

SENATOR JINGGOY EJERCITO ESTRADA, PETITIONER, VS. OFFICE OF THE OMBUDSMAN, HON. SANDIGANBAYAN, FIELD INVESTIGATION OFFICE, OFFICE OF THE OMBUDSMAN, NATIONAL BUREAU OF INVESTIGATION...

G.R. Nos. 212761-62. July 31, 2018

Ponente: CARPIO, J.

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CARPIO, J.:

The Case

The present consolidated[1] petitions for certiorari[2] filed by petitioners Senator Jinggoy Ejercito Estrada (Estrada), John Raymund de Asis (De Asis), and Janet Lim Napoles (Napoles) assail the Joint Resolution[3] dated 28 March 2014 and the Joint Order[4] dated 4 June 2014 of the Office of the Ombudsman (Ombudsman) in OMB-C-C-13-0313 and OMB-C-C-13-0397 finding probable cause to indict them, along with several others, for the crime of Plunder, defined and penalized under Section 2 of Republic Act No. (RA) 7080, as amended, and for violation of Section 3(e) of RA 3019.

The Facts

Petitioners are charged as co-conspirators for their respective participation in the illegal pillaging of public funds sourced from the Priority Development Assistance Fund (PDAF) of Estrada for the years 2004 to 2012. The charges are contained in two (2) complaints, namely: (1) a Complaint for Plunder[5] filed by the National Bureau of Investigation and Atty. Levito D. Baligod (NBI Complaint) on 16 September 2013, docketed as OMB-C-C-13-0313; and (2) a Complaint for Plunder and violation of Section 3(e) of RA 3019[6] filed by the Field Investigation Office of the Ombudsman (FIO Complaint) on 18 November 2013, docketed as OMB-C-C-13-0397, both before the Ombudsman. Briefly stated, petitioners were implicated for allegedly committing the following acts:

(a) Estrada, as Senator of the Republic of the Philippines, for: (1) authorizing the illegal utilization, diversion, and disbursement of his allocated PDAF through his endorsement of fraudulent non-governmental organizations created and controlled by Napoles' JLN Corporation (JLN-controlled NGOs); (2) acquiring and receiving significant portions of the diverted PDAF funds as his commission, kickbacks, or rebates in the total amount of P183,793,750.00; and (3) giving unwarranted benefits to Napoles and the JLN-controlled NGOs in the implementation of his PDAF-funded projects, causing undue injury to the government in an amount of more than P278,000,000.00;[7]

(b) Napoles, as the mastermind of the entire PDAF scam, for facilitating the illegal utilization, diversion, and disbursement of Estrada's PDAF through: (1) the commencement via "business propositions" with Estrada regarding his allocated PDAF; (2) the creation and operation of JLN-controlled NGOs to serve as "conduits" for "ghost" PDAF-funded projects; (3) the use of spurious receipts and liquidation documents to make it appear that

the projects were implemented by her NGOs; (4) the falsification and machinations used in securing funds from the various implementing agencies (IAs) and in liquidating disbursements; and (5) the remittance of Estrada's PDAF for misappropriation; and

(c) De Asis, as driver/messenger/janitor of Napoles, for assisting in the fraudulent processing and releasing of the PDAF funds to the JLN-controlled NGOs through, among others, his designation as President/Incorporator of a JLN-controlled NGO, namely, Kaupdanan Para sa Mangunguma Foundation, Inc. (KPMFI) and for eventually remitting the PDAF funds to Napoles' control.

The NBI Complaint alleged that, based on the sworn statements of Benhur Luy (Luy) along with several other JLN employees including Marina Sula (Sula) and Merlina Suñas (Suñas) (collectively, the whistleblowers), the PDAF scheme would commence with Napoles and the legislator - in this case, Estrada – discussing the utilization of the latter's PDAF. During this stage, the legislator and Napoles would discuss the list of projects, description or purpose of the projects, corresponding implementing government agency, project cost, and "commission" or "rebate" of the legislator, ranging from 40-60% of the total project cost or the amount stated in the Special Allotment Release Order (SARO). After the negotiations and upon instruction of Napoles, Luy would prepare the so-called "Listing," containing the list of projects allocated by the legislator to Napoles and her NGOs, project title or description, name of the IA under the General Appropriations Act (GAA) Menu, and the project cost. Thereafter, Napoles would submit the "Listing" to the legislator. The legislator would prepare a letter, which incorporated the "Listing" submitted by Napoles, addressed to the Senate President and the Finance Committee Chairperson in the case of a Senator, or to the House Speaker and Chairperson of the Appropriations Committee in the case of a Congressman, who would then endorse such request to the Department of Budget and Management (DBM) for the release of the SARO. Upon receipt by the DBM of a copy of the letter with the endorsement, the legislator would give Napoles a copy of the letter with a "received" stamp and Napoles would give the legislator the agreed advance legislator's commission.

Thereafter, Luy and other Napoles' employees would follow-up the release of the SARO from the DBM, by citing the details of the legislator's letter to expedite the release of the SARO. Upon release of the SARO, the DBM would furnish a copy of it to the legislator, who in turn, would give a copy of it to Napoles. Upon receipt of the copy of the SARO, Napoles would order her employees to prepare the balance of the legislator's commission, which would be delivered by Napoles to the legislator or his/her authorized representative.

Napoles, who chose the NGO owned or controlled by her that would implement the project, would instruct her employee to prepare a letter for the legislator to sign endorsing her NGO to the IA. The legislator would sign the letter endorsing Napoles' NGOs to the IAs, based on the agreement with Napoles. The IA would then prepare a Memorandum of Agreement (MOA) between the legislator, the IA, and the selected NGO. Napoles' employee would secure a copy of the MOA. Thereafter, the DBM would release the Notice of Cash Allocation (NCA) to the IA concerned, and the head of the IA would expedite the transaction and release of the corresponding check representing the PDAF disbursement, in exchange for a 10% share in the project cost.

The succeeding checks would be issued upon compliance with the necessary documentation, i.e. official receipts, delivery receipts, sales invoices, inspection reports, delivery reports, certificates of acceptance, terminal reports, and master lists of beneficiaries. Napoles' employees, upon instruction of Napoles, would pick up the checks and deposit them to the bank accounts of the NGO concerned. Once the funds are in the account of the JLN-controlled NGO, Napoles would call the bank to facilitate the withdrawal of the money, and Napoles' employees would bring the proceeds to the office of JLN Corporation for accounting. Napoles would then decide how much would be left in the office and how much would be brought to her residence in Taguig City. Napoles and her employees would subsequently manufacture fictitious lists of beneficiaries, inspection reports, and similar documents that

would make it appear that the PDAF-funded projects were implemented when, in fact, they were not.

Under this modus operandi, Estrada, with the help of Napoles and De Asis, among others, funneled his PDAF amounting to around P262,575,000.00[8] to the JLN-controlled NGOs, specifically Masaganang Ani Para sa Magsasaka Foundation, Inc. (MAMFI) and Social Development Program for Farmers Foundation, Inc. (SDPFFI), and in return, received "commissions" or "rebates" amounting to P183,793,750.00, through his authorized representative, Pauline Labayen (Labayen) and Ruby Tuason (Tuason).[9]

On the other hand, the FIO Complaint alleged that Estrada and Labayen, in conspiracy with Napoles and her NGOs, committed plunder through repeated misuse of public funds as shown by the series of SAROs issued to effect releases of funds from the PDAF allocation of Estrada to Napoles' NGOs, and through accumulation of more than P50,000,000.00 in the form of kickbacks.[10] Estrada likewise violated Section 3(e) of RA 3019 by acting with manifest partiality and evident bad faith in endorsing MAMFI and SDPFFI in violation of existing laws, such as the GAA, Implementing Rules and Regulations of RA 9184, Government Procurement Policy Board Resolution No. 012-2007 and Commission on Audit (COA) Circular 2007-01.

Both the NBI Complaint and the FIO Complaint cited the COA Special Audit Office Report No. 2012-2013 (COA report) in illustrating the PDAF allotments of Estrada in 2007-2009:

SARO Number

Amount (P)

IA

NGO

08-06025

16.490 million

National Agribusiness Corporation (NABCOR)

MAMFI

09-02770

9.700 million

08-01697

24.250 million[11]

08-03116

18.915 million[12]

09-01612

19.400 million

National Livelihood Development Corporation (NLDC)

09-02769
29.100 million
G-09-07076
30.070 million
G-09-07579
24.250 million
08-06025
19.400 million
NABCOR
SDPFFI
G-09-07579
24.250 million
NLDC
F-09-09579
24.250 million
08-01698
22.500 million
Technology Resource Center (TRC)
TOTAL
P262.575 million[13]

The COA Report also made the following observations applicable to all of the PDAF disbursements of Estrada for 2007-2009: (1) the implementation of most livelihood projects was undertaken by the NGOs, not the IAs, in violation of existing laws; (2) the selection of NGOs and implementation of the projects were not compliant with existing regulations; (3) the selected NGOs, their suppliers and beneficiaries are unknown, or could not be located at their given addresses, or submitted questionable documents, or failed to liquidate or fully document the utilization of funds; and (4) irregularities manifested in the implementation of the livelihood projects, such as multiple attendance of the same beneficiaries to the same or similar trainings and multiple receipt of the same or similar kits.[14]

Pursuant to the Orders of the Ombudsman directing the petitioners and their co-respondents in the complaints to submit their counter-affidavits, Estrada submitted his separate Counter-Affidavits to the NBI Complaint on 8 January 2014, and to the FIO Complaint on 16 January 2014. De Asis failed to submit his counter-affidavit to the NBI Complaint, while Napoles failed to submit her counter-affidavit to both complaints. The petitioners' co-respondents filed their respective counter-affidavits between 9 December 2013 and 14 March 2014.

In both his Counter-Affidavits,[15] Estrada denied having received, directly or indirectly, any amount from Napoles, or any person associated with her, or any NGO owned or controlled by her, and having amassed, accumulated, or acquired ill-gotten wealth. He further denied instructing or directing any of his staff to commit and/or participate in any irregular and unlawful transaction involving his PDAF allocations.

Estrada claimed that he committed no intentional or willful wrongdoing in his choice of NGOs to implement the PDAF projects, and he had no knowledge or notice of any relationship between the NGOs that implemented the projects and Napoles. He further claimed that the "letters where (a) [he] requested certain livelihood programs and projects to be implemented by certain [NGOs] and those where (b) [he] authorized [his] staff to follow[-]up, supervise, sign, and act in [his] behalf to ensure the proper and timely implementation of these projects do not show that [he] authorized the performance of any illegal activity." [16] Answering the charge against him for violation of Section 3(e) of RA 3019, he alleged that there was no manifest partiality or evident bad faith in endorsing the NGOs to implement the PDAF projects, since he only endorsed the NGOs accredited and selected by the IAs, and his act of endorsement was merely recommendatory and not deemed irregular or in violation of law. [17]

On 28 March 2014, the Ombudsman issued the assailed Joint Resolution finding probable cause to charge petitioners and several other respondents in the NBI and FIO Complaints for one (1) count of Plunder and eleven (11) counts of violation of Section 3(e) of RA 3019.

After considering the testimonial and documentary evidence, the Ombudsman concluded that petitioners conspired with the DBM personnel, and the heads of the IAs, specifically NABCOR, NLDC, and TRC, in amassing ill-gotten wealth by diverting the PDAF of Estrada from its intended project recipients to JLN-controlled NGOs, specifically MAMFI and SDPFFI. Estrada, in particular, took advantage of his official position and amassed, accumulated, and acquired ill-gotten wealth by receiving money from Napoles, through Tuason and Labayen, in the amount of P183,793,750.00 in exchange for endorsing JLN-controlled NGOs to the IAs of his PDAF-funded projects. De Asis, for his part, participated in the conspiracy by facilitating the transfer of the checks from the IAs and depositing the same to the bank accounts of the JLN-controlled NGOs. Furthermore, the Ombudsman found that petitioners, among others, acting in concert are manifestly partial, and in evident bad faith in violation of Section 3(e) of RA 3019 in relation to Estrada's PDAF releases, coursed through NABCOR, NLDC, TRC, MAMFI, and SDPFFI.

The motions for reconsideration were denied in the Joint Order issued by the Ombudsman on 4 June 2014.

Following the denial of the petitioners' motions for reconsideration, the Ombudsman filed several Informations before the Sandiganbayan, charging petitioners with one (1) count of Plunder and eleven (11) counts of violation of Section 3(e) of RA 3019.

Thus, Estrada, De Asis, and Napoles filed their separate petitions for certiorari assailing the Joint Resolution and Joint Order of the Ombudsman before this Court. The petition filed by Estrada is docketed as G.R. Nos. 212761-62, the petition filed by De Asis is docketed as G.R. Nos. 213473-74, and the petition filed by Napoles is docketed as G.R. Nos. 213538-39.

Estrada subsequently filed a Supplement to the Petition for Certiorari on 28 May 2015 and a Second Supplement to the Petition for Certiorari on 16 March 2018 basically asserting that his indictment is an act of political persecution and violates his constitutional right to equal protection of the laws.

The Issue

The sole issue left to be resolved in this case is whether or not the Ombudsman committed any grave abuse of

discretion in rendering the assailed Resolution and Order ultimately finding probable cause against Estrada, De Asis, and Napoles for the charges against them.

The Ruling of the Court

We do not find merit in the petitions.

Both the Constitution[18] and RA 6770,[19] or The Ombudsman Act of 1989, give the Ombudsman wide latitude to act on criminal complaints against public officials and government employees.[20] As an independent constitutional body, the Office of the Ombudsman is "beholden to no one, acts as the champion of the people, and is the preserver of the integrity of the public service."[21]

This Court's consistent policy has been to maintain non-interference in the determination by the Ombudsman of the existence of probable cause.[22] Since the Ombudsman is armed with the power to investigate, it is in a better position to assess the strengths or weaknesses of the evidence on hand needed to make a finding of probable cause.[23] As this Court is not a trier of facts, we defer to the sound judgment of the Ombudsman.[24]

This policy is based not only on respect for the investigatory and prosecutory powers granted by the Constitution to the Ombudsman, but upon practicality as well.[25] Otherwise, innumerable petitions seeking dismissal of investigatory proceedings conducted by the Ombudsman will grievously hamper the functions of the courts, in much the same way that courts will be swamped with petitions if they had to review the exercise of discretion on the part of public prosecutors each time prosecutors decide to file an information or dismiss a complaint by a private complainant.[26]

Nonetheless, this Court is not precluded from reviewing the Ombudsman's action when there is a charge of grave abuse of discretion.[27] Grave abuse of discretion implies a capricious and whimsical exercise of judgment tantamount to lack of jurisdiction.[28] The Ombudsman's exercise of power must have been done in an arbitrary or despotic manner which must be so patent and gross as to amount to an evasion of a positive duty or a virtual refusal to perform the duty enjoined by law.[29]

Thus, for the present petition to prosper, petitioners would have to show this Court that the Ombudsman exercised its power, to determine whether there is probable cause, in an arbitrary or despotic manner which must be so patent and gross as to amount to an evasion of a positive duty or a virtual refusal to perform the duty enjoined by law. On the petitioners lie the burden of demonstrating all the facts essential to establish the right to a writ of certiorari.[30]

There are two kinds of determination of probable cause: executive and judicial.[31] The executive determination of probable cause, made during preliminary investigation, is a function that properly pertains to the public prosecutor who is given a broad discretion to determine whether probable cause exists and to charge the person believed to have committed the crime as defined by law.[32] Whether or not that function has been correctly discharged by the public prosecutor, i.e., whether or not the prosecutor has made a correct ascertainment of the existence of probable cause in a case, is a matter that the trial court itself does not and may not be compelled to pass upon.[33] The judicial determination of probable cause, on the other hand, is one made by the judge to ascertain whether a warrant of arrest should be issued against the accused.[34]

Under Sections 1 and 3, Rule 112 of the Revised Rules of Criminal Procedure, probable cause is needed to be established 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, during preliminary investigation. Thus, 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.[35] It is merely based on opinion and reasonable belief.[36] In determining probable cause, the average person weighs facts and circumstances without resorting to the calibrations of the rules of evidence of which he or she has no technical knowledge.[37]

We have explained the concept of probable cause in *Estrada v. Office of the Ombudsman (Estrada)*[38] in this wise:

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.

x x x. 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. x x x.

x x x x

x x x. In the United States, from where we borrowed the concept of probable cause, 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.[39] (Emphasis supplied)

In order to arrive at probable cause, the elements of the crime charged should be present.[40] In *Reyes v. Ombudsman (Reyes)*,[41] this Court unanimously held that in determining the elements of the crime charged for purposes of arriving at a finding of probable cause, "only facts sufficient to support a prima facie case against the [accused] are required, not absolute certainty." We explained that:

Owing to the nature of a preliminary investigation and its purpose, all of the foregoing elements need not be definitively established for it is enough that their presence becomes reasonably apparent. This is because probable cause - the determinative matter in a preliminary investigation implies mere probability of guilt; thus, a finding based on more than bare suspicion but less than evidence that would justify a conviction would suffice.

Also, it should be pointed out that a preliminary investigation is not the occasion for the full and exhaustive display of the prosecution's evidence, and that the presence or absence of the elements of the crime is evidentiary in nature and is a matter of defense that may be passed upon after a full-blown trial on the merits. Therefore, "the validity and merits of a party's defense or accusation, as well as the admissibility of testimonies and evidence, are better ventilated during trial proper than at the preliminary investigation level."

Furthermore, owing to the initiatory nature of preliminary investigations, the "technical rules of evidence should not be applied" in the course of its proceedings, keeping in mind 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." Thus, in *Estrada v. Ombudsman* (*Estrada*), the Court declared that since a preliminary investigation does not finally adjudicate the rights and obligations of parties, "probable cause can be established with hearsay evidence, as long as there is substantial basis for crediting the hearsay." [42] (Emphasis supplied)

We reiterated the same principles in *Cambe v. Office of the Ombudsman* (*Cambe*): [43]

x x x [P]robable cause is determined during the context of a preliminary investigation which is "merely an inquisitorial mode of discovering whether or not there is reasonable basis to believe that a crime has been committed and that the person charged should be held responsible for it." It "is not the occasion for the full and exhaustive display of the prosecution's evidence." Therefore, "the validity and merits of a party's defense or accusation, as well as the admissibility of testimonies and evidence, are better ventilated during trial proper than at the preliminary investigation level." Accordingly, "owing to the initiatory nature of preliminary investigations, the technical rules of evidence should not be applied in the course of its proceedings." In this light, and as will be elaborated upon below, this Court has ruled that "probable cause can be established with hearsay evidence, as long as there is substantial basis for crediting the hearsay," and that even an invocation of the rule on *res inter alios acta* at this stage of the proceedings is improper. [44] (Boldfacing and underscoring in the original)

In the present case, petitioners are charged with the crime of plunder and violation of Section 3(e) RA 3019. Plunder, defined and penalized under Section 2 [45] of RA 7080, as amended, has the following elements: (a) that the offender is a public officer, who acts by himself or in connivance with members of his family, relatives by affinity or consanguinity, business associates, subordinates or other persons; (b) that he amasses, accumulates or acquires ill-gotten wealth through a combination or series of overt or criminal acts described in Section 1(d) [46] hereof; and (c) that the aggregate amount or total value of the ill-gotten wealth amassed, accumulated, or acquired is at least Fifty Million Pesos (P50,000,000.00). On the other hand, the elements of violation of Section 3(e) [47] of RA 3019 are: (a) that the accused must be a public officer discharging administrative, judicial, or official functions (or a private individual acting in conspiracy with such public officers); (b) that he acted with manifest partiality, evident bad faith, or inexcusable negligence; and (c) that his action caused undue injury to any party, including the government, or gave any private party unwarranted benefits, advantage, or preference in the discharge of his functions.

