

and administrative issuances – that all laws and rules must necessarily include within their terms the higher and overriding terms of the Philippine Constitution.

Among the terms of our Constitution deemed included within the terms of Rule 112 of the Rules of Court and Rule II of the Ombudsman Rules is the Bill of Rights – a significant and perhaps a most unique part of our Constitution – and its due process clauses namely: Section 1 (the general provision that guarantees life, liberty and property of individuals against arbitrary State action) and Section 14(1) on criminal due process.[25]

I note that the public prosecutor's power to conduct a preliminary investigation is quasi-judicial in nature. To be precise, a public prosecutor conducting preliminary investigation exercises discretion in deciding the factual issues presented and in applying the law to the given facts, all for the purpose of determining whether probable cause exists that a crime has been committed and the respondent probably committed it. This exercise of power to determine facts and to apply the law using discretion outside of the courts is undoubtedly quasi-judicial in character.

The Court explained in *Spouses Dacudao, et al. v. Secretary of Justice*[26] that this quasi-judicial characterization of the public prosecutor's power to conduct preliminary investigation is true only to the extent that the public prosecutor, like a quasi-judicial body, is an officer of the executive department exercising powers akin to those of a court of law. In *Paderanga v. Drilon, et al.*,[27] the Court, while admitting the inquisitorial nature of the preliminary investigation, also ruled that the institution of a criminal action depends on the sound discretion of the fiscal; he has the quasi-judicial discretion to determine whether or not a criminal case should be filed in court.

Under this quasi-judicial characterization (albeit a limited one as above explained), the due process standards that at the very least should be considered in the public prosecutor's conduct of a preliminary investigation are those that this Court first articulated in *Ang Tibay v. Court of Industrial Relations*. [28]

The basic due process safeguards in administrative proceedings established in *Ang Tibay* are: (1) the respondents' right to a hearing, which includes the right to present one's case and submit supporting evidence; (2) the tribunal must consider the evidence presented; (3) the decision must have some basis to support itself; (4) there must be substantial evidence; (5) the decision must be rendered on the evidence presented at the hearing, or at least contained in the record and disclosed to the parties affected; (6) in arriving at a decision, the tribunal must have acted on its own conclusions of the law and the facts of the controversy and must not have simply accepted the views of a subordinate; and (7) the decision must be rendered in such manner that respondents would know the reasons for it and the various issues involved.[29]

In light of *Ang Tibay*, the requirements in providing the evidence and materials that the respondent shall respond to in a preliminary investigation cannot simply be the complaint and affidavit, to the exclusion of the other materials such as the co-respondents' counter-affidavits if these latter statements have been used in considering the presence or absence of probable cause.

In the present case, the relevant and material facts are not disputed. Estrada's co-respondents, namely, Tuason, Cunanan, Figura, Buenaventura and Sevidal have all been mentioned in the Order finding probable cause to charge Estrada with Plunder and violations of the Anti-Graft laws before the Sandiganbayan. Hence, Estrada should have been allowed to respond to these submissions.

The Court must likewise consider that:

First, despite the timely filed Request, the Ombudsman refused to furnish Estrada copies, among others, of the counter-affidavits of his co-respondents.

Second, immediately after it issued the March 27, 2014 Order that denied Estrada's Request (or on March 28, 2014), the Ombudsman issued the Joint Resolution finding probable cause to indict him for violation of the Anti-Graft Law and the Plunder Law. Significantly, the Ombudsman, to a considerable extent, based its findings of probable cause on the affidavits of his co-respondents.

Third, belatedly realizing perhaps the flaw in its refusal to grant Estrada's Request and the accompanying due process implications, the Ombudsman eventually acceded to the Request on May 7, 2014. Compliance, however, with Estrada's Request, as I pointed out above, was only partial, as the Ombudsman did not furnish Estrada with copies of the affidavits of the other nine co-respondents from where the conclusion that probable cause existed, was drawn. In short, it still failed to fully furnish Estrada with copy of all the requested documents.

Last, even after it granted albeit partially, Estrada's Request, the Ombudsman also did not give Estrada sufficient opportunity to rebut the allegations against him before the Ombudsman actually decided to indict him. Note that, as I likewise discussed above, it gave Estrada only a five-day non-extendible period within which to reply or comment on the counter-affidavits of his co-respondents.

The reasonable opportunity to controvert evidence and ventilate one's cause in a proceeding as an essential part of due process requires full knowledge of the relevant and material facts and evidence specific to the proceeding and of which he has been sufficiently informed of.[30] A respondent (or accused) cannot be expected to respond to collateral allegations or assertions made by his co-respondents, which he was unaware of.[31]

Still following *Ang Tibay*, the decision or resolution in the preliminary investigation proceeding must be rendered: on the evidence presented at the hearing, or at least contained in the record and disclosed to the parties affected; and in such manner that respondents would know the reasons for it and the various issues involved. Only by confining the administrative tribunal to the evidence disclosed to the parties, can the latter be protected in their right to know and meet the case against them.[32]

In the light of the due process requirement of preliminary investigation, full knowledge of and reasonable opportunity to controvert material evidence (such as the counter-affidavits of his co-respondents) should have been given Estrada at the preliminary investigation proceedings prior to the Ombudsman Order finding probable cause. For, without the counter-affidavits, Estrada had nothing to controvert since the burden of evidence lies with the Ombudsman who asserts that a probable cause exists.

As the preliminary investigation is the crucial sieve in the criminal justice system that spells for Estrada the difference of months or years of trial and possible jail term, on the one hand (given the non-bailable nature of and the statutory penalty for the crime of plunder), and peace of mind and liberty, on the other hand, the Ombudsman should have, at the very least, complied with these essential due process requisites.

The Ombudsman's refusal – an act that effectively denied Estrada the full measure of his right to due process in a manner completely outside the contemplation of law – tainted the preliminary investigation proceedings with grave abuse of discretion that effectively nullifies them. This conclusion is unavoidable as in the hierarchy of rights, the Bill of Rights and its supporting statutes take precedence over the right of the State to prosecute; when weighed against each other, the scales of justice tilt towards the former.[33]

For the grave abuse of discretion committed by the Ombudsman in the manner by which it proceeded in OMB-C-C-13-0313 and OMB-C-C-13-0397, I vote to partially grant his petition.

Some final points: Consequence of the grave irregularity in the preliminary investigation

I submit the following discussions and observations on the effect of the grave irregularity in the Ombudsman's

conduct of the preliminary investigation on the complaints filed against Estrada. I consider it important to continue to reflect and stress these points if only to clarify any confusion, on the effect or consequence of a finding of irregularity in the preliminary investigation on the Information already pending before the Sandiganbayan as well as on the warrant issued for Estrada's arrest, that may have surfaced in the Court's deliberations on this case.

The grave irregularity in the preliminary investigation, effectively amounting to its absence, does not affect the Sandiganbayan's jurisdiction over the criminal case against Estrada

1. The absence of a preliminary investigation does not affect the validity of the Information already filed

As has also been mentioned, the conduct of preliminary investigation is governed generally by Rule 112 of the Rules of Court, and Rule II of Administrative Order No. 7 or the Ombudsman Rules. In terms of particular rules relevant to the present case, these are Section 3 of Rule 112[34] and Section 4 of Rule II.[35]

The preliminary investigation process, as provided under the above-cited sources may be summarized as follows: first, a verified complaint or affidavit is filed before the proper investigating officer; second, the investigating officer shall issue an order, attaching to it a copy of the affidavits and other supporting documents, and directing the respondent to submit within ten (10) days from his receipt, his counter-affidavits and controverting evidence with proof of service to the complainant; third, the complainant may then file reply-affidavits within ten (10) days from thereon; fourth, the investigating officer may conduct clarificatory hearing should there be any matter that, in his discretion, needs to be clarified, and where the parties may be present but without the right to confront the witness being questioned; and fifth, upon the termination of the preliminary investigation and the investigating officer finds probable cause, he shall prepare the Information and, subject to the required approval and certification, file it before the proper court; otherwise, subject to the required approval, he shall dismiss the complaint.

The filing of the Information in court initiates the criminal action. The court acquires jurisdiction and the accompanying authority to hear, control and decide the case up to its full disposition.

