EN BANC

G.R. Nos. 206438 and 206458 — CESAR MATAS CAGANG, *petitioner, versus* **SANDIGANBAYAN, FIFTH DIVISION, QUEZON CITY; OFFICE OF THE OMBUDSMAN; and PEOPLE OF THE PHILIPPINES,** *respondents.*

G.R. Nos. 210141-42 — CESAR MATAS CAGANG, *petitioner, versus* **SANDIGANBAYAN, FIFTH DIVISION, QUEZON CITY; OFFICE OF THE OMBUDSMAN; and PEOPLE OF THE PHILIPPINES,** *respondents.*

Promulgated:

July 31, 2018

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DISSENTING OPINION

CAGUIOA, *J.*:

Citing *Dela Peña v. Sandiganbayan*[1] (*Dela Peña*), the *ponencia* holds that "the failure x x x to invoke the right of speedy disposition even when [he] or she has already suffered or will suffer the consequences of delay constitutes a valid waiver of that right."[2] On this basis, the *ponencia* resolves to deny the Petitions, since "petitioner [Cesar Matas Cagang (petitioner)] has not shown that he asserted his rights [from 2003 to 2011], choosing instead to wait until the information was filed against him with the Sandiganbayan."[3]

With due respect, I disagree.

For the reasons set forth below, I submit that: (i) petitioner's right to speedy disposition had been violated; and (ii) petitioner cannot be deemed to have waived such right by mere inaction.

The facts are not disputed.

Sometime in 2003, the Commission on Audit (COA) launched a fact-finding investigation (COA investigation) involving the officials and employees of the Sarangani provincial government. The COA investigation was prompted by an anonymous complaint filed before the Office of the Ombudsman (OMB) and a news report by SunStar Davao alleging that

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1 412 Phil. 921 (2001) [En Banc, Per C.J. Davide, Jr.].

2 *Ponencia*, p. 33.

3 Id. at 37.

public funds, in the approximate amount of ₱61,000,000.00, were wrongfully diverted and given as aid to dummy cooperatives.

The COA investigation led to the implication of petitioner in two separate preliminary investigations before the OMB, petitioner having served as the Provincial Treasurer of Sarangani during the relevant period. These OMB preliminary investigations, in turn, led to the filing of three separate criminal Informations before the Sandiganbayan charging petitioner with the following offenses:

(i) Malversation of Public Funds through Falsification of Public Documents in 2005, in connection with the release of public aid in favor of the Kalalong Fishermen's Group (1st Sandiganbayan case); and

(ii) Malversation of Public Funds through Falsification of Public Documents *and* violation of Section 3(e) of RA 3019 in 2011, in connection with the release of public aid in favor of the Kamanga Muslim-Christian Fishermen's Cooperative (2nd and 3rd Sandiganbayan cases).

Petitioner alleges that the OMB incurred in delay in the conduct of preliminary investigation with respect to the 2nd and 3rd Sandiganbayan cases, considering the lapse of eight years between the start of preliminary investigation to the filing of the corresponding criminal informations. On such basis, petitioner claims that his constitutional right to speedy disposition was violated. Hence, petitioner prays that the 2nd and 3rd Sandiganbayan cases filed against him be dismissed.

The *ponencia* finds that while the OMB had in fact incurred in delay in the conduct of preliminary investigation against the petitioner, the latter is precluded from invoking his right to speedy disposition as he failed to assert the same in a timely manner.[4] This finding is primarily anchored on the case of *Dela Peña,*[5] where the Court held that silence on the part of the accused operates as an implied waiver of one's right to speedy disposition.[6]

I respectfully submit that it is time the Court revisits this sweeping statement in *Dela Peña* and that further clarification be made by the Court moving forward.

To recall, *Dela Peña* espouses that the following factors must be considered in determining whether the right to speedy trial or speedy disposition of cases is violated: "(1) the length of delay; (2) the reasons for

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4 *Ponencia,* p. 37.
5 Supra note 1.
6 Id. at 932.

the delay; (3) the assertion or failure to assert such right by the accused; and (4) the prejudice caused by the delay."[7]

This criterion adopts the "balancing test" which, as observed by the Court in *Perez v. People*[8] (*Perez*), finds its roots in American jurisprudence, particularly, in the early case of *Barker v. Wingo*[9] (*Barker*).

