Republic of the Philippines
Supreme Court
Manila

EN BANC

SENATOR JINGGOY EJERCITO ESTRADA,	**G.R. Nos. 212140-41**
Petitioner,	Present:
- versus -	SERENO, *C.J.*, CARPIO, VELASCO, JR., LEONARDO-DE CASTRO, BRION,* PERALTA, BERSAMIN, DEL CASTILLO, VILLARAMA, JR., PEREZ, MENDOZA, REYES, PERLAS-BERNABE, LEONEN, and JARDELEZA, *JJ.*
OFFICE OF THE OMBUDSMAN, FIELD INVESTIGATION OFFICE, Office of the Ombudsman, NATIONAL BUREAU OF INVESTIGATION and ATTY. LEVITO D. BALIGOD,	
Respondents.	Promulgated:
	January 21, 2015

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D E C I S I O N

CARPIO, *J.*:

> It is a fundamental principle that the accused in a preliminary investigation has no right to cross-examine the witnesses which the complainant may present. **Section 3, Rule 112 of the Rules of Court expressly provides that the respondent shall only have the right** to submit a counter-affidavit, **to examine all other evidence submitted by the complainant** and, where the fiscal sets a hearing to propound clarificatory questions to the parties or their witnesses, to be afforded an opportunity to be present but without the right to examine or cross-examine.
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> - *Paderanga v. Drilon*[1]

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* On official leave.

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

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

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

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

[3] OMB-C-C-13-0313 charges the following respondents:
1. Jose "Jinggoy" P. Ejercito Estrada, Senator of the Republic of the Philippines;
2. Janet Lim Napoles, private respondent;
3. Pauline Therese Mary C. Labayen, Deputy Chief of Staff, Office of Sen. Estrada;
4. Ruby Tuason, private respondent;
5. Alan A. Javellana, President, National Agribusiness Corporation (NABCOR);
6. Gondelina G. Amata, President, National Livelihood Development Corporation (NLDC);
7. Antonio Y. Ortiz, Director General, Technology Resource Center (TRC);
8. Mylene T. Encarnacion, private respondent, President, Countrywide Agri and Rural Economic and Development Foundation, Inc. (CARED);
9. John Raymund S. De Asis, private respondent, President, Kaupdanan Para sa Mangunguma Foundation, Inc. (KPMFI);
10. Dennis L. Cunanan, Deputy Director General, TRC;
11. Victor Roman Cojamco Cacal, Paralegal, NABCOR;
12. Romulo M. Relevo, employee, NABCOR;
13. Maria Ninez P. Guañizo, bookkeeper, officer-in-charge, Accounting Division, NABCOR;
14. Ma. Julie Asor Villaralvo-Johnson, chief accountant, NABCOR;
15. Rhodora Butalad Mendoza, Director for Financial Management Services and Vice President for Administration and Finance, NABCOR;
16. Gregoria G. Buenaventura, employee, NLDC;
17. Alexis Gagni Sevidal, Director IV, NLDC;
18. Sofia Daing Cruz, Chief Financial Specialist, NLDC/Project Management Assistant IV, NLDC;
19. Chita Chua Jalandoni, Department Manager III, NLDC;
20. Francisco Baldoza Figura, employee, TRC;
21. Marivic V. Jover, chief accountant, TRC;
22. Mario L. Relampagos, Undersecretary for Operations, Department of Budget and Management (DBM);
23-25. Rosario Nuñez (aka Leah), Lalaine Paule (aka Lalaine), Marilou Bare (Malou), employees at the Office of the Undersecretary for Operations, DBM; and
26. John and Jane Does

[4] OMB-C-C-13-0397 charges the following respondents for Plunder and Violation of Sec. 3(e) of RA 3019:
1. Jose "Jinggoy" P. Ejercito Estrada, Senator of the Republic of the Philippines;
2. Pauline Therese Mary C. Labayen, Director IV/Deputy Chief of Staff, Office of Sen. Estrada;
3. Antonio Y. Ortiz, Director General, TRC;
4. Alan Alunan Javellana, President, NABCOR;
5. Victor Roman Cacal, Paralegal, NABCOR;
6. Maria Ninez P. Guañizo, bookkeeper, officer-in-charge, Accounting Division, NABCOR;
7. Romulo M. Relevo, employee, NABCOR;

Ombudsman v. Jose "Jinggoy" P. Ejercito-Estrada, et al., refers to the complaint for Plunder as defined under RA No. 7080 and for violation of Section 3(e) of RA No. 3019 (Anti-Graft and Corrupt Practices Act).

The Facts

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

On 3 December 2013, the Ombudsman served upon Sen. Estrada a copy of the complaint in OMB-C-C-13-0397, filed by the FIO of the Ombudsman, which prayed, among others, that criminal proceedings for Plunder, as defined in RA No. 7080, and for violation of Section 3(e) of RA No. 3019, be conducted against Sen. Estrada. Sen. Estrada filed his counter-affidavit in OMB-C-C-13-0397 on 16 January 2014.

