PEOPLE V. LACSON: THE RULE ON PROVISIONAL DISMISSAL

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INTRODUCTION

People, and society as a whole, tend to be conservative.[1] And so does the pervasive institution we call, law. Law is inherently opposed to change for it establishes norms and rules. Norms and rules cannot become "norms" understood in its proper denotation unless they remain the same for a sufficient period of time. Change is avoided so that norms can be established. Further, from a practical perspective, for law to be changed it requires the long and tedious process of law-making and rule-making. This is followed by the implementation phase by the executive branch. Then finally, the interpretation of law, a function of the judiciary. It is here in this non-political branch of government that consequent changes in law are minimized if not totally countered or avoided.

The judicial power of the courts can only be exercised to settle actual controversies.[2] In deciding cases, *obiter dicta* are avoided. Thus, it takes a long time for the full impact of new laws, whether statutes or rules, procedural and implementing, to be judicially sanctioned. Further, change in law is minimized or counteracted by at least three legal doctrines namely, (1) the doctrine of *stare decisis et non quieta movere*,[3] (2) the *ratio legis*[4] and (3) the *interpotare et concordare legibus est optimus interpotandi modus*[5] rules of statutory construction.

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** LL.B., University of the Philippines College of Law (ranked 6th in the batch) (2005); B.A. Political Sciences, University of the Philippines College of Social Sciences and Philosophy (*Magna Cum Laude*) (2000); Associate, Castillo Laman Tan Pantaleon and San Jose Law Offices.

[1] At the time of the writing of this paper, U.S. Pres. George W. Bush of the conservative Republican Party won re-election. Commentators argue that he won because of his conservative stance in controversial issues such as the family, abortion, stem cell research, and marriage.

[2] CONST. art. VIII, sec. 1, par. (2).

[3] Of common law origin. It means to adhere to precedents, and not to unsettle things that are established. BLACK'S LAW DICTIONARY (6th ed., 1990).

[4] Interpretation according to spirit. RUBEN. E. AGPALO, STATUTORY CONSTRUCTION 480 (1998).

[5] Every statute must be so construed and harmonized with other statutes as to form a uniform system of law. R. AGPALO, *op. cit. supra* note 4, at 478.

This paper is not about the ideology of conservatism in law *per se*. Rather, it is about the application of such a judicial attitude when looking into the effects of the new rule on provisional dismissal,[6] on the State's right to prosecute crimes and felonies[7] and on the accused's rights to speedy trial[8] and speedy disposition of cases.[9]

The case of *People v. Lacson*[10] is the first and so far only case decided by the Supreme Court that deals squarely with some of the issues surrounding the new rule on provisional dismissal.[11] Like other cases, it did not raise all the issues related to the new rule. The most important question left unanswered by the majority decision centers on the effects of the new rule on the State's right to prosecute and the defendant's rights to speedy trial and speedy disposition of cases.

This paper, therefore, tries to present the issues resolved by the *People v. Lacson* decision, to clarify the questions left unanswered by the decision and to give answers from several views such as Justice Bellosillo's separate opinion.

The first part of this paper provides a review of *People v. Lacson*. The new rule on provisional dismissal as distilled from *People v. Lacson* then follows. Afterwards, the effects of the new rule on the State's right to prosecute and the accused's rights to speedy trial and speedy disposition of cases are analyzed. Implications from the majority decision on the effects are pinpointed. The views from the separate opinion and the dissenting opinions and the author's position are also presented. Finally, the paper ends with a summary of what the writer deems to be the proper resolution of the problem.

I. *PEOPLE V. LACSON*: THE CASE AT BAR

The 2000 Revised Rules of Criminal Procedure added a new section specifically dealing with provisional dismissal. This is the first time in Philippine legal history where a code of criminal procedure provides an extant section on the topic. This single section in Rule 117 is what is referred to in this paper as the New Rule on Provisional Dismissal:

> Sec. 8. *Provisional dismissal.* – A case shall not be provisionally dismissed except with the express consent of the accused and with notice to the offended party.
>
> The provisional dismissal of offenses punishable by imprisonment not exceeding six (6) years or a fine of any amount, or both, shall become permanent one (1) year after issuance of the order without the case having been revived. With respect to offenses punishable by imprisonment of more than six (6) years, their

[6] RULES OF COURT, Rule 117, sec. 8.

