EN BANC

G.R. No. 218232 *(Ramon "Bong" B. Revilla, Jr. vs. Sandiganbayan [First Division] and People of the Philippines)*

G.R. No. 218235 *(Richard A. Cambe vs. Sandiganbayan [First Division], People of the Philippines, and Office of the Ombudsman)*

G.R. No. 218266 *(Janet Lim Napoles vs. Sandiganbayan [First Division], Conchita Carpio Morales in her Capacity as Ombudsman, and People of the Philippines)*

G.R. No. 218903 *(People of the Philippines vs. Sandiganbayan [First Division], Ramon "Bong" Revilla, Jr., and Richard Cambe]*

G.R. No. 219162 *(Ramon "Bong" Revilla, Jr. vs. Sandiganbayan [First Division] and People of the Philippines)*

Promulgated:

July 24, 2018

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CONCURRING AND DISSENTING OPINION

VELASCO, JR., *J.*:

I concur with the majority's finding that Sandiganbayan did not commit grave abuse of discretion when it denied the prosecution's motion to transfer the detention of Senator Ramon "Bong" Revilla, Jr. (Revilla) and Richard Cambe (Cambe) from the PNP Custodial Center to a BJMP-operated facility. However, on the matter of Revilla's supposed waiver of his right to bail, I digress from the majority's opinion. And consistent with my position in *Cambe v. Office of the Ombudsman*,[1] I dissent from the *ponencia* insofar as it denies Cambe's application for bail and sustains the graft court's issuance of the writ of preliminary attachment against Revilla's monies and properties.

Withdrawal of Petition in G.R. No. 218232 is not a waiver of the right to bail

I cannot concur with the position that Revilla's withdrawal of his petition in G.R. No. 218232 amounts to a waiver of his constitutional right to bail. Waiver of a right by implication cannot be presumed. In criminal cases where life, liberty and property are all at stake, obviously, the rule on waiver cannot be any less.[2] Jurisprudence illustrates that there are (3) essential elements of a valid waiver: "(a) existence of a right; (b) the

[1] G.R. Nos. 212014-15, 212427-28, 212694-95, 212794-95, 213477-78, 213532-33, 213536-37 & 218744-59, December 6, 2016.

[2] *People v. Bodoso*, 446 Phil. 838 (2003).

knowledge of the existence thereof; and, (c) an intention to relinquish such right." [3] In *People v. Bodoso*,[4] this Court held that the last element—the intention to relinquish the right—does not exist where there is a reservation or a nature of any manifestation of a proposed action, *viz*:

> It is elementary that the existence of waiver must be positively demonstrated since a waiver by implication cannot be presumed. The standard of waiver requires that it "*not only must be voluntary, but must be knowing, intelligent, and done with sufficient awareness of the relevant circumstances and likely consequences.*" There must thus be persuasive evidence of an actual intention to relinquish the right. Mere silence of the holder of the right should not be easily construed as surrender thereof; the courts must indulge every reasonable presumption against the existence and validity of such waiver. Necessarily, where there is a reservation as to the nature of any manifestation or proposed action affecting the right of the accused to be heard before he is condemned, certainly, the doubt must be resolved in his favor to be allowed to proffer evidence in his behalf.

Here, while Revilla withdrew his petition in G.R. No. 218232, he made the following reservation:

> Considering, however, that the presentation of prosecution evidence in the Plunder Case below will already commence on 12 January 2017, and that trial will be conducted every Thursday thereafter, **petitioner will avail of the remedies available to him in said proceedings once the insufficiency of the evidence against him is established**.[5]

The absence of the intent to relinquish his right to bail is clear from Revilla's foregoing statement. In fact, nothing therein shows his awareness that by withdrawing his Petition, he was thereby abandoning his right to bail. On the contrary, Revilla clarified his intent to avail of the remedies available to him. This necessarily includes the remedy of applying for bail.

In addition, judicial notice should be taken of the fact that in his Petition before the Court in G.R. No. 236174, which assails the Sandiganbayan's denial of his Motion for Leave to File Demurrer to Evidence, Revilla even prayed, as an interim relief, that the Court grant him bail. His lack of intent to abandon his right to bail should not, therefore, be gainsaid. Waiver of a right is a matter of intention and must not be inferred by this Court in the face of clear statements to the contrary.