The Ombudsman did not abuse its discretion amounting to lack or excess of jurisdiction in finding probable cause to indict Estrada for one count of plunder and 11 counts of violation of Section 3(e) of RA 3019.

In its Joint Resolution [48] dated 28 March 2014, the Ombudsman found that probable cause exists to indict

Estrada for plunder, after finding that the elements of the crime charged are reasonably apparent based on the evidence on record:

First, it is undisputed that Senator Estrada was a public officer at the time material to the charges.

Second, he amassed, accumulated or acquired ill-gotten wealth.

As disclosed by the evidence, he repeatedly received sums of money from Janet Napoles for endorsing her NGOs to implement the projects to be funded by his PDAF.

x x x x

As outlined by witnesses Luy, Sula and Suñas which Tuason similarly claimed, once a PDAF allocation becomes available to Senator Estrada, his staff Labayen would inform Tuason of this development. Tuason, in turn, would relay the information to either Napoles or witness Luy. Napoles or Luy would then prepare a listing of the projects available where Luy would specifically indicate the IAs. This listing would be sent to Labayen who would then endorse it to the DBM under her authority as Deputy Chief-of-Staff of Senator Estrada. After the listing is released by the Office of Senator Estrada to the DBM, Napoles would give Tuason or Labayen a down payment for delivery to Senator Estrada. After the SARO and/or NCA is released, Napoles would give Tuason the full payment for delivery to Senator Estrada through Labayen or by Tuason.

It bears noting that money was paid and delivered to Senator Estrada even before the SARO and/or NCA is released. Napoles would advance Senator Estrada's down payment from her own pocket upon the mere release by his Office of the listing of projects to the DBM, with the remainder of the amount payable to be given after the SARO representing the legislator's PDAF allocation is released by the DBM and a copy of the SARO forwarded to Napoles.

Significantly, after the DBM issues the SARO, Senator Estrada, through Labayen, would then write another letter addressed to the IAs which would identify and indorse Napoles' NGOs as his preferred NGO to undertake the PDAF-funded project, thereby effectively designating in writing the Napoles-affiliated NGO to implement projects funded by his PDAF. Along with the other PDAF documents, the indorsement letter of Senator Estrada is transmitted to the IA, which, in turn, handles the preparation of the MOA concerning the project, to be entered into by the Senator's Office, the IA and the chosen NGO.

[Dennis] Cunanan, [Deputy Director General of TRC], in his Counter-Affidavit, claimed that Senator Estrada confirmed to him that he, indeed, chose the NGOs named in the aforementioned letters and insisted that the choice be honored by the TRC:

17.4. . . . I remember vividly how both Senators Revilla and Estrada admonished me because they thought that TRC was purportedly "delaying" the projects. Both Senators Revilla and Estrada insisted that the TRC should honor their choice of NGO, which they selected to implement the projects, since the projects were funded from their PDAF. They both asked me to ensure that TRC would immediately act on and approve their respective projects. (emphasis, italics and underscoring supplied)

As previously discussed, the indorsements enabled Napoles to gain access to substantial sums of public funds. The collective acts of Senator Estrada, Napoles, et al. allowed the illegal diversion of public funds to their own personal use.

It cannot be gainsaid that the sums of money received by Senator Estrada amount to "kickbacks" or "commissions" from a government project within the purview of Sec. 1 (d) (2) of RA 7080. He repeatedly received commissions, percentage or kickbacks representing his share in the project cost allocated from his PDAF, in exchange for his indorsement of Napole[s'] NGOs to implement his PDAF-funded projects.

Worse, the evidence indicates that he took undue advantage of his official position, authority and influence to

unjustly enrich himself at the expense, and to the damage and prejudice of the Filipino people and the Republic of the Philippines, within the purview of Sec. 1 (d) (6) of RA 7080. He used and took undue advantage of his official position, authority and influence as a Senator of the Republic of the Philippines to access his PDAF and illegally divert the allocations to the possession and control of Napoles and her cohorts, in exchange for commissions, kickbacks, percentages from the PDAF allocations.

Undue pressure and influence from Senator Estrada's Office, as well as his endorsement of Napoles' NGOs, were brought to bear upon the public officers and employees of the IAs.

[Francisco] Figura, an officer from the TRC, claimed that the TRC management told him: "legislators highly recommended certain NGOs/Foundations as conduit implementors and since PDAFs are their discretionary funds, they have the prerogative to choose their NGO's"; and the TRC management warned him that "if TRC would disregard it (choice of NGO), they (legislators) would feel insulted and would simply take away their PDAF from TRC, and TRC losses (sic) the chance to earn service fees." Figura further claimed that he tried his best to resist the pressure exerted on him and did his best to perform his duties faithfully; [but] he and other low-ranking TRC officials had no power to "simply disregard the wishes of Senator [Estrada]," especially on the matter of public bidding for the PDAF projects.

Cunanan, narrates that he met Napoles sometime in 2006 or 2007, who "introduced herself as the representative of certain legislators who supposedly picked TRC as a conduit for PDAF-funded projects;" at the same occasion, Napoles told him that "her principals were then Senate President Juan Ponce Enrile, Senators Ramon "Bong" Revilla, Jr., Sen. Jinggoy Ejercito Estrada;" letters signed by Estrada prove that he [Estrada] directly indorsed NGOs affiliated with or controlled by Napoles to implement his PDAF projects; in the course of his duties, he "often ended up taking and/or making telephone verifications and follow-ups and receiving legislators or their staff members;" during one of these telephone conversations, Estrada admonished him and "insisted that the TRC should honor their choice of the NGO....since the projects were funded from their PDAF;" "all the liquidation documents and the completion reports of the NGO always bore the signatures of Ms. Pauline Labayen, the duly designated representative of Sen. Estrada;" and he occasionally met with witness Luy, who pressured him to expedite the release of the funds by calling the offices of the legislators.

NLDC's [Gondelina] Amata also mentioned about undue pressure surrounding the designation of NLDC as one of the Implementing Agencies for PDAF. Her fellow NLDC employee [Gregoria] Buenaventura adds that in accordance with her functions, she "checked and verified the endorsement letters of Senator [Estrada], which designated the NGOs that would implement his PDAF projects and found them to be valid and authentic;" she also confirmed the authenticity of the authorization given by Estrada to his subordinates regarding the monitoring, supervision and implementation of PDAF projects; and her evaluation and verification reports were accurate.

Another NLDC officer, [Alexis] Sevidal, claimed that Senator Estrada and Napoles, not NLDC employees, were responsible for the misuse of the PDAF; Senator Estrada, through Labayen, was responsible for "identifying the projects, determining the project costs and choosing the NGOs" which was "manifested in the letters of Senator Estrada and Ms. Pauline Labayen...that were sent to the NLDC;" and that he and other NLDC employees were victims of the "political climate" and "bullied into submission by the lawmakers."

The evidence evinces that Senator Estrada used and took undue advantage of his official position, authority and influence as a Senator to unjustly enrich himself at the expense and to the damage and prejudice of the Filipino people and the Republic of the Philippines.

The PDAF was allocated to Senator Estrada by virtue of his position, hence, he exercised control in the selection of his priority projects and programs. He indorsed Napoles' NGOs in consideration for the remittance of

kickbacks and commissions from Napoles. These circumstances were compounded by the fact that the PDAF-funded projects were "ghost projects" and that the rest of the PDAF allocation went into the pockets of Napoles and her cohorts. Undeniably, Senator Estrada unjustly enriched himself at the expense, and to the damage and prejudice of the Filipino people and the Republic of the Philippines.

Third, the amounts earned by Senator Estrada through kickbacks and commissions amounted to more than Fifty Million Pesos (P50,000,000.00).

Witness Luy's ledger shows, among others, that Senator Estrada received the following amounts as and by way of kickbacks and commissions:

Year	Amount received by Senator Estrada (In Php)
2004	1,500,000.00
2005	16,170,000.00
2006	12,750,000.00
2007	16,250,000.00
2008	51,250,000.00
2009	2,200,000.00
2010	73,923,750.00
2012	9,750,000.00
Total:	Php183,793,750.00

The aggregate amount or total value of the ill-gotten wealth amassed, accumulated or acquired by Senator Estrada stands at Php183,793,750.00, at the very least.

The sums were received by the Senator either personally or through his Deputy Chief-Of-Staff, Labayen, as earlier discussed.

Napoles provided those kickbacks and commissions. Witnesses Luy and Suñas, not to mention Tuason, stated that Napoles was assisted in delivering the kickbacks and commissions by her employees and cohorts John Raymond

de Asis, Ronald John Lim and Tuason.

Senator Estrada's commission of the acts covered by Section 1 (d) (2) and Section 1 (d) (6) of RA No. 7080 repeatedly took place over the years 2004 to 2012. This shows a pattern – a combination or series of overt or criminal acts – directed towards a common purpose or goal, which is to enable Senator Estrada to amass, accumulate or acquire ill-gotten wealth.

Senator Estrada, taking undue advantage of official position, authority, relationship, connection or influence as a Senator acted, in connivance with his subordinate-authorized representative Labayen, to receive commissions and kickbacks for indorsing the Napoles NGOs to implement his PDAF-funded project; and likewise, in connivance with Napoles, with the assistance of her employees and cohorts Tuason, de Asis and Lim who delivered the kickbacks to him. These acts are linked by the fact that they were plainly geared towards a common goal which was to amass, acquire and accumulate ill-gotten wealth amounting to at least Php183,793,750.00 for Senator Estrada.[49] (Emphasis in the original)

In concluding that there is probable cause to indict Estrada for 11 counts of violation of Section 3(e) RA 3019, the Ombudsman likewise examined the evidence on record in finding that it is reasonably apparent that the elements of the crime are present:

First, respondents Senator Estrada, Labayen, x x x were all public officers at the time material to the charges. Their respective roles in the processing and release of PDAF disbursements were in the exercise of their administrative and/or official functions.

Senator Estrada himself chose, in writing, the Napoles-affiliated NGO to implement projects funded by his PDAF. His trusted authorized staff: respondent Labayen, then prepared indorsement letters and other communications relating to the PDAF disbursements addressed to the DBM and the IAs (NABCOR, TRC and NLDC). This trusted staff member also participated in the preparation and execution of MOAs with the NGOs and the IAs, inspection and acceptance reports, disbursement reports and other PDAF documents.

x x x x

From the accounts of witnesses Luy, Sula and Suñas as well as of Tuason, Napoles made a business proposal to Labayen regarding the Senator's PDAF, which Labayen accepted. Senator Estrada later chose NGOs affiliated with/controlled by Napoles to implement his PDAF-funded projects.

x x x x

Second, Senator Estrada and respondent-public officers of the IAs were manifestly partial to Napoles, her staff and the NGOs affiliated she controlled.

x x x x

That Napoles and the NGOs affiliated with/controlled by her were extended undue favor is manifest.

Senator Estrada repeatedly and directly chose the NGOs headed or controlled by Napoles and her cohorts to implement his projects without the benefit of a public bidding, and without being authorized by an appropriation law or ordinance.

As correctly pointed out by the FIO, the Implementing Rules and Regulations of RA 9184 states that an NGO may be contracted only when so authorized by an appropriation law or ordinance.

x x x x

National Budget Circular (NBC) No. 476, as amended by NBC No. 479, provides that PDAF allocations should be directly released only to those government agencies identified in the project menu of the pertinent

General Appropriations Act (GAAs). The GAAs in effect at the time material to the charges, however, did not authorize the direct release of funds to NGOs, let alone the direct contracting of NGOs to implement government projects. This, however, did not appear to have impeded Estrada's direct selection of the Napoles affiliated or controlled NGOs, and which choice was accepted in toto by the IAs.

Even assuming arguendo that the GAAs allowed the engagement of NGOs to implement PDAF-funded projects, such engagements remain subject to public bidding requirements. x x x.

x x x x

The aforementioned laws and rules, however, were disregarded by public respondents, Senator Estrada having just chosen the Napoles-founded NGOs. Such blatant disregard of public bidding requirements is highly suspect, especially in view of the ruling in *Alvarez v. People*.

x x x x

Notatu dignum is the extraordinary speed attendant to the examination, processing and approval by the concerned NABCOR, NLDC and TRC officers of the PDAF releases to the Napoles-affiliated or controlled NGOs. In most instances, the DVs were accomplished, signed and approved on the same day. Certainly, the required, careful examination of the transaction's supporting documents could not have taken place if the DV was processed and approved in one day.

x x x x

In addition to the presence of manifest partiality on the part of respondent public officers alluded to, evident bad faith is present.

x x x x

That several respondent public officers unduly benefitted from the diversion of the PDAF is borne by the records.

As earlier mentioned, Tuason claimed that she regularly remitted significant portions (around 50%) of the diverted sums to Estrada, which portions represented Senator Estrada's "share" or "commission" in the scheme, x x x.

x x x x

Notably, Tuason admitted having received a 5% commission for acting as liaison between Napoles and Senator Estrada.

Witness Luy's business ledgers validate Tuason's claim that Labayen did, from time to time, receive money from Napoles that was intended for Estrada.

x x x x

Indubitably, repeatedly receiving portions of sums of money wrongfully diverted from public coffers constitutes evident bad faith.

Third, the assailed PDAF-related transactions caused undue injury to the Government in the aggregate amount of PHP278,000,000.00.

Based on the 2007-2009 COA Report as well as on the independent field verification conducted by the FIO, the projects supposedly funded by Senator Estrada's PDAF were "ghost[s]" or inexistent. There were no livelihood kits distributed to beneficiaries. Witnesses Luy, Sula and Sufias declared that, per directive given by Napoles, they made up lists of fictitious beneficiaries to make it appear that the projects were implemented,

albeit none took place.

Instead of using the PDAF disbursements received by them to implement the livelihood projects, respondent De Asis as well as witnesses Luy, Sula and Suñas, all acting for Napoles, continuously diverted these sums amounting to PHP278,000,000.00 to the pocket of Napoles.

Certainly, these repeated, illegal transfers of public funds to Napoles' control, purportedly for projects which did not exist, and just as repeated irregular disbursements thereof, represent quantifiable, pecuniary losses to the Government, constituting undue injury within the context of Section 3 (e) of RA 3019.

Fourth, respondents Estrada, Labayen x x x, granted respondent Napoles unwarranted benefits.

x x x x

x x x. That they repeatedly failed to observe the requirements of R.A. No. 9184, its implementing rules and regulations, GPPB regulations as well as national budget circulars shows that unwarranted benefits, advantage or preference were given to private respondents.

The NGOs selected by Estrada did not appear to have the capacity to implement the undertakings to begin with. At the time material to the charges, these entities did not possess the required accreditation to transact with the Government, let alone possess a track record in project implementation to speak of.[50]

In *Clave v. Office of the Ombudsman*,^[51] we held that in order to arrive at a finding of probable cause, the Ombudsman only has to find enough relevant evidence to support its belief that the accused most likely committed the crime charged. Otherwise, grave abuse of discretion can be attributed to its ruling.

Given the ample supporting evidence it has on hand, the Ombudsman's exercise of prerogative to charge Estrada with plunder and violation of Section 3(e) of RA 3019 was not whimsical, capricious, or arbitrary, as to amount to grave abuse of discretion. Estrada's bare claim to the contrary cannot prevail over such positive findings of the Ombudsman.

In *Reyes*, we unanimously ruled that the Ombudsman did not gravely abuse its discretion in finding probable cause to indict Reyes of plunder and violation of Section 3(e) of RA 3019 after its consideration that the testimonial and documentary evidence are substantial enough to reasonably conclude that Reyes had, in all probability, participated in the PDAF scam and, hence, must stand trial therefor. The testimonial and documentary evidence relied upon by the Ombudsman in *Reyes* are: (a) the declarations of the whistleblowers Luy, Sula, and Suñas; (b) Tuason's verified statement which corroborated the whistleblowers accounts; (c) the business ledgers prepared by witness Luy, showing the amounts received by Senator Enrile, through Tuason and Reyes, as his "commission" from the so-called PDAF scam; (d) the 2007-2009 COA Report documenting the results of the special audit undertaken on PDAF disbursements - that there were serious irregularities relating to the implementation of PDAF-funded projects, including those endorsed by Senator Enrile; and (e) the reports on the independent field verification conducted in 2013 by the investigators of the FIO which secured sworn statements of local government officials and purported beneficiaries of the supposed projects which turned out to be inexistent.

We held in *Reyes* that: "[i]ndeed, these pieces of evidence are already sufficient to engender a well-founded belief that the crimes charged were committed and Reyes is probably guilty thereof as it remains apparent that: (a) Reyes, a public officer, connived with Senator Enrile and several other persons x x x in the perpetuation of the afore-described PDAF scam, among others, in entering into transactions involving the illegal disbursement of PDAF funds; (b) Senator Enrile and Reyes acted with manifest partiality and/or evident bad faith by repeatedly endorsing the JLN-controlled NGOs as beneficiaries of his PDAF without the benefit of public bidding and/or

negotiated procurement in violation of existing laws, rules, and regulations on government procurement; (c) the PDAF-funded projects turned out to be inexistent; (d) such acts caused undue injury to the government, and at the same time, gave unwarranted benefits, advantage, or preference to the beneficiaries of the scam; and (e) Senator Enrile, through Reyes, was able to accumulate and acquire ill-gotten wealth amounting to at least P172,834,500.00." [52]

In *Cambe*, we likewise upheld the Ombudsman's finding of probable cause against Revilla and held that Revilla should stand for trial for plunder and violation of Section 3(e) of RA 3019, considering that after taking all the pieces of evidence together, i.e. the PDAF documents, the whistleblowers' testimonies, Luy's business ledger, the COA and FIO reports, these pieces of evidence tend to prima facie establish that irregularities had indeed attended the disbursement of Revilla's PDAF and that he had a hand in such anomalous releases, being the head of office which unquestionably exercised operational control thereof. We agreed with the Ombudsman's observation that, "[t]he PDAF was allocated to him by virtue of his position as a Senator, and therefore he exercise[d] control in the selection of his priority projects and programs. He indorsed [Napoles'] NGOs in consideration for the remittance of kickbacks and commissions from Napoles. Compounded by the fact that the PDAF-funded projects turned out to be 'ghost projects', and that the rest of the PDAF allocation went into the pockets of Napoles and her cohorts, [there is probable cause to show that] Revilla thus unjustly enriched himself at the expense and to the damage and prejudice of the Filipino people and the Republic of the Philippines." [53]

In the present case, the Ombudsman relied upon the same testimonial and documentary evidence relied upon by the Ombudsman in *Reyes* and *Cambe*, specifically: (a) the testimonies of the whistleblowers Luy, Sula, and Suñas; (b) the affidavits of Tuason and other co-respondents in the NBI and FIO Complaints; (c) the business ledgers prepared by Luy, showing the amounts received by Estrada, through Tuason and Labayen, as his "commission" from the so-called PDAF scam; (d) the COA Report documenting the results of the special audit undertaken on PDAF disbursements; and (e) the reports on the independent field verification conducted by the FIO. Aside from the said pieces of evidence, the Ombudsman pointed to the PDAF documents, corporate papers of JLN-controlled NGOs, and admissions made by some of Estrada's co-respondents themselves, in concluding that a person of ordinary caution and prudence would believe, or entertain an honest or strong suspicion, that plunder and violation of Section 3(e) of RA 3019 were indeed committed by Estrada, among the respondents named in the Joint Resolution.

Applying our ruling in *Reyes* and *Cambe* to the present case, the Ombudsman, thus, did not abuse its discretion in holding that the same pieces of evidence, taken together, are already sufficient to engender a well-founded belief that the crimes charged were committed and Estrada is probably guilty thereof, since it remains apparent that: (a) Estrada, a public officer, connived with Napoles and several other persons in entering into transactions involving the illegal disbursement of PDAF funds; (b) Estrada acted with manifest partiality and/or evident bad faith by repeatedly endorsing the JLN-controlled NGOs as beneficiaries of his PDAF in violation of existing laws, rules, and regulations on government procurement; (c) the PDAF-funded projects turned out to be inexistent; (d) such acts caused undue injury to the government, and at the same time, gave unwarranted benefits, advantage, or preference to the beneficiaries of the scam; and (e) Estrada, through Tuason and Labayen, was able to accumulate and acquire ill-gotten wealth amounting to at least P183,793,750.00.