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

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

> (a) Affidavit of [co-respondent] Ruby Tuason (Tuason);
> (b) Affidavit of [co-respondent] Dennis L. Cunanan (Cunanan);
> (c) Counter-Affidavit of [co-respondent] Gondelina G. Amata (Amata);
> (d) Counter-Affidavit of [co-respondent] Mario L. Relampagos (Relampagos);
> (e) Consolidated Reply of complainant NBI, if one had been filed; and
> (f) Affidavits/Counter-Affidavits/Pleadings/Filings filed by all the other respondents and/or additional witnesses for the Complainants.[6]

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8. Ma. Julie Asor Villaralvo-Johnson, chief accountant, NABCOR;
9. Rhodora Butalad Mendoza, Director, NABCOR;
10. Ma. Rosalinda Lacsamana, Director III, TRC;
11. Marivic V. Jover, Accountant III, TRC;
12. Dennis L. Cunanan, Deputy Director General, TRC;
13. Evelyn Sucgang, employee, NLDC;
14. Chita Chua Jalandoni, Department Manager III, NLDC;
15. Emmanuel Alexis G. Sevidal, Director IV, NLDC;
16. Sofia D. Cruz, Chief Financial Specialist, NLDC; and
17. Janet Lim Napoles, private respondent.

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

[6] *Rollo*, p. 745.

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

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

> This Office finds however finds [sic] that the foregoing provisions [pertaining to Section 3[b], Rule 112 of the Rules of Court and Section 4[c], Rule II of the Rules of Procedure of the Office of the Ombudsman] do not entitle respondent [Sen. Estrada] to be <u>furnished all the filings of the respondents</u>.
>
> Rule 112 (3) (a) & (c) of the Rules of Court provides [sic]:
>
> (a) The **complaint** shall state the address of the respondent and shall be **accompanied by the affidavits of the complainant and his witnesses**, as well as other supporting documents to establish probable cause …
>
> xxx xxx xxx
>
> (c) Within ten (10) days from receipt of the subpoena with the complaint and supporting affidavits and documents, the **respondent shall submit his counter-affidavit** and that of his witnesses and other supporting documents relied upon for his defense. The counter-affidavits shall be subscribed and sworn to and certified as provided in paragraph (a) of this section, with **copies thereof furnished by him to the complainant**.
>
> Further to quote the rule in furnishing copies of affidavits to parties under the Rules of Procedure of the Office of the Ombudsman [Section 4 of Rule II of Administrative Order No. 07 issued on April 10, 1990]:
>
> a) If the complaint is not under oath or is based only on official reports, the investigating officer shall require the **<u>complainant or supporting witnesses to execute affidavits</u>** to substantiate the complaints.
>
> b) After ***such affidavits*** have been secured, the investigating officer shall issue an order, attaching thereto a **copy of the affidavits and other supporting documents**, directing the respondents to submit, within ten (10) days from receipt thereof, his counter-affidavits and controverting evidence with **<u>proof of service thereof on the complainant</u>**. The complainant may file reply affidavits within ten (10) days after service of the counter-affidavits.

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[7] Id.

> It can be gleaned from these aforecited provisions that this Office is required to furnish [Sen. Estrada] a copy of the Complaint and its supporting affidavits and documents; and this Office complied with this requirement when it furnished [Sen. Estrada] with the foregoing documents attached to the Orders to File Counter-Affidavit dated 19 November 2013 and 25 November 2013.
>
> It is to be noted that there is no provision under this Office's Rules of Procedure which entitles respondent to be furnished all the filings *by the other parties*, e.g. the respondents. Ruby Tuason, Dennis Cunanan, Gondelina G. Amata and Mario L. Relampagos themselves are all respondents in these cases. Under the Rules of Court as well as the Rules of Procedure of the Office of the Ombudsman, the respondents are **only required to furnish** their counter-affidavits and controverting evidence **to the complainant,** and **not** to the other respondents.
>
> To reiterate, the rights of respondent [Sen.] Estrada in the conduct of the preliminary investigation depend on the rights granted to him by law and these cannot be based on whatever rights he believes [that] he is entitled to or those that may be derived from the phrase "due process of law."
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> Thus, this Office cannot grant his motion to be furnished with copies of all the filings by the other parties. Nevertheless, he should be furnished a copy of the Reply of complainant NBI as he is entitled thereto under the rules; however, as of this date, no Reply has been filed by complainant NBI.
>
> **WHEREFORE**, respondent [Sen.] Estrada's *Request to be Furnished with Copies of Counter-Affidavits of the Other Respondents, Affidavits of New Witnesses and Other Filings* is **DENIED**. He is nevertheless entitled to be furnished a copy of the Reply if complainant opts to file such pleading.[8] (Emphases in the original)

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

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

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

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

March 2014 Order.

THE ARGUMENTS

Sen. Estrada raised the following grounds in his Petition:

> THE OFFICE OF THE OMBUDSMAN, IN ISSUING THE CHALLENGED *ORDER* DATED 27 MARCH 2014, ACTED WITHOUT OR IN EXCESS OF ITS JURISDICTION OR WITH GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION AND VIOLATED SEN. ESTRADA'S CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW.[10]

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

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

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

As of 2 June 2014, the date of filing of the Ombudsman's Comment to the present Petition, Sen. Estrada had not filed a comment on the counter-affidavits furnished to him. On 4 June 2014, the

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10 Id. at 9.
11 Id. at 3.
12 Id. at 27-28.