This Court's ruling in *People v. Donato*[6] relied upon by the *ponencia* does not foreclose Revilla's right to be admitted to bail. The factual circumstances in *Donato* and this case are entirely different. In *Donato*,

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[3] See *Spouses Valderama v. Macalde*, 507 Phil. 174 (2005).
[4] Supra note 2.
[5] *Rollo* (G.R. No. 218232), Vol. 7, p. 2622. Emphasis supplied.
[6] 275 Phil. 146 (1991).

therein detainee, private respondent Rodolfo Salas, withdrew his petition for habeas corpus, but with an explicit agreement with the government that he would "remain in legal custody and face trial before the court having custody over his person."[7] This is the reason why the Court in *Donato* ruled that there was a waiver of Salas' right to be admitted to bail. Unlike *Donato*, no such express act or statement on the part of petitioner Revilla is present.

Furthermore, it is well-settled that an order disposing a petition for bail is merely interlocutory[8] and does not attain finality.[9] Precedent confirms this point. In the recent case of *People v. Escobar*,[10] the Court recognized that a person may file a second application for bail, even after bail has been previously denied.

With the foregoing, to conclude that petitioner Revilla waived his right to bail despite his express intention is unwarranted. Revilla must be given the chance, should he so choose, to again invoke and prove his right to bail.

On Cambe's Application for Bail

The Constitution prohibits the deprivation of a person's liberty and detention in the absence of probable cause. As I discussed in my opinion in *Cambe*,[11] this probable cause requirement to indict, and thus detain Cambe has not been satisfied, *viz.*:

> ***Cambe***
>
> As to Cambe, the March 28, 2014 Joint Resolution of the respondent OOMB briefly outlines his alleged participation in the conspiracy, thus:
>
> x x x x
>
> In fine, the Ombudsman, in its Joint Resolution, attempted to establish Cambe's liability by presenting an elaborate, complicated scheme wherein he purportedly conspired with Revilla, *et al.* and the whistleblowers to allegedly enable Revilla to illegally acquire and amass portions of the PDAF through kickbacks.
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> Cambe's participation in the alleged conspiracy scheme to amass wealth, therefore, hinges on his participation as staff member of Sen. Revilla, and his purported signatures on the PDAF documents. On this point, Cambe argued that all his signatures in the PDAF documents were

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[7] Ibid.
[8] *Pobre v. Court of Appeals*, 501 Phil. 360 (2005).
[9] Ibid.
[10] G.R. No. 214300, July 26, 2017.
[11] Supra.

forged, and, thus, his participation in the conspiracy scheme has not been adequately established.

To underscore his point, he presented the examination report dated December 5, 2013 of Atty. Pagui, the forensic document examiner who examined the purported signatures of Cambe appearing on the PDAF documents, and compared them with various standard signatures presented by Cambe. In his report, Atty. Pagui concluded:

x x x x

Interestingly, the March 28, 2014 Joint Resolution of the respondent Ombudsman did not once mention the examination report of Atty. Pagui, nor did it squarely address the allegation of forgery. It immediately dismissed the argument by saying:

Forgery is not presumed, it must be proved by clear, positive, and convincing evidence and the burden of proof lies on the party alleging forgery.

Further, as gathered from the March 28, 2014 Joint Resolution, the fact of Cambe, acting on his own as a public officer, amassing or acquiring ill-gotten wealth amounting to at least Fifty Million Pesos (P50,000,000.00) through any of the means provided under the plunder law or acting in violation of RA 3019 has not been demonstrated.

The Ombudsman simply relied heavily on the statements of Luy, Sula, and Suñas, who confessed to having conspired with Napoles in executing this scheme. From their statements, the Ombudsman pieced together the participation of Revilla, Cambe, and the other petitioners. Thus, Cambe asserts that the whistleblowers' statements cannot be used against him under the *res inter alios acta* rule.

Respondents, through the OSG, claim that the case against Cambe fall under the exception to such rule.

I am unable to agree. The exception to the *res inter alios acta* rule, as earlier indicated, in Section 30 of Rule 130 provides:

> Section 30. Admission by conspirator. — The act or declaration of a conspirator relating to the conspiracy and during its existence, may be given in evidence against the co-conspirator after the conspiracy is shown by evidence other than such act or declaration.

x x x x

The requisites to bring a given set of facts under the exception to the *res inter alios acta* rule were not met in the present case. Consider:

First, the alleged conspiracy has yet to be established by competent evidence. Except for the whistleblowers' admissions/statements, no other evidence was adduced to show that Cambe agreed to commit plunder or any crime. In fact, these statements heavily relied upon do not even establish Cambe's participation in the scheme or imply any wrongdoing on his part. The PDAF documents made much of by respondents are tainted with falsehood, as the whistleblowers

themselves admitted, and can hardly be viewed to be independent and credible evidence to establish said conspiracy.