After an Information is filed, the exercise of discretion and authority of the investigating officer over the criminal complaint ends; he loses control and discretion regarding its disposition. Should the investigating officer find the need to re-investigate the case so that the objectives of a preliminary investigation may be served, he may do so, provided he first secures the permission of the court, following the rule that the court now has control and disposition of the case.[36]

Should a reinvestigation be allowed, the investigating officer, after the reinvestigation and consistent with the court's jurisdiction over the case, must submit his findings and recommendation to the court for the court's disposition.

Thus runs the relationship between the court and the investigating officer or prosecutor, viewed from the vantage point of the filing of Information in court after the preliminary investigator finds probable cause to lay a charge.

In the seminal case of *Crespo v. Mogul*,[37] the Court laid out in detail the extent and scope of the power and duties of the fiscals or prosecutors as they conduct the preliminary investigation, and of the court once it acquires jurisdiction over the criminal case through the filing of the Information in court. The court explained:

It is a cardinal principle that all criminal actions either commenced by complaint or by information shall be prosecuted under the direction and control of the fiscal. The institution of a criminal action depends upon the sound discretion of the fiscal. He may or may not file the complaint or information, follow or not follow that presented by the offended party, according to whether the evidence, in his opinion, is sufficient or not to

establish the guilt of the accused beyond reasonable doubt. The reason for placing the criminal prosecution under the direction and control of the fiscal is to prevent malicious or unfounded prosecution by private persons. It cannot be controlled by the complainant. Prosecuting officers under the power vested in them by law, not only have the authority but also the duty of prosecuting persons who, according to the evidence received from the complainant, are shown to be guilty of a crime committed within the jurisdiction of their office. They have equally the legal duty not to prosecute when after an investigation they become convinced that the evidence adduced is not sufficient to establish a prima facie case.

It is through the conduct of a preliminary investigation, that the fiscal determines the existence of a prima facie case that would warrant the prosecution of a case. The Courts cannot interfere with the fiscal's discretion and control of the criminal prosecution. It is not prudent or even permissible for a Court to compel the fiscal to prosecute a proceeding originally initiated by him on an information, if he finds that the evidence relied upon by him is insufficient for conviction. Neither has the Court any power to order the fiscal to prosecute or file an information within a certain period of time, since this would interfere with the fiscal's discretion and control of criminal prosecutions. Thus, a fiscal who asks for the dismissal of the case for insufficiency of evidence has authority to do so, and Courts that grant the same commit no error. The fiscal may re-investigate a case and subsequently move for the dismissal should the re-investigation show either that the defendant is innocent or that his guilt may not be established beyond reasonable doubt. In a clash of views between the judge who did not investigate and the fiscal who did, or between the fiscal and the offended party or the defendant, those of the fiscal's should normally prevail. On the other hand, neither an injunction, preliminary or in final nor a writ of prohibition may be issued by the Courts to restrain a criminal prosecution except in the extreme case where it is necessary for the courts to do so for the orderly administration of justice or to prevent the use of the strong arm of the law in an oppressive and vindictive manner.

However, the action of the fiscal or prosecutor is not without any limitation or control. The same is subject to the approval of the provincial or city fiscal or the chief state prosecutor as the case maybe and it may be elevated for review to the Secretary of Justice who has the power to affirm, modify or reverse the action or opinion of the fiscal. Consequently the Secretary of Justice may direct that a motion to dismiss the case be filed in Court or otherwise, that an information be filed in Court.

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. [Emphasis supplied]

Mindful of these considerations, an order for the dismissal of an Information already filed in court – as in Estrada's case – would be legally wrong as such move misappreciates the nature, purpose and scope of a preliminary investigation proceeding vis-a-vis the nature, purpose and scope of the proceedings in court after the

filing of the Information.

As early as the 1961 case of *People v. Casiano*,^[38] the Court declared that the absence of a preliminary investigation does not affect the court's jurisdiction over the case, nor does it impair the validity of the Information or otherwise render it defective. This has been the settled rule in this jurisdiction: once an Information or complaint is filed in court, any disposition of the case with respect to its dismissal or the conviction or acquittal of the accused, rests with the sound discretion of the court.^[39]

In the 1982 case of *People v. Gomez*,^[40] the Court reiterated the ruling that the absence of a preliminary investigation does not affect the court's jurisdiction over the case, nor does it impair the validity of the Information or otherwise render it defective. In this case, the Court set aside the trial court's order dismissing the criminal case against the accused Gomez that was based essentially on the irregularity in the preliminary investigations.

The Court repeated the *Casiano* ruling in *Doromal v. Sandiganbayan*,^[41] *People v. Abejuela*,^[42] *Liang v. People*,^[43] and *Villaflor v. Vivar*,^[44] to name a few.^[45] In *Torralba v. Sandiganbayan*,^[46] the Court added that the absence of preliminary investigation does not obliterate the proceedings already undertaken before the court.

Likewise in *Doromal*, the Court pointed out that the absence of the preliminary investigation is not a ground to quash the complaint or Information.^[47]

Section 3, Rule 117 of the Rules of Court enumerates the grounds in quashing an Information, as follows:

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.

As the Court pointedly noted in *Villaflor*,^[48] nowhere in Section 3 is the “lack of preliminary investigation” mentioned as a ground for a motion to quash.

2. Neither will the absence of a preliminary investigation affect the validity of an issued arrest warrant

As the absence of preliminary investigation does not affect the court’s jurisdiction over the case, so also does this irregularity not affect the proceedings already undertaken before the court, nor affect the validity of any warrant that the court may have issued for the arrest of the accused.

A warrant of arrest is a legal process issued by competent authority, directing the arrest of a person or persons upon grounds stated therein.^[49] The issuance of an arrest warrant is governed primarily, by Section 2, Article III of the Constitution,^[50] and secondarily, by Section 6, Rule 112 of the Rules of Court.

Under Section 6, Rule 112 of the Rules of Court, the trial court judge may issue a warrant of arrest within ten (10) days from the filing of the Information upon a finding of probable cause that the accused should be placed under immediate custody in order not to frustrate the ends of justice. Notably, the issuance of an arrest warrant and the preliminary investigation both require the prior determination of probable cause; the probable cause determination in these two proceedings, however, differs from one another.

In *Conjuanco, Jr. v. Sandiganbayan*,^[51] citing *Ho v. People*,^[52] the Court summarized the distinctions between the determination of probable cause to merit the issuance of a warrant of arrest, and the determination of probable cause in a preliminary investigation through this discussion:

First, x x x 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 a 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. (Emphasis supplied)

To sum up these distinctions:

First, the determination of probable cause for purposes of an arrest warrant is judicial, performed by the judge to ascertain whether the accused should be placed under the court's custody; the determination of probable cause as basis for the filing of the Information in court is executive, performed by the investigating officer to ascertain whether or not a criminal case must be filed in court against those whom he believes committed the crime.

Second, the former (the probable cause needed for a warrant of arrest) refers to "such facts and circumstances that would lead a reasonably discreet and prudent man to believe that an offense has been committed by the person to be arrested";[53] the latter (the probable cause to support the filing of the Information) refers to such facts as are sufficient to engender a well-founded belief that a crime has been committed and that the respondent is probably guilty thereof and should be held for trial.

Third, the prosecutor and the judge act independently of one another in their consideration of evidence commonly before them. One reason for this independence is their differing objectives. Another is the differing nature of the discretion they exercise, one being judicial and the other executive, with each being governed by their respective standards.

Since the Sandiganbayan already has jurisdiction and control of the present case, the case before it inevitably cannot be affected without its consent, except only by a cause that absolutely nullifies the proceedings before it. As I explained above, this nullification could not have transpired in the present case.

3. The "radical relief," i.e., dismissal of the Information already pending before the Sandiganbayan, as an exception to the rule that preserves the court's jurisdiction despite the grave irregularity in the preliminary investigation, does not apply to this case

I am not unaware that the Court, in the past, has not hesitated to grant the "radical relief" of dismissing the Information or the criminal case already filed in court when a grave irregularity in the conduct of the preliminary investigation exists, i.e., when there is violation of the accused's right to due process. The present situation, however, does not warrant the grant of the "radical relief" in the way grants were made in the past.