Given that the Court previously unanimously ruled in *Reyes* that the following pieces of evidence: (a) the declarations of the whistleblowers Luy, Sula, and Suñas; (b) Tuason's verified statement which corroborated the whistleblowers' accounts; (c) the business ledgers prepared by Luy; (d) the COA Report documenting the results of the special audit undertaken on PDAF disbursements; and (e) the reports on the independent field verification conducted by the FIO, all taken together are already sufficient to engender a well-founded belief that the crimes

charged were committed, specifically plunder and violation of Section 3(e) of RA 3019, and petitioners in Reyes and Cambe were probably guilty thereof, we shall likewise take these into account and uphold in the present case the finding of the Ombudsman as to the existence of probable cause against Estrada based on the said pieces of evidence.

Besides, we held in Estrada, that "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." [54]

In *Sec. De Lima v. Reyes*, [55] this Court held that once the trial court finds probable cause, which results in the issuance of a warrant of arrest, such as the Sandiganbayan in this case, with respect to Estrada, any question on the prosecution's conduct of preliminary investigation becomes moot.

Thus, the Ombudsman's exercise of prerogative to charge Estrada with plunder and violation of Section 3(e) of RA 3019 was not whimsical, capricious, or arbitrary, amounting to grave abuse of discretion.

To emphasize, a preliminary investigation is not the occasion for the full and exhaustive display of the prosecution's evidence; and the presence or absence of the elements of the crime charged is evidentiary in nature and is a matter of defense that may be passed upon only after a full-blown trial on the merits. [56] Moreover, the validity and merit of a party's defense or accusation, as well as the admissibility of testimonies and evidence, are better ventilated during trial proper than at the preliminary investigation level. [57]

Thus, Estrada's defense, similar to De Asis' and Napoles', which is anchored on the absence of all the elements of the crime charged, is better ventilated during trial and not during preliminary investigation.

Moreover, as to De Asis' arguments that there is no evidence that he knowingly took part in the acts of plunder, and that he merely acted as driver, messenger, and janitor in good faith when he delivered money to Napoles' house or he picked up checks and deposited the same in banks, [58] we have already ruled upon the same arguments raised by De Asis and upheld the finding of probable cause against him in the case of Cambe:

Records show that De Asis was designated as the President/Incorporator of KPMFI which was one of the many NGOs controlled by Napoles that was used in the embezzlement of Sen. Revilla's PDAF allocations. Moreover, whistleblowers Luy and Suñas explicitly named De Asis as one of those who prepared money to be given to the lawmaker. Said whistleblowers even declared that De Asis, among others, received the checks issued by the IAs to the NGOs and deposited the same in the bank; and that, after the money is withdrawn from the bank, he was also one of those tasked to bring the money to Janet Napoles' house. Indeed, the foregoing prove to be well-grounded bases to believe that, in all probability, De Asis conspired with the other co-accused to commit the crimes charged.

To refute the foregoing allegations, De Asis presented defenses which heavily centered on his perceived want of criminal intent, as well as the alleged absence of the elements of the crimes charged. However, such defenses are evidentiary in nature, and thus, are better ventilated during trial and not during preliminary investigation. To stress, a preliminary investigation is not the occasion for the full and exhaustive display of the prosecution's evidence; and the presence or absence of the elements of the crime is evidentiary in nature and is a matter of defense that may be passed upon only after a full-blown trial on the merits. [59] (Emphasis supplied)

As to the finding of probable cause to indict Napoles for the crimes charged, and as to her argument that the NBI and FIO Complaints are defective and insufficient in form and substance as to the charges against her, we likewise find our ruling in Reyes applicable to this case:

Anent Janet Napole[s'] complicity in the abovementioned crimes, records similarly show that she, in all reasonable likelihood, played an integral role in the calculated misuse of Senator Enrile's PDAF. As exhibited in the modus operandi discussed earlier, once Janet Napoles was informed of the availability of a PDAF allocation, either she or Luy, as the "lead employee" of the JLN Corporation, would prepare a listing of the available projects specifically indicating the IAs. After said listing is released by the Office of Senator Enrile to the DBM, Janet Napoles would give a down payment from her own pockets for delivery to Senator Enrile through Reyes, with the remainder of the amount given to the Senator after the SARO and/or NCA is released. Senator Enrile would then indorse Janet Napole[s'] NGOs to undertake the PDAF-funded projects, which were "ghost projects" that allowed Janet Napoles and her cohorts to pocket the PDAF allocation.

Based on the evidence in support thereof, the Court is convinced that there lies probable cause against Janet Napoles for the charge of Plunder as it has prima facie been established that: (a) she, in conspiracy with Senator Enrile, Reyes, and other personalities, was significantly involved in the afore-described modus operandi to obtain Senator Enrile's PDAF, who supposedly abused his authority as a public officer in order to do so; (b) through this modus operandi, it appears that Senator Enrile repeatedly received ill-gotten wealth in the form of "kickbacks" in the years 2004-2010; and (c) the total value of "kickbacks" given to Senator Enrile amounted to at least P172,834,500.00.

In the same manner, there is probable cause against Janet Napoles for violations of Section 3 (e) of RA 3019, as it is ostensible that: (a) she conspired with public officials, i.e., Senator Enrile and his chief of staff, Reyes, who exercised official functions whenever they would enter into transactions involving illegal disbursements of the PDAF; (b) Senator Enrile, among others, has shown manifest partiality and evident bad faith by repeatedly indorsing the JLN-controlled NGOs as beneficiaries of his PDAF-funded projects - even without the benefit of a public bidding and/or negotiated procurement, in direct violation of existing laws, rules, and regulations on government procurement; and (c) the "ghost" PDAF-funded projects caused undue prejudice to the government in the amount of P345,000,000.00.

x x x x

Furthermore, there is no merit in Janet Napole[s'] assertion that the complaints are insufficient in form and in substance for the reason that it lacked certain particularities such as the time, place, and manner of the commission of the crimes charged. "According to Section 6, Rule 110 of the 2000 Rules of Criminal Procedure, the complaint or information is sufficient if it states the names of the accused; the designation of the offense given by the statute; the acts or omissions complained of as constituting the offense; the name of the offended party; the approximate date of the commission of the offense; and the place where the offense was committed. The fundamental test in determining the sufficiency of the averments in a complaint or information is, therefore, whether the facts alleged therein, if hypothetically admitted, constitute the elements of the offense." In this case, the NBI and the FIO Complaints stated that: (a) Senator Emile, Reyes, and Janet Napoles, among others, are the ones responsible for the PDAF scam; (b) Janet Napoles, et al. are being accused of Plunder and violations of Section 3 (e) of RA 3019; (c) they used a certain modus operandi to perpetuate said scam, details of which were stated therein; (d) because of the PDAF scam, the Philippine government was prejudiced and defrauded in the approximate amount of P345,000,000.00; and (e) the PDAF scam happened sometime between the years 2004 and 2010, specifically in Taguig City, Pasig City, Quezon City, and Pasay City. The aforesaid allegations were essentially reproduced in the sixteen (16) Informations — one (1) for Plunder and fifteen (15) for violation of RA 3019 — filed before the Sandiganbayan. Evidently, these factual assertions already square with the requirements of Section 6, Rule 110 of the Rules of Criminal Procedure as above-cited. Upon such averments, there is no gainsaying that Janet Napoles has been completely informed of the accusations against her to enable her to prepare for an intelligent defense. The NBI and the FIO Complaints are, therefore, sufficient in form and in substance.[60] (Boldfacing and underscoring in the original)

Applying our ruling in Reyes and Cambe, we likewise do not find that the Ombudsman gravely abused its discretion in finding probable cause to indict De Asis and Napoles for the crimes charged in the present case.

Moreover, Justice Presbitero J. Velasco, Jr.'s dissent should not have individually assessed as inadmissible and incompetent the evidence used by the Ombudsman in finding that probable cause exists to indict petitioners for plunder and violation of Section 3(e) of RA 3019.

In *De Lima v. Judge Guerrero*,^[61] penned by Justice Velasco, the Court held that the admissibility of evidence, their evidentiary weight, probative value, and the credibility of the witness are matters that are best left to be resolved in a full-blown trial, not during a preliminary investigation where the technical rules of evidence are not applied nor at the stage of the determination of probable cause for the issuance of a warrant of arrest. Thus, the better alternative is to proceed to the conduct of trial on the merits and for the prosecution to present its evidence in support of its allegations.

In any event, we have already ruled on the arguments raised by Justice Velasco in individually refuting the evidence used by the Ombudsman in finding probable cause in the cases of Reyes and Cambe.

First, there is no basis in ruling at this stage that the whistleblowers' statements, along with those of Estrada's co-respondents, are not admissible as evidence for being hearsay and covered by the *res inter alios acta* rule. We have already unanimously ruled in Reyes, and reiterated in Cambe, that technical rules on evidence, such as hearsay evidence and the *res inter alios acta* rule, should not be rigidly applied in the course of preliminary investigation proceedings, thus:

Neither can the Napoles siblings discount the testimonies of the whistleblowers based on their invocation of the *res inter alios acta* rule under Section 28, Rule 130 of the Rules on Evidence, which states that the rights of a party cannot be prejudiced by an act, declaration, or omission of another, unless the admission is by a conspirator under the parameters of Section 30 of the same Rule. To be sure, the foregoing rule constitutes a technical rule on evidence which should not be rigidly applied in the course of preliminary investigation proceedings. In Estrada, the Court sanctioned the Ombudsman's appreciation of hearsay evidence, which would otherwise be inadmissible under technical rules on evidence, during the preliminary investigation "as long as there is substantial basis for crediting the hearsay." This is because "such investigation is merely preliminary, and does not finally adjudicate rights and obligations of parties." Applying the same logic, and with the similar observation that there lies substantial basis for crediting the testimonies of the whistleblowers herein, the objection interposed by the Napoles siblings under the evidentiary *res inter alios acta* rule should falter. Ultimately, as case law edifies, "[t]he technical rules on evidence are not binding on the fiscal who has jurisdiction and control over the conduct of a preliminary investigation," as in this case.^[62] (Emphasis supplied)

To reiterate, in Estrada, where the present petitioner is the same petitioner, we held that since a preliminary investigation does not finally adjudicate the rights and obligations of parties, "probable cause can be established with hearsay evidence, as long as there is substantial basis for crediting the hearsay."^[63] On the applicability of *res inter alios acta* rule, we further stated that: "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 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."^[64]

Second, as to Estrada's endorsement letters, which he admittedly executed, instructing the IAs to have his PDAF-funded projects implemented by JLN-controlled NGOs, we held in Cambe that "the PDAF documents, consisting of the written endorsements signed by Sen. Revilla himself requesting the IAs to release his PDAF funds to the identified JLN-controlled NGOs, as well as other documents that made possible the processing of his PDAF, x x x — directly implicate him for the crimes charged, as they were nonetheless, all issued under the

authority of his Office as Senator of the Republic of the Philippines. In *Belgica v. Ochoa* (*Belgica*), this Court observed that 'the defining feature of all forms of Congressional Pork Barrel would be the authority of legislators to participate in the post-enactment phases of project implementation.' x x x. It is through this mechanism that individual legislators, such as Sen. Revilla, were able to practically dictate the entire expenditure of the PDAF allocated to their offices throughout the years x x x under the DBM's menu for pork barrel allocations. '[However,] [i]t bears noting that the NGO is directly endorsed by the legislator [and that] [n]o public bidding or negotiated procurement [took] place[,] [in] defiance of [GPPB] Resolution No. 012-2007.' [65] Similarly, Estrada's endorsement letters directly implicate him for the crimes charged and there is no basis for his argument that his letters were merely recommendatory.

Third, as to Luy's business ledger, Luy's admission of falsification of PDAF-related documents did not cast serious doubt on its credibility, considering that in *Cambe*, we already held:

Luy's testimony therefore explicates that although the whistleblowers would sometimes forge the legislators' signatures, such were made with the approval of Napoles based on her prior agreement with the said legislators. It is not difficult to discern that this authorization allows for a more expedient processing of PDAF funds since the documents required for their release need not pass through the legislator's respective offices. It is also apparent that this grant of authority gives the legislators room for plausible deniability: the forging of signatures may serve as a security measure for legislators to disclaim their participation in the event of discovery. Therefore, Luy's testimony completely makes sense as to why the legislators would agree to authorize Napoles and her staff to forge their signatures. As such, even if it is assumed that the signatures were forged, it does not mean that the legislators did not authorize such forgery. [66] (Emphasis supplied)

And, fourth, as to the COA Report and FIO verifications, we likewise find that these evidence buttress the finding of probable cause against Estrada as they did against Revilla since we held in *Cambe*:

The findings of the COA in its SAO Report No. 2012-2013 (COA report) also buttress the finding of probable cause against Sen. Revilla. This report presents in detail the various irregularities in the disbursement of the PDAF allocations of several legislators in the years 2007 to 2009, such as: (a) the IAs not actually implementing the purported projects, and instead, directly releasing the funds to the NGOs after deducting a "management fee," which were done at the behest of the sponsoring legislator x x x; (b) the involved NGOs did not have any track record in the implementation of government projects, provided fictitious addresses, submitted false documents, and were selected without any public bidding and complying with COA Circular No. 2007-001 and GPPB Resolution No. 12-2007; and (c) the suppliers who purportedly provided supplies to the NGOs denied ever dealing with the latter. Resultantly, the COA Report concluded that the PDAF-funded projects of Sen. Revilla were "ghost" or inexistent.

The findings in the COA report were further corroborated by the field verifications conducted by the Field Investigation Office - Office of the Ombudsman (FIO) to determine whether or not Sen. Revilla's PDAF was indeed utilized for its intended livelihood projects. In the course of investigation, it was revealed that the mayors and municipal agriculturists, who had reportedly received livelihood assistance kits/packages, purportedly procured through Sen. Revilla's PDAF, actually denied receiving the same and worse, were not even aware of any PDAF-funded projects intended for their benefit. Moreover, the signatures on the certificates of acceptance and delivery reports were forged, and in fact, the supposed beneficiaries listed therein were neither residents of the place where they were named as such; had jumbled surnames; deceased; or even downright fictitious. The foregoing led the FIO to similarly conclude that the purported livelihood projects were "ghost" projects, and that its proceeds amounting to P517,000,000.00 were never used for the same. [67]

Accordingly, as Justice Velasco's dissent put it: "x x x the Ombudsman is given wide latitude, in the exercise of its investigatory and prosecutory powers, to prosecute offenses involving public officials and employees, pursuant

to Sec. 15 of RA No. 6770, otherwise known as the Ombudsman Act of 1989. As such, the Ombudsman possesses the authority to determine whether probable cause exists or not in a given set of facts and circumstances that would warrant the filing of a criminal case against erring government employees." [68] Thus, we have consistently held that we will not interfere in the determination by the Ombudsman of the existence of probable cause, absent grave abuse of discretion amounting to lack or excess of jurisdiction.

The Ombudsman is empowered to determine, in the exercise of its discretion, whether probable cause exists, and to charge the person believed to have committed the crime as defined by law. [69] The Ombudsman's finding of probable cause does not touch on the issue of guilt or innocence of the accused. [70] All that the Ombudsman did was to weigh the evidence presented together with the counter-allegations of the accused and determine if there was enough reason to believe that a crime has been committed and that the accused are probably guilty thereof. [71] Even Justice Velasco's dissent stated that:

Certainly, prosecutors are given a wide latitude of discretion in determining whether an information should be filed in court or whether the complaint shall be dismissed, and the courts must respect the exercise of such discretion when the information filed against the person charged is valid on its face, and that no manifest error or grave abuse of discretion can be imputed to the public prosecutor. It is for this reason that Sen. Estrada's asseveration of political persecution has no leg to stand on. Before such a claim may prosper, it must be proved that the public prosecutor – the Ombudsman, in this case – employed bad faith in prosecuting the case, or that it has employed schemes that lead to no other purpose than to place Sen. Estrada in contempt and disrepute. I do not find such malevolent designs in the case at bar. [72] (Emphasis supplied)

Thus, there is no evidence that the Ombudsman acted in capricious and whimsical exercise of judgment amounting to lack or excess of jurisdiction. No manifest error or grave abuse of discretion or bad faith can be imputed to the public prosecutor, or the Ombudsman in this case. In fine, the Ombudsman's finding of probable cause prevails over petitioners' bare allegations of grave abuse of discretion. Accordingly, the Court must defer to the exercise of discretion of the Ombudsman, in the absence of actual grave abuse of discretion on the part of the Ombudsman.

WHEREFORE, we DISMISS the petitions for lack of merit and AFFIRM the finding of probable cause against all the petitioners.

SO ORDERED.

Leonardo-De Castro, Del Castillo, and Perlas-Bernabe, JJ., concur.

Velasco, Jr., J., please see dissenting opinion.

Peralta, J., please see concurring and dissenting opinion.

Bersamin, J., join the dissenting opinion of J. Velasco.

Leonen, J., see separate concurring opinion.

Jardeleza, J., no part prior OSG action.

Caguioa, J., no part prior CLPCC and SOJ action.

Martires, J., no part due to his appointment on July 31, 2018 as Ombudsman.

Tijam, J., please see concurring opinion.

Reyes, Jr., J., join the concurring and dissenting opinion of J. Peralta.

Gesmundo, J., no part.

[1] See orders of consolidation in Court Resolutions dated 30 September 2014 (rollo [G.R. Nos. 213473-74], pp. 430-431) and 16 November 2015 (rollo [G.R. Nos. 213538-39], unpaginated).

[2] Under Rule 65 of the Rules of Court. Pertain to the following petitions: (a) petition in G.R. Nos. 212761-62 filed by Estrada; (b) petition in G.R. Nos. 213473-74 filed by De Asis; and (c) petition in G.R. Nos. 213538-39 filed by Napoles.

[3] Rollo (G.R. Nos. 212761-62), Vol. I, pp. 68-187.

[4] Id. at 188-232.

[5] Id. at 233-251.

[6] Id., Vol. II, pp. 675-736.

[7] Id., Vol. I, p. 94.

[8] Id. at 242.

[9] Id. at 246.

[10] Id., Vol. II, p. 727.

[11] P23,710,000.00 in the FIO Complaint.

[12] P18,914,000.00 in the FIO Complaint.

[13] P262,034,000.00 in the FIO Complaint.

[14] Rollo (G.R. Nos. 212761-62), Vol. II, pp. 722-723.

[15] Id. at 737-776 and 777-821.

[16] Id. at 771 and 817.

[17] Id. at 803-804, 808.

[18] 1987 CONSTITUTION, Article XI, Section 12 provides: "The Ombudsman and his Deputies, as protectors of the people, shall act promptly on complaints filed in any form or manner against public officials or employees of the Government, or any subdivision, agency or instrumentality thereof, including government-owned or controlled corporations, and shall, in appropriate cases, notify the complainants of the action taken and the result thereof."

[19] An Act Providing for the Functional and Structural Organization of the Office of the Ombudsman, and for Other Purposes (1989).

[20] Reyes v. Office of the Ombudsman, G.R. No. 208243, 5 June 2017, 825 SCRA 436, 446, citing Dichaves v. Office of the Ombudsman, G.R. Nos. 206310-11, 7 December 2016, 813 SCRA 273.

[21] Id.

[22] Id.; Cambe v. Office of the Ombudsman, G.R. Nos. 212014-15, 6 December 2016, 812 SCRA 537, 580; Clave v. Office of the Ombudsman, G.R. No. 206425, 5 December 2016, 812 SCRA 187, 196-197; Joson v. Office of the Ombudsman, 784 Phil. 172, 189 (2016); Reyes v. Ombudsman, 783 Phil. 304, 332 (2016); Ciron v. Ombudsman Gutierrez, 758 Phil. 354, 362 (2015).