Quoted below are the relevant portions of the US Supreme Court's (SCOTUS) decision in *Barker*:

> The nature of the speedy trial right does make it impossible to pinpoint a precise time in the process when the right must be asserted or waived, but that fact does not argue for placing the burden of protecting the right solely on defendants. A defendant has no duty to bring himself to trial; the State has that duty as well as the duty of insuring that the trial is consistent with due process. Moreover, for the reasons earlier expressed, society has a particular interest in bringing swift prosecutions, and society's representatives are the ones who should protect that interest.
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> **We reject, therefore, the rule that a defendant who fails to demand a speedy trial forever waives his right**. This does not mean, however, that the defendant has no responsibility to assert his right. **We think the better rule is that the defendant's assertion of or failure to assert his right to a speedy trial is one of the factors to be considered in an inquiry into the deprivation of the right**. Such a formulation avoids the rigidities of the demand-waiver rule and the resulting possible unfairness in its application. It allows the trial court to exercise a judicial discretion based on the circumstances, including due consideration of any applicable formal procedural rule. It would permit, for example, a court to attach a different weight to a situation in which the defendant knowingly fails to object from a situation in which his attorney acquiesces in long delay without adequately informing his client, or from a situation in which no counsel is appointed. It would also allow a court to weigh the frequency and force of the objections, as opposed to attaching significant weight to a purely *pro forma* objection.
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> **In ruling that a defendant has some responsibility to assert a speedy trial claim, we do not depart from our holdings in other cases concerning the waiver of fundamental rights, in which we have placed the entire responsibility on the prosecution to show that the claimed waiver was knowingly and voluntarily made.** Such cases have involved rights which must be exercised or waived at a specific time or under clearly identifiable circumstances, such as the rights to plead not guilty, to demand a jury trial, to exercise the privilege against self-incrimination, and to have the assistance of counsel. **We have shown above that the right to a speedy trial is unique in its uncertainty as to when and under what circumstances it must be asserted or may be deemed waived. But the rule we announce today, which comports with constitutional principles, places the primary burden on the courts and**

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7 Id. at 929.

8 568 Phil. 491 (2008) [Third Division, Per J. R.T. Reyes].

9 407 US 514 (1972).

the prosecutors to assure that cases are brought to trial. We hardly need add that, if delay is attributable to the defendant, then his waiver may be given effect under standard waiver doctrine, the demand rule aside.

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A balancing test necessarily compels courts to approach speedy trial cases on an *ad hoc* basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify four such factors: **Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.**

The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance. Nevertheless, because of the imprecision of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case. To take but one example, the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge.

Closely related to length of delay is the reason the government assigns to justify the delay. Here, too, different weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

We have already discussed the third factor, the defendant's responsibility to assert his right. Whether and how a defendant asserts his right is closely related to the other factors we have mentioned. The strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain. The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.

A fourth factor is prejudice to the defendant. Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) **to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system**. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record

> because what has been forgotten can rarely be shown.[10] (Emphasis and underscoring supplied)

In *Barker,* SCOTUS explained the nature of the accused's right to speedy trial under the Sixth Amendment to the U.S. Constitution (Sixth Amendment), and set forth the four factors to be considered in determining whether such right had been violated — length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.

However, **it bears stressing that this criterion was specifically crafted to address unreasonable delay within the narrow context of a criminal trial, since the scope of the Sixth Amendment right does not extend to cover delay incurred by the prosecution prior to indictment or arrest**. SCOTUS' ruling in *Betterman v. Montana*[11] (*Betterman*) lends guidance:

> The Sixth Amendment's Speedy Trial Clause homes x x x from arrest or indictment through conviction. **The constitutional right, our precedent holds, does not attach until this phase begins, that is, when a defendant is arrested or formally accused**. x x x[12] (Emphasis supplied and citations omitted)

In turn, *Betterman* makes reference to *United States v. Marion*[13] (*Marion*), a case decided prior to *Barker.* In *Marion,* SCOTUS ruled that the protection afforded by the Sixth Amendment right attaches only after a person has been "accused" of a crime. Hence, in *Marion,* SCOTUS held:

> Appellees do not claim that the Sixth Amendment was violated by the two-month delay between the return of the indictment and its dismissal. Instead, they claim that their rights to a speedy trial were violated by the period of approximately three years between the end of the criminal scheme charged and the return of the indictment; it is argued that this delay is so substantial and inherently prejudicial that the Sixth Amendment required the dismissal of the indictment. **In our view, however, the Sixth Amendment speedy trial provision has no application until the putative defendant in some way becomes an "accused,"** an event that occurred in this case only when the appellees were indicted x x x.
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> **The Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . ." On its face, the protection of the Amendment is activated only when a criminal prosecution has begun and extends only to those persons who have been "accused" in the course of that prosecution. These provisions would seem to afford no protection to those not yet accused, nor would they seem to require the Government to discover, investigate, and accuse any person within any particular period of time**. The Amendment would appear to guarantee to a criminal defendant

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[10] Id. at 527-532.
[11] 136 S. Ct. 1609 (2016).
[12] Id. at 1613.
[13] 404 U.S. 307 (1971).