My review of the cases where the Court granted this "radical relief" tells me that this approach has been reserved for special circumstances and situations where the violation of the accused's constitutional rights extended beyond the lack of due process that transpired in the present case.

In other words, while I find the Ombudsman's conduct of the preliminary investigation proceedings gravely irregular, to the point of affecting Estrada's right to due process in a manner completely outside the contemplation of law, such grave irregularity, by itself, does not sufficiently justify a "radical relief" approach.

In *Duterte v. Sandiganbayan*,^[54] the Court dismissed the criminal case, for violation of the Anti-Graft Law,

against petitioners Rodrigo R. Duterte and Benjamin C. De Guzman after finding that the Ombudsman, through its Graft Investigator, violated not only the petitioners' right to due process but also their right to speedy disposition of cases.

The Court pointed out that the Ombudsman completely disregarded the preliminary investigation procedure under Sections 2 and 4, Rule II of the Ombudsman Rules, thus, violating the petitioners' due process rights. As well, the Ombudsman unduly and unreasonably delayed the termination of the irregularly conducted preliminary investigation, thus, infringing the petitioners' right to the speedy disposition of their cases. In addition to these constitutional rights violations, the Court likewise found no probable cause to hold the petitioners liable for the charge.

In *Tatad v. Sandiganbayan*,^[55] the Court dismissed the Informations, for violation of the Anti-Graft Law, filed against petitioner Francisco S. Tatad.

As in *Duterte*, the Court found that the Tanodbayan not only completely departed from the preliminary investigation procedures, as provided under its Rules; it also unreasonably delayed the resolution of the preliminary investigation. Thus, as in *Duterte*, the Tanodbayan's acts in the case violated the petitioner's right to due process and to the speedy disposition of their cases. More than these, the Court observed that political motivations obviously propelled the criminal prosecutions against the petitioner, i.e., the complaint came out only after the petitioner had "a falling out with President Marcos;" instead of requiring the petitioner to file counter-affidavits and controverting evidence, the Tanodbayan referred the complaint to the Presidential Security Command for the fact-finding investigation and report.

In *Salonga v. Paño*,^[56] the Court, dismissed the certiorari petition filed by Jovito Salonga on the ground of mootness, but nevertheless declared the Information filed against the latter invalid. The Court reasoned that the respondent-investigating judge absolutely failed to establish *prima facie* Salonga's guilt for the crime charged; and that the respondents blatantly disregarded his constitutional right to be informed, during the arrest, of the charges against him, and of his right to counsel.

In *Mead v. Argel*,^[57] the Court ordered the respondent Judge Manuel A. Argel to dismiss on jurisdictional grounds the criminal cases for violation of R.A. No. 3931 filed against petitioner Donald Mead. Impliedly, the Court dismissed the case because of the irregularity in the preliminary investigation that proceeded from the lower court's lack of jurisdiction.

The Court pointed out that under R.A. No. 3931, a prior determination by the National Water and Air Pollution Control Commission of the existence of "pollution" is required before any criminal case for violation of its provisions may be filed in court. The Commission also has the exclusive authority to prosecute pollution violations. No prior determination by the Commission, however, was ever made, and the prosecution was undertaken by the Provincial Fiscal, not by the Commission. In addition, the Court noted that the Information accused the petitioner of multiple offenses in contravention of the law.

In *People v. Zulueta*,^[58] the Court affirmed the Court of Appeal's decision annulling the order of the Regional Trial Court that admitted the amended Information in the criminal case filed against respondent Jose C. Zulueta. The Court explained that the amendment to the Information that was filed after the respondent had already pleaded to the charge was substantial; it set forth a different manner of committing the felony with which the respondent was charged. To the Court, the amendment infringed on the respondent's right to be fully apprised of the charges against him.

Lastly, in *Zaldivar v. Sandiganbayan*,^[59] the Court dismissed the criminal cases filed by the Tanodbayan against

petitioner Enrique A. Zaldivar on the ground that these cases were filed by the Tanodbayan without legal and constitutional authority.

The Tanodbayan in this cited case issued its finding of probable cause against Zaldivar on February 5, 1987, filed the original Informations on March 3, 1987, and the amended Informations on June 4, 1987. The Court pointed out that “under the 1987 Constitution which took effect on February 2, 1987, it is only the Ombudsman, not the Tanodbayan who has authority to file cases with the Sandiganbayan.” In other words, the Information was filed by an officer without any authority and was thus patently void.

Significantly, in all of the above cases, the Court dismissed the criminal cases/information against the accused not only because of the grave irregularity amounting to the complete absence of preliminary investigation and resulting in the violation of the accused’s due process rights. More importantly, a dismissal was ordered because of the presence of the other clearly valid and legal grounds or compelling factors that, together with other constitutional rights violations, justified the dismissal of the criminal case/information.

These clearly valid and legal grounds or compelling factors that the Court found present in the above cited cases may be summarized into three:

One, the cases that involved other constitutional rights violations, i.e., unreasonable delay in the conduct and termination of the preliminary investigation resulting in the violation of the right to speedy disposition of cases; and refusal of the arresting officers to inform the accused of the charges and to allow him access to his counsel in violation of his right to information and to counsel during an arrest.

Two, the cases that involved grounds to quash the information, i.e., substantial amendment to the Information subsequent to the accused’s arraignment; multiple charges in the Information; and absolute lack of legal and Constitutional authority of the public officer that filed the information before the lower court or the Sandiganbayan.

Three, those that involved other clearly compelling and justifiable grounds, i.e., the absence of probable cause as found by the Court; and obvious political motivations that actively played and propelled the institution of the criminal prosecution against the accused.

Compared with these cases, I find that Estrada’s situation does not involve any clearly valid and legal grounds or compelling factors other than the grave irregularity that affected his right to due process in the preliminary investigation. As this Court made clear in Duterte and Tatad, the grant of the “radical relief” requires a particular regard for the facts and circumstances peculiar to each case.

The effect of a finding of grave irregularity in the preliminary investigation in this case: the proper disposition of Estrada’s petition

In the instances where the preliminary investigation suffers defects that are not absolutely irremediable in terms of their effects on the State and the individual, I believe that the proper course of action to take is to: (1) suspend the proceedings before the lower court; and (2) remand the case to the investigating officer and require the holding of a proper preliminary investigation.

This is the fair middle ground that will protect the interest of the State and the individual. This is the fair solution that will address the irregularity at the Ombudsman level without doing violence to the jurisdiction that the trial court has already acquired. This was the course of action that the Court took in Doromal, Torralba, and Abejuela cited above.

Parenthetically, this course of action is proper when viewed from the objectives of a preliminary investigation.

This procedure may save the accused from the rigors and hazards of a prolonged trial if, on preliminary investigation review, no Information should have been filed in the first place. The State may likewise be saved from spending its scarce time and resources if, in the end, there may be no case to speak of, on which a conviction can be secured.

In *Yusop v. Sandiganbayan*,^[60] the Court, after reversing the resolution of the Office of the Ombudsman for Mindanao recommending the prosecution of petitioner Alvarez A. Yusop, ordered the Ombudsman to conduct the preliminary investigation and suspended the trial on the merits of the criminal case against Yusop.

In this case, the Ombudsman agreed with the Court that Yusop was indeed deprived of his right to preliminary investigation. Yet the Court disagreed with Yusop that the case should be dismissed for lack of preliminary investigation. The Court emphasized that first, “nowhere in the Revised Rules of Criminal Procedure, or even the old Rules, is there any mention that this lack is a ground for a motion to quash;” and, second, “responsibility for the ‘absence of a preliminary investigation does not go to the jurisdiction of the court but merely to the regularity of the proceedings.’”

Thus, as applied to the present Estrada case, I submit that the proper course to take is to:

- (1) remand the case to the Ombudsman for the conduct of another preliminary investigation with dispatch, this time furnishing Estrada first with copies of all the requested documents and giving him a reasonable time to submit his counter-affidavits, comment and controverting evidence; and
- (2) order the Sandiganbayan to suspend the proceedings in Information Nos. SB-14-CRM-0239 and SB-14-CRM-0256 to SB-14-CRM-0266, but this suspension shall not, and should not, affect the arrest warrant that the Sandiganbayan has acted upon.