[23] Reyes v. Office of the Ombudsman, *supra* note 20, at 447, citing Dichaves v. Office of the Ombudsman, G.R. Nos. 206310-11, 7 December 2016, 813 SCRA 273.

[24] Reyes v. Office of the Ombudsman, *supra* note 20, at 447, citing Dichaves v. Office of the Ombudsman, G.R.

Nos. 206310-11, 7 December 2016, 813 SCRA 273.

[25] Reyes v. Office of the Ombudsman, supra note 20, at 447, citing Dichaves v. Office of the Ombudsman, G.R. Nos. 206310-11, 7 December 2016, 813 SCRA 273; Cambe v. Office of the Ombudsman, supra note 22, at 580; Clave v. Office of the Ombudsman, supra note 22, at 197; Joson v. Office of the Ombudsman, supra note 22, at 189; Reyes v. Ombudsman, supra note 22, at 333; Ciron v. Ombudsman Gutierrez, supra note 22, at 363.

[26] Reyes v. Office of the Ombudsman, supra note 20, at 447, citing Dichaves v. Office of the Ombudsman, G.R. Nos. 206310-11, 7 December 2016, 813 SCRA 273, further citing Republic v. Ombudsman Desierto, 541 Phil. 57 (2007); Clave v. Office of the Ombudsman, supra note 22, at 197; Joson v. Office of the Ombudsman, supra note 22, at 189; Reyes v. Ombudsman, supra note 22, at 333; Ciron v. Ombudsman Gutierrez, supra note 22, at 363.

[27] Soriano v. Deputy Ombudsman Fernandez, 767 Phil. 226, 240 (2015); Reyes v. Ombudsman, supra note 22, at 332; Ciron v. Ombudsman Gutierrez, supra note 22, at 362.

[28] Duque v. Ombudsman, G.R. Nos. 224648 and 224806-07, 29 March 2017 (Unsigned Resolution); Dichaves v. Office of the Ombudsman, G.R. Nos. 206310-11, 7 December 2016, 813 SCRA 273, 300, citing Casing v. Ombudsman, 687 Phil. 468 (2012); Cambe v. Office of the Ombudsman, supra note 22, at 580; Clave v. Office of the Ombudsman, supra note 22, at 197-198; Reyes v. Ombudsman, supra note 22, at 332; Ciron v. Ombudsman Gutierrez, supra note 22, at 362.

[29] Duque v. Ombudsman, supra note 28; Dichaves v. Office of the Ombudsman, supra note 20, at 300, citing Casing v. Ombudsman, 687 Phil. 468 (2012); Cambe v. Office of the Ombudsman, supra note 22, at 580; Clave v. Office of the Ombudsman, supra note 22, at 197-198; Reyes v. Ombudsman, supra note 22, at 332-333; Ciron v. Ombudsman Gutierrez, supra note 22, at 362.

[30] Clave v. Office of the Ombudsman, supra note 22, at 198.

[31] Inocentes v. People of the Philippines, 789 Phil. 318, 331 (2016), citing People v. Castillo, 607 Phil. 754, 764 (2009).

[32] Id.

[33] Id.

[34] Id.

[35] Joson v. Office of the Ombudsman, supra note 22, at 185; Estrada v. Office of the Ombudsman, 751 Phil. 821, 873 (2015) (citations omitted); Hasegawa v. Giron, 716 Phil. 364, 373 (2013).

[36] Cambe v. Office of the Ombudsman, supra note 22, at 580; Clave v. Office of the Ombudsman, supra note 22, at 199; Reyes v. Ombudsman, supra note 22, at 334; Estrada v. Office of the Ombudsman, supra note 35, at 873, (citations omitted); Aguilar v. Department of Justice, 717 Phil. 789, 800 (2013); Hasegawa v. Giron, supra note 35, at 374; Ang-Abaya v. Ang, 593 Phil. 530, 541(2008).

[37] Dichaves v. Office of the Ombudsman, supra note 20, at 302-303, citing Kalalo v. Office of the Ombudsman, 633 Phil. 160 (2010); Relampagos v. Office of the Ombudsman, G.R. Nos. 216812-16, 19 July 2016 (Unsigned Resolution); Aguilar v. Department of Justice, supra note 36, at 800; Hasegawa v. Giron, supra note 35, at 374.

[38] 751 Phil. 821 (2015).

[39] Estrada v. Office of the Ombudsman, supra note 35 at 868-871.

[40] Hasegawa v. Giron, supra note 35, at 374.

[41] 783 Phil. 304 (2016).

[42] Id. at 336-337.

[43] G.R. Nos. 212014-15, 6 December 2016, 812 SCRA 537.

[44] Id. at 583-584.

[45] This provision reads:

Section 2. Definition of the Crime of Plunder; Penalties. – Any public officer who, by himself or in connivance with members of his family, relatives by affinity or consanguinity, business associates, subordinates or other persons, amasses, accumulates or acquires ill-gotten wealth through a combination or series of overt or criminal acts as described in Section 1(d) hereof in the aggregate amount or total value of at least Fifty million pesos (P50,000,000.00) shall be guilty of the crime of plunder and shall be punished by reclusion perpetua to death. Any person who participated with the said public officer in the commission of an offense contributing to the crime of plunder shall likewise be punished for such offense. In the imposition of penalties, the degree of participation and the attendance of mitigating and extenuating circumstances, as provided by the Revised Penal Code, shall be considered by the court. The court shall declare any and all ill-gotten wealth and their interests and other incomes and assets including the properties and shares of stocks derived from the deposit or investment thereof forfeited in favor of the State.

[46] Section 1(d) states:

d) "Ill-gotten wealth" means any asset, property, business enterprise or material possession of any person within the purview of Section Two (2) hereof, acquired by him directly or indirectly through dummies, nominees, agents, subordinates and or business associates by any combination or series of the following means or similar schemes.

1) Through misappropriation, conversion, misuse, or malversation of public funds or raids on the public treasury;

2) By receiving, directly or indirectly, any commission, gift, share, percentage, kickbacks or any other form of pecuniary benefit from any person and/or entity in connection with any government contract or project or by reason of the office or position of the public officer concerned;

3) By the illegal or fraudulent conveyance or disposition of assets belonging to the National Government or any of its subdivisions, agencies or instrumentalities or government-owned or -controlled corporations and their subsidiaries;

4) By obtaining, receiving or accepting directly or indirectly any shares of stock, equity or any other form of interest or participation including promise of future employment in any business enterprise or undertaking;

5) By establishing agricultural, industrial or commercial monopolies or other combinations and/or implementation of decrees and orders intended to benefit particular persons or special interests; or

6) By taking undue advantage of official position, authority, relationship, connection or influence to unjustly enrich himself or themselves at the expense and to the damage and prejudice of the Filipino people and the Republic of the Philippines.

[47] This provisions reads:

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

x x x x

(e) Causing any undue injury to any party, including the Government, or giving any private party any

unwarranted benefits, advantage or preference in the discharge of his official administrative or judicial functions through manifest partiality, evident bad faith or gross inexcusable negligence. This provision shall apply to officers and employees of offices or government corporations charged with the grant of licenses or permits or other concessions.

[48] Rollo (G. R. Nos. 212761-62), Vol. I, pp. 68-187.

[49] Id. at 145-157.

[50] Id. at 127-140.

[51] Supra note 22.

[52] Reyes v. Ombudsman, supra note 22, at 340-341.

[53] Cambe v. Office of the Ombudsman, supra note 22, at 599.

[54] Estrada v. Office of the Ombudsman, supra note 35, at 865.

[55] 776 Phil. 623, 652 (2016).

[56] Cambe v. Office of the Ombudsman, supra note 22, at 604; Reyes v. Ombudsman, supra note 22, at 336-337.

[57] Cambe v. Office of the Ombudsman, supra note 22, at 583; Reyes v. Ombudsman, supra note 22, at 337; Hasegawa v. Giron, supra note 35, at 376.

[58] Rollo (G.R. Nos. 213473-74), pp. 24-26.

[59] Cambe v. Office of the Ombudsman, supra note 22, at 604.

[60] Reyes v. Ombudsman, supra note 22, at 348-351.

[61] G.R. No. 229781, 10 October 2017.

[62] Cambe v. Office of the Ombudsman, supra note 22, at 592-593, citing Reyes v. Ombudsman, 783 Phil. 304 (2016).

[63] Estrada v. Office of the Ombudsman, supra note 35, at 874.

[64] Estrada v. Office of the Ombudsman, supra note 35, at 865.

[65] Cambe v. Office of the Ombudsman, supra note 22, at 584-586. Emphasis supplied.

[66] Cambe v. Office of the Ombudsman, supra note 22, at 589-590.

[67] Cambe v. Office of the Ombudsman, supra note 22, at 598-599.

[68] Concurring and Dissenting Opinion of Justice Velasco, p. 7.

[69] Ramiscal, Jr. v. Sandiganbayan, 530 Phil. 773, 792 (2006).

[70] Cambe v. Office of the Ombudsman, supra note 22, at 607; Duque v. Ombudsman, supra note 28.

[71] Cambe v. Office of the Ombudsman, supra note 22, at 607; Duque v. Ombudsman, supra note 28.

[72] Concurring and Dissenting Opinion of Justice Velasco, p. 11.

CONCURRING AND DISSENTING OPINION

VELASCO, JR., J.:

I join with the majority insofar as it sustained the finding of probable cause against petitioner John Raymund De Asis (De Asis).

I, however, register my dissent from the majority's view that there is probable cause to indict petitioner Senator Jose "Jinggoy" P. Ejercito Estrada (Sen. Estrada).

Factual Antecedents

The National Bureau of Investigation (NBI) and the Field Investigation Office (FIO) of the Office of the Ombudsman (Ombudsman) filed two separate complaints against petitioners for their alleged participation in the so-called Priority Development Assistance Fund (PDAF) scam that exposed the irregular utilization and disbursement of the PDAF of several members of Congress, the Malampaya Fund (Special Account in the General Fund 151), and funds allocated for the procurement of fertilizers, which was purportedly orchestrated by Janet Lim Napoles (Napoles) in connivance with several government and private personalities.

Docketed as OMB-C-C-13-0313 and entitled "National Bureau of Investigation and Atty. Levito D. Baligod vs. Jose "Jinggoy" P. Ejercito Estrada, et. al." (NBI Complaint), the NBI charged Sen. Estrada, his Deputy Chief of Staff, Pauline Therese Mary C. Labayen (Labayen), Alan A. Javellana, Godelina G. Amata (Amata), Antonio Y. Ortiz, Dennis Lacson Cunanan (Cunanan), Victor Roman Cojamco Cacal, Romulo M. Relevo, Maria Ninez Z. Guañizo, Ma. Julie A. Villaralvo-Johnson, Rhodora Bulatad Mendoza, Gregoria G. Buenaventura (Buenaventura), Alexis G. Sevidal, Sofia D. Cruz, Chita C. Jalandoni, Francisco B. Figura (Figura), Marivic V. Jover, Mario L. Relampagos (Relampagos), "Leah," "Lalaine," "Malon," Ruby Tuason (Tuason), Mylene T. Encarnacion, John/Jane Does, Napoles, and De Asis with Plunder, as defined and penalized under Sec. 2[1] in relation to Sec. 1(d), sub pars. (1), (2), and (6)[2] of Republic Act (RA) No. 7080, otherwise known as the "Anti-Plunder Law." The NBI alleged that Sen. Estrada acquired and/or received, on various occasions and in conspiracy with his co-respondents, commissions, kickbacks, or rebates in the total amount of at least P183,793,750.00 from projects financed by his PDAF from 2004 to 2012.[3]

Meanwhile, in its complaint docketed as OMB-C-C-13-0397 and entitled "Field Investigation Office v. Jose "Jinggoy" P. Ejercito Estrada, et. al." (FIO Complaint), the FIO charged Sen. Estrada, among others, with violation of Sec. 3(e) of RA No. 3019, otherwise known as the "Anti-Graft and Corrupt Practices Act," and Plunder for purportedly giving unwarranted benefits to Napoles and to several Non-Governmental Organizations (NGOs) that she organized, causing injury to the government in an amount exceeding P278,000,000.00. The FIO alleged that the Commission on Audit (COA), in its Special Audit Office Report No. 2012-03 (COA Report), unearthed several irregularities in the disbursement and disposition of the 2007-2009 PDAF releases to certain Implementing Agencies (IAs) which implemented the lawmakers' projects, including those chargeable against the PDAF of Sen. Estrada.

Among those charged in the NBI Complaint is De Asis, the driver/messenger/janitor of Napoles during the time material to the complaint, and president of Kaupdanang Para sa Mangunguma Foundation, Inc. (KPMFI), one of the NGOs identified with Napoles. The charge against De Asis stemmed from his alleged assistance in the fraudulent processing and releasing of the PDAF funds to the Napoles NGOs.

On November 19 and 29, 2013, the Ombudsman issued Orders directing the petitioners and their co-respondents in the complaints to submit their counter-affidavits. In compliance therewith, Sen. Estrada submitted his Counter-Affidavit[4] to the NBI Complaint on January 8, 2014, and his Counter-Affidavit[5] to the FIO

Complaint on January 16, 2014. De Asis, for his part, failed to submit his counter-affidavit to the NBI Complaint. The petitioners' co-respondents[6] filed their respective counter-affidavits between December 9, 2013 and March 14, 2014.

Refuting the charges levelled against him, Sen. Estrada denied having received, directly or indirectly, any amount from Napoles, or any person associated with her, or an NGO owned or controlled by her, and having amassed, accumulated, or acquired ill-gotten wealth. He similarly controverted the allegation that he had any knowledge or participation in the transfer of any amount from his PDAF to anyone other than the legally intended recipients or beneficiaries thereof.[7]

Thereafter, upon receiving information from the media that some of the respondents implicated him in the PDAF scam in their respective counter-affidavits, Sen. Estrada filed a request[8] to be furnished with copies of the counter-affidavits of Tuason, Cunanan, Amata, and Relampagos, as well as any filing submitted by all the other respondents and/or additional witnesses of the complainants. The Ombudsman denied the request in its March 27, 2014 Order.[9] In response, Sen. Estrada questioned its denial in a Petition for Certiorari before this Court, docketed as G.R. Nos. 212140-41.

On March 28, 2014, the Ombudsman issued a Joint Resolution[10] finding probable cause to charge petitioners and several other respondents in the NBI and FIO Complaints for one (1) count of Plunder and eleven (11) counts of violation of Sec. 3 (e) of R.A. No. 3019.

The scheme purportedly used in the anomalous utilization of the PDAF is outlined in the adverted Joint Resolution in this wise:

The scheme commences when Napoles first meets with a legislator and offers to "acquire" his or her PDAF allocation in exchange for a "commission" or kickback amounting to a certain percentage of the PDAF.

Once an agreement is reached, Napoles would then advance to the legislator a down payment representing a portion of his or her kickback. The legislator would then request the Senate President or the House Speaker, as the case may be, for the immediate release of his or her PDAF. The Senate President or Speaker would then indorse the request to the [Department of Budget and Management (DBM)]. This initial letter-request to the DBM contains a program or list of IAs and the amount of PDAF to be released in order to guide the DBM in its preparation and release of the corresponding SARO.

The kickbacks, around 50% of the PDAF amount involved, are received by legislators personally or through their representatives, in the form of cash, fund transfer, manager's check or personal check issued by Napoles.

After the DBM issues the SARO representing the legislator's PDAF allocation, the legislator would forward a copy of said issuance to Napoles. She, in turn, would remit the remaining portion of the kickback due the legislator.

The legislator would then write another letter addressed to the IAs which would identify his or her preferred NGO to undertake the PDAF-funded project. However, the NGO chosen by the legislator would be among those organized and controlled by Janet Napoles. These NGOs were, in fact, specifically set up by Napoles for the purpose.

Upon receipt of the SARO, Napoles would direct her staff, at the time material to these cases, including witnesses Benhur Luy (Luy), Marina Sula (Sula) and Merlina Suñas (Suñas), to prepare the PDAF documents for the approval of the legislator. These documents reflect, among other things, the preferred NGO to implement the undertaking, the project proposals by the identified NGO/s; and [e]ndorsement letters to be signed by the legislator and/or his staff. Once signed by the legislator or his/her authorized staff, the PDAF documents are transmitted to the IA, which, in turn, handles the preparation of the MOA relating to the project

to be executed by the legislator's office, the IA and the chosen NGO.

The projects are authorized as eligible under the DBM's menu for pork barrel allocations. Note that the NGO is directly selected by the legislator. No public bidding or negotiated procurement takes place in violation of RA 9184 or the Government Procurement Reform Act.

Napoles, through her employees, would then follow up the release of the NCA with the DBM.

After the DBM releases the NCA to the IA concerned, the IA would expedite the processing of the transaction and the release of the corresponding check representing the PDAF disbursement. Among those tasked by Napoles to pick up the checks and deposit the same to bank accounts in the name of the NGO concerned were witnesses Luy and Suñas as well as respondent De Asis.

Once the funds are deposited in the NGO's account, Napoles would then call the bank to facilitate the withdrawal thereof. Her staff would then withdraw the funds and remit the same to her, thereby placing said amount under Napoles' full control and possession.

To liquidate the disbursements, Napoles and her staff would then manufacture fictitious lists of beneficiaries, liquidation reports, inspection reports, project activity reports and similar documents that would make it appear that, indeed, the PDAF[-]related project was implemented.[11]

Based from the foregoing, the Ombudsman concluded that petitioners conspired with Napoles, DBM personnel, and the heads of the National Agribusiness Corporation (NABCOR), National Livelihood Development Corporation (NLDC), and Technology Resource Center (TRC)—government agencies tasked with the implementation of the lawmakers' projects—in amassing ill-gotten wealth by diverting the PDAF of Sen. Estrada from its intended project recipients to NGOs controlled by Napoles. Sen. Estrada, in particular, purportedly took advantage of his official position and amassed, accumulated, and acquired ill-gotten wealth by receiving money from Napoles in the amount of P183,793,750.00 in exchange for endorsing her NGOs to the IAs of his PDAF-funded projects. The endorsement, in turn, permitted Napoles to gain access to public funds. The collective acts of Sen. Estrada, Napoles, and their cohorts, according to the Ombudsman, enabled public funds to be illegally diverted for their own personal use.[12]

De Asis, for his part, allegedly participated in the conspiracy by facilitating the transfer of the checks from the IAs and depositing the same to the bank accounts of the Napoles NGOs.

Petitioners separately moved for the reconsideration of the Joint Resolution. Pending resolution of the motion, the Ombudsman issued a Joint Order[13] dated May 7, 2014 allowing Sen. Estrada to be furnished with copies of the requested counter-affidavits and enjoining him to file his comment thereon within a non-extendible period of five (5) days from receipt of the affidavits.

Due to the pendency of G.R. Nos. 212140-41 before Us, Sen. Estrada sought to suspend the proceedings in OMB-CC-13-0313 and OMB-C-C-13-0397 until the case has been resolved with finality. The Ombudsman denied the motion and refused to suspend the proceedings in an Order[14] dated May 15, 2014. The motion for the reconsideration of the said order was similarly denied in an Order[15] dated June 3, 2014.

The Ombudsman then issued a Joint Order[16] dated June 4, 2014 denying petitioners' motions for the reconsideration of the Joint Resolution dated March 28, 2014. The Joint Order effectively rejected petitioners' contention that they were denied due process for failure to be furnished copies of their co-respondents' counter-affidavits. The Ombudsman insists that, upon re-evaluation of Sen. Estrada's request, he was eventually furnished with copies of the requested counter-affidavits and given ample time to formally respond to his co-respondents' claims.