[7] Particularly the law on prescription of crimes.

[8] CONST. art. III, sec. 14, par. (2).

[9] CONST. art. III, sec. 16.

[10] People v. Lacson I, 432 Phil. 113 (2002), People v. Lacson II, G.R. No. 149453, April 1, 2003, & People v. Lacson III, G.R. No. 149453, October 7, 2003.

[11] Effective 1 December 2000, per A.M. No. 00-5-03-SC.

provisional dismissal shall become permanent two (2) years after issuance of the order without the case having been revived. (n)[12]

To show its roots in decisional history, the new rule on provisional dismissal is placed in Rule 117 immediately after the rule on double jeopardy in section 7. The precursor or ancestor, so to speak, of the concept of provisional dismissal is "dismissal with the express consent of the accused" in the rule on double jeopardy.

At the time of the writing of this paper, the first and only case in the Supreme Court that has dealt directly with the new rule on provisional dismissal is *People v. Lacson*.[13] The majority and the minority views[14] had to grapple with the questions surrounding the new rule in relation to the concepts of prescription of crimes and rights to speedy trial and speedy disposition of cases.

A. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The accused, Senator Panfilo Lacson,[15] was Chief Superintendent and head of the Presidential Anti-Crime Commission (PACC) at the time the material facts of the case happened. Together with twenty-six (26) others, Lacson faced eleven informations for murder, filed by the Ombudsman before the Sandiganbayan.

1. The First Prosecution

Before the Sandiganbayan, Lacson's motion for reinvestigation was granted. Thereafter, amended informations were filed charging the same twenty-six (26) accused; but the participation of accused Lacson was downgraded from principal to accessory. Arraignment followed and Lacson entered a plea of not guilty. Due to statutory changes and a subsequent decision by the Supreme Court,[16] the cases were transferred and raffled off to the Quezon City Regional Trial Court, Branch 81, presided by Judge Agnir, Jr. Before the arraignment, Lacson filed a motion to (1) make a judicial determination of the existence of probable cause for the issuance of warrants of arrest, (2) to hold in abeyance the issuance of the warrants, and (3) a general prayer for other just and equitable relief.[17] It was not clear whether the private offended parties were notified of the hearing on the motion. Judge Agnir resolved the motion in favor of Lacson and dismissed the cases saying: "There is no more evidence to show that a crime

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[12] A similar provision, where the concepts of dismissal without prejudice and revival are used, is section 18 of the 1991 Revised Rules on Summary Procedure.

[13] For a short reading and interpretation of the case of People v. Lacson, *supra*, see FORTUNATO GUPIT, JR., SIGNIFICANT REVISIONS IN CRIMINAL PROCEDURE 73-75 (2003).

[14] Separate concurring and dissenting opinions.

[15] After his stint as PACC head, Lacson later was appointed by Pres. Joseph Estrada as Director-General of the Philippine National Police (PNP). He was elected as senator in 2001. He ran for president in 2004 but lost to the incumbent president.

[16] See Lacson v. Executive Secretary, 361 Phil. 251 (1999).

[17] It must be emphasized that in the narration of facts of People v. Lacson I, the Court said that the third prayer is to "dismiss the cases should the trial court find lack or probable cause." This finding was contradicted by the People and it became an issue in People v. Lacson II & III.

has been committed and that the accused are probably guilty thereof. Following the doctrine above-cited (*Allado v. Diokno*[18]), there is no more reason to hold accused for trial and further expose them to an open and public accusation."[19]

2. The Second Prosecution for the Same Offenses

More than two years later, because of some new affidavits presented by the witnesses, a new preliminary investigation was conducted.[20] In order to enjoin the prosecutors from conducting the preliminary investigation, Lacson invoked his constitutional right against double jeopardy[21] and filed a petition for prohibition with the Manila Regional Trial Court, which was denied by Judge Pasamba. This paved the way to the filing of eleven (11) more informations for the same offenses in the Quezon City Regional Trial Court. In those cases, Lacson's participation was upgraded to that of a principal.