The fact that some of the PDAF Documents Cambe purportedly signed were notarized is of no moment in light of the admissions made by the "whistle-blowers" that they themselves did the "notarization." In his *Karagdagang Sinumpaang Salaysay* dated September 12, 2013, Luy admitted that Napoles' employees kept the dry seals and notarial registers of several notary publics and used them to "notarize" the PDAF Documents:

x x x x

Hence, the PDAF Documents by themselves are not reliable evidence of Cambe's complicity in the conspiracy to funnel funds out of the PDAF.

Second, Luy, Sula, and Suñas' admissions pertain to their own acts in perpetrating the scheme Napoles designed. This includes the forging and falsification of official documents to make it appear their issuance was authorized by legislators and their staff. Any alleged participation of Cambe as related to by the whistleblowers is hearsay considering that their supposed knowledge as to Cambe's role has Napoles, as source.

Moreover, Cambe's alleged receipt of P224,512,500.00 for Revilla and 5% for himself from the years 2006 to 2010, which purportedly represent their commissions, "rebates," or "kickbacks" for endorsing Napoles' NGOs was never corroborated by any independent evidence aside from the whistleblowers' testimonies. The business ledgers Luy submitted cannot be considered as such independent evidence since they are still based on Luy's statement. The allegation made by Cunanan of the TRC in his counter-affidavit pertaining to his phone conversation with Cambe and Revilla, has not been corroborated and does not establish any wrongdoing on the part of Cambe or Revilla.

Finally, public respondents never refuted the fact that these statements were made after the purported conspiracy had ceased. Luy, Sula, and Suñas only executed their respective admissions/statements sometime in September 2013, long after they have completed the alleged scheme.

What may be taken as independent evidence gathered during the FIO and the NBI's investigations consisted of endorsement letters, MOAs, and other documentation. They are of little evidentiary value, however, as they have been shown to have been falsified and forged by Luy, Sula, and Suñas upon Napoles' instructions. The COA report which found PDAF projects to be inexistent or have never been implemented is also insufficient as to Cambe, as his alleged participation is predicated on the forged indorsement letters, MOAs, and other documents. Even the MOAs allegedly executed by the NGOs, the implementing agencies, and Cambe as representative of Revilla, were admitted to have been *"notarized"* by Napoles' cohorts, not by legitimate notaries. Owing to this aberration, the MOAs do not enjoy the presumption of regularity and cannot be considered to be credible evidence to establish probable cause against Cambe.

> Aside from the whistleblowers' own admission of forgery, handwriting experts Azores and Pagui had evaluated the authenticity of the PDAF documents and had determined that the signatures on the PDAF documents were not made by one and the same person. The testimonies of these experts cannot simply be swept aside by mere resort to legal arguments, but must be addressed and refuted by superior contrary evidence. Until then, the shifted burden to establish the authenticity of the documents rests with public respondents. The evaluation by the Special Panel of Investigators as to such authenticity would not, in context, suffice to overturn the expert testimonies of Azores and Pagui since the Special Panel is not experts in the field of handwriting analysis.
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> The Ombudsman's selective appreciation of certain critical testimonial evidence is a badge of grave abuse of discretion. She, for instance, accepted as gospel truth the accusatory statements of Luy, Sula, and Suñas insofar as the alleged participation of Revilla and Cambe in the scam is concerned, but in the same breath disregarded their admission of forgery and fabrication of the PDAF documents. In fine, the Ombudsman viewed as true those portions of the whistleblowers' statements which would support the prosecution's version despite contrary evidence presented by petitioners.
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> Considering the apparent whimsical and capricious approach thus taken by the Ombudsman, I submit that this Court should have exercised its power of judicial review. **Tolerating the practice of establishing probable cause based on forged or questionable documents would expose the criminal justice system to malicious prosecution.** It will create a dangerous precedent. It will encourage unscrupulous individuals to file trumped up charges based on fictitious, spurious, or manipulated documents. Malicious lawsuits designed to harass the innocent will proliferate, in clear violation of their rights enshrined by no less than the Constitution. This, I cannot allow.

Without the satisfaction of the lower standard of probable cause, there cannot be a strong evidence of guilt that could warrant Cambe's continuous detention. Therefore, I submit that, at the very least, he should be released on bail.

As relevant here, and consistent with the doctrine on the presumption of innocence accorded to accused, this Court has ruled that the sole purpose of confining an accused in jail before conviction is to assure his presence at the trial. Citing *Montana v. Ocampo*,[12] this Court wrote:

> In the evaluation of the evidence the probability of flight is one other important factor to be taken into account. The sole purpose of confining accused in jail before conviction, it has been observed, is to secure his presence at the trial. In other words, if denial of bail is authorized in capital cases, it is only on the theory that the proof being strong, the defendant would flee, if he has the opportunity, rather than face the verdict of the jury. Hence, the exception to the

[12] G.R. No. L-6352, January 29, 1953, cited in *People v. Hernandez*, 99 Phil. 515 (1956).