> that the Government will move with the dispatch that is appropriate to assure him an early and proper disposition of the charges against him. "[T]he essential ingredient is orderly expedition and not mere speed." x x x
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> Our attention is called to nothing in the circumstances surrounding the adoption of the Amendment indicating that it does not mean what it appears to say, nor is there more than marginal support for the proposition that, at the time of the adoption of the Amendment, the prevailing rule was that prosecutions would not be permitted if there had been long delay in presenting a charge. The framers could hardly have selected less appropriate language if they had intended the speedy trial provision to protect against pre-accusation delay. No opinions of this Court intimate support for appellees' thesis, and the courts of appeals that have considered the question in constitutional terms have never reversed a conviction or dismissed an indictment solely on the basis of the Sixth Amendment's speedy trial provision where only pre-indictment delay was involved.[14] (Emphasis and underscoring supplied; citations omitted)

Apart from clarifying the parameters of the Sixth Amendment right, *Marion* and *Betterman* appear to confirm that no constitutional right similar to that of speedy disposition exists under the U.S. Constitution. Hence, *Barker's* balancing test should not be understood to contemplate unreasonable delay during "pre-accusation," or the period within which the State conducts an investigation to determine whether there exists probable cause to arrest or charge a particular suspect.[15]

In the Philippine context, this "pre-accusation" period falls precisely within the scope of the right to speedy disposition protected by the Constitution, particularly, under Section 16, Article III:

> Section 16. All persons shall have the right to a speedy disposition of their cases before all judicial, quasi-judicial, or administrative bodies.

The right to speedy disposition covers the periods "before, during, and after trial."[16] Hence, the protection afforded by the right to speedy disposition, as detailed in the foregoing provision, **covers not only preliminary investigation, but extends further, to cover the fact-finding process**. As explained by the Court in *People v. Sandiganbayan*[17]:

> The guarantee of speedy disposition under Section 16 of Article III of the Constitution applies to *all* cases pending before *all* judicial, quasi-judicial or administrative bodies. The guarantee would be defeated or rendered inutile if the hair-splitting distinction by the State is accepted. **Whether or not the fact-finding investigation was separate from the preliminary investigation conducted by the Office of the Ombudsman should not matter for purposes of determining if the respondents'**

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14 Id. at 313-315.
15 Id.
16 I Joaquin G. Bernas, *Constitutional Rights and Duties* 270 (1974).
17 723 Phil. 444 (2013) [First Division, Per J. Bersamin].

> **right to the speedy disposition of their cases had been violated.**[18] (Emphasis supplied)

Moreover, in *Torres v. Sandiganbayan*[19] (*Torres*) the Court categorically stated that the speedy disposition of cases covers "not only the period within which the preliminary investigation was conducted, but also all stages to which the accused is subjected, **even including fact-finding investigations conducted prior to the preliminary investigation proper.**"[20]

Unreasonable delay incurred during fact-finding and preliminary investigation, like that incurred during the course of trial, is equally prejudicial to the respondent, as it results in the impairment of the very same interests which the right to speedy trial protects — against oppressive pre-trial incarceration, unnecessary anxiety and concern, **and the impairment of one's defense**. To hold that such right attaches only upon the launch of a formal preliminary investigation would be to sanction the impairment of such interests at the first instance, and render respondent's right to speedy disposition *and* trial nugatory. Further to this, it is oppressive to require that for purposes of determining inordinate delay, the period is counted only from the filing of a formal complaint or when the person being investigated is required to comment (in instances of fact-finding investigations).[21]

Prejudice is not limited to when the person being investigated is notified of the proceedings against him. Prejudice is more real in the form of denial of access to documents or witnesses that have been buried or forgotten by time, and in one's failure to recall the events due to the inordinately long period that had elapsed since the acts that give rise to the criminal prosecution. Inordinate delay is clearly prejudicial when it impairs one's ability to mount a complete and effective defense. Hence, contrary to the majority, **I maintain that *People v. Sandiganbayan* and *Torres* remain good law in this jurisdiction**. The scope of right to speedy disposition corresponds *not* to any specific phase in the criminal process, but rather, attaches the very moment the respondent (or accused) is exposed to prejudice, which, in turn, may occur as early as the fact-finding stage.