In sum, I vote to PARTIALLY GRANT the petition.

[1] Dated September 16, 2013; attached as Annex “B” to the Petition. The complaint also recommended for prosecution the following individuals: Janet Lim Napoles, Pauline Labayen, Ruby Tuazon, Alan A. Javellana, Godelina G. Amata, Antonio Y. Ortiz, Mylene T. Encarnacion, John Raymund S. De Asis, Dennis L. Cunanan, Victor Roman Cacal, Romulo M. Relevo, Maria Ninez P. Guañizo, Ma. Julie A. Villaralvo-Johnson, Rhodora B. Mendoza, Gregoria G. Buenaventura, Alexis G. Sevidal, Sofia D. Cruz, Chita C. Jalandoni, Francisco B. Figura and Marivic V. Jover.

[2] Dated November 18, 2013; attached as Annex “C” to the petition. Specifically, the FIO complaint charged Estrada for violation of Section 3(e) of R.A. No. 3019 which penalizes the act of:

(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 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 or licenses or permits or other concessions.

[3] Attached as Annexes “D” and “E” to the petition.

[4] The date when the Informations were filed before the Sandiganbayan was obtained from media reports: <http://www.manilatimes.net/plunder-filed-against-enrile-jinggoy-bong/102255/>; <http://www.rappler.com/nation/59826-enrile-jpe-jinggoy-charged-plunder-pdaf-scam>; <http://www.interaksyon.com/article/88515/pork-plunder-case-filed--employees-of-ombudsmans-office-go-to-sandiganbayan-carrying-reams-of-paper>

[5] *Uy v. Office of the Ombudsman*, 578 Phil. 635, 654-655 (2008).

[6] See *Medado v. Heirs of the Late Antonio Consing*, G.R. No. 186720, February 8, 2012, 665 SCRA 534, 547-548.

The other exceptions, as provided by jurisprudence, are:

- (a) where the order is a patent nullity, as where the court a quo has no jurisdiction;
- (b) where the questions raised in the certiorari proceedings have been duly raised and passed upon by the lower court, or are the same as those raised and passed upon in the lower court;
- (c) where there is an urgent necessity for the resolution of the question and any further delay would prejudice the interests of the Government or of the petitioner or the subject matter of the petition is perishable;
- (d) where, in a criminal case, relief from an order of arrest is urgent and the granting of such relief by the trial court is improbable;
- (e) where the proceedings in the lower court are a nullity for lack of due process;
- (f) where the proceeding was ex parte or in which the petitioner had no opportunity to object; and,
- (g) where the issue raised is one purely of law or public interest is involved.

[7] See *Chavez v. Court of Appeals*, G.R. No. 174356, January 20, 2010, 610 SCRA 399, 403, citing *Cruz v. Caraos*, G.R. No. 138208, April 23, 2007, 521 SCRA 510, 522; and *Spouses Melo v. Court of Appeals*, 376 Phil. 204, 211 (1999).

[8] See *Philippine Savings Bank v. Senate Impeachment Court*, G.R. No. 200238, November 20, 2012, 686 SCRA 35, 38, where the Court dismissed the petition on mootness grounds. The Court ruled that the “main issue of whether the Impeachment Court acted arbitrarily when it issued the assailed subpoena to obtain information concerning the subject foreign currency deposits notwithstanding the confidentiality of such deposits under RA 6426 has been overtaken by x x x [t]he supervening conviction of Chief Justice Corona x x x as well as his execution of a waiver against the confidentiality of all his bank accounts.”

See also *Mendoza v. Villas*, G.R. No. 187256, February 23, 2011, 644 SCRA 347, 357, where the Court, denying the petition likewise on the ground of mootness, reasoned that “with the conduct of the 2010 barangay elections, a supervening event has transpired that has rendered this case moot and academic and subject to dismissal x x x Mendoza’s term of office has expired with the conduct of last year’s elections.”

The present petition, contrasted with these cited cases, does not involve a situation – a supervening event – that could have rendered the issue and Estrada’s prayers moot and academic. Note that the Ombudsman’s compliance was only partial; hence, the relief sought for in this petition has not at all been achieved.

[9] Section 1, Rule 112, Rules of Court.

[10] *Sales v. Sandiganbayan*, 421 Phil. 176, 186-187 (2001); *Uy v. Office of the Ombudsman*, supra note 5, at 655. See also *Yusop v. Sandiganbayan*, 405 Phil. 233, 239 (2001).

[11] *Riano*, Criminal Procedure (The Bar Lecture Series), 2011, p. 149.

[12] *Id.*

[13] See *People v. Salonga*, 411 Phil. 845 (2001); *People v. Ayson*, 256 Phil. 671 (1989); *People v. Canton*, 442 Phil. 743 (2002).

[14] Section 4, Rule II of the Ombudsman Rules in relation to Section 18 of R.A. No. 6770 (or the Ombudsman Law), and Section 3, Rule 112 of the Rules of Court.

[15] See *Go v. Court of Appeals*, G.R. No. 101837, February 11, 1992, 206 SCRA 138, 153. Under Section 1, Article III of the Constitution, “No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.”

[16] See *Doromal v. Sandiganbayan*, 258 Phil. 146, 152-153 (1989); *Torralba v. Lim*, G.R. No. 101421, February 10, 1994, 230 SCRA 33, 41; *Uy v. Office of the Ombudsman*, supra note 5, at 655; *Ladlad v. Senior State Prosecutor Velasco*, 551 Phil. 313, 336 (2007).

[17] *Yusop v. Sandiganbayan*, supra note 10, at 242; *Uy v. Office of the Ombudsman*, supra note 5, at 655.

[18] Signed on June 19 (or 15), 1215 at Runnymede between the barons of Medieval England and King John. It was the first formal document that guaranteed the rights of the individuals against the wishes of the King.

http://www.bbc.co.uk/schools/primaryhistory/british_history/magna_carta/

<http://britishlibrary.typepad.co.uk/digitisedmanuscripts/2013/06/15-june-1215-a-significant-date-in-history.html>

[19] Supra note 16, at 41.

[20] Supra note 15, at 153.

[21] Supra note 5, at 94.

[22] Id. at 95.

[23] Approved November 17, 1989. See Section 18 of R.A. No. 6770. It states in part:

Section 18. Rules of Procedure. — (1) The Office of the Ombudsman shall promulgate its rules of procedure for the effective exercise or performance of its powers, functions, and duties.

(2) The rules of procedure shall include a provision whereby the Rules of Court are made suppletory.

x x x x

[24] Section 3, Rule 112 of the Rules of Court reads in full:

Section 3. Procedure. — The preliminary investigation shall be conducted in the following manner:

(a) The complaint shall state the address of the respondent and shall be accompanied by the affidavits of the complainant and his witnesses, as well as other supporting documents to establish probable cause. They shall be in such number of copies as there are respondents, plus two (2) copies for the official file. The affidavits shall be subscribed and sworn to before any prosecutor or government official authorized to administer oath, or, in their absence or unavailability, before a notary public, each of who must certify that he personally examined the affiants and that he is satisfied that they voluntarily executed and understood their affidavits.

(b) Within ten (10) days after the filing of the complaint, the investigating officer shall either dismiss it if he finds no ground to continue with the investigation, or issue a subpoena to the respondent attaching to it a copy of the complaint and its supporting affidavits and documents.

The respondent shall have the right to examine the evidence submitted by the complainant which he may not have been furnished and to copy them at his expense. If the evidence is voluminous, the complainant may be required to specify those which he intends to present against the respondent, and these shall be made available for

examination or copying by the respondent at his expense.

Objects as evidence need not be furnished a party but shall be made available for examination, copying, or photographing at the expense of the requesting party.

(c) Within ten (10) days from receipt of the subpoena with the complaint and supporting affidavits and documents, the respondent shall submit his counter-affidavit and that of his witnesses and other supporting documents relied upon for his defense. The counter-affidavits shall be subscribed and sworn to and certified as provided in paragraph (a) of this section, with copies thereof furnished by him to the complainant. The respondent shall not be allowed to file a motion to dismiss in lieu of a counter-affidavit.