> fundamental right to be bailed should be applied in direct ratio to the extent of the probability of evasion of prosecution.
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> The possibility of escape in this case, bearing in mind the defendant's official and social standing and his other personal circumstances, seem remote if not nil.

Thus, in this Court's July 12, 2016 Resolution in *Enrile*,[13] the Court stated that the right to bail "should be curtailed only if the risks of flight from this jurisdiction were too high," taking into consideration circumstances such as the accused's past and present disposition of respect for the legal processes, the length of his public service, and his individual public and private reputation, thus:

> Secondly, the imputation of "preferential treatment" in "undue favor" of the petitioner is absolutely bereft of basis. A reading of the decision of August 18, 2015 indicates that the Court did not grant his provisional liberty because he was a sitting Senator of the Republic. It did so because there were proper bases — legal as well as factual — for the favorable consideration and treatment of his plea for provisional liberty on bail. By its decision, the Court has recognized his right to bail by emphasizing that such right should be curtailed only if the risks of flight from this jurisdiction were too high. In our view, however, the records demonstrated that the risks of flight were low, or even nil. The Court has taken into consideration other circumstances, such as his advanced age and poor health, his past and present disposition of respect for the legal processes, the length of his public service, and his individual public and private reputation.

Given these precedents, this case should raise questions about whether the Cambe is a flight risk who will jump bail should they be provisionally released. I maintain that Cambe is not. To recall, Cambe surrendered within hours after the Sandiganbayan issued a warrant for his arrest. Four (4) years have passed since trial in the plunder case ensued, without any report of any misdeed or attempts to escape on his part. Clearly, Cambe cannot be categorized as being the same as those who usually jump bail, shadowy characters mindless of their reputation in the eyes of the people for as long as they can flee from the retribution of justice. Thus, I submit that his application for bail should have been considered and granted by the Sandiganbayan.

The issuance of the writ of preliminary attachment against Revilla is not warranted.

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[13] *Enrile v. Sandiganbayan (Third Division)*, G.R. No. 213847 (Resolution), July 12, 2016.

For the reasons set forth in my opinion in *Cambe v. Office of the Ombudsman*,[14] I submit that there is no *prima facie* case for plunder against Revilla that warrants the issuance of the writ of preliminary attachment of his monies and properties. To reiterate my discussion, there is nary enough reasonable and competent evidence to sustain probable cause to indict him for plunder, *viz.*:

> The majority sustained the Ombudsman's finding of probable cause to indict Revilla for Plunder and violation of Sec. 3 (e) of RA 3019, for supposedly amassing ill-gotten wealth by allegedly misappropriating, or supposedly receiving commission for allowing the misappropriation of, the PDAF in conspiracy with and/or by giving unwarranted benefit to Napoles and her cohorts. As I have previously stated, I cannot concur with the majority opinion.
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> A look at the evidence that the complainants had presented demonstrates that **there is nary any competent and relevant evidence that can constitute as basis for the finding of probable cause against Revilla.**
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> Ruling in favor of the complainants, the Ombudsman sweepingly concluded that Revilla conspired with Napoles and her cohorts to amass ill-gotten wealth at the expense of the State, specifying Revilla's role in the alleged conspiracy as follows:
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> x x x x
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> To support such conclusion, the Ombudsman cited the counter-affidavits of Revilla's co-respondents and the whistleblowers' bare testimonies, *viz.*:
>
> x x x x
>
> Notably, the pieces of evidence relied upon by the Ombudsman do not provide sufficient basis for even a *prima facie* finding of probable cause to believe **that Revilla negotiated and agreed with Napoles** on: (i) the list of projects to be chosen by the lawmaker; (ii) the corresponding IA that would implement the project; (iii) the project cost; (iv) the Napoles-controlled NGO that would implement the project; and (v) the amount of commission or kickback which the lawmaker would receive in exchange for endorsing the NGO. Indeed, **the Ombudsman's affirmation of these allegations stands on mere inferences and presumptions**.
>
> What is certain is that the Ombudsman surmised Revilla's involvement with the PDAF scam from the following: (1) his purported signatures appearing in several documents endorsing the NGOs affiliated with Napoles; (2) the testimonies of the so-called "whistleblowers"; and (3) the Counter-Affidavits of some of Revilla's co-respondents. As will be discussed, these are neither relevant nor competent, and do not constitute sufficient bases to sustain the finding of probable cause to subject Revilla to continuous prosecution.

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[14] G.R. Nos. 212014-15, 212427-28, 212694-95, 212794-95, 213477-78, 213532-33, 213536-37 & 218744-59, December 6, 2016.