The right to speedy disposition is two-pronged. *Primarily,* it serves to extend to the individual citizen a guarantee against State abuse brought about by protracted prosecution. Conversely, it imposes upon the State the concomitant duty to expedite all proceedings lodged against individual citizens, whether they be judicial, quasi-judicial or administrative in nature. **This constitutional duty imposed upon the State stands regardless of the vigor with which the individual citizen asserts his right to speedy disposition**. Hence, the State's duty to dispose of judicial, quasi-judicial or

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[18] Id. at 493.
[19] 796 Phil. 856 (2016) [Third Division, Per J. Velasco, Jr.].
[20] Id. at 868. Emphasis supplied.
[21] *Ponencia*, p. 30.

administrative proceedings with utmost dispatch cannot be negated solely by the inaction of the respondent upon the dangerous premise that such inaction, without more, amounts to an implied waiver thereof.

Verily, the Court has held that the State's duty to resolve criminal complaints with utmost dispatch is one that is mandated by the Constitution.[22] Bearing in mind that the Bill of Rights exists precisely to strike a balance between governmental power and individual personal freedoms, it is, to my mind, unacceptable to place on the individual the burden to assert his or her right to speedy disposition of cases when the State has the burden to respect, protect, and fulfill the said right.

It is thus not the respondent's duty to follow up on the prosecution of his case, for it is the prosecution's responsibility to expedite the same within the bounds of reasonable timeliness.[23] Considering that the State possesses vast powers and has immense resources at its disposal, it is incumbent upon it **alone** to ensure the speedy disposition of the cases it either initiates or decides. Indeed, as the Court held in *Secretary of Justice v. Lantion,*[24] "[t]he individual citizen is but a speck of particle or molecule *vis-a-vis* the vast and overwhelming powers of government. His only guarantee against oppression and tyranny are his fundamental liberties under the Bill of Rights which shield him in times of need."[25] Further, as earlier observed, no such similar duty is imposed by the U.S. Constitution.

Proceeding therefrom, I find the adoption of the third factor in *Barker's* balancing test improper. Instead, I respectfully submit that in view of the fundamental differences between the scope of the Sixth Amendment right to speedy trial on one hand, and the right to speedy disposition on the other, the third factor in *Barker's* balancing test (that is, the assertion of one's right) should no longer be taken against those who are subject of criminal proceedings.

I am not unaware of the catena of cases that have applied *Barker's* balancing test, including those wherein the accused's invocation of the right to speedy disposition had been rejected on the basis of its third factor.[26] I maintain, however, that the adoption of *Barker's* third factor in the Philippine context fails to take into account the limited scope of the Sixth Amendment right for which the balancing test had been devised *vis-à-vis* the expanded scope of the right to speedy disposition under the Constitution.

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22 See *Almeda v. Office of the Ombudsman (Mindanao),* 791 Phil. 129, 144 (2016) [Second Division, Per J. Del Castillo], citing *Cervantes v. Sandiganbayan,* 366 Phil. 602, 609 (1999) [First Division, Per J. Pardo].

23 See *Coscolluela v. Sandiganbayan,* 714 Phil. 55, 64 (2013) [Second Division, Per J. Perlas-Bernabe].

24 379 Phil. 165-251 (2000) [En Banc, Per J. Melo].

25 Id. at 185.

26 See *Dela Peña,* supra, note 1; see also *Guerrero v. Court of Appeals,* 327 Phil. 496 (1996) [Third Division, Per J. Panganiban]; *Republic v. Desierto,* 480 Phil. 214 (2004) [Special Second Division, Per J. Austria-Martinez]; and *Perez v. People,* supra note 8.

One such case is *Dela Peña,* wherein it was required that an individual at least perform some overt act to show that he was not waiving that right. The ridiculousness of the principle of waiver of the right to speedy disposition of cases, however, could be easily gleaned from the ratiocination in *Dela Peña* itself — wherein it cited the filing of a motion for early resolution as an instance where the individual would be deemed not to have waived the right. It is absurd to place on the individual the burden *to egg on*, so to speak, government agencies to prioritize a particular case when it is their duty in the first place to resolve the same at the soonest possible time. To stress, it is the State which has the **sole** burden to see to it that the cases which it files, or are filed before it, are resolved with dispatch. Thus, to sustain the same principle laid down in *Dela Peña* in present and future jurisprudence is to perpetuate the erroneous notion that the individual, in any way, has the burden to expedite the proceedings in which he or she is involved.