(d) If the respondent cannot be subpoenaed, or if subpoenaed, does not submit counter-affidavits within the ten (10) day period, the investigating officer shall resolve the complaint based on the evidence presented by the complainant.

(e) The investigating officer may set a hearing if there are facts and issues to be clarified from a party or a witness. The parties can be present at the hearing but without the right to examine or cross-examine. They may, however, submit to the investigating officer questions which may be asked to the party or witness concerned.

The hearing shall be held within ten (10) days from submission of the counter-affidavits and other documents or from the expiration of the period for their submission. It shall be terminated within five (5) days.

(f) Within ten (10) days after the investigation, the investigating officer shall determine whether or not there is sufficient ground to hold the respondent for trial.

[25] Atty. Macalintal v. Comelec, 453 Phil. 586, 631 (2003); In the Matter of the Petition for Issuance of Writ of Habeas Corpus of Sabio v. Senator Gordon, 535 Phil. 687, 709-710 (2006); Manila Prince Hotel v. Government Service Insurance System, G.R. No. 122156, February 3, 1997, 267 SCRA 408, 430-431.

[26] G.R. No. 188056, January 8, 2013.

[27] G.R. No. 96080, April 19, 1991, 196 SCRA 86.

[28] 69 Phil. 635 (1960).

[29] Id. at 642.

[30] Supra note 5, at 95.

[31] Id.

[32] Id.

[33] Id.

[34] Supra note 24.

[35] See Section 4(a) and (b), Rule II of the Ombudsman Rules.

[36] See Crespo v. Judge Mogul, 235 Phil. 465 (1987).

[37] Id.

[38] 111 Phil. 73 (1961).

[39] See Crespo v. Judge Mogul, supra note 36.

[40] G.R. No. L-29086, September 30, 1982, 117 SCRA 72, 77-78.

[41] Supra note 16.

[42] G.R. No. L-29715, March 31, 1971, 38 SCRA 324.

[43] 380 Phil. 673 (2000).

[44] 402 Phil. 222 (2001).

[45] See also Atty. Serapio v. Sandiganbayan, 444 Phil. 499, 531 (2003); and Budiongan, Jr. v. De la Cruz, Jr., 534 Phil. 47, 55 (2006) where the Court reiterated the ruling that the absence of a preliminary investigation will not affect the jurisdiction of the court. While in these cases, the Court dismissed the accused's certiorari petition assailing: (1) the Ombudsman's memorandum finding probable cause and denying the motion for reconsideration in Budiongan for failure of the accused to timely invoke the right to preliminary investigation tantamount to its waiver; and (2) the Sandiganbayan's resolution denying the accused's motion for reinvestigation in Serapio for failure to show arbitrariness in the Ombudsman's conduct of the preliminary investigation, the principle nevertheless still holds true.

[46] Supra note 16, at 41.

[47] Doromal v. Sandiganbayan, supra note 16, at 153-154. See also Budiongan, Jr. v. De la Cruz, Jr., supra note 45; and Atty. Serapio v. Sandiganbayan, supra note 45, at 531.

[48] Supra note 44. The Court in this case reversed the order of the Regional Trial Court that dismissed the criminal cases against respondent Dindo Vivar on the ground that the public prosecutor had failed to conduct a preliminary investigation. The Court observed that contrary to the RTC's ruling, the prosecutor had in fact previously conducted a preliminary investigation and that a new preliminary investigation was not warranted under the circumstances as the change made by the prosecutor to the Information was merely formal, not substantial as to require a reinvestigation. The difference in the factual situation between Villaflor and the present petition, however, cannot invalidate nor weaken the force of the Casiano ruling – that absence of a preliminary investigation does not impair the validity of the information or affect the court's jurisdiction.

[49] Herrera, Remedial Law IV, 2001 edition, p. 271.

[50] Section 2, Article III of the Constitution reads:

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. [Emphasis supplied]

[51] 360 Phil. 559, 578-579 (1998).

[52] 345 Phil. 597 (1997).

[53] See People v. Tan, G.R. No. 182310, December 9, 2009, 608 SCRA 85, 95.

[54] 352 Phil. 557 (1998).

[55] G.R. No. L-72335-39, March 21, 1988, 159 SCRA 70.

[56] 219 Phil. 402 (1985).

[57] 200 Phil. 650 (1982).

[58] 89 Phil. 752 (1951).

[59] 243 Phil. 988 (1988).

[60] Supra note 10.

CONCURRING OPINION

LEONEN, J.:

I concur with the ponencia. The petition should be dismissed for failure to show grave abuse of discretion on the part of the Ombudsman. It is unorthodox and contrary to existing doctrine to suspend the proceedings in a court that has acquired jurisdiction simply on the basis of an alleged error on the part of the Ombudsman.[1]

I agree that the fundamental constitutional norm of “due process of law” embeds the social value of fairness. I disagree, however, with the approach proposed by both Justices Velasco and Brion in their dissents that will clinically remove the preliminary investigation from the entire process of holding the accused to account through a process of criminal trial. The approach they propose also detaches the formalities of procedure from the preliminary investigation’s purpose.

In my view, the relevant questions to ask are the following:

First, has the petitioner been so fundamentally deprived of his opportunity to be heard in the light of the purposes of a preliminary investigation?

Second, assuming that aspects of the opportunity to be heard were less than ideally observed, are these infirmities so fatal that these deprive petitioner of all opportunities to be heard during the course of judicial examination, i.e., pre-trial and trial?

Third, granting without conceding that there were infirmities in the preliminary investigation, will there be a public policy interest in suspending the criminal action? Or would it in effect be detrimental to the fundamental rights of both the prosecution and the petitioner?

I

The grant of the opportunity to be heard in a preliminary investigation must relate to the purpose for which a preliminary investigation is created. To declare that the judicial proceedings in a criminal procedure will be affected by alleged irregularities in a preliminary investigation misapprehends the nature and purpose of a preliminary investigation.

Due process takes a different form in a preliminary investigation as compared with its form in a criminal action. In *Artillero v. Casimiro*:^[2]

The law is vigilant in protecting the rights of an accused. Yet, notwithstanding the primacy put on the rights of an accused in a criminal case, even they cannot claim unbridled rights in [p]reliminary [i]nvestigations. In *Lozada v. Hernandez*, we explained the nature of a [p]reliminary [i]nvestigation in relation to the rights of an accused, to wit:

It has been said time and again that a preliminary investigation is not properly a trial or any part thereof but is merely preparatory thereto, its only purpose being to determine whether a crime has been committed and

whether there is probable cause to believe the accused guilty thereof. The right to such investigation is not a fundamental right guaranteed by the constitution. At most, it is statutory. And rights conferred upon accused persons to participate in preliminary investigations concerning themselves depend upon the provisions of law by which such rights are specifically secured, rather than upon the phrase “due process of law.”[3] (Emphasis supplied)

The right to due process of accused respondent in a preliminary investigation is merely a statutory grant. It is not a constitutional guarantee. Thus, the validity of its procedures must be related to the purpose for which it was created.

Salonga v. Cruz-Paño[4] clarifies the purpose of a preliminary investigation:

The purpose of a preliminary investigation is to secure the innocent against hasty, malicious and oppressive prosecution, and to protect him 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.[5]

Thus, the right of a respondent to present counter-affidavits and to confront the witnesses against him or her in a preliminary investigation is merely to assist the prosecution to decide in a summary manner whether there is basis for supporting a charge and preventing a harassment suit that prejudices respondent and wastes the resources of the state. The process is essentially one-sided, that is, it only serves to assist the prosecution in determining whether it has prima facie evidence to sustain the filing of an information. In Salonga:

The term “prima facie evidence” denotes evidence which, if unexplained or uncontradicted, is sufficient to sustain the proposition it supports or to establish the facts, or to counter-balance the presumption of innocence to warrant a conviction.[6]

Due to the preliminary nature of the proceedings, it would be erroneous to insist that the due process safeguards in *Ang Tibay v. Court of Industrial Relations*[7] apply in a preliminary investigation.