Following the denial of the petitioners' motions for reconsideration, the Ombudsman filed several Informations[17] before the Sandiganbayan, charging petitioners with one (1) count of Plunder and eleven (11) counts of violation of Sec. 3 (e) of R.A. No. 3019.

Petitioners now come before this Court, seeking redress from the March 28, 2014 Joint Resolution and June 4, 2014 Joint Order of the Ombudsman and praying for this Court to: 1) enjoin the Sandiganbayan from taking cognizance of or acting upon the challenged Joint Resolution and Order, and any and all Informations, orders, resolutions, or other issuances, issued, promulgated, and/or filed as a result of such challenged issuances, and from issuing any warrants of arrest based on such Informations; 2) enjoin the Ombudsman, its FIO, the NBI, and Atty. Levito Baligod, from conducting any further proceedings relative to the NBI and FIO Complaints; from implementing, or taking any other actions based on the challenged Joint Resolution and Order; and from prosecuting any and all criminal cases arising from the complaints and proceedings in OMB-C-C-13-0313 and OMB-C-C-13-0397; 3) render judgment declaring Sen. Estrada as having been denied due process of law and equal protection of the laws; and 4) consequently declare the Joint Resolution and Order null and void.

Issues

I.

Whether or not the Ombudsman committed grave abuse of discretion in refusing to furnish Sen. Estrada copies of his co-respondents' counter-affidavits prior to resolving the preliminary investigation, in violation of his right to due process; and

II.

Whether or not the Ombudsman committed grave abuse of discretion amounting to lack or excess of jurisdiction in finding probable cause to indict petitioners for Plunder and violation of Sec. 3(e) of RA 3019.

Discussion

At the outset, the Ombudsman is given wide latitude, in the exercise of its investigatory and prosecutory powers, to prosecute offenses involving public officials and employees, pursuant to Sec. 15[18] of RA No. 6770, otherwise known as the Ombudsman Act of 1989. As such, the Ombudsman possesses the authority to determine whether probable cause exists or not in a given set of facts and circumstances that would warrant the filing of a criminal case against erring government employees.[19]

This rule, nevertheless, is not without exception. Under the mantle of its power of judicial review, this Court may inquire into the propriety of, and intervene with, the Ombudsman's findings and conclusions to determine whether its determination of probable cause has been gravely abused.[20] This is buttressed by Our pronouncement in *Aguilar v. Department of Justice*, wherein the Court underscored this particular exception to the prosecutor's exclusive prerogative:

A public prosecutor's determination of probable cause - that is, one made for the purpose of filing an information in court - is essentially an executive function and, therefore, generally lies beyond the pale of judicial scrutiny. The exception to this rule is when such determination is tainted with grave abuse of discretion and perforce becomes correctible through the extraordinary writ of certiorari. It is fundamental that the concept of grave abuse of discretion transcends mere judgmental error as it properly pertains to a jurisdictional aberration.[21]

Certainly, a public prosecutor's determination of probable cause – that is, one made for the purpose of filing an information in court – is essentially an executive function and, therefore, generally lies beyond the pale of judicial scrutiny. By way of exception, however, judicial review is allowed where the petitioner has clearly established

that the prosecutor committed grave abuse of discretion. Grave abuse of discretion implies a capricious and whimsical exercise of judgment tantamount to lack of jurisdiction.

In the extant case, the Court is asked, did the Ombudsman, in the exercise of its prosecutorial power, gravely abuse its discretion and acted beyond the bounds of its jurisdiction? Specifically, did the Ombudsman act in an arbitrary, capricious, whimsical, or despotic manner in determining the existence of probable cause against the petitioners, such that it amounted to an evasion of or virtual refusal to perform a duty enjoined by law?

Sec. 1, Rule 112, Rules of Court defines preliminary investigation as "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." Otherwise stated, the prosecution determines during preliminary investigation whether probable cause exists to indict the respondents therein for the crime charged.

The significance of a preliminary investigation cannot be gainsaid. Preliminary investigation, although an executive function, is part of a criminal proceeding^[22] conducted not only to prosecute the guilty, but to protect the innocent from the embarrassment, expense and anxiety of a public trial. It is the crucial sieve in the criminal justice system which spells for an individual the difference between months, if not years, of agonizing trial and possibly jail term, on the one hand, and peace of mind and liberty, on the other.^[23] More than a tool for prosecution, jurisprudence lays down another more significant objective and purpose of a preliminary investigation. In *People v. Yecyec*,^[24] the Court explained that preliminary investigations are designed to exculpate the respondents from the difficulties of a formal trial, unless and until the probability of his or her guilt for the crime charged has been reasonably established:

The primary objective of a preliminary investigation is to free respondent from the inconvenience, expense, ignominy and stress of defending himself/herself in the course of a formal trial, until the reasonable probability of his or her guilt in a more or less summary proceeding by a competent office designated by law for that purpose. Secondly, such summary proceeding also protects the state from the burden of the unnecessary expense [for] an effort in prosecuting alleged offenses and in holding trials arising from false, frivolous or groundless charges. (Emphasis supplied)

Thus, the Court has characterized the right to a preliminary investigation as not a mere formal or technical right but a substantive one, forming part of due process in criminal justice.^[25] Accordingly, preliminary investigations should be scrupulously conducted not only to protect the constitutional right to liberty of a potential accused from any material damage,^[26] but also to protect the State from the burden of unnecessary expenses in prosecuting and trying cases arising from false, fraudulent or groundless charges.^[27]

The foregoing disquisition sheds light on the issue of whether the Ombudsman gravely abused its discretion in issuing the Joint Resolution and Joint Order finding probable cause against the petitioners and holding them for trial for plunder and graft and corruption.

G.R.Nos. 212761-62 (Sen. Estrada)

Sen. Estrada seeks to invalidate the Joint Resolution and Joint Order of the Ombudsman for being issued with grave abuse of discretion, following the supposed transgression of his right to due process of law during preliminary investigation. He laments that he was denied due process when the Ombudsman failed to furnish him with copies of the counter-affidavits of his co-respondents prior to the resolution of the preliminary investigation. This denial, according to the Senator, violated his right to be fully informed of, and to effectively respond to, the allegations regarding his supposed participation in the PDAF scam.

In addition, Sen. Estrada asserts that there is no admissible nor reasonable evidence that proves that he acquired, amassed, or accumulated ill-gotten wealth from illegal activities, or that he instructed anyone to divert public funds for his personal use.[28] Invoking the doctrine of *res inter alios acta*, he further contends that he cannot be bound by the actions and utterances of his co-respondents and the whistleblowers Luy, Suñas, and Sula; thus, their testimonies, upon which the Ombudsman based its findings of probable cause, cannot be utilized against him. Consequently, he maintains that the public respondent has not sufficiently established all the elements of Plunder or of violation of Sec. 3(e) of RA No. 3019 and that his indictment was merely meant to harass and persecute members of the past administration's political opposition. This pernicious design is purportedly evidenced by the Ombudsman's intentional refusal to investigate or file charges against the political allies of the past administration who were also mentioned in the COA Report,[29] as well as the testimony of one Rodante Beron, an agent of the NBI who testified in Criminal Case Nos. SB14CRM0256 to 0266 that the members of the bureau were instructed to be selective in their investigation of the PDAF Scam. Public respondent's selective prosecution, Sen. Estrada asserts, violated his constitutional right to equal protection of the laws and constituted a grave abuse of its discretion which amounted to lack or excess of jurisdiction.[30]

The Ombudsman's denial in its
March 27, 2014 Order of Sen.
Estrada's request did not constitute
grave abuse of discretion

The issue of whether the Ombudsman gravely abused its discretion in failing to furnish Sen. Estrada with copies of his co-respondents' counter-affidavits had been sufficiently settled in this Court's Decision[31] in G.R. Nos. 212140-41.

There, the majority discussed the absence of law or rule requiring the investigating officer to furnish the respondent with copies of the affidavits of his co-respondents. As stated in Section 3(b),[32] Rule 112 of the Revised Rules of Criminal Procedure, the right of the respondent is only limited to examining the evidence submitted by the complainant. Neither the Revised Rules of Criminal Procedure nor the Revised Rules of Procedures of the Office of the Ombudsman require the investigating officer to furnish the respondent with copies of the affidavits of his or her co-respondents.[33]

Furthermore, following Our pronouncement in *Paderanga v. Drilon*,[34] the Court reiterated that the accused in a preliminary investigation has no right to cross-examine the witnesses whom the complainant may present. Section 3, Rule 112 of the Rules of Court is clear in that the accused only has the right 1) to submit a counter-affidavit, 2) to examine all other evidence submitted by the complainant and, 3) 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.[35]

As this Court's pronouncement in G.R. Nos. 212140-41 has already attained finality, the same constitutes *stare decisis* as regards the first issue herein raised and can no longer be disturbed.

The evidence adduced is insufficient
to sustain a *prima facie* case against
Sen. Estrada for Plunder and
violation of Sec. 3(e) of RA No. 3019

Probable cause, for purposes of filing a criminal information in court, is defined under case law as "such facts as are sufficient to engender a well-founded belief that a crime has been committed and that respondents are probably guilty thereof." [36] It is such set of facts and circumstances which would lead a reasonably discreet and

prudent man to believe that the offense charged in the Information, or any offense included therein, has been committed by the person sought to be arrested.[37] A finding of probable cause needs only to rest on evidence showing that, more likely than not, a crime has been committed by the suspects. It need not be based on clear and convincing evidence of guilt, not on evidence establishing guilt beyond reasonable doubt, and definitely not on evidence establishing absolute certainty of guilt.[38]

Certainly, prosecutors are given a wide latitude of discretion in determining whether an information should be filed in court or whether the complaint should be dismissed,[39] and the courts must respect the exercise of such discretion when the information filed against the person charged is valid on its face, and that no manifest error or grave abuse of discretion can be imputed to the public prosecutor.[40] It is for this reason that Sen. Estrada's asseveration of political persecution has no leg to stand on. Before such a claim may prosper, it must be proved that the public prosecutor – the Ombudsman, in this case – employed bad faith in prosecuting the case, or that it has employed schemes that lead to no other purpose than to place Sen. Estrada in contempt and disrepute.[41] I do not find such malevolent designs in the case at bar.

Nevertheless, *Ang-Abaya v. Ang*[42] emphasizes that for the public prosecutor to determine that there exists a probable cause, the elements of the crime charged should, in all reasonable likelihood, be present. This is based on the principle that every crime is defined by its elements, without which there should be, at the most, no criminal offense. Hence, it behooves the Ombudsman to maintain a level of certainty that the elements of the crimes charged are extant based on the facts and evidence gathered, and that the respondents are the ones who may be criminally liable therefor. To this end, the Court in *Salapuddin v. Court of Appeals*[43] instructs that, even during preliminary investigations, the investigating prosecutors are required to thoroughly evaluate the evidence before them to ensure that neither the State nor the accused would be burdened with unnecessary and frivolous suits, thus:

Hence, even at this stage, the investigating prosecutors are duty-bound to sift through all the documents, objects, and testimonies to determine what may serve as a relevant and competent evidentiary foundation of a possible case against the accused persons. They cannot defer and entirely leave this verification of all the various matters to the courts. Otherwise, the conduct of a preliminary investigation would be rendered worthless; the State would still be forced to prosecute frivolous suits and innocent men would still be unnecessarily dragged to defend themselves in courts against groundless charges. Indeed, while prosecutors are not required to determine the rights and liabilities of the parties, a preliminary investigation still constitutes a realistic judicial appraisal of the merits of the case so that the investigating prosecutor is not excused from the duty to weigh the evidence submitted and ensure that what will be filed in court is only such criminal charge that the evidence and inferences can properly warrant.

In the case at bench, the Ombudsman primarily based its conclusion that Sen. Estrada agreed with Napoles to funnel his PDAF to her NGOs in exchange for commissions corresponding to a percentage of the amounts disbursed to her on the statements of the three whistleblowers, along with that of Tuason, Cunanan, Amata, Buenaventura, Figura, and Relampagos, not on any concrete, much less written proof of such agreement or contract.

I submit that the adverted statements are insufficient to support such conclusion for being inadmissible in evidence.

First, under Sec. 28,[44] Rule 130 of the Rules of Court, the rights of a party cannot be prejudiced by an act, declaration, or omission of another. Consequently, an extrajudicial confession is binding only on the confessant and is not admissible against his or her co-accused because it is considered as hearsay against them.[45] This rule, otherwise known as *res inter alios acta*, is based on the tenet that it is manifestly unjust and inconvenient if a

person should be bound by the acts of mere unauthorized strangers; thus, if a party ought not to be bound by the acts of strangers, neither ought their acts or conduct be used as evidence against him.[46]

Admittedly, the *res inter alios acta* rule admits of certain exceptions, such as the rule on the admissions by conspirators under Sec. 29,[47] Rule 130. Nevertheless, in order that the admission of a conspirator may be received as evidence against his co-conspirator, it is necessary that first, the conspiracy be first proved by evidence other than the admission itself; second, the admission relates to the common object; and third, it has been made while the declarant was engaged in carrying out the conspiracy.[48]

It is, therefore, indispensable that the conspiracy must first be established by evidence of intentional participation in the transaction with a view to the furtherance of the common design or purpose.[49] As the Court stressed in *People v. Furugganan*,[50] "conspiracy must be established, not by conjectures, but by positive and conclusive evidence. In fact, the same degree of proof necessary to establish the crime is required to support a finding of the presence of a criminal conspiracy, which is, proof beyond reasonable doubt."

Here, no competent and independent evidence, other than the bare statements and admissions of Sen. Estrada's co-respondents, has been presented to establish conspiracy, among others, and his complicity therein. While the Ombudsman adduced evidence to support the scheme described by the whistleblowers, i.e., a) Luy's business ledgers, b) the 2007-2009 COA Report which detailed the irregularities in the disbursement of the PDAF of several lawmakers from 2007-2009, and c) the independent field verifications conducted in 2013 by the FIO,[51] the same does not sufficiently establish Sen. Estrada's participation in the purported conspiracy.

In his *Sinumpaang Salaysay*[52] dated September 12, 2013, Luy himself admitted having forged various PDAF documents, such as the liquidation papers, certificate of inspection and acceptance from the office of the proponent or lawmaker, among others:

116.

T:

May iba pa ba kayong gagawin maliban sa report of disbursement patungkol sa liquidation?

S:

Mayroon pa po. Pini-prepare din yung list of beneficiaries, certificate of inspection and acceptance coming from the office ng proponent or legislators, certificate of project completion, delivery receipts, sales invoice, official receipts from the supplier, independent auditor's report, accomplishment report, at pictures ng implementation kung mayroong implementation. Kung wala pong implementation, wala po kaming i-attach na pictures. At sa mga nasabing mga dokumento na kailangan ang pirma ng legislators, may mga panahon po na kami na ang pumipirma sa mga pangalan ng mga Chief of Staff ng mga legislators o sa pangalan ng iilang Congressman sa utos ni Madame Janet Lim Napoles.

117.

T:

Nabanggit mona may mga panahon na kayo ang pumipirma sa pangalan ng mga Chief of Staff ng mga legislators or sa pangalan ng iilang Congressman, ano ang ibig sabihin dito at sinu-sino ang mga kasama mong pumipirma?

S:

Kapag kami ay nagli-liquidate at may mga dokumento na kailangan ang pirma ng Chief of Staff ng mga legislators o ng Congressman ay kami na po ang pumipirma para sa kanila sa utos po ni Madame Janel Lim

Napoles. Ang mga kasama ko po na pumipirma sa mga nasabing dokumento ay sila Evelyn de Leon, at Merlina Suñas.[53]

The admission of falsification of PDAF-related documents casts serious doubt on the credibility of the documents proffered by the whistleblowers, including Luy's ledger, which the Ombudsman relied upon as presumptive proof of Sen. Estrada's receipt of commissions from the PDAF in the amount of P183,793,750.00.

The endorsement letters, which ostensibly show Sen. Estrada's instructions to the IAs to have his PDAF-funded projects implemented by Napoles' NGOs and consequently enabled the latter to divert the funds to her own personal use, are likewise inadequate to presume his involvement in the scheme.

As stated by the Ombudsman, the IAs were mandated to comply with the guidelines set forth in National Budget Circular (NBC) No. 476[54] and Sec. 53.11[55] of the Revised Implementing Rules and Regulations of the R.A. No. 9184, otherwise known as the Government Procurement Reform Act (GPRA), in the implementation of government projects, particularly those with NGO participation. Sen. Estrada did not have the authority to compel or direct the heads of the IAs on the manner of implementation of his PDAF projects. Hence, the accountability for any irregularities on the implementation of the projects, including the contracting of NGOs and disbursement of funds, falls on the IAs and cannot be attributed to Sen. Estrada.

With respect to the COA Report and FIO verifications, it was determined in these reports that the IAs directly released the funds to the NGOs that were selected without compliance with COA Circular No. 2007-001 and GPPB Resolution No. 12-2007, and that the PDAF projects implemented by some lawmakers are ghost or inexistent. The same, however, does not adequately support the allegation that Sen. Estrada received commissions from Napoles, nor his involvement in the perpetration of these irregularities. His participation was limited to merely identifying the projects to be implemented and recommending its project partner.

Anent the requirement that the statements and admissions of the conspirators must have been made during the existence of the conspiracy to be admissible against the co-conspirators, the same does not obtain in this case. The statements of the whistleblowers, as well as of Tuason, Cunanan, Relampagos, Buenaventura, Amata, and Figura, were evidently made long after the supposed conspiracy ceased. At any rate, there are no allegations that such statements were made by the affiants during the existence of the conspiracy.

Tuason, Cunanan, Relampagos, Amata, Buenaventura, and Figura are similarly charged with Sen. Estrada for purportedly conspiring with Napoles in furthering the PDAF scam. Considering that the alleged conspiracy has not been sufficiently proved by independent evidence, the statements of Sen. Estrada's co-respondents respecting his complicity in the PDAF scam are inadmissible against him as mere hearsay.

Second, the allegations fail to show that Sen. Estrada indeed diverted public funds amounting to at least P50,000,000.00 for his own personal use in conspiracy with his co-respondents, nor that he caused the disbursement of his PDAF to the Napoles NGOs through illegal means.

To reiterate, the elements of the crime charged should in all likelihood be present in order to engender the well-founded belief that a crime has been committed. This rule is based on the principle that every crime is defined by its elements, without which there should be – at the most – no criminal offense.[56]

The crime of Plunder is defined under Sec. 2 of R.A. 7080 in the following wise:

Sec. 2. Definition of the Crime of Plunder; Penalties. - Any public officer who, by himself or in connivance with members of his family, relatives by affinity or consanguinity, business associates, subordinates or other persons, amasses, accumulates or acquires ill-gotten wealth through a combination or series of overt criminal acts as described in Section 1 (d) hereof in the aggregate amount or total value of at least Fifty million pesos

(P50,000,000.00) shall be guilty of the crime of plunder and shall be punished by reclusion perpetua to death. Any person who participated with the said public officer in the commission of an offense contributing to the crime of plunder shall likewise be punished for such offense. In the imposition of penalties, the degree of participation and the attendance of mitigating and extenuating circumstances, as provided by the Revised Penal Code, shall be considered by the court. The court shall declare any and all ill-gotten wealth and their interests and other incomes and assets including the properties and shares of stocks derived from the deposit or investment thereof forfeited in favor of the State.