Considering that the Constitution, unlike its U.S. counterpart, imposes upon the State the *positive* duty to ensure the speedy disposition of all judicial, quasi-judicial or administrative proceedings, waiver of the right to speedy disposition should not be implied solely from the respondent's silence. To be sure, the duty to expedite proceedings under the Constitution does *not* pertain to the respondent, but to the State. To fault the respondent for the State's inability to comply with such positive duty on the basis of mere silence is, in my view, the height of injustice.

Following these parameters, it is my view that petitioner *cannot* be precluded from invoking his right to speedy disposition in the present case.

The *ponencia* further averred that institutional delay is a reality, and is thus inevitable. It further stated that "[p]rosecution is staffed by overworked and underpaid government lawyers with mounting caseloads. Court dockets are congested."[27] While this "reality" may exist, as it exists in any government, it does not, as it should not, in any way justify the State's act of subjecting its citizens to unreasonable delays that impinge on their fundamental rights. I therefore disagree with the *ponencia* where it said that:

> Institutional delay, in the proper context, should not be taken against the State. Most cases handled by the Office of the Ombudsman involve powerful politicians who engage private counsel with the means and resources to fully dedicate themselves to their client's case. More often than not, respondents only invoke the right to the speedy disposition of cases when the Ombudsman has already rendered an unfavorable decision. The prosecution should not be prejudiced for private counsels' failure to protect the interests of their clients or the accused's lack of interest in the prosecution of their case.[28]

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[27] *Ponencia*, p. 33.
[28] Id. at 34.

I disagree for two reasons:

First, this statement is based on the premise that the individual has the burden to do something to expedite the proceedings. To repeat, to require individuals to do so would be to sanction deviation by government agencies, including the courts, from its sacrosanct duty of dispensing justice. Cliché as it may be, it cannot be denied that justice delayed is justice denied.

Second, the fact that "[m]ost cases handled by the Office of the Ombudsman involve powerful politicians who engage private counsel with the means and resources to fully dedicate themselves to their client's case"[29] does not constitute a sufficient excuse. The State's disadvantage, if any, brought about by the *creativity* of defense counsels is easily balanced out by the second of the four factors laid down in *Dela Peña*, namely, when the court takes into consideration the reasons for the delay in determining whether the right to speedy disposition has indeed been violated.

For instance, in *Mendoza-Ong v. Sandiganbayan,*[30] the Court held that the right to speedy disposition of cases was not violated, as the accused herself contributed to the instances of delay for her refusal to provide certain information despite orders from the Court. In *Domondon v. Sandiganbayan (First Division)*,[31] the Court ruled that the right was not violated because the "postponements were caused by numerous pending motions or petitions"[32] filed by the accused themselves.

Thus, even as the Court may recognize institutional delay as a reality, the result of such recognition should be a thrust towards structural and procedural changes. The answer lies in reforming these institutions, but certainly not in sanctioning a violation of an individual's constitutionally guaranteed right to a speedy disposition of his case.

Time and again, this Court has recognized the State's inherent right to prosecute and punish violators of the law.[33] This right to prosecute, however, must be balanced against the State's duty to respect the fundamental constitutional rights extended to each of its citizens.

This Court has held that every reasonable presumption against the waiver of fundamental constitutional rights must be afforded.[34] Such waiver "not only must be voluntary, but must be knowing, intelligent, and done with sufficient awareness of the relevant circumstances and likely consequences."[35]

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29 Id.
30 483 Phil. 451, 457 (2004) [Special Second Division, Per J. Quisumbing].
31 512 Phil. 852 (2005) [First Division, Per J. Ynares-Santiago].
32 Id. at 863.
33 See *Allado v. Diokno,* 302 Phil. 213, 238 (1994) [First Division, Per J. Bellosillo].
34 See generally *Chavez v. Court of Appeals,* 133 Phil. 661 (1968) [En Banc, Per J. Sanchez].
35 *People v. Bodoso*, 446 Phil. 838, 850 (2003) [En Banc, Per J. Bellosillo]; see also *People v. Caguioa,* 184 Phil. 1 (1980) [En Banc, Per C.J. Fernando].