Ombudsman issued a Joint Order in OMB-C-C-13-0313 and OMB-C-C-13-0397 denying, among other motions filed by the other respondents, Sen. Estrada's motion for reconsideration dated 7 April 2014. The pertinent portion of the 4 June 2014 Joint Order stated:

> While it is true that Senator Estrada's request for copies of Tuason, Cunanan, Amata, Relampagos, Figura, Buenaventura and Sevidal's affidavits was denied by Order dated 27 March 2014 and *before* the promulgation of the assailed Joint Resolution, this Office thereafter re-evaluated the request and granted it by Order dated 7 May 2014 granting his request. Copies of the requested counter-affidavits were appended to the copy of the Order dated 7 May 2014 transmitted to Senator Estrada through counsel.
>
> **This Office, in fact, held in abeyance the disposition of the motions for reconsideration in this proceeding in light of its grant to Senator Estrada a period of five days from receipt of the 7 May 2014 Order to formally respond to the above-named co-respondents' claims.**
>
> In view of the foregoing, this Office fails to see how Senator Estrada was deprived of his right to procedural due process.[13] (Emphasis supplied)

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

> I. PETITIONER [SEN. ESTRADA] WAS NOT DENIED DUE PROCESS OF LAW.
>
> II. THE PETITION FOR *CERTIORARI* IS PROCEDURALLY INFIRM.
>
> A. *LITIS PENDENTIA* EXISTS IN THIS CASE.
>
> B. PETITIONER HAS A PLAIN, SPEEDY AND ADEQUATE REMEDY IN THE ORDINARY COURSE OF LAW.
>
> III. PETITIONER IS NOT ENTITLED TO A WRIT OF PRELIMINARY INJUNCTION AND/OR TEMPORARY RESTRAINING ORDER.[14]

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

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

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

Sen. Estrada be furnished with copies of the submissions of his co-respondents.

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

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

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

This Court's Ruling

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

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

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

> From the Revised Rules of Criminal Procedure, Rule 112: Preliminary Investigation
>
> Section 3. *Procedure*. — The preliminary investigation shall be conducted in the following manner:
>
> (a) The complaint shall state the address of the respondent and shall be ***accompanied by the affidavits of the complainant and his witnesses,*** **as well as other *supporting* documents to establish probable cause.** They shall be in such number of copies as there are respondents, plus two (2) copies for the official file. The affidavits shall be subscribed and sworn to before any prosecutor or government official authorized to administer oath, or, in their absence or unavailability, before a notary public, each of who must certify that he personally examined the affiants and that he is satisfied that they voluntarily executed and understood their affidavits.
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> (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.
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> **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.
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> 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.
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> (c) Within ten (10) days from receipt of the subpoena with the complaint and supporting affidavits and documents, the respondent shall submit his counter-affidavit and that of his witnesses and other supporting documents relied upon for his defense. The counter-affidavits shall be subscribed and sworn to and certified as provided in paragraph (a) of this section, with copies thereof furnished by him to the complainant. The respondent shall not be allowed to file a motion to dismiss in lieu of a counter-affidavit.

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

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

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

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

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

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

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

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

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

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

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

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

a) dismissed outright for want of palpable merit;

b) referred to respondent for comment;

c) indorsed to the proper government office or agency which has jurisdiction over the case;

d) forwarded to the appropriate office or official for fact-finding investigation;

e) referred for administrative adjudication; or

f) subjected to a preliminary investigation.

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

1) Ombudsman Investigators;

2) Special Prosecuting Officers;

3) Deputized Prosecutors;

4) Investigating Officials authorized by law to conduct preliminary investigations; or

5) Lawyers in the government service, so designated by the Ombudsman.

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

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

b) **After such affidavits have been secured,** ***the investigating officer shall issue an order, attaching thereto a copy of the affidavits and other supporting documents,*** **directing the respondent to submit, within ten (10) days from receipt thereof, his counter-affidavits and**

controverting evidence with proof of service thereof on the complainant. The complainant may file reply affidavits within ten (10) days after service of the counter-affidavits.

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

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

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

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

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

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

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

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

x x x x

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

Sen. Estrada claims that the denial of his Request for the counter-affidavits of his co-respondents violates his constitutional right to due process. **Sen. Estrada, however, fails to specify a law or rule which states that it is a compulsory requirement of due process in a preliminary investigation that the Ombudsman furnish a respondent with the counter-affidavits of his co-respondents.** Neither Section 3(b), Rule 112 of the Revised Rules of Criminal Procedure nor Section 4(c), Rule II of the Rules of Procedure of the Office of the Ombudsman supports Sen. Estrada's claim.