The PDAF Documents

By the PDAF documents, Revilla supposedly coerced the IAs to choose the Napoles NGOs to implement the projects identified by Revilla. The Ombudsman should have been more than wary in accepting such allegations since Revilla, as a member of Congress, was without authority to compel officials or agencies of the executive branch to act at his bidding. The IAs, in fine, simply do not come under the jurisdiction of the Senate, let alone senators. In fact, free from the legislature's control, **the IAs are mandated by law to conduct a public bidding in selecting the NGOs that would implement the projects chosen by the legislator.**

x x x x

In a word, any endorsement made by Revilla does not bear any value that could have compelled the endorsee IA to benefit a Napoles-controlled NGO. The choice of the NGO made by the IA, without complying with RA 9184 and similar laws, falls on the IA alone. This is apparent from the very words of the NBI Complaint x x x.

x x x x

As Revilla maintained all along, his involvement/participation in the release of his PDAF was limited only to the identification and selection of projects or programs listed in the GAA and communicating such selection to the Chair of the Senate Committee on Finance and the Senate President. Any endorsement made by him does not and cannot sway these IAs to act per his will and contrary to legal requirements. It is, therefore, perplexing that Revilla's involvement in the PDAF scam is hinged on apparently worthless "endorsements" of Napoles-controlled NGOs.

Further, the Ombudsman ought to have exercised caution especially **since the "whistleblowers" no less admitted to forging the lawmakers' endorsements of Napoles' NGOs to the IAs along with all other PDAF Documents**. Suñas testified that they prepared these endorsement letters, upon which Revilla is now being indicted. xxxx

x x x x

The fact of having falsified or forged the signatures on the PDAF Documents was again mentioned by Suñas in her own *Sinumpaang Salaysay* dated November 5, 2013, thus:

x x x x

During the September 12, 2013 Senate Blue Ribbon Committee, Luy also admitted forging the signatures of lawmakers:

x x x x

Luy restated his testimony in his *Karagdagang Sinumpaang Salaysay* dated September 12, 2013, where he admitted falsifying documents and forging signatures of legislators and their chiefs of staff, *viz.*:

x x x x

Not to be overlooked are the findings of handwriting experts, Rogelio G. Azores and Atty. Desiderio A. Pagui. The two were one in saying that the signatures appearing above Revilla's name on the PDAF Documents were not his. Mr. Azores, in particular, concluded:

The questioned signatures above the printed name Hon. Ramon Revilla, Jr., Ramon "Bong" Revilla, Jr., Ramon Revilla, Jr., on one hand and the standard signatures above the printed name Ramon "Bong" Revilla, Jr., on the other hand, **were not written by one and the same person**.

Atty. Pagui similarly found the signatures above Revilla's name on the PDAF Documents as not belonging to the latter. Atty. Pagui's conclusion after examining the signatures on the PDAF documents and comparing them with Revilla's standard signatures categorically declared that **the signatures on the questioned documents were not affixed by Revilla,** *viz.*:

x x x x

In fact, even a cursory glance at some of the PDAF Documents questioned by Revilla reveals **a forgery so obvious as to be remarkably noticeable to the naked eye of an ordinary person**. A prime example is the "endorsement" letter addressed to Gondelina Amata of the NLDC dated October 23, 2009, supposedly signed by Revilla. Compared to the standard signatures submitted by Revilla, the signature contained therein lacks the cursive flourishes of his true signatures and instead contains sharp and blunt strokes. Similarly noticeable is the variance of the letterheads used in these various endorsement letters, with some containing supposed bar codes of Revilla's office, others simply a number.

Respondent Ombudsman, however, makes much of the letter dated July 20, 2011 Letter addressed to COA Assistant Commissioner Cuenco, Jr., wherein Revilla supposedly confirmed the authenticity of his and Cambe's signatures on the PDAF documents. Upon closer examination of the said letter, however, Mr. Azores found that even the said letter is spurious. He noted, thus:

x x x x

The same finding was made by Atty. Pagui with respect to the same July 20, 2011 Letter. He observed:

x x x x

At the very least, the Azores and Pagui findings should have impelled the Ombudsman to consider the veracity of the signatures on the PDAF documents given that these experts' findings uniformly detail discrepancies between the signatures in the PDAF documents and Revilla's admitted genuine specimens of writing. **That the Ombudsman failed to even require NBI handwriting experts to study the questioned signatures renders the immediate dismissal of the two handwriting expert's certifications highly suspect.** Where the genuineness of the documents is crucial to the respondents' defense, it is more prudent, as stressed in *People v. Agresor*, to allow the opinion of handwriting experts:

The task of determining the genuineness of the handwriting would have been made easier had an expert witness been employed to aid the court in carrying out this responsibility. The records show that counsel for the accused did ask the court for time to file a motion so that the handwriting may be submitted to the National Bureau of Investigation (NBI) to ascertain its authenticity. Such motion was, however, denied by the court, ruling that "The Court itself can determine whether or not that handwriting is the handwriting of the private complainant."

x x x x

It is true that the opinion of handwriting experts are not necessarily binding upon the courts, the expert's function being to place before the court data upon which the court can form its own opinion. Ultimately, the value of the expert testimony would still have to be weighed by the judge, upon whom the duty of determining the genuineness of the handwriting devolves. **Nevertheless, the handwriting expert may afford assistance in pointing out distinguishing marks, characteristics and discrepancies in and between genuine and false specimens of writing which would ordinarily escape notice or detection from an unpracticed observer. There is no doubt that superior skills along these lines will often serve to direct the attention of the courts to facts, assent to which is yielded not because of persuasion or argument on the part of the expert, but by their own intrinsic merit and reasonableness.**

As there was a dispute regarding the genuineness of the handwriting, it would have been more prudent if the trial court allowed the presentation of a handwriting expert by the defense. The denial of the request for time to file a motion to have the handwriting examined in effect rendered the right of the accused to have compulsory process to secure the production of evidence in his behalf nugatory.

Being uncontroverted and, in fact, confirmed by the complainants' witnesses, I submit that this forgery of Revilla's signatures and the falsification of the PDAF Documents should have dissuaded the Ombudsman from filing the Informations against Revilla.

Certainly, **the finding of probable cause to indict a person for plunder cannot be based on *admittedly* falsified documents**. While probable cause falls below proof beyond reasonable doubt in the hierarchy of quanta of evidence, it must nonetheless be supported by sufficient, credible and competent evidence, *i.e.*, **there should be facts and circumstances sufficiently strong in themselves to warrant a prudent and cautious man to believe that the accused is guilty of the crime with which he is charged**. x x x

Testimonies of the Co-Respondents

Absent any credible proof of Revilla's actual link or participation in the alleged scheme to divert his PDAF to Napoles' NGOs, the Ombudsman should likewise not have accepted hook, line, and sinker any testimony of a participant in the supposed conspiracy.

It is basic **that an extrajudicial confession binds only the confessant or declarant and is inadmissible against his or her co-**

accused. This basic postulate, an extension of the *res inter alios acta* rule, is embodied in Section 28, Rule 130 of the Rules of Court x x x.

Under the rule, the testimony made by the confessant is hearsay and inadmissible as against his co-accused even during the preliminary investigation stage. x x x

The exception to the above rule, the succeeding Section 30 of Rule 130, requires foremost, the existence of an independent and conclusive proof of the conspiracy and that the person concerned has **performed an overt act** in pursuance or furtherance of the complicity.

As discussed above, besides the admittedly falsified and forged PDAF documents, **there is no concrete proof showing that Revilla pulled off any "overt act" in furtherance of the supposed conspiracy with Napoles**. Other than saying that without Revilla, the scheme would have supposedly failed, the Ombudsman has been unable to point to concrete set of facts to support her conclusion as to the complicity of Revilla to the conspiracy in question. Thus, **the conclusion reached by the Ombudsman falls short of the threshold requirement that conspiracy itself must be proved as positively as the commission of the felony itself.** The quantum of evidence required is as should be, as conspiracy is a "facile device by which an accused may be ensnared and kept within the penal fold."

For this reason, I submit that the testimonies of Revilla's co-respondents cannot be taken against him. Yet, the Ombudsman repeatedly and freely cited the ***previously withheld*** counter-affidavits of Revilla's co-respondents in finding probable cause to indict him for Plunder and violation of Section 3 (e) of RA 3019.

The reliance on these previously suppressed testimonies of Revilla's co-respondents to conjure up probable cause against him is not only violative of the *res inter alios acta* rule, worse, it desecrates the basic rule of due process.

To recall, the counter-affidavits of Revilla's co-respondents, in which the foregoing statements were contained, were not furnished to Revilla before the Ombudsman rendered the March 28, 2014 Resolution despite Revilla's Motion to be Furnished. In denying the Motion, the Ombudsman held that it had no basis to grant the motion and cited *Artillero v. Casimiro*. But *Artillero* is not even applicable to the case. *First*, in *Artillero*, it was the *complainant* who claimed denial of due process when he was not furnished with a copy of the counter-affidavit of the accused. Here, it is the petitioner, as *accused*, requesting for the counter-affidavits of his co-respondents. *Second*, the complainant in *Artillero* requested a copy of the counter-affidavit of the accused not because he wanted to answer the counter-charges against him, such as what petitioner intended to do, but because he wanted to file a reply lest his complaint is dismissed for insufficiency of evidence.