To constitute a valid waiver of a constitutional right, it must appear that: (i) the right exists; (ii) the persons involved had knowledge, either actual or constructive, of the existence of such right; and, (iii) **the person possessing the right had an actual intention to relinquish the right**.[36]

Intent, being a product of one's state of mind, may be inferred only from external acts.[37] **Hence, the intention to relinquish a constitutional right cannot be deduced solely from silence or inaction**. A valid waiver of one's right to speedy disposition cannot thus be predicated on acquiescence alone, but rather, simultaneously anchored on acts indicative of an intent to relinquish. Verily, **"[m]ere silence of the holder of the right should not be easily construed as surrender thereof"**.[38]

The principles on waiver of constitutional rights find emphatic application in this case, for unlike other fundamental rights, the right to speedy disposition cannot be confined to a particular point in time, as it necessarily covers an indefinite period which expands and contracts for reasons not solely attributable to the whims of the accused but also on the nature of the offense, the complexity of the case, as well as other factors over which the accused has absolutely no control.

On such basis, I urge that the principle espoused in *Dela Peña* be revisited accordingly.

The case of *R v. Jordan*[39] (*Jordan*) is consistent with the foregoing principles proffered in this dissent. In *Jordan*, the Supreme Court of Canada declared as waived only those periods of time when the delay was attributable to the defense. Thus:

> In this case, the total delay between the charges and the end of trial was 49.5 months. As the trial judge found, **four months of this delay were waived by J when he changed counsel shortly before the trial was set to begin**, necessitating an adjournment. In addition, **one and a half months of the delay were caused solely by J for the adjournment of the preliminary inquiry because his counsel was unavailable for closing submissions on the last day**. This leaves a remaining delay of 44 months, an amount that vastly exceeds the presumptive ceiling of 30 months in the superior court. The Crown has failed to discharge its burden of demonstrating that the delay of 44 months **(excluding defence delay)** was reasonable. While the case against J may have been moderately complex given the amount of evidence and the number of co-accused, it was not so exceptionally complex that it would justify such a delay.[40] (Emphasis and underscoring supplied)

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36 *Pasion v. Locsin*, 65 Phil. 689, 694-695 (1938) [En Banc, Per J. Laurel]; emphasis supplied.

37 On intent, see J. Velasco, Jr., Concurring Opinion in *Poe-Llamanzares v. Commission on Elections*, G.R. Nos. 221697 & 221698-700, March 8, 2016, 786 SCRA 1, 402.

38 *People v. Bodoso*, supra note 35, at 850-851; emphasis supplied. See also *Alonte v. Savellano, Jr.*, 350 Phil. 700, 720 (1998) [En Banc, Per J. Vitug].

39 2016 SCC 27, [2016] 1 S.C.R. 631.

40 Id. at 634-635.

In addition, *Jordan* used different factors in determining if there was a waiver, unlike in the case of *Dela Peña* that limited it to an inquiry on whether the individual asserted his or her right to speedy disposition of cases. The Supreme Court of Canada, in interpreting "meaningful steps that demonstrate a sustained effort to expedite the proceedings" stated:

> As to the first factor, while the defence might not be able to resolve the Crown's or the trial court's challenges, it falls to the defence to show that it **attempted to set the earliest possible hearing dates, was cooperative with and responsive to the Crown and the court, put the Crown on timely notice when delay was becoming a problem, and conducted all applications (including the s. 11(*b*) application) reasonably and expeditiously.** At the same time, trial judges should not take this opportunity, with the benefit of hindsight, to question every decision made by the defence. The defence is required to act reasonably, not perfectly.[41]

To my mind, if the Court intends to insist on including the third of the four factors laid down in *Dela Peña* – the assertion or failure to assert such right by the accused – as upheld by the *ponencia,* then the said factor should be interpreted in the same manner as it was in *Jordan.* Again, bearing in mind that it is primarily the State's duty to see to it that the right to speedy disposition of cases is fulfilled, it bears to stress that it is the State which has the burden to prove that the individual indeed waived his or her right, instead of the other way around.

In fact, in this jurisdiction, the Court had already settled the appreciation of waiver *vis-à-vis* the right to speedy disposition. In *Remulla v. Sandiganbayan,*[42] the Court made a distinction on the seemingly conflicting two sets of cases that have dealt with waiver, and reconciled them. In apparent conflict, in the first set of cases,[43] the Court found that there was no violation of the right to speedy disposition of cases due to the failure to assert such right, while in the second set of cases,[44] the Court found otherwise.

The Court in *Remulla* found no conflict between these two sets of cases. In the first set, the Court did not solely rely on the failure of the accused to assert his right; rather, the proper explanation on the delay and the lack of prejudice to the accused were also considered therein. Likewise, the Court in the second set of cases took into account several factors in upholding the right to a speedy disposition of cases, such as length of delay,

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41 Id. at 633.