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

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

Second, Section 4(b) states that "the investigating officer shall issue an order attaching thereto a copy of the affidavits and all other supporting documents, directing the respondent" to submit his counter-affidavit. The

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

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

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

Justice Velasco's dissent relies on the ruling in *Office of the Ombudsman v. Reyes* (*Reyes* case),[15] an **administrative** case, in which a different set of rules of procedure and standards apply. Sen. Estrada's Petition, in contrast, involves the preliminary investigation stage in a criminal case. Rule III on the Procedure in *Administrative* Cases of the Rules of Procedure of the Office of the Ombudsman applies in the *Reyes* case, while Rule II on the Procedure in *Criminal* Cases of the Rules of Procedure of the Office of the Ombudsman applies in Sen. Estrada's Petition. In both cases, the Rules of Court apply in a suppletory character or by analogy.[16]

In the *Reyes* case, the complainant Acero executed an affidavit against Reyes and Peñaloza, who were both employees of the Land Transportation Office. Peñaloza submitted his counter-affidavit, as well as those of his two witnesses. Reyes adopted his counter-affidavit in another case before the Ombudsman as it involved the same parties and the same incident. None of the parties appeared during the preliminary conference. Peñaloza waived his right to a formal investigation and was willing to submit the case for resolution based on the evidence on record. Peñaloza also submitted a

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

16 Sec. 3, Rule V of the Rules of Procedure of the Office of the Ombudsman reads:
Section 3. *Rules of Court, application.* – In all matters not covered by these rules, the Rules of Court shall apply in a suppletory manner, or by analogy whenever practicable and convenient.

counter-affidavit of his third witness. The Ombudsman found Reyes guilty of grave misconduct and dismissed him from the service. On the other hand, Peñaloza was found guilty of simple misconduct and penalized with suspension from office without pay for six months. This Court agreed with the Court of Appeals' finding that Reyes' right to due process was indeed violated. This Court remanded the records of the case to the Ombudsman, for two reasons: (1) Reyes should not have been meted the penalty of dismissal from the service when the evidence was not substantial, and (2) there was disregard of Reyes' right to due process because he was not furnished a copy of the counter-affidavits of Peñaloza and of Peñaloza's three witnesses. **In the *Reyes* case, failure to furnish a copy of the counter-affidavits happened in the administrative proceedings on the merits, which resulted in Reyes' dismissal from the service.** In Sen. Estrada's Petition, the denial of his Request happened during the preliminary investigation where the only issue is the existence of probable cause for the purpose of determining whether an information should be filed, and does not prevent Sen. Estrada from requesting a copy of the counter-affidavits of his co-respondents during the pre-trial or even during the trial.

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

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

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

> A preliminary investigation is defined as an inquiry or proceeding for the purpose of determining whether there is sufficient ground to engender a well founded belief that a crime cognizable by the Regional Trial Court has been committed and that the respondent is probably guilty

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

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

> thereof, and should be held for trial. **The quantum of evidence now required in preliminary investigation is such evidence sufficient to "engender a well founded belief" as to the fact of the commission of a crime and the respondent's probable guilt thereof. A preliminary investigation is not the occasion for the full and exhaustive display of the parties' evidence; it is for the presentation of such evidence only as may engender a well-grounded belief that an offense has been committed and that the accused is probably guilty thereof.** We are in accord with the state prosecutor's findings in the case at bar that there exists prima facie evidence of petitioner's involvement in the commission of the crime, it being sufficiently supported by the evidence presented and the facts obtaining therein.
>
> Likewise devoid of cogency is petitioner's argument that the testimonies of Galarion and Hanopol are inadmissible as to him since he was not granted the opportunity of cross-examination.
>
> **It is a fundamental principle that the accused in a preliminary investigation has no right to cross-examine the witnesses which the complainant may present. Section 3, Rule 112 of the Rules of Court expressly provides that the respondent shall only have the right to submit a counter-affidavit, to examine all other evidence submitted by the complainant and, where the fiscal sets a hearing to propound clarificatory questions to the parties or their witnesses, to be afforded an opportunity to be present but without the right to examine or cross-examine.** Thus, even if petitioner was not given the opportunity to cross-examine Galarion and Hanopol at the time they were presented to testify during the separate trial of the case against Galarion and Roxas, he cannot assert any legal right to cross-examine them at the preliminary investigation precisely because such right was never available to him. The admissibility or inadmissibility of said testimonies should be ventilated before the trial court during the trial proper and not in the preliminary investigation.
>
> Furthermore, **the technical rules on evidence are not binding on the fiscal who has jurisdiction and control over the conduct of a preliminary investigation.** If by its very nature a preliminary investigation could be waived by the accused, **we find no compelling justification for a strict application of the evidentiary rules**. In addition, considering that under Section 8, Rule 112 of the Rules of Court, the record of the preliminary investigation does not form part of the record of the case in the Regional Trial Court, then the testimonies of Galarion and Hanopol may not be admitted by the trial court if not presented in evidence by the prosecuting fiscal. And, even if the prosecution does present such testimonies, petitioner can always object thereto and the trial court can rule on the admissibility thereof; or the petitioner can, during the trial, petition said court to compel the presentation of Galarion and Hanopol for purposes of cross-examination.[19] (Emphasis supplied)

Furthermore, in citing the *Reyes* case, Justice Velasco's dissent overlooked a vital portion of the Court of Appeals' reasoning. This Court quoted from the Court of Appeals' decision: "x x x [A]dmissions made by

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

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

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

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

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

> (1) The first of these rights is the right to a hearing, which includes the right of the party interested or affected to present his own case and submit evidence in support thereof. x x x.
>
> (2) Not only must the party be given an opportunity to present his case and adduce evidence tending to establish the rights which he asserts but the tribunal *must consider* the evidence presented. x x x.

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

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

[22] Id. at 641-642.

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

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

The purpose in determining probable cause is to make sure that the courts are not clogged with weak cases that will only be dismissed, as well as to spare a person from the travails of a needless prosecution.[26] The

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

[24] 357 Phil. 511 (1998).