It can be recalled that in *Ang Tibay*, this court observed that although quasi-judicial agencies “may be said to be free from the rigidity of certain procedural requirements[,] [it] does not mean that it can, in justifiable cases before it, entirely ignore or disregard the fundamental and essential requirements of due process in trials and investigations of an administrative character.”[8] It presupposes that the administrative investigation has the effect of an adjudication on respondent’s guilt or innocence.

A preliminary investigation is not a quasi-judicial proceeding similar to that conducted by other agencies in the executive branch. The prosecutor does not pass judgment on a respondent; he or she merely ascertains if there is enough evidence to proceed to trial. It is a court of law which ultimately decides on an accused’s guilt or innocence.

It would also be erroneous to conclude that the prosecutor performs a quasi-judicial function merely on the basis that the proceeding is similar to that in courts. This court clarified the similarities in *Bautista v. Court of Appeals*:[9]

Petitioner submits that a prosecutor conducting a preliminary investigation performs a quasi-judicial function, citing *Cojuangco v. PCGG*, *Koh v. Court of Appeals*, *Andaya v. Provincial Fiscal of Surigao del Norte* and *Crespo v. Mogul*. In these cases this Court held that the power to conduct preliminary investigation is quasi-judicial in nature. But this statement holds true only in the sense that, like quasi-judicial bodies, the prosecutor is an office in the executive department exercising powers akin to those of a court. Here is where the similarity ends.

A closer scrutiny will show that preliminary investigation is very different from other quasi-judicial

proceedings. A quasi-judicial body has been defined as "an organ of government other than a court and other than a legislature which affects the rights of private parties through either adjudication or rule-making."

....

[T]he prosecutor in a preliminary investigation does not determine the guilt or innocence of the accused. He does not exercise adjudication nor rule-making functions. Preliminary investigation is merely inquisitorial, and is often the only means of discovering the persons who may be reasonably charged with a crime and to enable the fiscal to prepare his complaint or information. It is not a trial of the case on the merits and has no purpose except that of determining whether a crime has been committed and whether there is probable cause to believe that the accused is guilty thereof. While the fiscal makes that determination, he cannot be said to be acting as a quasi-court, for it is the courts, ultimately, that pass judgment on the accused, not the fiscal.[10] (Emphasis supplied)

Preliminary investigation, in cases of public officers, is outlined in Republic Act No. 6770[11] or The Ombudsman Act of 1989, and Administrative Order No. 7[12] or The Rules of Procedure of the Office of the Ombudsman. Section 18 of Republic Act No. 6770 mandates the Office of the Ombudsman to formulate its rules of procedure. The procedure for preliminary investigations is outlined in Rule II, Section 4 of Administrative Order No. 7:

Sec. 4. PROCEDURE. — Preliminary investigation of cases falling under the jurisdiction of the Sandiganbayan and Regional Trial Courts shall be conducted in the manner prescribed in Section 3, Rule 112 of the Rules of Court, subject to the following provisions:

- a) If the complaint is not under oath or is based only on official reports, the investigating officer shall require the complainant or supporting witnesses to execute affidavits to substantiate the complaints.
- b) After such affidavits have been secured, the investigating officer shall issue an order, attaching thereto a copy of the affidavits and other supporting documents, directing the respondent to submit, within ten (10) days from receipt thereof, his counter-affidavits and controverting evidence with proof of service thereof on the complainant. The complainant may file reply affidavits within ten (10) days after service of the counter-affidavits.
- c) If the respondent does not file a counter-affidavit, the investigating officer may consider the comment filed by him, if any, as his answer to the complaint. In any event, the respondent shall have access to the evidence on record.
- d) No motion to dismiss shall be allowed except for lack of jurisdiction. Neither may a motion for a bill of particulars be entertained. If respondent desires any matter in the complainant's affidavit to be clarified, the particularization thereof may be done at the time of clarificatory questioning in the manner provided in paragraph (f) of this section.
- e) If the respondent cannot be served with the order mentioned in paragraph 6 hereof, or having been served, does not comply therewith, the complaint shall be deemed submitted for resolution on the basis of the evidence on record.
- f) If, after the filing of the requisite affidavits and their supporting evidences, there are facts material to the case which the investigating officer may need to be clarified on, he may conduct a clarificatory hearing during which the parties shall be afforded the opportunity to be present but without the right to examine or cross-examine the witness being questioned. Where the appearance of the parties or witnesses is impracticable, the clarificatory questioning may be conducted in writing, whereby the questions desired to be asked by the investigating officer or a party shall be reduced into writing and served on the witness concerned who shall be required to answer the same in writing and under oath.

g) Upon the termination of the preliminary investigation, the investigating officer shall forward the records of the case together with his resolution to the designated authorities for their appropriate action thereon.

No information may be filed and no complaint may be dismissed without the written authority or approval of the Ombudsman in cases falling within the jurisdiction of the Sandiganbayan, or of the proper Deputy Ombudsman in all other cases.

Furthermore, the Rules of Court, Rule 112, Section 1 of the Rules of Criminal Procedure describes the process as:

Section 1. Preliminary investigation defined; when required. — Preliminary investigation is an inquiry or proceeding to determine whether there is sufficient ground to engender a well-founded belief that a crime has been committed and the respondent is probably guilty thereof, and should be held for trial.

The opportunity to be heard and to defend one's self is satisfied by the filing of respondent's counter-affidavits. There is no right granted to a respondent in a preliminary investigation to be furnished with the counter-affidavits of his or her co-respondents, save for the provision where he or she "shall have access to the evidence on record,"[13] regardless of whether or not he or she files a counter-affidavit. It contemplates a situation wherein the evidence on record only consists of complainant's evidence, to which respondent shall have access "[i]n any event." [14] Given the purpose of a preliminary investigation, this should already be the extent of due process granted to him or her by law.

The Ombudsman may avail herself of information provided by the respondent to the case contained in his or her counter-affidavits against another respondent. To require that the Ombudsman conduct her summary investigation with all the rigors of a criminal trial would be more than what is statutorily required. Besides, all she needs to determine is whether there is sufficient probable cause that will give confidence in moving forward with the prosecution.

II

Assuming without conceding that there were irregularities in the preliminary investigation, any alleged infirmity in the preliminary investigation does not deprive the petitioner of his opportunity to be heard during the course of judicial examination.

Preliminary investigation is not part of the criminal action. It is merely preparatory and may even be disposed of in certain situations.[15] The "invalidity or absence of preliminary investigation does not affect the jurisdiction of the court." [16] Thus, in *People v. Narca*: [17]

It must be emphasized that the preliminary investigation is not the venue for the full exercise of the rights of the parties. This is why preliminary investigation is not considered as a part of trial but merely preparatory thereto and that the records therein shall not form part of the records of the case in court. Parties may submit affidavits but have no right to examine witnesses though they can propound questions through the investigating officer. In fact, a preliminary investigation may even be conducted ex-parte in certain cases. Moreover, in Section 1 of Rule 112, the purpose of a preliminary investigation is only to determine a well grounded belief if a crime was "probably" committed by an accused. In any case, the invalidity or absence of a preliminary investigation does not affect the jurisdiction of the court which may have taken cognizance of the information nor impair the validity of the information or otherwise render it defective.[18] (Emphasis supplied)

Similarly, in *Drilon v. Court of Appeals*, [19] this court clarified the role and function of preliminary investigation.

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.[20] (Emphasis supplied)

Any irregularities that may have been committed during a preliminary investigation should not deprive the parties — both the prosecution and the accused — of their rights to due process and to trial. A criminal trial is a separate proceeding from that of the preliminary investigation. The courts will judge and act at their own instance, independently of the conclusions of the prosecutor since:

a finding of probable cause does not ensure a conviction, or a conclusive finding of guilt beyond reasonable doubt. The allegations adduced by the prosecution will be put to test in a full-blown trial where evidence shall be analyzed, weighed, given credence or disproved.[21]

Thus, after determination of probable cause by the Sandiganbayan, the best venue to fully ventilate the positions of the parties in relation to the evidence in this case is during the trial. The alleged violation of due process during the preliminary investigation stage, if any, does not affect the validity of the acquisition of jurisdiction over the accused.

