Republic of the Philippines
**SUPREME COURT**
Manila

CERTIFIED TRUE COPY
WILFREDO V. LAPITAN
Division Clerk of Court
Third Division
JUL 04 2016

**THIRD DIVISION**

| | |
|---|---|
| **EMILIO S. AGCOLICOL, JR.,** Petitioner, | **G.R. No. 217732** |
| | Present: |
| - versus - | VELASCO, JR., *J.*, Chairperson, PERALTA, PEREZ, REYES, and JARDELEZA,* *JJ.* |
| **JERWIN CASIÑO,** Respondent. | |
| | Promulgated: June 15, 2016 |

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# DECISION

**VELASCO, JR., *J.*:**

## The Case

Before the Court is a Petition for Review on Certiorari under Rule 45 of the Rules of Court, questioning the Resolution[1] of the Court of Appeals (CA) dated September 30, 2014 in CA-G.R. SP No. 137026 and its Resolution dated March 26, 2015 which denied reconsideration. The CA Decision dismissed petitioner Emilio S. Agcolicol, Jr.'s appeal and affirmed the National Labor Relations Commission's (NLRC) April 30, 2014 Resolution in NLRC Case LAC No. 02-000498-14.

## The Facts

Respondent Jerwin Casiño (Casiño) was hired by petitioner in 2009 as Stock Custodian and Cook in the latter's Kubong Sawali Restaurant. Upon discovery of theft involving company property where respondent was allegedly a conspirator, a criminal complaint for qualified theft against him and his co-employees was filed on November 26, 2012 before the Office of the City Prosecutor of Baguio City. Additionally, he and his co-employees were preventively suspended indefinitely pending investigation. He was

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* On leave.

[1] Penned by Associate Justice Amy C. Lazaro-Javier and concurred in by Associate Justices Mariflor P. Punzalan Castillo and Zenaida T. Galapate-Laguilles.

informed of the suspension through a Memorandum Order dated November 27, 2012, effective November 28, 2012, by the restaurant's Human Resource Manager, Henry Revilla. The said Memorandum Order reads:

> *"TO :* ***MS. JESSICA VDAMULLOG***
> ***MR. JERWIN CASINO***
> ***MR. ROSENDO [LOMBOY]***
>
> *FROM :* ***HUMAN RESOURCE MANAGER***
>
> *SUBJECT:* ***MEMORANDUM ORDER***
>
> ---
>
> *You are hereby notified that starting tomorrow, November 28, 2012, a preventive suspension will be imposed indefinitely while investigation is still under going on the case filed to you by the Owner, Mr. Sonny S. Agcolicol, Jr. with [regard] to "Qualified Theft" based on the evidences gathered by under cover agents and questionable documents on the inventory and delivery reports found out by outside auditing group.*
>
> *Your assigned [tasks] will then [cease] and the Management will assign its own personnel to handle your previous job description.*
>
> *For your reference and strict guidance!*
>
> *(signed)*
> ***HENRY G. REVILLA***
> *Human Resource Manager*
>
> *Cc:* ***MR. SONNY S. AGCOLICOL, JR.***
> *Operations Manager"*[2]

Meanwhile, the criminal complaint for qualified theft was later dismissed for lack of basis.

According to respondent, sometime thereafter, he received a letter dated January 10, 2013 where he was made to explain why his services should not be terminated.[3] Said letter, in its entirety, reads:

> January 10, 2013
>
> ROSENDO LOMBOY
> No. 64 Dominican Hill
> Baguio City
>
> Dear Mr. Lomboy
>
> We have not heard from you since November 27, 2012. After you have received the subpoena from the office of the City Prosecutor on the said date you simply walked out of the establishment and have never reported back to work. Notwithstanding the case filed against you with the

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[2] *Rollo*, pp. 96-97.
[3] Id. at 73, 93.