[25] Id. at 533.

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

Ombudsman and the prosecution service under the **control and supervision** of the Secretary of the Department of Justice are inherently the fact-finder, investigator, hearing officer, judge and jury of the respondent in preliminary investigations. Obviously, this procedure cannot comply with *Ang Tibay*, as amplified in *GSIS*. However, there is nothing unconstitutional with this procedure because this is merely an Executive function, a part of the law enforcement process leading to trial in court where the requirements mandated in *Ang Tibay*, as amplified in *GSIS*, will apply. This has been the procedure under the 1935, 1973 and 1987 Constitutions. To now rule that *Ang Tibay*, as amplified in *GSIS*, should apply to preliminary investigations will mean that all past and present preliminary investigations are in gross violation of constitutional due process.

Moreover, a person under preliminary investigation, as Sen. Estrada is in the present case when he filed his Request, is not yet an accused person, and hence cannot demand the full exercise of the rights of an accused person:

> A finding of probable cause needs only to rest on evidence showing that more likely than not a crime has been committed and was committed by the suspects. Probable cause need not be based on clear and convincing evidence of guilt, neither on evidence establishing guilt beyond reasonable doubt and definitely, not on evidence establishing absolute certainty of guilt. As well put in *Brinegar v. United States*, while probable cause demands more than "bare suspicion," it requires "less than evidence which would justify . . . conviction." A finding of probable cause merely binds over the suspect to stand trial. It is not a pronouncement of guilt.
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> Considering the low quantum and quality of evidence needed to support a finding of probable cause, we also hold that the DOJ Panel did not gravely abuse its discretion in refusing to call the NBI witnesses for clarificatory questions. The decision to call witnesses for clarificatory questions is addressed to the sound discretion of the investigator and the investigator alone. If the evidence on hand already yields a probable cause, the investigator need not hold a clarificatory hearing. **To repeat, probable cause merely implies probability of guilt and should be determined in a summary manner. Preliminary investigation is not a part of trial and it is only in a trial where an accused can demand the full exercise of his rights, such as the right to confront and cross-examine his accusers to establish his innocence.** In the case at bar, the DOJ Panel correctly adjudged that enough evidence had been adduced to establish probable cause and clarificatory hearing was unnecessary.[27]

Justice J.B.L. Reyes, writing for the Court, emphatically declared in *Lozada v. Hernandez*,[28] that the "**rights conferred upon accused persons to participate in preliminary investigations concerning themselves *depend upon the provisions of law by which such rights are specifically secured*,**

Kennedy,18 Phil. 122 (1910).

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

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

rather than upon the phrase 'due process of law'." This reiterates Justice Jose P. Laurel's oft-quoted pronouncement in *Hashim v. Boncan*[29] that "**the right to a preliminary investigation is statutory, not constitutional**." In short, the rights of a respondent in a preliminary investigation are merely statutory rights, not constitutional due process rights. An investigation to determine probable cause for the filing of an information does not initiate a criminal action so as to trigger into operation Section 14(2), Article III of the Constitution.[30] It is the filing of a complaint or information in court that initiates a criminal action.[31]

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

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

> In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and

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29 71 Phil. 216 (1941).

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

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

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

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

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

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

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

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

(1) In Sections 1 and 3 of Rule 112: By the investigating officer, to determine whether there is sufficient ground to engender a well-founded belief that a crime has been committed and the respondent is probably guilty thereof, and should be held for trial. A preliminary investigation is required before the filing of a complaint or information for an offense where the penalty prescribed by law is at least four years, two months and one day without regard to the fine;

(2) In Sections 6 and 9 of Rule 112: By the judge, to determine whether a warrant of arrest or a commitment order, if the accused has already been arrested, shall be issued and that there is a necessity of placing the respondent under immediate custody in order not to frustrate the ends of justice;

(3) In Section 5(b) of Rule 113: By a peace officer or a private person making a warrantless arrest when an offense has just been committed, and he has probable cause to believe based on personal

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

knowledge of facts or circumstances that the person to be arrested has committed it; and

(4) In Section 4 of Rule 126: By the judge, to determine whether a search warrant shall be issued, and only upon probable cause in connection with one specific offense to be determined personally by the judge after examination under oath or affirmation of the complainant and the witnesses he may produce, and particularly describing the place to be searched and the things to be seized which may be anywhere in the Philippines.

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

> The determination of probable cause needs only to rest on evidence showing that more likely than not, a crime has been committed and there is enough reason to believe that it was committed by the accused. It need not be based on clear and convincing evidence of guilt, neither on evidence establishing absolute certainty of guilt. What is merely required is "probability of guilt." Its determination, too, does not call for the application of rules or standards of proof that a judgment of conviction requires after trial on the merits. Thus, in concluding that there is probable cause, it suffices that it is believed that the act or omission complained of constitutes the very offense charged.
>
> It is also important to stress that **the determination of probable cause does not depend on the validity or merits of a party's accusation or defense or *on the admissibility or veracity of testimonies presented*.** As previously discussed, these matters are better ventilated during the trial proper of the case. As held in *Metropolitan Bank & Trust Company v. Gonzales*:
>
> > Probable cause has been defined as the existence of such facts and circumstances as would excite the belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted. x x x. The term does not mean "actual or positive cause" nor does it import absolute certainty. It is merely based on opinion and reasonable belief. Thus, a finding of probable cause does not require an inquiry into whether there is sufficient evidence to procure a conviction. It is enough that it is believed that the act or omission complained of constitutes the offense charged. Precisely, there is a trial for the reception of evidence of the prosecution in support of the charge. (Boldfacing and italicization supplied)