After denying Revilla's Motion to be Furnished and his Motion for Reconsideration, the Ombudsman would suddenly turn around, find Revilla's request in order, and allow him to be furnished copies of the counter-affidavits of some his co-respondents.

In a bid to justify her initial refusal to provide Revilla with subject affidavits, the Ombudsman stated that Revilla was anyway eventually furnished the desired documents before the rendition of the assailed June 4, 2014 Joint Order (albeit after the March 28, 2014 Joint Resolution) and yet chose not to submit his comment within the time given him. Upon this premise, Revilla cannot, as the Ombudsman posited citing *Ruivivar v. Office of the Ombudsman*, be heard about being denied due process having, as it were, "been given ample opportunity to be heard but x x x did not take full advantage of the proffered chance."

I believe that that the Ombudsman has misread *Ruivivar*, which, at bottom, is not consistent with the essence of due process: **to be heard before a decision is rendered**. In *Ruivivar*, petitioner Ruivivar's motion for reconsideration that paved the way for his being furnished with copies of the affidavits of private respondent's witnesses came after the Ombudsman rendered a decision. In the present case, however, Revilla's request to be furnished with his co-respondents' counter-affidavits preceded the Ombudsman's issuance of her probable cause-finding resolution. Clearly, **the accommodation accorded Revilla was belated**, *i.e.*, after the denial of his motion for reconsideration and way after the issuance of the resolution finding probable cause against him. There lies the crucial difference.

It appears that the Ombudsman issued the May 7, 2014 Joint Order only as an afterthought, as an attempt to address the defects of the preliminary investigation the OOMB conducted on petitioner. However, such Order is of little moment as any comment that Revilla would file would no longer have any bearing precisely because the Ombudsman already issued the Joint Resolution on March 28, 2014 finding probable cause against them.

Worse, the Court cannot see its way clear on why the Ombudsman limited the grant to few counter-affidavits when it could have allowed Revilla access to all counter-affidavits and other filings of his co-respondents. The Ombudsman conveniently justified the selective liberality on the notion that only these counter-affidavits contain allegations that tend to incriminate Revilla to the scam. Yet, as pointed out by Revilla, **due process does not only cover the right to know and respond to the inculpatory evidence, but also the concomitant right to secure exculpatory evidence. The mere fact of suppression of evidence, regardless of its nature, is enough to violate the due process rights of the respondent**.

Indeed, *Morfe v. Mutuc* teaches that **the due process requirement is met if official action is free from arbitrariness. But, the Ombudsman's denial and limitation of Revilla's Motion to be Furnished, were arbitrary and unreasonable for there was nothing improper or irregular in Revilla's request**. And it cannot be overemphasized in this regard that the requesting petitioners offered to have the requested documents photocopied at his expense. Verily, these limitations **coupled with her use of the counter-affidavits requested against Revilla, without giving him a prior opportunity to know each and every allegation against him, whether from the complainants and their witnesses or his co-respondents,** are random, unreasonable, and taint the Ombudsman's actions with grave abuse of discretion for violating the sacred rule of due process. As such, **the statements contained in the**

Counter-Affidavits of Revilla's co-respondents cannot be used to find probable cause to indict him.

In *Duterte v. Sandiganbayan* where the petitioners therein were not sufficiently apprised of the charges against them during preliminary investigation, this Court ordered the dismissal of the criminal case filed against them x x x.

In like manner, in the present case, Revilla was not sufficiently apprised of the entirety of the allegations against him *before* the probable cause finding Resolution of March 28, 2014 was rendered by the Ombudsman. Consequently, his right to due process was denied and I believe that this Court is duty-bound to reverse the Ombudsman's action that was tainted with grave abuse of discretion.

Even assuming *arguendo* that the counter-affidavits of Revilla's co-respondents are admissible, the testimonies contained therein are inadequate to engender the probability that Revilla was a knowing participant in the alleged scheme to divert the PDAF. Buenaventura simply testified in general terms that she confirmed the authenticity of the authorization given by Revilla without specifying how she made such confirmation or providing the details of the documents and transactions involved. In like manner, Sevidal broadly claimed that Revilla, through Cambe, was responsible for "identifying the projects costs and choosing the NGOs" but did not provide the factual details that justified her claim. Figura's declaration of having no power to "simply disregard the wishes of [Revilla]" is a clearly baseless assumption.

Meanwhile, a closer look of Cunanan's testimony, which was a critical part of the Ombudsman's Resolutions, bares the infirmity of his claim. While he could have easily asked for a written confirmation of the authorization given by Revilla to Cambe, Cunanan himself admitted that he, instead, supposedly sought verification over the telephone. Yet, an audio recording of the alleged telephone conversation was not presented or even mentioned. Not even a transcript of the alleged telephone conversation was attached to Cunanan's Counter-Affidavit.