> said office of the City Prosecutor of Baguio, we have not dropped you from the rolls of employees though you are considered as absent without leave (AWOL).
>
> We are giving you three (3) days from receipt hereof to explain in writing why you should not be dropped from the rolls of employees for being AWOL. Likewise[,] please include in your written explanation why [you] should not be terminated for grave misconduct arising from the pilferages committed. We are adopting the complaint before the City Prosecutor as the charges against you. Failure on your part to do so shall constrain us to act accordingly.
>
> For your compliance.
>
> HENRY G. REVILLA
> Human Resource Manager
>
> cc. MR. SONNY S. AGCOLICOL, Jr.
> Operations Manager[4]

The letter was clearly addressed only to Lomboy but it appears from respondent's allegations in his complaint that he considered said letter as a directive for him to give said explanation.[5]

On May 17, 2013, respondent filed with the NLRC a complaint for illegal dismissal, illegal suspension, and non-payment of monetary benefits.[6]

For his part, petitioner denies having dismissed respondent, arguing that they were prevented from completing the investigation because respondent stopped reporting for work after Reynante Camba, his co-employee, was arrested. This, according to petitioner, prevented him from complying with the twin-notice rule. Nevertheless, petitioner insists, respondent was never dismissed from work notwithstanding the audit team's finding that his participation in the scam was extensive. Furthermore, petitioner contends that respondent's monetary claims were speculative.

Meanwhile, respondent's co-employee, Rosendo Lomboy, suspected to be involved in the incident, also filed a separate complaint against petitioner, allegedly based on the same set of facts, before the NLRC.[7] Petitioner sought a consolidation of the two cases which motion was granted.

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[4] Id. at 118.
[5] Id. at 73.
[6] Docketed as NLRC Case No. RAB-CAR-05-0174.
[7] Docketed as NLRC Case No. RAB-CAR-03-0080-13.

**Decision of the NLRC First Division in the *Lomboy* case**

Despite said consolidation, however, Labor Arbiter Monroe C. Tabingan resolved the case involving Lomboy ahead of that of respondent Casiño, since it was filed first. In said Decision, the Labor Arbiter ruled in favor of Lomboy, holding that the latter was illegally dismissed.

Later, upon elevation of the case to the NLRC, the NLRC First Division partially granted the appeal and reversed the Labor Arbiter's ruling on the illegality of Lomboy's dismissal.

The NLRC disagreed with the Labor Arbiter's finding that respondent was illegally dismissed. There, the Commission held that Lomboy's services were not terminated and that, as a matter of fact, Lomboy was given the opportunity to explain his failure to report for work in the January 10, 2013 letter.[8] According to the NLRC:

> In the instant case, the records would show that [petitioner] did not terminate the services of [Lomboy]. In fact, based on the 10 January 2013 letter, respondents gave [Lomboy] an opportunity to explain in writing why he should not be dropped from the employees' roll for being absent without leave. No termination letter was ever sent to [Lomboy] nor was there any allegation that he was prevented from reporting back for work.[9]

The NLRC First Division then went on to rule that Lomboy "interpreted the letter of preventive suspension [as] tantamount to termination to which the Commission does not agree."[10] In so ruling, the First Division relied on this Court's pronouncement in *MZR Industries v. Colambot* that "[i]n the absence of any showing of an overt or positive act proving that petitioners had dismissed respondent, the latter's claim of illegal dismissal cannot be sustained – as the same would be self-serving, conjectural and of no probative value."[11]

Thus, according to the NLRC First Division, petitioner's error was that he failed to comply with the provisions of the Omnibus Rules Implementing the Labor Code, particularly on the 30-day limit in imposing a preventive suspension.[12]

The NLRC accordingly dismissed the complaint for illegal dismissal but affirmed the grant of salary differentials, service incentive leave pay, and 13th month pay, disposing of the case in this manner:

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[8] *Rollo*, p. 86.
[9] Id.
[10] Id.
[11] G.R. No. 179001, August 28, 2013.
[12] *Rollo*, p. 87.