Initially relying on the right against double jeopardy, Lacson filed a petition for *certiorari* assailing the order of Judge Pasamba before the Court of Appeals.[22] However, in his second amended petition, he raised and essentially depended on the new rule on provisional dismissal enshrined in Rule 117, section 8. Eventually, the Court of Appeals,[23] with Associate Justice Guerrero dissenting, granted the petition and declared null and void the preliminary investigation and the corresponding informations.

3. *People v. Lacson I*

The People et al.[24] sought to reverse the decision of the Court of Appeals via a petition for review on certiorari filed before the Supreme Court. On 28 May 2002, in a unanimous resolution, with Justices Melo and Carpio taking no part, the Court took the middle ground by neither siding with the People nor with Lacson.[25] It remanded the case to the Quezon City Regional Trial Court, Branch 81, so that the prosecutors and Lacson could adduce evidence on whether the requirements of the new rule on provisional dismissal have been complied with. This resolution is referred to as *People v. Lacson I* in this paper.

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[18] G.R. No. 113630, May 5, 1994.

[19] People v. Lacson I, 432 Phil. 113, 122 (2002).

[20] As to this fact, see one dissenting opinion, People v. Lacson II, G.R. No. 149453, April 1, 2003 (Sandoval-Gutierrez, *J., dissenting opinion*).

[21] The counsel of Lacson miscalculated by basing the petition on the right against double jeopardy. The requisite of entry of a valid plea was absent because the plea entered by Lacson was before the Sandiganbayan, which had no jurisdiction over the offense. In addition, the counsel should have filed its motion before Judge Agnir after entry of plea so that the right against double jeopardy could have been validly invoked later.

[22] Special Third Division.

[23] The decision is penned by Associate Justice Eriberto U. Rosario, Jr. and concurred in by Associate Justices Conrado M. Vasquez., Jr., Hilarion L. Aquino, and Josefina Guevara-Salonga. Associate Justice Buenaventura J. Guerrero dissented.

[24] Other named petitioners are the Secretary of Justice, the Director-General of the PNP, Chief State Prosecutor Jovencito Zuño, State Prosecutors Peter L. Ong and Ruben A Zacarias, Second Assistant Prosecutor Conrado M. Janolin and City Prosecutor of Quezon City Claro Arellano.

[25] People v. Lacson I, *supra.*

4. *People v. Lacson II*

The People and other petitioners took no time in filing a Motion for Reconsideration. A divided Supreme Court on a 10-4 vote[26] reversed itself and granted the motion for reconsideration almost a year later on April 1, 2003.[27] Through the pen of Justice Callejo, Sr., it thus reversed the decision of the Court of Appeals and directed the Regional Trial Court, Branch 81, of Quezon City to proceed with the trial of the criminal cases against Lacson. This resolution is referred to in this paper as *People v. Lacson II*.

5. *People v. Lacson III*

People v. Lacson III, in this paper, refers to the 7 October 2003 Resolution of the Supreme Court.[28] This Resolution dealt with several motions of Lacson. Essentially, he prayed for three reliefs, *viz.*: (1) reversal of *People v. Lacson II*, (2) recusation of five members[29] of the Court, and (3) setting of the motions for oral arguments. On an 8-4 vote,[30] the majority[31] through the same *ponente*, Justice Callejo, Sr., denied with finality all the motions. The *ponencia* also ordered the consolidation of the criminal cases and their re-raffle to one of the branches of Regional Trial Court in Quezon City designated as a special court exclusively for heinous crimes cases. The dissenters[32] stood their ground and remained firm in their position on the issues.

B. ISSUES, ARGUMENTS AND RULINGS

1. The Unanimous *People v. Lacson I*

a. On Express Consent

The order of dismissal issued by Judge Agnir, upon motion of accused Lacson, is unconditional and without any reservation:

> WHEREFORE, in view of the foregoing, the Court finds no probable cause for the issuance of the warrants of arrest against the accused or to hold them for

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[26] By this time, there were already four new members of the Court. Chief Justice Davide, Jr., Justices Mendoza, Panganiban, Austria-Martinez, Corona, Carpio-Morales and Azcuna concurred with the *ponencia* of Justice Callejo, Sr. Justice Bellosillo concurred in the result but filed a separate opinion. Justice Quisumbing, concurred with Justice Bellosillo's opinion. These ten justices composed the majority. Justices Puno, Vitug, and Sandoval-Gutierrez filed their respective dissenting opinions. Justice Ynares-Santiago, joined the dissents of Justices Puno and Sandoval-Gutierrez. These four formed the minority. Justice Carpio took no part.