Section 1, Rule 11 of the Rules on Electronic Evidence provides that an audio evidence, such as a telephone conversation, is admissible only if it is presented, explained, or authenticated, *xxxx*

Given that no audio evidence of the telephone conversation was presented, much less "identified, explained or authenticated," the occurrence of the alleged telephone conversation is rendered highly suspect, if not improbable, and any testimony thereon is inadmissible and of no probative value.

But granting, *arguendo*, that Cunanan did call Revilla's office, it still begs the question of how he could have recognized or confirmed the identity of the person he was speaking with over the phone and not face-to-face. There is no indication, and Cunanan never even hinted, that he was closely familiar with Revilla's voice that he can easily recognize it over the phone in a single conversation.

This Court had previously declared that the person with whom the witness was conversing on the telephone **must first be reliably identified**

before the telephone conversation can be admitted in evidence and given probative value. x x x

x x x x

In this case where there is no authentication or identification of the person with whom Cunanan was conversing on the telephone, Cunanan's testimony is inadmissible and of no probative value.

In sum, the Ombudsman should have closely scrutinized the testimonies of the alleged participants in the supposed conspiracy. This holds especially true for testimonies that not only try to relieve the affiant from responsibility but also seek to pass the blame to others. The Ombudsman, however, utterly failed to do so and simply accepted the co-respondents' declarations as the gospel truth, unmindful that a neglect to closely sift through the affidavits of the parties can still force the unnecessary prosecution of frivolous cases. By itself, this neglect constitutes a grave abuse of discretion, which should be reversed by this Court.

Whistleblowers' Testimonies

Anent the elements of the crimes charged, the gravamen of the crime of Plunder is the accumulation by the accused of ill-gotten wealth amounting to at least Fifty Million Pesos (P50,000,000.00). In a bid to satisfy this element against Revilla, the Ombudsman heavily relied on the testimonies of the whistleblowers, Luy, Sula, and Suñas. Yet, **none of the witnesses stated that they deposited money representing the alleged commissions to any of Revilla's accounts. Not one of them testified that they personally handed money or saw anyone handing/delivering money to Revilla as commission/kickback.**

The closest thing passed as proof by the complainants is the private and personal records of Luy. But, even **Luy himself admitted his lack of personal knowledge of Revilla's involvement in the PDAF scam, much less of the former senator receiving money from it**. x x x

x x x x

The foregoing at once betrays **the *hearsay* nature of Luy's testimony** against Revilla. The hearsay nature of Luy's testimony regarding Revilla's receipt of money from his PDAF is again highlighted in Luy's Sworn Statement of November 8, 2013, *viz.*: x x x

Similarly, the testimony given by Suñas on September 12, 2013 regarding the supposed receipt by Revilla of a part of his PDAF is not based on her own personal knowledge. x x x

Given the hearsay character of the whistleblowers' testimonies, these are devoid of any intrinsic merit, dismissible as without any probative value.

At most, the whistleblowers claimed that money was handed to Cambe. Yet, **there is nothing to prove that Revilla received the said money from Cambe or that Cambe's alleged receipt of the said money was under his authority or instruction.**

> For this and for the fact that there is absolutely nothing competent and relevant that can sway a reasonable man to believe that Revilla had participated in the PDAF scheme, I vote for the reversal of the Ombudsman's finding of probable cause to indict Revilla for plunder and violation of Section 3 (e) of RA 3019 on account of grave abuse of discretion.
>
> It must not be forgotten that the crimes involved in these cases are Plunder and violation of Section 3 (e), RA 3019 — two grave charges that can strip a man of his good name and liberty, as in this case. The Ombudsman should not have found probable cause to indict Revilla given that there is nothing but falsified documents, hearsay testimonies and declarations barred by the *res inter alios acta* that support the complaints. Worse, the Ombudsman violated the due process protection of the Constitution in citing affidavits and testimonies not previously furnished Revilla. Without a doubt, the Assailed Resolutions, insofar as it found probable cause against Revilla, were tainted with grave abuse of discretion.

Accordingly, I vote that the Court resolve to GRANT the petitions in G.R. Nos. 218235 and 219162 and ORDER the Sandiganbayan to provisionally release Richard Cambe upon his posting of a cash bond in an amount to be set by the Sandiganbayan and RECALL the writ of preliminary attachment issued against Senator Ramon "Bong" Revilla in Criminal Case No. SB-14-CRM-0240. Revilla is not barred from availing his right to bail.

PRESBITERO J. VELASCO, JR.
Associate Justice

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EDGAR O. ARICHETA
Clerk of Court En Banc
Supreme Court