> WHEREFORE, the instant appeal is hereby PARTIALLY GRANTED. The decision of Labor Arbiter Monroe C. Tabingan dated 19 August 2013 is hereby SET ASIDE and a new one entered dismissing the complaint for illegal dismissal. However, respondent Kubong Sawali Restaurant is hereby ordered to reinstate complainant to his former position but without backwages and to pay the complainant Three Thousand Nine Hundred Twenty (Php3,920.00) representing his salaries and benefits for fourteen (14) days – the period he was placed under illegal suspension. Furthermore, respondent Kubong Sawali Restaurant is ordered to pay complainant the following amounts as awarded by the labor arbiter:
>
> | | |
> |---|---|
> | (1) Salary differentials on account of underpaid wages | = Php 2,275.00 |
> | (2) Service incentive leave pay | = Php 4,200.00 |
> | (3) 13th month pay | = Php 18,330.00 |
> | TOTAL | = Php 24,805.00 |
>
> All other monetary claims are dismissed for lack of merit.
>
> SO ORDERED.[13]

The parties no longer questioned the Decision after petitioner's motion for reconsideration was denied.

## Labor Arbiter's Decision[14] in Casiño's case

As for Casiño, finding merit in his complaint, the Labor Arbiter also held that Casiño was constructively dismissed and disposed of the case in this wise:

> WHEREFORE, premises all considered, judgment is hereby rendered ordering respondents Emilio Agcolicol, Jr. and Kubong Sawali Restaurant jointly and severally liable to pay complainant JERWIN CASIÑO the following:
>
> (1) Separation pay of one (1) month pay for every year of service in the amount of P280.00 x 26 days x 4 years **P29,120.00**;
>
> (2) Full backwages from the time he was illegally dismissed up to the finality of the decision, in the amount of **P107,021.10**;
>
> Computation
>
> | | |
> |---|---|
> | P280.00 x 26 days x 13.5 months | = P98,280.00 |
> | 13th Month Pay: P243 x 26 x 13.5/12 | = 7,107.75 |
> | SILP: P280.00 x 5 days x 1 yr. + 2 months | = 1,633.35 |
>
> (3) Salary differentials on account of underpaid wages in the amount of **P8,216.00**
>
> Computation:
>
> Jan. 1, 2011 – June 17, 2012

[13] Id. at 88.

[14] Dated January 14, 2014, by Labor Arbiter Monroe C. Tabingan.

| | |
|---|---|
| P272.00 – 260 x 26 x 17.5 months | = P5,460.00 |
| June 18, 2012 – Nov. 27, 2012 | |
| P280.00 – 260 x 26 x 5.3 months | = P2,756.00 |
| | **P8,216.00** |

(4) Service incentive leave pay in the amount of P280.00 x 5 days x 1 year and 11 months = **P2,683.35**;

(5) 13th month pay for 2010, 2012 and 2013 in the amount of **P11,700.85**; and
Computation:

| | |
|---|---|
| 2010 = P235 x 26 days x 12/12 = | P6,110.00 |
| 2012 = P235.00 x 26 x 5.5/12 = | 2,800.40 |
| [2013 = P]243.00 x 26 x 5.3/12 = | 2,790.45 |
| | **P11,700.85** |

(6) Attorney's fees in the amount of **P15,874.13**

All other claims are dismissed for lack of merit.

**SO ORDERED.**[15]

The Labor Arbiter held that there is no truth to petitioner's defense that respondent abandoned his work thereat since he was clearly suspended indefinitely following his being charged with the crime of qualified theft which was later proved to be baseless. Too, petitioner never lifted said suspension and did not reinstate respondent in his job after the dismissal of the qualified theft case.

## Resolution[16] of the NLRC Second Division in Casiño's case

On appeal, the NLRC affirmed the Labor Arbiter's Decision in this manner:

> WHEREFORE, premises considered, the instant Appeal filed by the respondents is hereby DENIED for lack of merit.
>
> The Decision dated January 14, 2014 of Labor Arbiter Monroe C. Tabingan in NLRC RAB Case No. CAR-05-0174-13 is hereby **AFFIRMED** in toto.
>
> SO ORDERED.

Unlike in Lomboy's case, here the NLRC agreed with the Labor Arbiter's finding that Casiño was constructively dismissed. In so ruling, the NLRC Second Division relied on *Pido v. NLRC, et al.* where the employee was placed under preventive suspension for an indefinite period of time pending the investigation of the complaint against him. There, We held that the prolonged suspension of the employee, which in said case lasted for nine (9) months before the employee filed the case for constructive dismissal,

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[15] *Rollo*, pp. 80-81.