To constitute the crime of plunder, the following elements must be alleged and established:

1. That the offender is a public officer who acts by himself or in connivance with members of his family, relatives by affinity or consanguinity, business associates, subordinates or other persons;

2. That the offender amasses, accumulates or acquires ill-gotten wealth through a combination or series of the following overt or criminal acts:

(a)

through misappropriation, conversion, misuse, or malversation of public funds or raids on the public treasury;

(b)

by receiving, directly or indirectly, any commission, gift, share, percentage, kickback or any other form of pecuniary benefits from any person and/or entity in connection with any government contract or project or by reason of the office or position of the public officer;

(c)

by the illegal or fraudulent conveyance or disposition of assets belonging to the National Government or any of its subdivisions, agencies or instrumentalities of Government owned or controlled corporations or their subsidiaries;

(d)

by obtaining, receiving or accepting directly or indirectly any shares of stock, equity or any other form of interest or participation including the promise of future employment in any business enterprise or undertaking;

(e)

by establishing agricultural, industrial or commercial monopolies or other combinations and/or implementation of decrees and orders intended to benefit particular persons or special interests; or

(f)

by taking advantage of official position, authority, relationship, connection or influence to unjustly enrich himself or themselves at the expense and to the damage and prejudice of the Filipino people and the Republic of the Philippines; and,

3. That the aggregate amount or total value of the ill-gotten wealth amassed, accumulated or acquired is at least P50,000,000.00.[57]

On the other hand, a prosecution for violation of Sec. 3 (e)[58] of RA No. 3019 requires the concurrence of the following elements: (a) the offender must be a public officer discharging administrative, judicial, or official functions; (b) he must have acted with manifest partiality, evident bad faith or gross inexcusable negligence; and (c) his action caused any undue injury to any party, including the government, or gave any private party unwarranted benefits, advantage or preference in the discharge of his functions.[59] Thus, Sec. 3 (e) of RA No.

3019 states:

(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.

The paucity of evidence establishing the elements of the crimes charged is glaring in the present case.

The corpus delicti of plunder is the amassment, accumulation or acquisition of ill-gotten wealth valued at not less than P50,000,000.00.[60] Yet, there is no evidence pointing to the fact that Sen. Estrada indeed received such amount through illegal means. Tuason's testimony, which the Ombudsman repeatedly relied on to create a direct link between Napoles and Sen. Estrada and to prove his receipt of commissions from her, failed to categorically establish such fact. In the same vein, Luy himself cannot personally attest to the purported delivery of money to Sen. Estrada, as borne by his statements in his Sinumpaang Salaysay dated September 12, 2013:

67.

T:

Mayroon bang pagkakataon na ikaw mismo ay nakapagbigay ng pera na "rebates" ng transaction sa Senador o Congressman o sa kung sino mang representative ng pulitiko?

S:

Opo. Sa mga Chief-of-Staff ng mga Senador at sa mga Congressman mismo ay nakapag-abot na po ako ng personal. Pero sa mga Senador po ay wala pong pagkakataon na ako mismo ang nag-abot. Naririnig ko lang kay Madame JANET LIM NAPOLES na nagbibigay daw siya sa mga Senador.[61] (Emphasis supplied)

Luy's business ledgers, which supposedly validate Tuason's statements, cannot serve to bolster the allegation that Sen. Estrada amassed such amount from the supposed illegal disbursement of his PDAF for being hearsay and lacking in credibility. Indubitably, the receipt of money was not shown to be corroborated by other hard evidence other than the bare assertions of the whistleblowers and Tuason. On the contrary, even the whistleblowers' testimonies lack credence. Luy's knowledge of Sen. Estrada's alleged receipt of commissions and kickbacks was evidently derived only from information fed to him by Napoles and not based on his personal knowledge. This being the case, the same is considered hearsay and lacks probative value.

Without any reliable evidence showing that Sen. Estrada repeatedly received sums of money from Napoles, the corpus delicti cannot be established. Consequently, the failure to establish the corpus delicti should lead to the dismissal of the criminal prosecution.[62]

With respect to the violation of Sec. 3 (e) of R.A. No. 3019, the Court explained in *Cosigna v. People*[63] that there are two (2) ways by which a public official violates it in the performance of his functions, namely: (a) by causing undue injury to any party, including the Government; or (b) by giving any private party any unwarranted benefits, advantage or preference. The accused may be charged under either mode or under both.

The public respondent has not shown any concrete proof that Sen. Estrada, by himself or through Labayen, carried out any of the modes of committing the crime. Suffice it to state that Sen. Estrada's endorsement of an NGO or the act of following up on the release of the PDAF allocations cannot, in no uncertain terms, constitute an illegal act. Without more, the endorsements cannot be equated to any intentional or overt instruction to the heads of the IAs to circumvent the laws and procedural requirements in the implementation of his projects.

Sen. Estrada likewise cannot be said to have been complicit with his co-respondents in allegedly giving unwarranted benefits to Napoles by funneling his PDAF to her NGOs. For one, it is the DBM that releases the PDAF to the heads of the IAs, and the latter, in turn, are tasked to disburse it within the parameters of the applicable appropriations law, the GPRA as well as its implementing rules, and NBC Nos. 476[64] and 537.[65] Sen. Estrada neither exercises control over the DBM or the IAs, nor is he allowed to dictate the course of the implementation of his projects.

In sum, the conclusion that Sen. Estrada colluded with his co-respondents in amassing wealth through the illegal disbursement of his PDAF proves to be grounded more on conjectures and surmises, rather than tangible and concrete proof. Accordingly, the finding of probable cause against Sen. Estrada crumbles in the absence of competent, admissible, and independent evidence of any overt act on the part of Sen. Estrada to intentionally commit illegal acts constituting plunder and/or violation of Sec. 3 (e) of R.A. No. 3019.

I, therefore, submit that the reversal of the Joint Resolution and Joint Order as to Sen. Estrada is warranted.

G.R. Nos. 213473-74 (De Asis)

For his part, De Asis contends that the Ombudsman had no valid reason to charge him as the NBI and FIO Complaints do not cover transactions with KPMFI, the Napoles NGO of which he is alleged to be the president. He likewise insists that he had no knowledge of the incorporation of KPMFI and no participation in the management of its affairs; and even on the assumption that he participated in the incorporation and management thereof, it was not among the NGOs found by the Ombudsman to have been used as a conduit in the PDAF scam.[66]

De Asis similarly takes exception to the charge of violation of Sec. 3 (e) of RA No. 3019 in the Joint Resolution, noting that the FIO Complaint did not include him among those charged therefor.[67] He avers that his inclusion in the complaints was based solely on his functions as driver and messenger of Napoles and is insufficient to charge him for the crimes of Plunder and violation of Sec. 3 (e) of RA No. 3019. His alleged act of delivering monies to Sen. Estrada, without proof that he was knowingly and purposely delivering his commissions or kickbacks, belies any reasonable ground to doubt his criminal intent and overt act constitutive of Plunder. Finally, he claims that, as a private individual, he cannot be held liable for Plunder in the absence of proof that he conspired with the public officials charged.

Notably, the arguments and defenses raised by De Asis herein are similar to those raised in G.R. Nos. 213477-78. Specifically, that his performance of his duties as driver and messenger of Napoles does not amount to a willful participation in the crimes for which he is being charged.

I concur with the majority that the petition is without merit.

First, contrary to De Asis' claim, a cursory reading of the NBI Complaint would show that KMPFI is alleged to be one of the Napoles NGOs that Napoles used as a conduit in the diversion of public funds. In any case, his position and/or role in KMPFI are immaterial since the charges against him stem from his alleged participation in directly aiding Napoles to transfer the funds received from the IAs to the bank accounts of her NGOs, in conspiracy with other public officials.

Second, good faith is ordinarily used to describe that state of mind denoting honesty of intention and freedom from knowledge of circumstances which ought to put the holder upon inquiry; an honest intention to abstain from taking any unconscientious advantage of another, even through technicalities of law, together with absence of all information, notice, or benefit or belief of facts which render transaction unconscientious. It is actually a question of intention, which can be ascertained by relying not on a person's own protestations of good faith, which is

self-serving, but on evidence of his conduct and outward acts.[68]

Third, the issue of whether a person acted in good faith is a question of fact, the determination of which is beyond the ambit of this Court's power of review. Only questions of law may be raised under this Rule as this Court is not a trier of facts.[69] As the Court stated in G.R. Nos. 213477-78, De Asis' defenses are better ventilated during trial and not during preliminary investigation.

Notably, Sen. Estrada is not the only named public officer involved in this issue; there are others against whom the Ombudsman found probable cause. De Asis, therefore, may be charged with Plunder despite being a private individual due to the existence of probable cause that he acted in concert with other public officers.

In view of the foregoing, I register my vote:

1. To DISMISS the petition in G.R. Nos. 213473-74 for lack of merit; and
2. To GRANT the petition in G.R. Nos. 212761-62 and to REVERSE and SET ASIDE the assailed Joint Resolution and Joint Order issued by the Ombudsman on March 28, 2014 and June 4, 2014, respectively, insofar as they found probable cause to indict Sen. Estrada for the crimes indicated therein.

Accordingly, I vote to DISMISS charges for plunder and violation of Sec. 3 (e) of Republic Act No. 3019 against Sen. Estrada and to order his name dropped in Crim. Case Nos. SB14CRIM0239, SB14CRM0256, SB14CRM0257, SB14CRM0258, SB14CRM0259, SB14CRM0260, SB14CRM0261, SB14CRM0262, SB14CRM0263, SB14CRM0264, SB14CRM0265, and SB14CRM0266.

[1] Section 2. Definition of the Crime of Plunder; Penalties - Any public officer who, by himself or in connivance with members of his family, relatives by affinity or consanguinity, business associates, subordinates or other persons, amasses, accumulates or acquires ill-gotten wealth through a combination or series of overt or criminal acts as described in Section 1(d) hereof, in the aggregate amount or total value of at least Seventy-five million pesos (P75,000,000.00), shall be guilty of the crime of plunder and shall be punished by life imprisonment with perpetual absolute disqualification from holding any public office. Any person who participated with said public officer in the commission of plunder shall likewise be punished. In the imposition of penalties, the degree of participation and the attendance of mitigating and extenuating circumstances shall be considered by the court. The court shall declare any and all ill-gotten wealth and their interests and other incomes and assets including the properties and shares of stock derived from the deposit or investment thereof forfeited in favor of the State.

[2] Section 1. Definition of Terms - As used in this Act, the term – x x x

d) Ill-gotten wealth means any asset, property, business enterprise or material possession of any person within the purview of Section Two (2) hereof, acquired by him directly or indirectly through dummies, nominees, agents, subordinates and/or business associates by any combination or series of the following means or similar schemes:

1) Through misappropriation, conversion, misuse, or malversation of public funds or raids on the public treasury;

2) By receiving, directly or indirectly, any commission, gift, share, percentage, kickbacks or any other form of pecuniary benefit from any person and/or entity in connection with any government contract or project or by reason of the office or position of the public officer concerned;

x x x

6) By taking undue advantage of official position, authority, relationship, connection or influence to unjustly

enrich himself or themselves at the expense and to the damage and prejudice of the Filipino people and the Republic of the Philippines.

[3] Rollo, pp. 94, 246.

[4] Id. at 737-776.

[5] Id. at 777-821.

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

[7] Rollo, p. 783, p. 7 of Counter Affidavit.

[8] Id. at 822-828.

[9] Id. at 829-832.

[10] Id. at 66-187.

[11] Id. at 119-122.

[12] Id. at 123, 127, 150-151.

[13] Id. at 859-860.

[14] Id. at 1639-1642.

[15] Id. at

[16] Id. at 188-232.

[17] Docketed as Crim. Case Nos. SB14CRM0256, SB14CRM0257, SB14CRM0258, SB14CRM0259, SB14CRM0260, SB14CRM0261, SB14CRM0262, SB14CRM0263, SB14CRM0264, SBI4CRM0265, SB14CRM0266; id. at 1656-1691.

[18] As mandated under in Section 15 of [RA] No. 6770, otherwise known as the Ombudsman Act of 1989:

Sec. 15. Powers, Functions and Duties. - The Office of the Ombudsman shall have the following powers, functions and duties:

(1) Investigate and prosecute on its own or on complaint by any person, any act or omission of any public officer or employee, office or agency, when such act or omission appears to be illegal, unjust, improper or inefficient. It has primary jurisdiction over cases cognizable by the Sandiganbayan and, in the exercise of this primary jurisdiction, it may take over, at any stage, from any investigatory agency of government, the investigation of such cases.

[19] *Joseon v. Office of the Ombudsman*, G.R. Nos. 210220-21, April 6, 2016, 788 SCRA 647, 658.

[20] Section 1, Article VIII of the Constitution states: Section 1. The judicial power shall be vested in one Supreme Court and in such lower courts as may be established by law.

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

[21] G.R. No. 197522, September 11, 2013, 705 SCRA 629, 638.

- [22] *Heirs of Federico C. Delgado v. Gonzalez*, G.R. No. 184337, August 7, 2009, 595 SCRA 501, 522.
- [23] *Arroyo v. Department of Justice*, G.R. No. 199082, September 18, 2012, 681 SCRA 181, 232, citing *Ladlad v. Velasco*, G.R. Nos. 170270-72, June 1, 2007, 523 SCRA 318, 344.
- [24] G.R. No. 183551, November 12, 2014, 734 SCRA 719, 730-731, citing *Ledesma v. Court of Appeals*, 344 Phil. 207, 226, 227 (1997).
- [25] *Maza v. Gonzalez*, G.R. Nos. 172074-76, June 1, 2007, 523 SCRA 318, 344.
- [26] *Webb v. De Leon*, 317 Phil. 759, 803 (1995).
- [27] *Cam v. Casimiro*, G.R. No. 184130, June 29, 2015, 760 SCRA 467, 480.
- [28] *Rollo*, p. 20.
- [29] Second Supplement to the Petition, p. 2.
- [30] *Id.* at 6.
- [31] Promulgated on January 21, 2015, 748 SCRA 1.
- [32] Section 3. Procedure. — The preliminary investigation shall be conducted in the following manner: x x x
- (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.
- x x x
- 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.
- [33] *Estrada v. Office of the Ombudsman*, *supra* note 31, at 37.
- [34] 273 Phil. 290, 299 (1991).
- [35] *Estrada v. Office of the Ombudsman*, *supra* note 31, at 40.
- [36] *People v. Borje, Jr.*, G.R. No. 170046, December 10, 2014, 744 SCRA 399, 409; *Aguilar v. Department of Justice*, *supra* note 23, at 639-640.
- [37] *Kalalo v. Office of the Ombudsman*, G.R. No. 158189, April 23, 2010, 619 SCRA 141, 148, citing *Advincula v. Court of Appeals*, G.R. No. 131144, October 18, 2000, 343 SCRA 583, 589-590.
- [38] *Reyes v. Pearlbank Securities, Inc.*, G.R. No. 171435, July 30, 2008, 560 SCRA 518.
- [39] *De Lima v. Reyes*, G.R. No. 209330, January 11, 2016, 779 SCRA 1, 27, citing *Crespo v. Mogul*, 235 Phil. 465 (1987)
- [40] *People of the Philippines v. Castillo*, G.R. No. 171188, June 19, 2009; 590 SCRA 95, citing *Schroeder v. Saldevar*, G.R. No. 163656, April 27, 2007, 522 SCRA 624

[41] Paredes, Jr. v. Sandiganbayan, G.R. No. 108251, January 31, 1996, 252 SCRA 641, citing Dimayuga v. Fernandez, 43 Phil 304, 306-307 (1922).

[42] G.R No. 178511, December 4, 2008, 573 SCRA 129, 143.

[43] G.R. No. 184681, February 25, 2013, 691 SCRA 578, 599.

[44] Section 28. Admission by third party. — The rights of a party cannot be prejudiced by an act, declaration, or omission of another, except as hereinafter provided.

[45] People v. Cachuela, G.R No. 191752, June 10, 2013.

[46] People v. Tena, G.R. No. 100909, October 21, 1992 (citations omitted).

[47] Section 29. Admission by co-partner or agent. — The act or declaration of a partner or agent of the party within the scope of his authority and during the existence of the partnership or agency, may be given in evidence against such party after the partnership or agency is shown by evidence other than such act or declaration. The same rule applies to the act or declaration of a joint owner, joint debtor, or other person jointly interested with the party.

[48] People v. Bokingo, G.R. No. 187536, August 10, 2011, 655 SCRA 313, 333.

[49] Medija, Jr. v. Sandiganbayan (First Div.), 291 Phil. 236, 241 (1993).

[50] 271 Phil. 496, 507 (1991).

[51] Rollo, p. 126.

[52] Id. at 598-631.

[53] Id. at 618-619.

[54] Otherwise known as "Guidelines for the Release and Utilization of the PDAF for FY 2001 and thereafter."

[55] 53.11. NGO Participation.

When an appropriation law or ordinance earmarks an amount to be specifically contracted out to Non-Governmental Organizations (NGOs), the procuring entity may enter into a Memorandum of Agreement with an NGO, subject to guidelines to be issued by the GPPB.

[56] Ang-Abaya v. Ang, supra note 42.

[57] Macapagal-Arroyo v. People of the Philippines, G.R. No. 220598, July 19, 2016, 797 SCRA 241, 329-330.

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

x x x

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

[59] *Garcia v. Office of the Ombudsman*, G.R. No. 197567, November 19, 2014, 741 SCRA 172, 184-185, citing *Lihaylihay v. People*, G.R. No. 191219, July 31, 2013, 702 SCRA 755.

[60] *Macapagal-Arroyo v. People of the Philippines*, *supra* note 57, at 330.

[61] *Rollo*, p. 984.

[62] *Macapagal-Arroyo v. People of the Philippines*, *supra* note 57, at 331.

[63] G.R. Nos. 175750-51, April 2, 2014, 720 SCRA 350, 367-368, citing *Cabrera v. Sandiganbayan*, 484 Phil. 350, 360 (2004).

[64] Guidelines on the Release of Funds Chargeable Against the Priority Development Assistance Fund for the Second Semester of FY 2001 and Thereafter.

[65] Guidelines on the Release of Funds Chargeable Against the Priority Development Assistance Fund for FY 2012.

[66] *Rollo*, pp. 41-42.

[67] *Id.* at 49.

[68] *Civil Service Commission v. Maala*, G.R. No. 165253, August 18, 2005, 467 SCRA 390, 399.

[69] *Id.* at 398, citing *Alfredo v. Borras*, G.R. No. 144225, June 17, 2003, 404 SCRA 145.

CONCURRING AND DISSENTING OPINION

PERALTA, J.:

I concur in the result, but I submit a different view with respect to the grounds for dismissing the instant petitions. I also express my dissent with respect to the correctness of charging petitioner Senator Jose "Jinggoy" P. Ejercito Estrada separately for violation of Section 3(e) of Republic Act (R.A.) No. 3019.

The instant petitions should have been dismissed for being moot and academic.

The undisputed fact is that the Information against petitioners have already been filed in court. In fact, a warrant of arrest has been issued and trial has already commenced. The rule 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.[1] 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.[2] The court is the best and sole judge on what to do with the case before it.[3] The determination of the case is within its exclusive jurisdiction and competence.[4]

Hence, with the filing of the Information before the Sandiganbayan, the present petitions have become moot and academic. The trial court has acquired exclusive jurisdiction over the case, and the determination of the accused's guilt or innocence rests within its sole and sound discretion.

It is true that the Constitution allows the exercise of the power of judicial review in cases where grave abuse of discretion exists. In this case, however, a petition for certiorari before this Court is not the "plain, speedy, and adequate remedy in the ordinary course of law" because, as discussed above, the trial court already acquired jurisdiction over the case. As such, the proper remedy for petitioners was to proceed to trial and present their

evidence.[5]

The foregoing notwithstanding, I find it necessary to express my views on the impropriety of some of the indictments against petitioner Estrada. He should not have been charged separately for violations of Section 3(e) of R.A. No. 3019 for reasons discussed below.