42 G.R. No. 218040, April 17, 2017, 823 SCRA 17 [Second Division, Per J. Mendoza].

43 See *Tilendo v. Sandiganbayan*, 559 Phil. 739 (2007) [Second Division, Per J. Carpio], *Guerrero v. Court of Appeals*, supra note 26, *Bernat v. Sandiganbayan*, 472 Phil. 869 (2004) [First Division, Per J. Azcuna, and *Tello v. People*, 606 Phil. 514 (2009) [First Division, Per J. Carpio].

44 See *Cervantes v. Sandiganbayan*, supra note 22; *People v. Sandiganbayan, Fifth Division*, 791 Phil. 37 (2016) [Third Division, Per J. Peralta]; *Inocentes v. People*, 789 Phil. 318 (2016) [Second Division, Per J. Brion]; *Coscolluela v. Sandiganbayan*, supra note 23; and *Duterte v. Sandiganbayan*, 352 Phil. 557 (1998) [Third Division, Per J. Kapunan].

failure of the prosecution to justify the period of delay, and the prejudice caused to the accused. Hence, the Court in the second set of cases found that the lack of follow ups from the accused outweighed the utter failure of the prosecution to explain the delay of the proceedings.[45]

What can be deduced from both sets of cases is that the balancing test necessarily compels the court to approach speedy trial and speedy disposition cases on an *ad hoc* basis. In considering the four factors, the Court cautioned that none of these factors is "either a necessary or sufficient condition; they are related and must be considered together with other relevant circumstances. These factors have no talismanic qualities as courts must still engage in a difficult and sensitive balancing process."[46]

As regards waiver, the Court in *Remulla* made the following pronouncements:

> In addition, **there is no constitutional or legal provision which states that it is mandatory for the accused to follow up his case before his right to its speedy disposition can be recognized.** To rule otherwise would promote judicial legislation where the Court would provide a compulsory requisite not specified by the constitutional provision. It simply cannot be done, thus, the *ad hoc* characteristic of the balancing test must be upheld.
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> Likewise, contrary to the argument of the OSP, **the U.S. case of *Barker v. Wingo,* from which the balancing test originated, recognizes that a respondent in a criminal case has no compulsory obligation to follow up on his case.** It was held therein that "[a] defendant has no duty to bring himself to trial; the State has that duty as well as the duty of insuring that the trial is consistent with due process."[47] (Emphasis supplied)

The Court even went further and stated that the rule that the accused has no duty to follow up on the prosecution of their case is not limited to cases where the accused is unaware of the preliminary investigation as was the case in *Coscolluela v. Sandiganbayan*[48] (*Coscolluela*). On the contrary, the subsequent rulings of *Duterte v. Sandiganbayan*[49] (*Duterte*), *Cervantes v. Sandiganbayan*[50] (*Cervantes*), *People v. Sandiganbayan, Fifth Division*[51] (*People*), and *Inocentes v. People*[52] (*Inocentes*) show that the rule is applicable even if the accused was fully informed and had participated in the investigation.[53] Verily, the factors in the balancing test must not be rigidly

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45 Supra note 42, at 33.
46 Id. at 27.
47 Id. at 35-36.
48 Supra note 23.
49 Supra note 44.
50 Supra note 22.
51 Supra note 44.
52 Supra note 44.
53 See *Remulla v. Sandiganbayan*, supra note 42, at 36.

applied but must be weighed in light of the factual circumstances of each case.

As applied in the facts of *Remulla*, the Court therein ruled that the failure of the prosecution to justify the nine-year interval before the case was filed in court far outweighed the accused's own inaction over the delay. Citing *Coscolluela, Duterte, Cervantes, People*, and *Inocentes*, the Court reiterated that it is the duty of the prosecutor to expedite the prosecution of the case regardless of whether or not the accused objects to the delay.[54]

In the recent case of *People v. Macasaet*,[55] the Court pronounced that "the silence of the accused during such period [of delay] could not be viewed as an unequivocal act of waiver of their right to speedy determination of their cases. That the accused could have filed a motion for early resolution of their cases is immaterial. The more than eight years delay the [Prosecutor] incurred before issuing his resolution of the complaints is an affront to a reasonable dispensation of justice and such delay could only be perpetrated in a vexatious, capricious, and oppressive manner."[56]

The following pronouncements in *Almeda v. Office of the Ombudsman (Mindanao)*[57] illustrate why the burden of expediting the cases should not be placed on the accused:

> Regarding delays, it may be said that "[i]t is almost a universal experience that the accused welcomes delay as it usually operates in his favor, especially if he greatly fears the consequences of his trial and conviction. He is hesitant to disturb the hushed inaction by which dominant cases have been known to expire." These principles should apply to respondents in other administrative or quasi-judicial proceedings as well. It must also be remembered that **generally, respondents in preliminary investigation proceedings are not required to follow up on their cases; it is the State's duty to expedite the same "within the bounds of reasonable timeliness."**
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> x x x x
>
> "It is the **duty of the prosecutor to speedily resolve the complaint, as mandated by the Constitution, regardless of whether the (respondent) did not object to the delay or that the delay was with his acquiescence provided that it was not due to causes directly attributable to him."** Failure or inaction may not have been deliberately intended, yet unjustified delay nonetheless causes just as much vexation and oppression. Indeed, delay prejudices the accused or respondent — and the State just the same.[58] (Emphasis and underscoring supplied)

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54 Id. at 42.
55 G.R. Nos. 196094, 196720 & 197324, March 5, 2018 [Second Division, Per J. Caguioa].
56 Id. at 19.
57 791 Phil. 129 (2016) [Second Division, Per J. Del Castillo].
58 Id. at 144.

In any event, I find that even if the third factor of the balancing test were to be applied, petitioner's alleged inaction in this case still fails to qualify as an implied waiver of his right to speedy disposition.

A review of recent jurisprudence that rely on and follow *Dela Peña* illustrates that, far too often, the Court has used this one factor alone in denying the right against speedy disposition of cases.[59] Such practice, as explained, is contrary to the parameters set in *Barker*.

To recall, *Barker* instructs that the third factor in the balancing test serves as an important factor that should be measured in conjunction with the prejudice that the accused experiences as a consequence of the delay ascribed to the prosecution. **Hence, inaction on the part of the accused, *without more*, should not be *a priori* deemed as an implied waiver of such right**.

In this connection, I respectfully submit that even if the third factor of the balancing test, as applied in *Dela Peña,* is adopted herein, petitioner still cannot be deemed to have waived his right to speedy disposition because he purportedly failed to show that he had asserted his right during the period of delay.

It bears emphasizing that petitioner had been criminally charged as a result of two separate investigations before the OMB — OMB-M-C-0487-J (PI-1) and OMB-M-C-0480-K (PI-2), which began sometime in September 2003 and October 2004, respectively.[60] PI-1 led to the filing of an Information dated **July 12, 2005** for the 1st Sandiganbayan case.[61] Petitioner was acquitted of this charge through the Decision dated **June 17, 2010** rendered by the Fourth Division of the Sandiganbayan.[62]

It appears, however, that on **November 17, 2011**, two Informations were filed for the 2nd and 3rd Sandiganbayan cases.[63] The Informations in question proceed from the results of PI-2, which, in turn, is the subject of the present Petition.

To my mind, the petitioner cannot be said to have slept on his rights from July 12, 2005 to June 17, 2010, in view of his participation in the 1st Sandiganbayan case. In other words, it was reasonable for petitioner to assume that his participation in the 1st Sandiganbayan case would work towards the termination of PI-2 in his favor, considering that both proceed from closely related incidents.

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59 See *Perez v. People*, supra note 8; *Bernat v. Sandiganbayan*, supra note 43, at 875-876; *Valencia v. Sandiganbayan,* 510 Phil. 70, 90 (2005) [First Division, Per J. Ynares-Santiago]; and *De Guzman, Jr. v. People*, G.R. Nos. 232693-94, August 23, 2017 (Unsigned Resolution).

60 See *ponencia,* pp. 4-5.

61 Id. at 5-6.

62 Id. at 6.

63 Id. at 7.

Moreover, the State failed to show that the delay from July 12, 2005 to June 17, 2010 was reasonable. The *ponencia*'s holding that the transactions were complex and numerous, involving 40 individuals in 81 transactions, is not sufficient to justify the delay. As the *ponencia* admits, the COA Report already exhaustively investigated each transaction. It nonetheless ruled that delay was inevitable in the hands of a competent and independent Ombudsman.[64] This fails to justify the delay.

Given that a constitutional right is at stake, the Ombudsman should justify what it had done during the period from July 12, 2005 to June 17, 2010. Indeed, the Ombudsman is not bound by the findings of COA. But the Ombudsman should show the actions it had done with regard to the findings of the COA. Its failure to do so shows the lack of justification for its delay in filing the Informations subject of these Petitions.

I vote to **GRANT** the Petitions.

ALFREDO BENJAMIN S. CAGUIOA
Associate Justice

[64] Id. at 38.