[16] Dated April 30, 2014, NLRC Second Division. Penned by Commissioner Erlinda T. Agus and concurred in by Commissioners Raul T. Aquino and Teresita D. Castillon-Lora.

owing to the employer's neglect to conclude the investigation, had ripened to constructive dismissal.[17]

Anent the January 10, 2013 Letter, the NLRC Second Division ruled that it was "more of an afterthought and was meant to cure the illegal dismissal of the complainant arising from his indefinite preventive suspension."[18] The NLRC Second Division went on to state that petitioner "never directed [respondent] to immediately return to work. If it was actually a case of [respondent's] absence without leave, [petitioner] should have required [respondent] to report back immediately, and failing to do so, then that is the only time that the [petitioner] should have required the [respondent] to explain his failure to return to work and why he should not be removed from the roll of employees."[19]

Because of the alleged conflicting rulings of the two Divisions of the NLRC in the cases of Lomboy and Casiño, petitioner, via a motion for reconsideration, brought to the NLRC Second Division's attention the ruling of the First Division in the Lomboy case.

Petitioner's motion for reconsideration was, however, denied by the Commission in its July 8, 2014 Resolution. Thus, he elevated the case to the CA via a Rule 65 Petition.

**CA Ruling**

Finding no merit in the petition, the CA affirmed the Labor Arbiter and NLRC's disposition of the constructive dismissal case, holding that: (1) the findings of the Labor Arbiter and the NLRC are supported by substantial evidence; (2) the Memorandum Order issued by petitioner's human resource manager indeed imposed an indefinite preventive suspension; (3) this indefinite suspension resulted in Casiño's constructive dismissal; (4) that Casiño was included in the list of suspended employees, contrary to petitioner's assertion that the memo order, which was addressed to him and his co-employee, was only intended for his co-employee since it was not personally served on respondent; (5) anent the monetary awards, the Labor Arbiter's findings are duly supported by the documentary evidence presented; and (6) petitioner failed to attach copies of all relevant and pertinent pleadings and documents to his petition.

The *fallo* of the assailed Resolution reads:

> **ACCORDINGLY**, the petition is **DENIED DUE COURSE** and **DISMISSED** for utter lack of merit.
>
> **SO ORDERED**.

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[17] G.R. No. 169812, February 23, 2007, 516 SCRA 609.
[18] *Rollo*, p. 100.
[19] Id. at 101.

His Motion for Reconsideration having been denied,[20] petitioner now seeks relief from this Court.

**Issues**

With this factual background, petitioner submits the following issues for Our resolution:

I. Whether the CA erred in affirming the Decision of the Second Division of the NLRC and holding that the private respondent was illegally dismissed;
II. Whether the CA erred when it did not reconcile the decisions of the First and Second Divisions of the NLRC notwithstanding that the said decisions are based on the same set of facts; and
III. Whether the CA and the NLRC erred in not looking beyond the suspension into the cause of the termination after it had held that the suspension was equivalent to illegal dismissal.

Petitioner insists that the NLRC made conflicting rulings on exactly the same set of facts, considering that in Lomboy's case, it held that Lomboy was not illegally dismissed. He contends that, unlike in the instant case, the 1st Division of the NLRC held that Lomboy's allegation that he was terminated from work was unsubstantiated. He claims that, along with Lomboy, Casiño was made to explain his failure to report to work through the January 10, 2013 letter. Furthermore, according to him, the theft of company property was sufficient justification for the latter's dismissal, maintaining that an employer should not be compelled to continue employing a person who is admittedly guilty of misfeasance or malfeasance and whose continued employment is patently inimical to the employer. Lastly, petitioner contends that assuming that it was indeed constructive dismissal, what he only failed to do was to observe the procedural requirements of dismissing an employee.

**Our Ruling**

We resolve to deny the petition.