[27] People v. Lacson II, *supra*.

[28] People v. Lacson III, GR No. 149453, October 7, 2003.

[29] Lacson sought the inhibition of Justices Corona, Austria-Martinez, Morales, Callejo, Sr. and Azcuna from the resolution of the motions.

[30] Three justices did not participate. These were Justices Carpio, Tinga and Corona.

[31] Chief Justice Davide, Jr., Justices Bellosillo, Panganiban, Quisumbing, Austria-Martinez, Carpio-Morales, and Azcuna, concurred in the *ponencia* of Justice Callejo, Sr..

[32] Justices Puno and Vitug maintained their respective dissenting opinions in People v. Lacson II, *supra*, while Justices Ynares-Santiago and Sandoval-Gutierrez filed their respective dissenting opinions.

> trial. Accordingly, the Informations in the above-numbered cases are hereby ordered dismissed.
>
> SO ORDERED.33

After failing in its first attempt to invoke the right against double jeopardy because the requisite of a valid plea was absent, the defense changed its theory and based its petition before the Court of Appeals on the new rule on provisional dismissal. Despite the absence of any indication in the order of dismissal of the lower court that such is provisional, the Court of Appeals still ruled that said dismissal was provisional. Implicit here is this line of reasoning: (1) since the rule on double jeopardy does not apply as correctly held by Judge Pasamba, then another prosecution for the same offense will lie, and (2) since another prosecution will lie, it thus manifests the effect of provisional dismissal, ergo, (3) the order of dismissal is a provisional dismissal. As a purely logical matter, the conclusion, i.e., No. (3), is flawed. It commits the fallacy of affirming the antecedent.[34]

It could have been legally valid, though still illogical, if there was no new rule on provisional dismissal. A review of the different codes of criminal procedure in force in the Philippines throughout the twentieth century shows that there was no extant provision in any of the codes that specifically governed or even sanctioned explicitly the concept of provisional dismissal. From the provisions of past codes of criminal procedure the nearest provisions relating to provisional dismissal are those concerning double jeopardy. In fact, the rule on provisional dismissal appeared only as an adjunct of the rule on double jeopardy. Previously, the rule on provisional dismissal was imbedded in one of three manners by which a former or first jeopardy is terminated. The three modes of termination of former jeopardy are conviction (*auterfois convict*[35]), acquittal (*auterfois acquit*[36]) and dismissal or termination of the case without the accused's express consent. The reverse of the third mode is a species of provisional dismissal. That is, dismissal or termination of a criminal case with the defendant's express consent is equivalent to provisional dismissal of the case. Chief Justice Moran, in his Comments on the Rules of Court, tersely elucidates on this point.

> The possibility of the idea as to provisional dismissal may arise only as a mere consequence of a dismissal with or without the express consent of the accused. For, if the dismissal is without the express consent of the accused it becomes final, because jeopardy attaches. But if the dismissal is with the express consent of the accused, it is provisional since no jeopardy attaches and another criminal action

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[33] People v. Lacson I, 432 Phil. 113, 123 (2002).

[34] The classic example of this fallacy is the argument: "If it was raining, the streets will be wet. But the streets are wet. Therefore, it was raining." The fact that the streets are wet may be caused by several reasons aside from rain. Substituting the terms of the argument with the concepts under consideration, the argument will look like this: "If it was provisional dismissal, another prosecution for the same offense would lie. But another prosecution for the same offense would lie. Therefore, it was provisional dismissal." See T. BURNS, A THEORY OF THE TRIAL 41. As is shown later, the effect of the new rule on provisional dismissal is partly to affirm the *Gandicela* line of cases by requiring express consent of the accused even in the case of provisional dismissal.

[35] Literally, "formerly convicted." BLACK'S LAW DICTIONARY (6th ed., 1990).

[36] Literally, "formerly acquitted." BLACK'S LAW DICTIONARY (6th ed., 1990).