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

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

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

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

It is, moreover, necessary to distinguish between the constitutionally guaranteed rights of an accused and the right to a preliminary investigation. **To treat them the same will lead to absurd and disastrous consequences.**

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

All pending criminal cases in all courts throughout the country will have to be remanded to the preliminary investigation level because none of these will satisfy *Ang Tibay*, as amplified in *GSIS*. Preliminary investigations are conducted by prosecutors, who are the same officials who will determine probable cause and prosecute the cases in court. The prosecutor is hardly the impartial tribunal contemplated in *Ang Tibay*, as amplified in *GSIS*. A reinvestigation by an investigating officer outside of the prosecution service will be necessary if *Ang Tibay*, as amplified in *GSIS*, were to be applied. This will require a new legislation. In the meantime, all pending criminal cases in all courts will have to be remanded for reinvestigation, to proceed only when a new law is in place. To require *Ang Tibay*, as amplified in *GSIS*, to apply to preliminary investigation will necessarily change the concept of preliminary investigation as we know it now. Applying the constitutional due process in *Ang Tibay*, as amplified in *GSIS*, to preliminary investigation will necessarily require the application of the rights of an accused in Section 14(2), Article III of the 1987 Constitution. This means that the respondent can demand an actual hearing and the right to cross-examine the witnesses against him, rights which are not afforded at present to a respondent in a preliminary investigation.

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

Second. Sen. Estrada's present Petition for Certiorari is **premature**.

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

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

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

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

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

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

A motion for reconsideration allows the public respondent an opportunity to correct its factual and legal errors. Sen. Estrada, however, failed to present a compelling reason that the present Petition falls under the exceptions[41] to the general rule that the filing of a motion for reconsideration is required prior to the filing of a petition for certiorari. This Court has

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[41] As enumerated in *Tan v. CA*, 341 Phil. 570, 576-578 (1997), the exceptions are:
(a) where the order is a patent nullity, as where the Court *a quo* had no jurisdiction;
(b) where the questions raised in the *certiorari* proceeding have been duly raised and passed upon by the lower court, or are the same as those raised and passed upon in the lower court;
(c) where there is an urgent necessity for the resolution of the question and any further delay would prejudice the interests of the Government or of the petitioner or the subject matter of the action is perishable;
(d) where, under the circumstances, a motion for reconsideration would be useless;
(e) where petitioner was deprived of due process and there is extreme urgency for relief;
(f) where, in a criminal case, relief from an order of arrest is urgent and the granting of such relief by the trial Court is improbable;
(g) where the proceedings in the lower court are a nullity for lack of due process;
(h) where the proceedings was *ex parte* or in which the petitioner had no opportunity to object; and
(i) where the issue raised is one purely of law or where public interest is involved. (Citations omitted)

reiterated in numerous decisions that a motion for reconsideration is **mandatory** before the filing of a petition for certiorari.[42]

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

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

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

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

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

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

43 587 Phil. 100 (2008).

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

public respondent to rebut the affidavits submitted by private respondent. . . and had a speedy and adequate administrative remedy but she failed to avail thereof for reasons only known to her."

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

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

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

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

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

> "Undoubtedly, the respondent herein has been furnished by this Office with copies of the affidavits, which she claims she has not received. Furthermore, the respondent has been given the opportunity to present her side relative thereto, however, she chose not to submit countervailing evidence or argument. The respondent, therefore *(sic)*, cannot claim denial of due process for purposes of assailing the Decision issued in the present case. On this score, the Supreme Court held in the case of People v. Acot, 232 SCRA 406, that "***a party cannot feign denial of due process where he had the opportunity to present his side".*** This becomes all the more important since, as correctly pointed out by the complainant, the decision issued in the present case is deemed final and unappealable pursuant to Section 27 of Republic Act 6770, and Section 7, Rule III of Administrative Order No. 07. ***Despite the clear provisions of the law and the rules, the respondent herein was given the opportunity not normally accorded, to present her side, but she opted not to do so which is evidently fatal to her cause."*** **[emphasis supplied].**
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> Under these circumstances, we cannot help but recognize that the petitioner's cause is a lost one, not only for her failure to exhaust her available administrative remedy, but also on due process grounds. *The law can no longer help one who had been given ample opportunity to be heard but who did not take full advantage of the proffered chance.*[45]

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

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

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45 Supra note 43, at 113-116. Emphases in the original; citations omitted.
46 242 Phil. 563 (1988).
47 352 Phil. 557 (1998).
48 Supra note 46, at 576.

terminate its preliminary investigation.