Section 2 of R.A. No. 7080 provides as follows:

Definition of the Crime of Plunder; Penalties - Any public officer who, by himself or in connivance with members of his family, relatives by affinity or consanguinity, business associates, subordinates or other persons, amasses, accumulates or acquires ill-gotten wealth through a combination or series of overt or criminal acts as described in Section 1(d) hereof, in the aggregate amount or total value of at least Seventy-five million pesos (P75,000,000.00), shall be guilty of the crime of plunder and shall be punished by life imprisonment with perpetual absolute disqualification from holding any public office. Any person who participated with said public officer in the commission of plunder shall likewise be punished. In the imposition of penalties, the degree of participation and the attendance of mitigating and extenuating circumstances shall be considered by the court. The court shall declare any and all ill-gotten wealth and their interests and other incomes and assets including the properties and shares of stock derived from the deposit or investment thereof forfeited in favor of the State.[6]

Section 1(d) of the same law defines "ill-gotten wealth" as any asset, property, business enterprise or material possession of any person within the purview of Section 2 thereof, acquired by him, directly or indirectly, through dummies, nominees, agents, subordinates, and/or business associates by any combination or series of means or similar schemes enumerated therein.

Based on the above provisions, the elements of plunder are:

1. That the offender is a public officer who acts by himself or in connivance with members of his family, relatives by affinity or consanguinity, business associates, subordinates or other persons;
2. That he amassed, accumulated or acquired ill-gotten wealth through a combination or series of the following overt or criminal acts:
 - (a) through misappropriation, conversion, misuse, or malversation of public funds or raids on the public treasury;
 - (b) by receiving, directly or indirectly, any commission, gift, share, percentage, kickback or any other form of pecuniary benefits from any person and/or entity in connection with any government contract or project or by reason of the office or position of the public officer;
 - (c) by the illegal or fraudulent conveyance or disposition of assets belonging to the National Government or any of its subdivisions, agencies or instrumentalities of Government owned or controlled corporations or their subsidiaries;
 - (d) by obtaining, receiving or accepting directly or indirectly any shares of stock, equity or any other form of interest or participation including the promise of future employment in any business enterprise or undertaking;
 - (e) by establishing agricultural, industrial or commercial monopolies or other combinations and/or implementation of decrees and orders intended to benefit particular persons or special interests; or
 - (f) by taking advantage of official position, authority, relationship, connection or influence to unjustly enrich himself or themselves at the expense and to the damage and prejudice of the Filipino people and the Republic of the Philippines; and,

3. That the aggregate amount or total value of the ill-gotten wealth amassed, accumulated or acquired is at least

P50,000,000.00.[7]

On the other hand, Section 3(e) of R.A. No. 3019 reads:

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

x x x x

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

The elements of the above-quoted Section 3(e) are:

- (1) the offender is a public officer or a private person charged in conspiracy with the public officer;
- (2) the act was done in the discharge of the public officer's official, administrative or judicial functions;
- (3) the act was done through manifest partiality, evident bad faith, or gross inexcusable negligence; and
- (4) the public officer caused any undue injury to any party, including the Government, or gave any unwarranted benefits, advantage or preference.[8]

Under the Complaint filed by the Field Investigation Office (FIO) of the Office of the Ombudsman, petitioner Estrada, among others, was charged with violation of Section 3(e) of R.A. No. 3019 and plunder for supposedly giving unwarranted benefits to Napoles and to several NGOs that she organized, thereby causing injury to the government in an amount exceeding P278,000,000.00.

In the Complaint filed by the NBI, petitioner Estrada was charged with plunder for having allegedly acquired and/or received on various occasions, and in conspiracy with his co-respondents, commissions, kickbacks, or rebates from projects financed by his PDAF.

Under the given facts of the present case, had petitioner Estrada not committed the acts constituting alleged violations of Section 3(e) of R.A. No. 3019, would he have been charged with plunder? In other words, is it possible for petitioner Estrada to commit plunder in the instant case without the acts which were used as bases to charge him with violation of Section 3(e) of R.A. No. 3019? I submit that it is not.

These alleged various acts of giving unwarranted benefits to Napoles and various NGOs and of receiving commissions, kickbacks, or rebates are what comprises, precisely, what is defined under R.A. No. 7080 as a "combination or series of overt or criminal acts" which, when taken together, constitute the crime of plunder. In the instant case, the various acts constituting alleged violations of Section 3(e) of R.A. No. 3019, taken together, are predicate acts of plunder which should not be considered independent crimes for which petitioner Estrada should be separately indicted.

Predicate means "found" or "base." [9] Hence, by definition alone, the acts enumerated under Section 1(d) of R.A. No. 7080 are the bases or foundation for the commission of the crime of plunder, without which the said crime cannot be committed. Evidently, the acts allegedly committed by petitioner Estrada which were used as bases to charge him with several counts of violation of Section 3(e) of R.A. No. 3019 are part of the same series of acts used as grounds to indict him for plunder.

In *Estrada v. Sandiganbayan* (Third Division),^[10] this Court had the occasion to explain one of the primary reasons for the enactment of R.A. No. 7080, which is to avoid the mischief and folly of filing multiple informations against persons committing various crimes of malversation of public funds, bribery, extortion, theft and graft but, these offenses, nonetheless, make up a complex and manifold network of crimes constituting plunder which causes material damage to the nation's economy. This is clearly evident in the Explanatory Note to Senate Bill No. 733, to wit:

Plunder, a term chosen from other equally apt terminologies like kleptocracy and economic treason, punishes the use of high office for personal enrichment, committed thru a series of acts done not in the public eye but in stealth and secrecy over a period of time, that may involve so many persons, here and abroad, and which touch so many states and territorial units. The acts and/or omissions sought to be penalized do not involve simple cases of malversation of public funds, bribery, extortion, theft and graft but constitute plunder of an entire nation resulting in material damage to the national economy. The above-described crime does not yet exist in Philippine statute books. Thus, the need to come up with a legislation as a safeguard against the possible recurrence of the depravities of the previous regime and as a deterrent to those with similar inclination to succumb to the corrupting influence of power.^[11]

Thus, to hold petitioner Estrada liable and indict him separately under a different law (R.A. No. 3019) for the same acts executed as a means of committing plunder would run afoul of the intent of R.A. No. 7080.

In view of the foregoing discussions, I vote to DISMISS the petitions for being MOOT.

[1] *Napoles v. Secretary De Lima, et. al.*, 790 Phil. 161, 172 (2016).

[2] *Id.* at 172-173.

[3] *Id.* at 173.

[4] *Id.*

[5] *Id.*

[6] Emphasis supplied.

[7] *Estrada v. Sandiganbayan*, 421 Phil. 290, 343-344 (2001); *Enrile v. People, et al.*, 766 Phil. 75, 115-116 (2015).

[8] *Ampil v. The Honorable Office of the Ombudsman, et al.*, 715 Phil. 733, 755 (2013); *People v. The Honorable Sandiganbayan* (4th Div.), 642 Phil. 640, 650 (2010).

[9] Webster's Third New International Dictionary of the English Language, Unabridged, Copyright 1993, p. 1786; 72 C.J.S. 478.

[10] 427 Phil. 820 (2002).

[11] *Estrada v. Sandiganbayan* (Third Division), *supra*, at 851-852.

SEPARATE CONCURRING OPINION

LEONEN, J.:

I concur with the ponencia. In addition, I would like to emphasize the following:

The Ombudsman's determination of the existence of probable cause is entitled to great weight and respect. In a preliminary investigation, only the probability of an accused's guilt is ascertained. Upon the filing of an Information with the Sandiganbayan, the latter acquires jurisdiction over the case and retains full discretion on its disposition.

The Office of the Ombudsman is bestowed with broad investigatory and prosecutorial powers to act on complaints against public officials and government employees.[1] Considered as "the champion of the people and the preserver of the integrity of public service,"[2] the Ombudsman is specifically empowered under Article XI, Section 13 of the Constitution to exercise the following functions:

Section 13. The Office of the Ombudsman shall have the following powers, functions, and duties:

- (1) Investigate on its own, or on complaint by any person, any act or omission of any public official, employee, office or agency, when such act or omission appears to be illegal, unjust, improper, or inefficient.
- (2) Direct, upon complaint or at its own instance, any public official or employee of the Government, or any subdivision, agency or instrumentality thereof, as well as of any government-owned or controlled corporation with original charter, to perform and expedite any act or duty required by law, or to stop, prevent, and correct any abuse or impropriety in the performance of duties.
- (3) Direct the officer concerned to take appropriate action against a public official or employee at fault, and recommend his removal, suspension, demotion, fine, censure, or prosecution, and ensure compliance therewith.
- (4) Direct the officer concerned, in any appropriate case, and subject to such limitations as may be provided by law, to furnish it with copies of documents relating to contracts or transactions entered into by his office involving the disbursement or use of public funds or properties, and report any irregularity to the Commission on Audit for appropriate action.
- (5) Request any government agency for assistance and information necessary in the discharge of its responsibilities, and to examine, if necessary, pertinent records and documents.
- (6) Publicize matters covered by its investigation when circumstances so warrant and with due prudence.
- (7) Determine the causes of inefficiency, red tape, mismanagement, fraud, and corruption in the Government and make recommendations for their elimination and the observance of high standards of ethics and efficiency.
- (8) Promulgate its rules of procedure and exercise such other powers or perform such functions or duties as may be provided by law.

Section 15 of Republic Act No. 6770 amplifies the Office of the Ombudsman's investigative and prosecutorial powers. For instance, the Office of the Ombudsman may, in the exercise of its primary jurisdiction, step in and take over the investigation of cases from other agencies. It may also request assistance and information from other government agencies, issue subpoenas, and cite persons in contempt.[3]

Such broad investigative powers were vested on the Office of the Ombudsman to shield it from "the long tentacles of officialdom that are able to penetrate judges' and fiscals' offices, and others involved in the prosecution of erring public officials, and through the exertion of official pressure and influence, quash, delay, or dismiss investigations into malfeasances and misfeasances committed by public officers." [4]

In this regard and owing to the independent nature of its office, this Court has generally adopted a policy of non-interference with the Office of the Ombudsman's exercise of its functions, especially with regard to its finding of probable cause.[5] Practical considerations also dictate the exercise of judicial restraint. In *Dichaves v. Office of the Ombudsman*:^[6]

Practicality also leads this Court to exercise restraint in interfering with the Office of the Ombudsman's finding of probable cause. *Republic v. Ombudsman Desierto* explains:

[T]he functions of the courts will be grievously hampered by innumerable petitions assailing the dismissal of investigatory proceedings conducted by the Office of the Ombudsman with regard to complaints filed before it, in much the same way that the courts would be extremely swamped if they could be compelled to review the exercise of discretion on the part of the fiscals or prosecuting attorneys each time they decide to file an information in court or dismiss a complaint by a private complainant.^[7] (Citations omitted)

This Court is not a trier of facts. Unless there is a clear showing of grave abuse of discretion on the part of the Office of the Ombudsman, this Court would defer to its sound discretion as it is in the best position to assess whether the filing of an Information is warranted.^[8]

A preliminary investigation, as its name suggests, is a preparatory step in the prosecutorial process, where the prosecutor determines whether there is probable cause to file an Information in court. Its purpose is two (2)-fold. In *Salonga v. Cruz-Paño*:^[9]

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.^[10]

The rules governing the conduct of a preliminary investigation are outlined in Rule 112, Section 3 of the Rules of Court:

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 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 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.

Preliminary investigations conducted by the Office of the Ombudsman are done in the same manner outlined above subject to the provisions under Section 4 of its Rules of Procedure.[11]

The investigating prosecutor may rely on the affidavits and supporting documents submitted by the parties. A hearing is not even mandatory. The prosecutor is given the discretion whether to set a hearing between the parties but only if certain facts or issues need to be clarified.

A preliminary investigation, therefore, is "merely inquisitorial." [12] It is neither an occasion for an exhaustive display of evidence [13] nor "the venue for the full exercise of the rights of the parties." [14] Whether the parties' evidence would pass the threshold of admissibility is not a matter that the prosecution should be concerned with at this stage. The prosecution needs only satisfy itself that there is reasonable belief to hold a person liable for a crime. Neither absolute nor moral certainty is required: [15]

Probable cause has been defined as the existence of such facts and circumstances as would lead a person of ordinary caution and prudence to entertain an honest and strong suspicion that the person charged is guilty of the crime subject of the investigation. Being based merely on opinion and reasonable belief, it does not import absolute certainty. Probable cause need not be based on clear and convincing evidence of guilt, as the investigating officer acts upon reasonable belief. Probable cause implies probability of guilt and requires more than bare suspicion but less than evidence which would justify a conviction. [16] (Citations omitted)

Given the exploratory nature of a preliminary investigation, the technical rules of evidence would not apply. For instance, the invocation of the *res inter alios acta* rule under Rule 130, Section 28 of the Rules of Court in the context of a preliminary investigation has been considered as improper. [17] In *Cambe v. Office of the Ombudsman*: [18]

It should be borne in mind that probable cause is determined during the context of a preliminary investigation which is "merely an inquisitorial mode of discovering whether or not there is reasonable basis to believe that a crime has been committed and that the person charged should be held responsible for it." It "is not the occasion for the full and exhaustive display of the prosecution's evidence." Therefore, "the validity and merits of a party's defense or accusation, as well as the admissibility of testimonies and evidence, are better ventilated during trial proper than at the preliminary investigation level." [19] (Citations omitted)

A finding of probable cause can even rest on hearsay evidence. In *Estrada v. Office of the Ombudsman*: [20]

[P]robable 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.[21] (Emphasis supplied)

The Office of the Ombudsman's determination of the existence of probable cause during a preliminary investigation is an executive function,[22] which is different from the judicial determination of probable cause. In a criminal proceeding, there are two (2) instances where probable cause is determined. The first instance refers to the executive determination of probable cause, which is undertaken by the prosecution for the purpose of determining whether an Information charging an accused should be filed. The second instance refers to the judicial determination, which is assumed by a judge to determine whether a warrant of arrest should be issued.

In *People v. Castillo*: [23]

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

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

Corollary to the principle that a judge cannot be compelled to issue a warrant of arrest if he or she deems that there is no probable cause for doing so, the judge in turn should not override the public prosecutor's determination of probable cause to hold an accused for trial on the ground that the evidence presented to substantiate the issuance of an arrest warrant was insufficient. It must be stressed that in our criminal justice system, the public prosecutor exercises a wide latitude of discretion in determining whether a criminal case should be filed in court, and that courts must respect the exercise of such discretion when the information filed against the person charged is valid on its face, and that no manifest error or grave abuse of discretion can be imputed to the public prosecutor.

Thus, absent a finding that an information is invalid on its face or that the prosecutor committed manifest error or grave abuse of discretion, a judge's determination of probable cause is limited only to the judicial kind or for the purpose of deciding whether the arrest warrants should be issued against the accused.[24] (Citations omitted, emphasis supplied)

The prosecution determines the existence of probable cause independently from the court. The executive determination of probable cause concerns itself with the indictment of a person or the propriety of filing a criminal information.

Once an information is filed, jurisdiction over the case is vested on the court. The judge, upon assumption of jurisdiction, "does not act as an appellate court." [25] He or she does not review the determination made by the prosecutor. Courts "cannot pass upon the sufficiency or insufficiency of evidence to determine the lack or existence of probable cause." [26] Instead, the judge makes an independent assessment of the evidence to determine whether there is probable cause to issue a warrant of arrest.

In *De Lima v. Reyes*,^[27] this Court held that a petition for certiorari questioning the regularity of a preliminary investigation becomes moot upon the filing of an information in court and the issuance of a warrant of arrest against the accused:

Once the information is filed in court, the court acquires jurisdiction of the case and any motion to dismiss the case or to determine the accused's guilt or innocence rests within the sound discretion of the court

....

[It] would be ill-advised for the Secretary of Justice to proceed with resolving respondent's Petition for Review pending before her. It would be more prudent to refrain from entertaining the Petition considering that the trial court already issued a warrant of arrest against respondent. The issuance of the warrant signifies that the trial court has made an independent determination of the existence of probable cause....

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

The Court of Appeals should have dismissed the Petition for Certiorari filed before them when the trial court issued its warrant of arrest. Since the trial court has already acquired jurisdiction over the case and the existence of probable cause has been judicially determined, a petition for certiorari questioning the conduct of the preliminary investigation ceases to be the "plain, speedy, and adequate remedy" provided by law. Since this Petition for Review is an appeal from a moot Petition for Certiorari, it must also be rendered moot.^[28] (Citations omitted)

The pronouncement in *De Lima* has been affirmed subsequently in *Pemberton v. De Lima*^[29] and *Cambe v. Office of the Ombudsman*.^[30] In these cases, the trial courts already made a judicial determination of probable cause, which resulted in the issuance of a warrant of arrest.

Here, the Office of the Ombudsman found probable cause to indict petitioners for violation of Republic Act No. 7080 and Republic Act No. 3019. It issued the assailed Joint Order dated June 4, 2014 and Joint Resolution dated March 28, 2014. Accordingly, the corresponding Informations have been filed before the Sandiganbayan.^[31]

This Court's ruling in *De Lima*, *Pemberton*, and *Cambe* should likewise apply in this case. Upon the filing of an Information, the prosecution loses jurisdiction over the case. The court to which the information is filed acquires jurisdiction and has full discretion on how the case should proceed.

Crespo v. Mogul^[32] is instructive:

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

The preliminary investigation conducted by the fiscal for the purpose of determining whether a prima facie case exists warranting the prosecution of the accused is terminated upon the filing of the information in the proper court. In turn, as above stated, the filing of said information sets in motion the criminal action against the accused in Court. Should the fiscal find it proper to conduct a reinvestigation of the case, at such stage, the permission of the Court must be secured. After such reinvestigation the finding and recommendations of the fiscal should be submitted to the Court for appropriate action. While it is true that the fiscal has the

quasi-judicial discretion to determine whether or not a criminal case should be filed in court or not, once the case had already been brought to Court whatever disposition the fiscal may feel should be proper in the case thereafter should be addressed for the consideration of the Court. The only qualification is that the action of the Court must not impair the substantial rights of the accused or the right of the People to due process of law.

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

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 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. (Citations omitted, emphasis supplied)

Accordingly, I vote to DENY the Petitions for Certiorari. The Sandiganbayan should proceed to determine whether there is probable cause for the issuance of a warrant of arrest against petitioners in Criminal Case Nos. SB14CRM0256, SB14CRM0257, SB14CRM0258, SB14CRM0259, SB14CRM0260, SB14CRM0261, SB14CRM0262, SB14CRM0263, SB14CRM0264, SB14CRM0265, and SB14CRM0266.

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

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

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

[3] Rep. Act No. 6770, sec. 15 provides:

Section 15. Powers, Functions and Duties. — The Office of the Ombudsman shall have the following powers, functions and duties:

(1)

Investigate and prosecute on its own or on complaint by any person, any act or omission of any public officer or employee, office or agency, when such act or omission appears to be illegal, unjust, improper or inefficient. It has primary jurisdiction over cases cognizable by the Sandiganbayan and, in the exercise of this primary jurisdiction, it may take over, at any stage, from any investigatory agency of Government, the investigation of such cases;

(2)

Direct, upon complaint or at its own instance, any officer or employee of the Government, or of any subdivision, agency or instrumentality thereof, as well as any government-owned or controlled corporations with original charter, to perform and expedite any act or duty required by law, or to stop, prevent, and correct any abuse or impropriety in the performance of duties;

(3)

Direct the officer concerned to take appropriate action against a public officer or employee at fault or who neglect to perform an act or discharge a duty required by law, and recommend his removal, suspension, demotion, fine, censure, or prosecution, and ensure compliance therewith; or enforce its disciplinary authority as provided in Section 21 of this Act: Provided, That the refusal by any officer without just cause to comply with an order of the Ombudsman to remove, suspend, demote, fine, censure, or prosecute an officer or employee who is at fault or who neglects to perform an act or discharge a duty required by law shall be a ground for disciplinary action against said officer;

(4)

Direct the officer concerned, in any appropriate case, and subject to such limitations as it may provide in its rules of procedure, to furnish it with copies of documents relating to contracts or transactions entered into by his office involving the disbursement or use of public funds or properties, and report any irregularity to the Commission on Audit for appropriate action;

(5)

Request any government agency for assistance and information necessary in the discharge of its responsibilities, and to examine, if necessary, pertinent records and documents;

(6)

Publicize matters covered by its investigation of the matters mentioned in paragraphs (1), (2), (3) and (4) hereof, when circumstances so warrant and with due prudence: Provided, That the Ombudsman under its rules and regulations may determine what cases may not be made public: Provided, further, That any publicity issued by the Ombudsman shall be balanced, fair and true;

(7)

Determine the causes of inefficiency, red tape, mismanagement, fraud, and corruption in the Government, and make recommendations for their elimination and the observance of high standards of ethics and efficiency;

(8)

Administer oaths, issue subpoena and subpoena duces tecum, and take testimony in any investigation or inquiry, including the power to examine and have access to bank accounts and records;

(9)

Punish for contempt in accordance with the Rules of Court and under the same procedure and with the same penalties provided therein;

(10)

Delegate to the Deputies, or its investigators or representatives such authority or duty as shall ensure the effective exercise or performance of the powers, functions, and duties herein or hereinafter provided;

(11)

Investigate and initiate the proper action for the recovery of ill-gotten and/or unexplained wealth amassed after February 25, 1986 and the prosecution of the parties involved therein.