Foremost, while a careful review of the records shows that petitioner, in handling Casiño's case, observed the same procedure used in Lomboy's case where he was exonerated from the illegal dismissal charge, this Court is of the view that the alleged conflict in the NLRC rulings is unnecessary in the resolution of the instant petition. Besides, We cannot fault the CA for not reconciling the two dispositions considering that res judicata by conclusiveness of judgment is not applicable in the instant case due to the absence of the element of identity of parties. This is further shown by the fact that petitioner himself refrained from invoking the principle in arguing

[20] Id. at 64-65, via CA Resolution dated March 26, 2015.

that the NLRC ruling in Casiño's case should follow that in Lomboy's case which already attained finality.

Thus, even though We are faced with the absurd situation of two cases having the same set of facts and where the difference is only on the employee involved, giving rise to two different dispositions from the NLRC, We find it appropriate to simply deal with the issue of whether respondent was indeed constructively dismissed or not considering that said matter is the meat of the controversy. Perhaps it is worth mentioning that situations like these can and should be avoided, especially if the parties did not fall short in informing the quasi-judicial agency or court that a related case is pending or has been resolved already so as to avoid conflicting rulings or varied appreciation of the same set of facts and evidence presented.

With that, We now tackle the issue of constructive dismissal through the imposition of an indefinite preventive suspension.

An employee is considered to be constructively dismissed from service if an act of clear discrimination, insensibility or disdain by an employer has become so unbearable to the employee as to leave him or her with no option but to forego with his or her continued employment.[21]

From said definition, it can be gathered that various situations, whereby the employee is intentionally placed by the employer in a situation which will result in the former's being coerced into severing his ties with the latter, can result in constructive dismissal. One such situation is where an employee is preventively suspended pending investigation for an indefinite period of time.

At this point it is well to note that not all preventive suspensions are tantamount to constructive dismissal. The employer's right to place an employee under preventive suspension is recognized in Rule XXIII, Implementing Book V of the Omnibus Rules Implementing the Labor Code. Section 8 of said Rule provides:

> SEC. 8. ***Preventive suspension.*** The employer may place the worker concerned under preventive suspension if his continued employment poses a serious and imminent threat to the life or property of the employer or of his co-workers.

To be valid, however, not only must the preventive suspension be imposed pursuant to Section 8, it must also follow the 30-day limit exacted under the succeeding Section 9 of the Rule. Thus:

> SEC. 9. ***Period of suspension.*** No preventive suspension shall last longer than thirty (30) days. The employer shall thereafter reinstate the worker in his former or in a substantially equivalent position or the

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[21] See *Mandapat v. Add Force Personnel Services, Inc. and CA*, G.R. No. 180285, July 6, 2010, 624 SCRA 155, 161.

> employer may extend the period of suspension provided that during the period of extension, he pays the wages and other benefits due to the worker. In such case, the worker shall not be bound to reimburse the amount paid to him during the extension if the employer decides, after completion of the hearing, to dismiss the worker.

Here, there is no inquiry on the propriety of petitioner's resort to the imposition of a preventive suspension. What is now in question is the fact that respondent was preventively suspended by **petitioner for an indefinite period of time** and whether the imposition of indefinite preventive suspension is tantamount to constructive dismissal.

On the 30-day limit on the duration of an employee's preventive suspension, We have previously ruled that "when preventive suspension exceeds the maximum period allowed without reinstating the employee either by actual or payroll reinstatement or when preventive suspension is for [an] indefinite period,[22] only then will constructive dismissal set in."[23]

In *Pido*, upon which case the NLRC Second Division hinged its ruling in Casiño's case, We considered the employee's "prolonged suspension, owing to [the employer's] neglect to conclude the investigation, had ripened to constructive dismissal." There, the employee was placed under preventive suspension for an indefinite period of time pending the investigation of a complaint against him. After the imposition of said suspension, however, the employer "merely chose to dawdle with the investigation in absolute disregard of [the employee's] welfare." In that case, the employer did not inform the employee that it was extending its investigation, nor was the latter paid his wages and other benefits after the lapse of the 30-day period of suspension. Neither did the employer issue an order lifting the suspension or any official communication for the employee to assume his post or another post. Having resulted in the employee's nine (9)-month preventive suspension, this Court considered such to have ripened into constructive dismissal.[24]