There is, of course, a fundamental difference between a government agency allegedly committing irregularities in the conduct of a preliminary investigation and the failure of a government agency in conducting a preliminary investigation. The first is a question of procedure while the second involves a question of whether the government agency deprived respondent of a statutory right.

It is, thus, erroneous for the dissenting opinions to cite *Uy v. Ombudsman*,[22] *Yusop v. Sandiganbayan*,[23] and *Larrañaga v. Court of Appeals*[24] and to insist that irregularities in the conduct of a preliminary investigation deprived petitioner of his constitutional rights. These cases involve situations where a regular preliminary investigation was never conducted despite repeated requests.

In this case, the preliminary investigation was conducted by the Office of the Ombudsman in the regular course of its duties. The only question involved is whether petitioner has the right to be furnished copies of the affidavits of his co-respondents in the preliminary investigation despite the absence of this requirement in the rules of procedure.

III

The right to due process of law applies to both the prosecution representing the people and the accused. Even as the Constitution outlines a heavy burden on the part of law enforcers when a person is “under investigation for the commission of an offense”[25] and when a person is actually under prosecution,[26] it does not do away with the guarantee of fairness both for the prosecution and the accused.

In *People v. Court of Appeals and Jonathan Cerbo*,[27] this court stated:

The rights of the people from what could sometimes be an “oppressive” exercise of government prosecutorial powers do need to be protected when circumstance so require. But just as we recognize this need, we also acknowledge that the State must likewise be accorded due process. Thus, when there is no showing of nefarious irregularity or manifest error in the performance of a public prosecutor’s duties, courts ought to refrain from interfering with such lawfully and judicially mandated duties.[28] (Emphasis supplied)

A defect in the procedure in the statutory grant of a preliminary investigation would not immediately be considered as a deprivation of the accused’s constitutional right to due process. Irregularities committed in the

executive determination of probable cause do not affect the conduct of a judicial determination of probable cause.

The Constitution mandates the determination by a judge of probable cause to issue a warrant of arrest against an accused. This determination is done independently of any prior determination made by a prosecutor for the issuance of the information.

Article III, Section 2 of the Constitution states:

ARTICLE III
BILL OF RIGHTS

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. (Emphasis supplied)

It is a constitutional requirement that before a warrant can be issued, the judge must first determine the existence of probable cause. The phrase “to be determined personally” means that the judge determines the existence of probable cause himself or herself. This determination can even be ex parte since the Constitution only mentions “after examination under oath or affirmation of the complainant and the witnesses he [or she] may produce.”

The judicial determination of probable cause is considered separate from the determination of probable cause by the prosecutor in a preliminary investigation. In *People v. Inting*:^[29]

Judges and Prosecutors alike should distinguish the preliminary inquiry which determines probable cause for the issuance of a warrant of arrest from the preliminary investigation proper which ascertains whether the offender should be held for trial or released. Even if the two inquiries are conducted in the course of one and the same proceeding, there should be no confusion about the objectives. The determination of probable cause for the warrant of arrest is made by the Judge. The preliminary investigation proper — whether or not there is reasonable ground to believe that the accused is guilty of the offense charged and, therefore, whether or not he should be subjected to the expense, rigors and embarrassment of trial — is the function of the Prosecutor.^[30] (Emphasis supplied)

The difference between the executive determination of probable cause and the judicial determination of probable cause is doctrinal and has been extensively explained by this court. In *Ho v. People*:^[31]

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.[32] (Emphasis supplied)

The issuance of the warrant of arrest is based on an independent assessment by the Sandiganbayan of the evidence on hand, which may or may not be the same evidence that the prosecutor relies on to support his or her own conclusions. Hence, irregularities in the conduct of the preliminary investigation — for purposes of the criminal procedure — are negated upon the issuance of the warrant of arrest. The Sandiganbayan has, independent of the preparatory actions by the prosecutor, determined for themselves the existence of probable cause as to merit the arrest of the accused, acquire jurisdiction over his or her person, and proceed to trial.

Once the information is filed and the court acquires jurisdiction, it is the Sandiganbayan that examines whether, despite the alleged irregularity in the preliminary investigation, there still is probable cause to proceed to trial. The actions or inactions of the Ombudsman or the investigating prosecutor do not bind the court.

In *Crespo v. Mogul*,[33] this court clearly stated that:

[t]he 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.

However, one may ask, if the trial court refuses to grant the motion to dismiss filed by the fiscal upon the directive of the Secretary of Justice will there not be a vacuum in the prosecution? A state prosecutor to handle the case cannot possibly be designated by the Secretary of Justice who does not believe that there is a basis for prosecution nor can the fiscal be expected to handle the prosecution of the case thereby defying the superior order of the Secretary of Justice.

The answer is simple. The role of the fiscal or prosecutor as we all know is to see that justice is done and not necessarily to secure the conviction of the person accused before the Courts. Thus, in spite of his opinion to the contrary, it is the duty of the fiscal to proceed with the presentation of evidence of the prosecution to the Court to enable the Court to arrive at its own independent judgment as to whether the accused should be convicted or acquitted. The fiscal should not shirk from the responsibility of appearing for the People of the Philippines even under such circumstances much less should he abandon the prosecution of the case leaving it to the hands of a private prosecutor for then the entire proceedings will be null and void. The least that the fiscal should do is to continue to appear for the prosecution although he may turn over the presentation of the evidence to the private prosecutor but still under his direction and control.

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. 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.^[34] (Emphasis supplied)

Thus, after the Sandiganbayan has determined for itself the existence of probable cause, it is also within its authority to issue the warrant of arrest. The Sandiganbayan should proceed with due and deliberate dispatch to proceed to trial in order to provide the accused with the fullest opportunity to defend himself or herself.

ACCORDINGLY, I vote that the petition be DENIED. The Sandiganbayan should proceed with the cases docketed as SB-14-CRM-0239 and SB-14-CRM-0256 to SB-14-CRM-0266 with due and deliberate dispatch.

[1] I acknowledge Justice Velasco and Justice Brion's doubts regarding my use of these adjectives. I maintain my views and reading of doctrines in this separate opinion.

[2] G.R. No. 190569, April 25, 2012, 671 SCRA 357 [Per J. Sereno, Second Division].

[3] Id. at 369, citing *Lozada v. Hernandez*, 92 Phil. 1051 (1953) [Per J. Reyes, En Banc]; *U.S. v. Yu Tuico*, 34 Phil. 209 (1916) [Per J. Moreland, En Banc]; *People v. Badilla*, 48 Phil. 718 (1926) [Per J. Ostrand, En Banc]; II MORAN, RULES OF COURT 673 (1952); *U.S. v. Grant and Kennedy*, 18 Phil. 122 (1910) [Per J. Trent, En Banc].

[4] 219 Phil. 402 (1985) [Per J. Gutierrez, Jr., En Banc].

[5] Id. at 428, citing *Trocio v. Manta*, 203 Phil. 618 (1982) [Per J. Relova, First Division] and *Hashim v. Boncan*, 71 Phil. 216 (1941) [Per J. Laurel, En Banc].

[6] *Salonga v. Cruz-Paño*, 219 Phil. 402, 415–416 (1985) [Per J. Gutierrez, En Banc].

[7] 69 Phil. 635 (1940) [Per J. Laurel, En Banc].

[8] Id. at 641–642.

[9] 413 Phil. 159 (2001) [Per J. Bellosillo, Second Division].

[10] Id. at 167–169, citing *Cojuangco v. Presidential Commission on Good Government*, 268 Phil. 235 (1990) [Per J. Gancayco, En Banc]; *Koh v. Court of Appeals*, 160-A Phil. 1034 (1975) [Per J. Esguerra, First Division]; *Andaya v. Provincial Fiscal of Surigao del Norte*, 165 Phil. 134 (1976) [Per J. Fernando, Second Division]; *Crespo v. Mogul*, 235 Phil. 465 (1987) [Per J. Gancayco, En Banc]; *Presidential Anti-Dollar Salting Task Force v. Court of Appeals*, 253 Phil. 344 (1989) [Per J. Sarmiento, En Banc]; *Tandok v. Judge Resultan*, 256 Phil. 485 (1989) [Per J. Padilla, Second Division].