The Ombudsman shall give priority to complaints tiled against high ranking government officials and/or those occupying supervisory positions, complaints involving grave offenses as well as complaints involving large sums of money and/or properties.

[4] *Deloso v. Domingo*, 269 Phil. 580, 586 (1990) [Per J. Griño-Aquino, En Banc].

[5] *Dichaves v. Office of the Ombudsman*, G.R. Nos. 206310-11, December 7, 2016 < <http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2016/december2016/206310-11.pdf> > [Per J. Leonen, Second Division]; *Reyes v. Office of the Ombudsman*, G.R. No. 208243, June 5, 2017 [Per J. Leonen, Second Division]; *Cambe v. Office of the Ombudsman*, G.R. Nos. 212014-15, December 6, 2016 [Per J. Perlas-Bernabe, En Banc].

[6] G.R. Nos. 206310-11, December 7, 2016 < <http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2016/december2016/206310-11.pdf> > [Per J. Leonen, Second Division].

[7] *Id.* at 17.

[8] *Id.* 16-17.

[9] 219 Phil. 402 (1985) [Per J. Gutierrez, Jr., En Banc].

[10] *Id.* at 428.

[11] Rules of Procedure of the Office of the Ombudsman, Adm. Order No. 07, sec. 4.

[12] *De Lima v. Reyes*, 776 Phil. 623 (2016) [Per J. Leonen, Second Division] citing *Pilapil v. Sandiganbayan*, 298 Phil. 368 (1993) [Per J. Nocon, En Banc].

[13] *Paderanga v. Drilon*, 273 Phil. 290, 299 (1991) [Per J. Regalado, En Banc]; *Cambe v. Office of the Ombudsman*, G.R. Nos. 212014-15, December 6, 2016 < <http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2016/december2016/212014-15.pdf> > [Per J. Perlas-Bernabe, En Banc].

[14] *People v. Narca*, 341 Phil. 696, 705 (1997) [Per J. Francisco, Third Division].

[15] See *Paderanga v. Drilon*, 273 Phil. 290, 296-299 (1991) [Per J. Regalado, En Banc].

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

[17] *Estrada v. Office of the Ombudsman*, 751 Phil. 821 (2015) [Per J. Carpio, En Banc]; *Reyes v. Office of the Ombudsman*, G.R. Nos. 212593-94, March 15, 2016 [Per J. Perlas-Bernabe, En Banc].

[18] G.R. Nos. 212014-15, December 6, 2016 < <http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2016/december2016/212014-15.pdf> > [Per J. Perlas-Bernabe, En Banc].

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

[20] 751 Phil. 821 (2015) [Per J. Carpio, En Banc].

[21] *Id.* at 874.

[22] *Dichaves v. Office of the Ombudsman*, G.R. Nos. 206310-11, December 7, 2016 < <http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2016/december2016/206310-11.pdf> > 17 [Per J. Leonen, Second Division].

[23] 607 Phil. 754 (2009) [Per J. Quisumbing, Second Division].

[24] *Id.* at 764-766.

[25] *Mendoza v. People*, 733 Phil. 603, 611 (2014) [Per J. Leonen, Second Division].

[26] *Parma, Jr. v. Office of the Deputy Ombudsman*, 576 Phil. 558 (2008) [Per J. Velasco, Jr., Second Division] citing *Longos Rural Waterworks and Sanitation Association, Inc. v. Desierto*, 434 Phil. 618 (2002) [Per J. Austria-Martinez, First Division].

[27] 776 Phil. 623 (2016) [Per J. Leonen, Second Division].

[28] *Id.* at 649-653.

[29] 784 Phil. 918 (2016) [Per J. Leonen, Second Division].

[30] G.R. Nos. 212014-15, December 6, 2016 < <http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2016/december2016/212014-15.pdf> > [Per J. Perlas-Bernabe, En Banc].

[31] *Ponencia*, p. 7.

[32] 235 Phil. 465 (1987) [Per J. Gancayo, En Banc].

CONCURRING OPINION

TIJAM, J.:

In this petition, petitioners Senator Jose "Jinggoy" P. Ejercito Estrada (Senator Estrada) and John Raymund De Asis (De Asis) seek to correct the grave abuse of discretion purportedly committed by the public respondent Office of the Ombudsman (Ombudsman) in connection with OMB-C-C-13-1313, entitled *National Bureau of Investigation and Atty. Levito Baligod v. Jose "Jinggoy" P. Ejercito Estrada, et. al.* and OMB-C-C-13-0397 entitled *Field Investigation Office v. Jose "Jinggoy" P. Ejercito Estrada*.

Assailed rulings in these consolidated petitions for certiorari are:

1. Joint Resolution dated March 28, 2014 of the Ombudsman, which found probable cause to charge petitioners and several other respondents for one count of Plunder and eleven counts of violation of Section 3(e) of Republic Act (R.A.) No. 3019; and
2. Joint Order dated June 4, 2014 of the Ombudsman, which denied petitioners' motion for reconsideration of the March 28, 2014 Joint Resolution of the Ombudsman.

Petitioners pray that this Court:

1. enjoin the Sandiganbayan from taking cognizance of or acting upon the challenged Joint Resolution and Order, and any and all Informations, orders, resolutions, or other issuances, and from issuing any warrants of arrest based on such Informations;
2. enjoin the Ombudsman, its FIO, the NBI, and Atty. Levito Baligod, from conducting any further proceedings relative to the NBI and FIO Complaints; from implementing or taking any other actions based on the challenged Joint Resolution and Order; and from prosecuting any and all criminal cases arising from the complaints and proceedings in OMB-C-C-13-0313 and OMB-C-C-13-0397;
3. render judgment declaring Senator Estrada as having been denied due process of law and equal protection of the laws, and consequently; and
4. declare the Joint Resolution and Order null and void.

In a petition for certiorari, the jurisdiction of the court is narrow in scope. It is limited to resolving only errors of jurisdiction. It is not to stray at will and resolve questions and issues beyond its competence, such as an error of judgment. The courts duty in the pertinent case is confined to determining whether the executive and judicial determination of probable cause was done without or in excess of jurisdiction or with grave abuse of discretion. Although it is possible that error may be committed in the discharge of lawful functions, this does not render the act amenable to correction and annulment by the extraordinary remedy of certiorari, absent any showing of grave abuse of discretion amounting to excess of jurisdiction.

Rules in reviewing the findings of the Ombudsman

As a matter of policy, courts are bound to respect the prosecution's preliminary determination of probable cause absent proof of manifest error, grave abuse of discretion and prejudice. "The right to prosecute vests the prosecutor with a wide range of discretion — the discretion of what and whom to charge, the exercise of which depends on a smorgasbord of factors which are best appreciated by prosecutors." [1]

"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." [2]

In any case, if there was palpable error or grave abuse of discretion in the public prosecutor's finding of probable cause, the accused can appeal such finding to the justice secretary and move for the deferment or suspension of the proceedings until such appeal is resolved. [3]

The aforesaid policy of non-interference applies with greater force in the case of the Ombudsman. In *Casing v. Hon. Ombudsman, et al.*, [4] this Court explained:

In line with the constitutionally-guaranteed independence of the Office of the Ombudsman and coupled with the inherent limitations in a certiorari proceeding in reviewing the Ombudsmans discretion, we have consistently held that so long as substantial evidence supports the Ombudsman's ruling, his decision should

stand. In a criminal proceeding before the Ombudsman, the Ombudsman merely determines whether probable cause exists, i.e., whether there is a sufficient ground to engender a well-founded belief that a crime has been committed and that the respondent is probably guilty thereof. Probable cause is a reasonable ground of presumption that a matter is, or may be, well founded on such a state of facts in the mind of the prosecutor as would lead a person of ordinary caution and prudence to believe, or entertain an honest or strong suspicion, that a thing is so. As the term itself implies, probable cause is concerned merely with probability and not absolute or even moral certainty; it is merely based on opinion and reasonable belief. On this score, *Galario v. Office of the Ombudsman (Mindanao)* is instructive:

[A] finding 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. A finding of probable cause merely binds over the suspect to stand trial. It is not a pronouncement of guilt. x x x

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.

x x x x

In closing, we reiterate the rule that absent good and compelling reason, the Ombudsmans finding of probable cause or lack thereof deserves great respect from the Court. If it were otherwise, the Court would be inundated with innumerable petitions ultimately aimed at seeking a review of the Ombudsman's exercise of discretion on whether to file a case in the courts, wreaking havoc to our orderly system of government, based on the principles of separation of powers, and checks and balances. It is only in a clear case of grave abuse of discretion that the Court may properly supplant the Ombudsman's exercise of discretion.[5] (Citations omitted, emphasis ours, italics and underscoring in the original)

Public Respondent Ombudsman did
not commit grave abuse of discretion
in finding probable cause against
Senator Estrada for the crimes of
plunder and Section 3(e) of R.A. No.
3019

In *Gov. Garcia, Jr. v. Office of the Ombudsman, et al.*, [6] the Court explained the concept of probable cause, as follows:

Probable cause, for the purpose of filing a criminal information, exists when the facts are sufficient to engender a well-founded belief that a crime has been committed and that the respondent is probably guilty thereof. To engender a well-founded belief that a crime has been committed, and to determine if the suspect is probably guilty of the same, the elements of the crime charged should, in all reasonable likelihood, be present. This is based on the principle that every crime is defined by its elements, without which there should be, at the most, no criminal offense.[7] (Citation omitted)

In *Enrile v. People of the Philippines*, [8] the Court enumerated the elements of plunder as follows:

(1)

That the offender is a public officer who acts by himself or in connivance with members of his family, relatives by affinity or consanguinity, business associates, subordinates, or other persons;

(2)

That he amassed, accumulated or acquired ill-gotten wealth through a combination or series of the following overt or criminal acts:

(a)

through misappropriation, conversion, misuse, or malversation of public funds or raids on the public treasury;

(b)

by receiving, directly or indirectly, any commission, gift, share, percentage, kickback or any other form of pecuniary benefits from any person and/or entity in connection with any government contract or project or by reason of the office or position of the public officer concerned;

c)

by the illegal or fraudulent conveyance or disposition of assets belonging to the National Government or any of its subdivisions, agencies or instrumentalities of government-owned or -controlled corporations or their subsidiaries;

(d)

by obtaining, receiving or accepting directly or indirectly any shares of stock, equity or any other form of interest or participation including the promise of future employment in any business enterprise or undertaking;

(e)

by establishing agricultural, industrial or commercial monopolies or other combinations and/or implementation of decrees and orders intended to benefit particular persons or special interests; or

(f)

by taking undue advantage of official position, authority, relationship, connection or influence to unjustly enrich himself or themselves at the expense and to the damage and prejudice of the Filipino people and the Republic of the Philippines; and

(3)

That the aggregate amount or total value of the ill-gotten wealth amassed, accumulated or acquired is at least P50,000,000.00.[9] (Emphasis in the original)

Meanwhile, the essential elements of Section 3(e) of R.A. No. 3019, are:

- The accused must be a public officer discharging administrative, judicial or official functions;
- He must have acted with manifest partiality, evident bad faith or inexcusable negligence; and
- That his action caused any undue injury to any party, including the government, or giving any private party unwarranted benefits, advantage or preference in the discharge of his functions.

In the instant case, I find that the pieces of evidence relied upon by the Ombudsman are sufficient for purposes of establishing probable cause.

Evidently, the facts of this case are identical to *Cambe v. Office of the Ombudsman*,^[10] where this Court upheld the March 28, 2014 Resolution of the Ombudsman finding probable cause to indict Senator Ramon "Bong"

Revilla Jr. for his alleged involvement in the PDAF scheme. The Court already ruled as to the sufficiency of identical pieces of evidence as to the respondent Senator's purported involvement in the PDAF scheme.

The majority in the Cambe case deemed the pieces of evidence relied upon by the Ombudsman sufficient to establish a prima facie case against the public respondent Senator. It must be noted that the evidentiary bases of the Ombudsman in that case are identical to those mentioned in the instant case. The relevant portions of the Court's discussion in Cambe are summarized below:

Evidence

Court's findings

- Luy's business ledgers

Corroborate Luy's testimony that Senator Revilla dealt with Napoles and received [kickbacks]

- COA Report in SAO Report NO. 2012-2013 detailing the irregularities in the PDAF disbursement and Field Investigation Office (FIO) verifications conducted in 2013

Prima facie establishes that the implementing agencies not actually implementing the projects and instead directly releasing the funds to the NGOs, at the behest of Senator Revilla

- Endorsement letters signed by Sen. Bong Revilla asking the Implementing Agencies to release his PDAF to the Napoles identified NGOs

Directly implicates the Senator because all were issued under his authority

In that case, the Court did not strictly apply the rules of evidence and primarily held the whistleblowers' testimonies as sufficient to justify the finding of probable cause against respondent Senator. Specifically, the Court made the following findings:

-

The Court deemed sufficient Luy's testimony to implicate respondent Senator despite his admission that sometimes the whistleblowers would forge the signatures of the legislators in the PDAF documents. The Court noted that the "forging" of the PDAF documents would be under the authority and subject to prior agreement between Napoles and the legislators. The Court deemed such arrangement favorable to the legislators because it would give them plausible deniability of responsibility.

-

The Court rejected the application of the *res inter alios acta* rule, stating that technical rules of evidence should not apply during preliminary investigation. The Court also found that even if the testimonies of Luy etc. were to be deemed hearsay, the same can be considered an exception because they are independently relevant statements.

Considering that the pieces of evidence and the factual antecedents of Cambe and the instant case are identical, there is no reason to depart from Our ruling therein.

The dissent of Justice Presbitero J. Velasco, Jr. found public respondent Ombudsman to have committed grave abuse of discretion because the allegation that Senator Estrada colluded with his co-respondents in amassing wealth through illegal disbursement of his PDAF was not grounded on "concrete proof." It found the testimonies of the three whistleblowers, either lacking in credibility or insufficient for purposes of establishing Senator Estrada's purported participation in the illegal PDAF scheme. Specifically, Justice Velasco found the following pieces of evidence unreliable for the following reasons:

Evidence

Justice Velasco's findings

- Luy's business ledgers

Unreliable because Luy himself, in his affidavit, admitted having forged various PDAF documents, including certificate of inspection and acceptance from the office of the proponent or lawmaker.

- COA Report in SAO Report NO. 2012-2013 detailing the irregularities in the PDAF disbursement and Field Investigation Office (FIO) verifications conducted 2013

Not material to establish his involvement because he merely identified the projects to be implemented and recommended a project partner. The COA Reports merely stated that the implementing agencies directly released the funds to the NGOS that were selected in violation of public bidding requirements.

- Endorsement letters signed by Sen. Jinggoy Estrada asking the Implementing Agencies to release his PDAF to the Napoles identified NGOs

Inadequate to presume his involvement in the scheme

Evidently, such findings digress from this Court's findings in *Cambe* with respect to the same pieces of evidence. I am thus constrained to agree with the ponencia in upholding the Ombudsman as there appears no logical, nor legal reason to treat Senator Estrada differently.

Echoing my separate concurring opinion in *De Lima v. Guerrero*, owing primarily to the nature of preliminary investigation, and being cognizant of the stage at which the case is currently in, it would be baseless, not to mention unfair, to examine every single piece of evidence presented by the prosecution under the same rules observed during trial.

Senator Estrada's participation in
identifying projects for
implementation and recommending
the project partner facilitates the
illegal disbursement of funds

The dissent of Justice Velasco, Jr. downplays Senator Estrada's role in the PDAF scheme by stating that "his participation was limited to merely identifying the projects to be implemented and recommending its project partner." Hence, the ponencia concluded that such act does not support the allegation that Senator Estrada received commissions from Napoles, nor his involvement in the perpetration of irregularities.

It must be noted, however, that the Court, in *Belgica, et al. v. Hon. Exec. Sec. Ochoa, Jr. et al.*,^[11] ruled that it is precisely this authority of the legislators to identify the projects for implementation which facilitates the Pork Barrel system. To quote the relevant portion of the Court's discussion in:

Clearly, these post-enactment measures which govern the areas of project identification, fund release and fund realignment are not related to functions of congressional oversight and, hence, allow legislators to intervene and/or assume duties that properly belong to the sphere of budget execution. Indeed, by virtue of the foregoing, legislators have been, in one form or another, authorized to participate in – as Guingona, Jr. puts it — "the various operational aspects of budgeting," including "the evaluation of work and financial plans for individual activities" and the "regulation and release of funds" in violation of the separation of powers principle. The fundamental rule, as categorically articulated in *Abakada*, cannot be overstated — from the moment the law becomes effective, any provision of law that empowers Congress or any of its members to play any role in the

implementation or enforcement of the law violates the principle of separation of powers and is thus unconstitutional. That the said authority is treated as merely recommendatory in nature does not alter its unconstitutional tenor since the prohibition, to repeat, covers any role in the implementation or enforcement of the law. Towards this end, the Court must therefore abandon its ruling in *Philconsa* which sanctioned the conduct of legislator identification on the guise that the same is merely recommendatory and, as such, respondents' reliance on the same falters altogether.

Besides, it must be pointed out that respondents have nonetheless failed to substantiate their position that the identification authority of legislators is only of recommendatory import. Quite the contrary, respondents — through the statements of the Solicitor General during the Oral Arguments — have admitted that the identification of the legislator constitutes a mandatory requirement before his PDAF can be tapped as a funding source, thereby highlighting the indispensability of the said act to the entire budget execution process[.][12] (Citation omitted, Emphasis in the original, and emphasis ours)

Based from the foregoing, Senator Estrada's identification of a project partner should, at the very least, be treated as a *prima facie* indication of his participation in the PDAF scheme.

To end, the majority's opinion merely touches on the preliminary issue regarding the Ombudsman's purported grave abuse of discretion. Petitioners' innocence or guilt on the charges is yet to be determined during trial. Incidentally, petitioners are not prevented nor estopped from raising the same or similar objections as the ones they stated in these petitions. In any case, as discussed above, the circumstances of the instant case fail to establish that the Ombudsman's acts were exercised in an arbitrary or despotic manner by reason of passion, prejudice, or personal hostility as to satisfy reversal of its assailed Resolution.

Accordingly, I vote to DISMISS the petitions.

[1] *Leviste v. Hon. Alameda, et al.*, 640 Phil. 620, 638 (2010)

[2] *Mendoza v. People, et al.*, 733 Phil. 603, 612 (2014)

[3] *Id.*

[4] 687 Phil. 468 (2012).

[5] *Id.* at 476-478, 481.

[6] 747 Phil. 445 (2014)

[7] *Id.* at 459.

[8] 766 Phil. 75 (2015).

[9] *Id.* at 115-116.

[10] G.R. Nos. 212014-15, December 6, 2016, 812 SCRA 537.

[11] 721 Phil. 416 (2013).

[12] *Id.* at 542-543.

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