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

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

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

> 3.1 I, however, disclose that I have filed a *Motion for Reconsideration* dated 07 April 2014 in OMB-C-C-13-0313 and OMB-C-C-13-0397, raising as **sole issue** the finding of probable cause in the *Joint Resolution* dated 28 March 2014.
>
> Such *Motion for Reconsideration* has yet to be resolved by the Office of the Ombudsman.[49] (Emphasis supplied)

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

> 8. It is respectfully submitted that the Ombudsman violated the foregoing rule [Rule 112, Section 4 of the Rules of Court] and principles. **A reading of the Joint Resolution will reveal that various pieces of evidence which Senator Estrada was not furnished with – hence, depriving him of the opportunity to controvert the same – were heavily considered by the Ombudsman in finding probable cause to charge him with Plunder and with violations of Section 3(e) of R.A. No. 3019.**
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> x x x x
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> 11. Notably, under dated 20 March 2014, Senator Estrada filed a "Request to be Furnished with Copies of Counter-Affidavits of the Other Respondents, Affidavits of New Witnesses and Other Filings," pursuant to the right of a respondent "to examine the evidence submitted by the complainant which he may not have been furnished" (Section 3[b], Rule

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[49] *Rollo*, p. 30.

> 112 of the Rules of Court), and to "have access to the evidence on record" (Section 4[c], Rule II of the Rules of Procedure of the Office of the Ombudsman).
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> However, notwithstanding the gravity of the offenses leveled against Senator Estrada and the law's vigilance in protecting the rights of an accused, **the Special Panel of Investigators, in an Order dated 27 March 2014, unceremoniously denied the request on the ground that "there is no provision under this Office's Rules of Procedure which entitles respondent to be furnished all the filings *by the other parties*** x x x x." (Order dated 27 March 2013, p. 3)
>
> **As such, Senator Estrada was not properly apprised of the evidence offered against him, which were eventually made the bases of the Ombudsman's finding of probable cause.**[50]

The Ombudsman denied Sen. Estrada's Motion for Reconsideration in its 4 June 2014 Joint Order. Clearly, Sen. Estrada expressly raised in his Motion for Reconsideration with the Ombudsman the violation of his right to due process, the same issue he is raising in this petition.

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

> 17. Sen. Estrada was shocked not only at the Office of the Ombudsman's finding of probable cause, which he maintains is without legal or factual basis, but also that such finding of probable cause was premised on evidence not disclosed to him, including those subject of his *Request to be Furnished with Copies of Counter-Affidavits of the Other Respondents, Affidavits of New Witnesses and Other Filings* dated 20 March 2014.
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> In particular, the Office of the Ombudsman used as basis for the *Joint Resolution* the following documents -
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> i. Alexis G. Sevidal's *Counter-Affidavits* dated 15 January and 24 February 2014;
> ii. Dennis L. Cunanan's *Counter-Affidavits* both dated 20 February 2014;
> iii. Francisco B. Figura's *Counter-Affidavit* dated 08 January 2014;
> iv. Ruby Tuason's *Counter-Affidavits* both dated 21 February 2014;
> v. Gregoria G. Buenaventura's *Counter-Affidavit* dated 06 March 2014; and
> vi. Philippine Daily Inquirer Online Edition news article entitled "*Benhur Luy upstages Napoles in Senate Hearing*" by Norman Bordadora and TJ Borgonio, published on 06 March 2014,

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[50] Id. at 789-791.

> none of which were ever furnished Sen. Estrada prior to the issuance of the challenged *Joint Resolution,* despite written request.
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> II
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> THE OFFICE OF THE OMBUDSMAN, IN ISSUING THE CHALLENGED *JOINT RESOLUTION* DATED 28 MARCH 2014 AND CHALLENGED *JOINT ORDER* DATED 04 JUNE 2014, NOT ONLY ACTED WITHOUT OR IN EXCESS OF ITS JURISDICTION OR WITH GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION, BUT ALSO VIOLATED SEN. ESTRADA'S CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW AND TO EQUAL PROTECTION OF THE LAWS.
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> x x x x
>
> 2.17 x x x x
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> Notably, in its *Joint Order* dated 07 May 2014, the Office of the Ombudsman even arbitrarily limited the filing of Sen. Estrada's comment to the voluminous documents comprising the documents it furnished Sen. Estrada to a "non-extendible" period of five (5) days, making it virtually impossible for Sen. Estrada to adequately study the charges leveled against him and intelligently respond to them. The *Joint Order* also failed to disclose the existence of other counter-affidavits and failed to furnish Sen. Estrada copies of such counter-affidavits.[51]

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

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

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

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

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

> x x x [D]espite the fact that what the petitioners filed was **a petition for *certiorari*, a recourse that – in the usual course and because of its nature and purpose – is not covered by the rule on forum shopping. The exception from the forum shopping rule, however, is true only where a petition for *certiorari* is properly or regularly invoked in the usual course; the exception does not apply when the relief sought, through a petition for *certiorari*, is still pending with or has as yet to be decided by the respondent court, tribunal or body exercising judicial or quasi-judicial body**, e.g., a motion for reconsideration of the order assailed via a petition for *certiorari* under Rule 65, as in the present case. This conclusion is supported and strengthened by **Section 1, Rule 65 of the Revised Rules of Court which provides that the availability of a remedy in the ordinary course of law precludes the filing of a petition for *certiorari*; under this rule, the petition's dismissal is the necessary consequence if recourse to Rule 65 is prematurely taken.**
>
> To be sure, **the simultaneous remedies the petitioners sought could result in possible conflicting rulings, or at the very least, to complicated situations**, between the RTC and the Court of Appeals. An extreme possible result is for the appellate court to confirm that the RTC decision is meritorious, yet the RTC may at the same time reconsider its ruling and recall its order of dismissal. In this eventuality, the result is the affirmation of the decision that the court *a quo* has backtracked on. Other permutations depending on the rulings of the two courts and the timing of these rulings are possible. **In every case, our justice system suffers as this kind of sharp practice opens the system to the possibility of manipulation; to uncertainties when conflict of rulings arise; and at least to vexation for complications other than conflict of rulings.** Thus, it matters not that ultimately the Court of Appeals may completely agree with the RTC; **what the rule on forum shopping addresses are the possibility**