[11] Rep. Act No. 6770 (1989), otherwise known as An Act for Providing for the Functional and Structural Organization of the Office of the Ombudsman and for Other Purposes.

[12] Adm. Order No. 07 (1990), otherwise known as Rules of Procedure of the Office of the Ombudsman.

[13] Adm. Order No. 7 (1990), Rule II, sec. 4(c).

[14] Adm. Order No. 7 (1990), Rule II, sec. 4(c).

[15] See RULES OF CRIMINAL PROCEDURE (2000), Rule 112, sec. 7.

[16] *People v. Narca*, 341 Phil. 696, 705 (1997) [Per J. Francisco, Third Division], citing *Romualdez v. Sandiganbayan*, 313 Phil. 871 (1995) [Per C.J. Narvasa, En Banc]; *People v. Gomez*, 202 Phil. 395 (1982) [Per J. Relova, First Division].

[17] 341 Phil. 696 (1997) [Per J. Francisco, Third Division].

[18] Id. at 705, citing *Lozada v. Hernandez*, 92 Phil. 1051 (1953) [Per J. Reyes, En Banc]; RULES OF CRIMINAL PROCEDURE (2000), Rule 112, sec.8; RULES OF CRIMINAL PROCEDURE (2000), Rule 112, sec. 3(e); RULES OF CRIMINAL PROCEDURE (2000), Rule 112, sec. 3(d); *Mercado v. Court of Appeals*, 315 Phil. 657 (1995) [Per J. Quiason, First Division]; *Rodriguez v. Sandiganbayan*, 205 Phil. 567 (1983) [Per J. Escolin, En Banc]; *Webb v. De Leon*, 317 Phil. 758 (1995) [Per J. Puno, Second Division]; *Romualdez, v. Sandiganbayan*, 313 Phil. 871 (1995) [Per C.J. Narvasa, En Banc]; *People v. Gomez*, 202 Phil. 395 (1982) [Per J. Relova, First Division].

[19] 327 Phil. 916 (1996) [Per J. Romero, Second Division].

[20] Id., citing *Salonga v. Cruz-Paño*, 219 Phil. 402 (1985) [Per J. Gutierrez, En Banc]; *Hashim v. Boncan*, 71 Phil. 216 (1941) [Per J. Laurel, En Banc]; *Paderanga v. Drilon*, G.R. No. 96080, April 19, 1991, 196 SCRA 86, 92 [Per J. Regalado, En Banc]; concurring opinion of J. Francisco in *Webb v. De Leon*, 317 Phil. 758, 809–811 (1995) [Per J. Puno, Second Division].

[21] *Drilon v. Court of Appeals*, 327 Phil. 916 (1996) [Per J. Romero, Second Division].

[22] 578 Phil. 635 (2008) [Per J. Brion, En Banc].

[23] 405 Phil. 233 (2001) [Per J. Panganiban, Third Division].

[24] 351 Phil. 75 (1998) [Per J. Puno, Second Division].

[25] Const., art. III, sec. 12, which provides:

Sec. 12. (1) Any person under investigation for the commission of an offense shall have the right to be informed of his right to remain silent and to have competent and independent counsel preferably of his own choice. If the

person cannot afford the services of counsel, he must be provided with one. These rights cannot be waived except in writing and in the presence of counsel.

(2) No torture, force, violence, threat, intimidation, or any other means which vitiate the free will shall be used against them. Secret detention places, solitary, incommunicado, or other similar forms of detention are prohibited.

(3) Any confession or admission obtained in violation of this or Section 17 hereof shall be inadmissible in evidence against him.

(4) The law shall provide for penal and civil sanctions for violations of this section as well as compensation to and rehabilitation of victims of torture or similar practices, and their families.

[26] Const., art. III, sec. 14, which provides:

Sec. 14. (1) No person shall be held to answer for a criminal offense without due process of law.

(2) In all criminal prosecutions, the accused shall be presumed innocent until the contrary is proved, and shall enjoy the right to be heard by himself and counsel, to be informed of the nature and cause of the accusation against him, to have a speedy, impartial, and public trial, to meet the witnesses face to face, and to have compulsory process to secure the attendance of witnesses and the production of evidence in his behalf. However, after arraignment, trial may proceed notwithstanding the absence of the accused provided that he has been duly notified and his failure to appear and unjustifiable.

[27] 361 Phil. 401 (1999) [Per J. Panganiban, Third Division].

[28] Id. at 420–421.

[29] G.R. No. 88919, July 25, 1990, 187 SCRA 788 [Per J. Gutierrez, En Banc].

[30] Id. at 792–793.

[31] 345 Phil. 597 (1997) [Per J. Panganiban, En Banc].

[32] Id. at 611–612, citing RULES OF CIVIL PROCEDURE, Rule 112, sec. 6(b) and the dissenting opinion of J. Puno in *Roberts, Jr. v. Court of Appeals*, 324 Phil. 568, 623–642 (1996) [Per J. Davide, Jr., En Banc].

[33] 235 Phil. 465 (1987) [Per J. Gancayco, En Banc].

[34] Id. at 474–476, citing *Herrera v. Barretto*, 25 Phil. 245 (1913) [Per J. Moreland, En Banc]; *U.S. v. Limsiongco*, 41 Phil. 94 (1920) [Per J. Malcolm, En Banc]; *De la Cruz v. Moir*, 36 Phil. 213 (1917) [Per J. Moreland, En Banc]; RULES OF COURT, Rule 110, sec. 1; RULES OF CRIMINAL PROCEDURE (1985), sec. 1; 21 C.J.S. 123; *Carrington*; *U.S. v. Barreto*, 32 Phil. 444 (1917) [Per Curiam, En Banc]; *Asst. Provincial Fiscal of Bataan v. Dollete*, 103 Phil. 914 (1958) [Per J. Montemayor, En Banc]; *People v. Zabala*, 58 O. G. 5028; *Galman v. Sandiganbayan*, 228 Phil. 42 (1986) [Per C.J. Teehankee, En Banc]; *People v. Beriales*, 162 Phil. 478 (1976) [Per J. Concepcion, Jr., Second Division]; *U.S. v. Despabiladeras*, 32 Phil. 442 (1915) [Per J. Carson, En Banc]; *U.S. v. Gallegos*, 37 Phil. 289 (1917) [Per J. Johnson, En Banc]; *People v. Hernandez*, 69 Phil. 672 (1964) [Per J. Labrador, En Banc]; *U.S. v. Labial*, 27 Phil. 82 (1914) [Per J. Carson, En Banc]; *U.S. v. Fernandez*, 17 Phil. 539 (1910) [Per J. Torres, En Banc]; *People v. Velez*, 77 Phil. 1026 (1947) [Per J. Feria, En Banc].

ABOUT BATAS.ORG

Study smarter at BATAS.org

The Philippine bar review and law-school companion built around how your brain actually remembers.

The complete Philippine law library - free for everyone.

More than 100,000 Supreme Court decisions, Republic Acts, and executive issuances - full-text searchable, browsable by category and year, and always free. No paywall, no login. This PDF came from it.

Audio case-brief lectures.

Any decision becomes a podcast-style lecture - facts, issues, ruling, and doctrine - with read-along highlighting and a hands-free presentation mode. Study while commuting, working out, or resting your eyes.

Bar review built on the science of memory.

Complete, sequenced courses for all eight bar subjects, narrated like podcasts and reinforced with retrieval practice and spaced review - the study techniques with the strongest evidence behind them.

The full law-school curriculum.

One subscription unlocks the entire J.D. curriculum - every subject, every lesson, with your progress tracked down to the paragraph so you can pick up exactly where you left off, on any device.

Mock exams that tell you where you stand.

Timed multiple-choice exams graded instantly, with per-subject score breakdowns and focus suggestions that point you at your weakest topics first.

A study planner that keeps you on pace.

Set your schedule and BATAS tells you every day whether you are on track for bar day - and exactly which lesson to take next.

Start free at <https://batas.org>

The law library is free forever - and your first lesson is one click away.

The text of this document is an official public record and remains in the public domain. Formatting, presentation, and compilation © 2026 batas.org.

Downloaded free from the batas.org Law Library. Share it freely - the library is free for every law student, bar reviewee, and practitioner.