Moreover, in *C. Alcantara & Sons, Inc. v. NLRC*, We considered the employer's imposition of a preventive suspension pending final investigation of the employee's case, coupled with the former's lack of intention to conduct said final investigation, as tantamount to constructive dismissal.[25]

In another case, *Premiere Development Bank, et al. v. NLRC*, We agreed with the NLRC that the employee having been placed on preventive suspension in excess of the 30-day limit was a predetermined effort of dismissing the latter from the service in the guise of preventive suspension.[26]

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[22] See *Pido v. NLRC, et al.*, supra note 17.

[23] *Mandapat v. Add Force Personnel Services, Inc. and CA*, G.R. No. 180285, July 6, 2010, 624 SCRA 155, 163; citations omitted.

[24] *Pido v. NLRC, et al.*, supra note 17.

[25] G.R. No. 73521, January 5, 1994, 229 SCRA 109, 114.

[26] G.R. No. 114695, July 23, 1998, 293 SCRA 49, 59.

There, the NLRC found that the prolonged suspension was the result of the employer's desire to force the employee to submit to an inquiry.

Similarly, in *Hyatt Taxi Services, Inc. v. Catinoy*, this Court held that the employer's actions were tantamount to constructive dismissal when it failed to recall the employee to work after the expiration of the suspension, taken together with the former's precondition that the employee withdraw the complaints against it.[27] In said case, the employee involved reported for work after the lapse of his suspension but was told that he would not be able to resume his employment if he will not withdraw the cases that he filed against them.[28]

In the case at hand, there is no question that what was meted was an indefinite preventive suspension pending investigation as clearly stated in the Memorandum Order dated November 27, 2012. This, in itself, is already a clear violation of the proscription against indefinite or prolonged preventive suspensions, making the suspension tantamount to constructive dismissal as repeatedly held by this Court in a long line of cases.

What further strengthens Our finding against petitioner is the fact that after the imposition of the indefinite preventive suspension on November 28, 2012 and despite the City Prosecutor's dismissal of the case for qualified theft against respondent on December 28, 2012,[29] petitioner never issued a return-to-work order to respondent or any similar correspondence. The only communication received by respondent after the November 27, 2012 Memorandum Order is the January 10, 2013 Letter, which letter was addressed to Lomboy.

Additionally, the fact that the Letter was addressed to Lomboy is, to Us, an indication of petitioner's lack of intention to obtain an explanation from respondent for his absences. This is so because, obviously, said Letter was intended for Lomboy.

As in the above-cited cases, petitioner's actuations and omissions after the imposition of the indefinite preventive suspension, coupled with the contents of the Letter and the circumstances surrounding its issuance, are proof of petitioner's lack of desire to have respondent continue in his employment at Kubong Sawali. It does not cure petitioner's violation of the 30-day limit. On the contrary, it strengthens the finding that respondent was indeed constructively dismissed. There is, therefore, no reason for Us to disturb the ruling of the CA affirming that of the NLRC Second Division.

With these, We find no need to tackle the other issues presented.

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[27] G.R. No. 143204, June 26, 2001, 359 SCRA 686, 697.
[28] Id. at 696.
[29] *Rollo*, pp. 73, 137.

**WHEREFORE**, premises considered, the petition is **DENIED.** The September 30, 2014 and March 26, 2015 Resolutions of the Court of Appeals are hereby **AFFIRMED**.

**SO ORDERED.**

**PRESBITERO J. VELASCO, JR.**
Associate Justice

WE CONCUR:

**DIOSDADO M. PERALTA**
Associate Justice

**JOSE PORTUGAL PEREZ**
Associate Justice

**BIENVENIDO L. REYES**
Associate Justice

(On Leave)
**FRANCIS H. JARDELEZA**
Associate Justice

## ATTESTATION

I attest that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

**PRESBITERO J. VELASCO, JR.**
Associate Justice
Chairperson

## CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution and the Division Chairperson's Attestation, I certify that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

**MARIA LOURDES P. A. SERENO**
Chief Justice

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JUL 04 2016