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

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

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

and the actuality of its harmful effects on our judicial system.[55]

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

SUMMARY

The Ombudsman, in furnishing Sen. Estrada a copy of the complaint and its supporting affidavits and documents, **fully complied** with Sections 3 and 4 of Rule 112 of the Revised Rules of Criminal Procedure, and Section 4, Rule II of the Rules of Procedure of the Office of the Ombudsman, Administrative Order No. 7. Both the Revised Rules of Criminal Procedure and the Rules of Procedure of the Office of the Ombudsman require the investigating officer to furnish the respondent with copies of the affidavits of the complainant and affidavits of his supporting witnesses. Neither of these Rules require the investigating officer to furnish the respondent with copies of the affidavits of his co-respondents. **The right of the respondent is only "to examine the evidence *submitted by the complainant,"*** as expressly stated in Section 3(b), Rule 112 of the Revised Rules of Criminal Procedure. This Court has unequivocally ruled in *Paderanga* that "Section 3, Rule 112 of the Revised Rules of Criminal Procedure expressly provides that the respondent shall only have the right to submit a counter-affidavit, to examine all other evidence submitted by the complainant and, where the fiscal sets a hearing to propound clarificatory questions to the parties or their witnesses, to be afforded an opportunity to be present but without the right to examine or cross-examine." Moreover, Section 4 **(a, b and c**) of Rule II of the Ombudsman's Rule of Procedure, **read together**, only require the investigating officer to furnish the respondent with copies of the affidavits of the complainant and his supporting witnesses. There is no law or rule requiring the investigating officer to furnish the respondent with copies of the affidavits of his co-respondents.

In the 7 May 2014 Joint Order, the Ombudsman **went beyond legal duty** and even furnished Sen. Estrada with copies of the counter-affidavits of his co-respondents whom he specifically named, as well as the counter-affidavits of some of other co-respondents. In the 4 June 2014 Joint Order, the Ombudsman even held in abeyance the disposition of the motions for reconsideration because the Ombudsman granted Sen. Estrada five days from receipt of the 7 May 2014 Joint Order to formally respond to the claims made by his co-respondents. The Ombudsman faithfully complied with the existing Rules on preliminary investigation and even accommodated Sen.

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

Estrada beyond what the Rules required. Thus, the Ombudsman could not be faulted with grave abuse of discretion. **Since this is a Petition for Certiorari under Rule 65, the Petition fails in the absence of grave abuse of discretion on the part of the Ombudsman.**

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

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

Sen. Estrada did not file a Motion for Reconsideration of the 27 March 2014 Order in OMB-C-C-13-0313 denying his Request, which is the subject of the present Petition. He should have filed a Motion for

Reconsideration, in the same manner that he filed a Motion for Reconsideration of the 15 May 2014 Order denying his motion to suspend proceedings. The unquestioned rule in this jurisdiction is that certiorari will lie only if there is no appeal or any other plain, speedy and adequate remedy in the ordinary course of law against the acts of the public respondent.[56] The plain, speedy and adequate remedy expressly provided by law is a Motion for Reconsideration of the 27 March 2014 Order of the Ombudsman. Sen. Estrada's failure to file a Motion for Reconsideration renders this Petition **premature**.

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

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

SO ORDERED.

ANTONIO T. CARPIO
Associate Justice

WE CONCUR:

MARIA LOURDES P. A. SERENO
Chief Justice

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56 *Interorient Maritime Enterprises, Inc. v. NLRC*, 330 Phil. 493, 502 (1996).

I register my Dissenting Opinion.

PRESBITERO J. VELASCO, JR.
Associate Justice

I join the dissent of Justice Velasco.
Teresita Leonardo de Castro

TERESITA J. LEONARDO-DE CASTRO
Associate Justice

J. Brion left his vote; see his dissenting opinion

ARTURO D. BRION
Associate Justice

DIOSDADO M. PERALTA
Associate Justice

I join the dissent of J. Velasco

LUCAS P. BERSAMIN
Associate Justice

MARIANO C. DEL CASTILLO
Associate Justice

MARTIN S. VILLARAMA, JR.
Associate Justice

JOSE PORTUGAL PEREZ
Associate Justice

JOSE CATRAL MENDOZA
Associate Justice

BIENVENIDO L. REYES
Associate Justice

I concur, see separate opinion

ESTELA M. PERLAS-BERNABE
Associate Justice

MARVIC M.V.F. LEONEN
Associate Justice

FRANCIS H. JARDELEZA
Associate Justice

No part
Prior OSG Action

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, 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.

MARIA LOURDES P. A. SERENO
Chief Justice