> may be brought. But it is not the provisionality or finality of the dismissal that generates the factor leading to the solution as to whether or not jeopardy attaches. The determinative idea is the existence or non-existence of an express consent of the accused for that is the only element that may evince the existence or non-existence of a waiver by the accused of his constitutional right, which in turn is the only means by which jeopardy may or may not attach in cases of dismissal.[37]

However, it must be pointed out that provisional dismissal *per se* is broader than the provisional dismissal corresponding to the opposite of the third mode of termination of former jeopardy (dismissal with the accused's express consent). The latter can be considered as one species of provisional dismissal. Provisional dismissal is a much broader concept because the court can enter it even if none of the other requisites for the application of the double jeopardy rule is present.

In decisional history, the concepts of unconditional (or simple or definite) dismissal and provisional dismissal (or dismissal without prejudice) had to go through a very problematic path. This is evidenced by three views.

The first view was enunciated in *Jaca v. Blanco*.[38] In this case, the lower court on its own and without the consent of the defendant dismissed the case without prejudice for failure of the prosecution to appear. However, a few minutes later it set aside its order of dismissal when the wayward prosecution arrived. The Supreme Court held that the dismissal contemplated in the rule is a definite or unconditional dismissal, which terminates the case, and not a dismissal without prejudice. In order for the rule on double jeopardy not to apply, the Supreme Court needed to construe the term "dismissal" to which the accused must not have given his express consent to mean definite or unconditional dismissal. It leads therefore to the conclusion that provisional dismissal cannot give rise to the operation of the double jeopardy rule, even if the accused did not consent to it.[39]

However, a year later, the Supreme Court in *Gandicela v. Lutero*[40] seemed to contradict itself when it took a different position from that held in *Jaca*. This is the second view. In that case the Court in a hypothetical remark said:

> If the defendant or petitioner did not move for the dismissal and the respondent dismissed the case, the dismissal would be definite or a bar to another prosecution for the same offense, even if the court or judge erroneously states in the order of dismissal that it be without prejudice on the part of the city fiscal to file another information, because the court can not change the nature and legal effects of such dismissal, and the petitioner cannot be prosecuted again for the same offense. [41]

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[37] 4 MANUEL V. MORAN, COMMENTS ON THE RULES OF COURT 273-274 (1980).
[38] Jaca v. Blanco, 86 Phil 452 (1950).
[39] *Id.* at 455.
[40] Gandicela v. Lutero, 88 Phil 299 (1951).
[41] *Id.* at 304-305.

In the Resolution of the accused's motion for reconsideration the Court continued:

> In the resolution denying the appellant's motion for reconsideration in the case of Francisco v. Borja, *supra*, p. 83 and in the decision in the present case, we held that courts have no discretion to determine or characterize the legal effects of their orders or decisions, unless expressly authorized by law to do so as provided for in Rule 30, Rules of Court. The addition of such words as "without prejudice", "provisionally," or "definitely" to their order or decision would be a mere surplusage if the legal effect thereof under the law is otherwise, because courts cannot amend the law. So it is not for the court to state in the order or decision that the case is dismissed either definitely or without prejudice. The legal effect of a dismissal depends upon the stage of the trial and the circumstances under which a criminal case is dismissed.[42]

In this case the Supreme Court was saying that a dismissal without prejudice and without the express consent of the accused does not amount to a provisional dismissal where second prosecution is allowed but on the contrary would be covered by the proscription of double jeopardy. This is the direct opposite of the holding in *Jaca* where it was held immaterial whether the accused consented or not to dismissal without prejudice ordered by the court *motu proprio*. From this perspective, the concept of provisional dismissal is not different from unconditional dismissal. The addition of the word "provisional" is without any legal effect.[43]

Justice Labrador aired a different view, the third view, in his concurring opinion[44] in *People v. Jabajab*.[45] It can be read from him that the opposite of "dismissal without the express consent of the accused" is provisional dismissal only. According to him:

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[42] *Id.* at 306.

[43] In People v. Hinaut, 105 Phil 303 (1959), the Court initially tried to resolve the conflict when it clarified *Gandicela*, at 305-306, to wit:

> When the accused signified their express conformity with the provisional dismissal of the case, there was neither acquittal nor dismissal that would put them twice in jeopardy of the same offense upon the refilling of the case. The resolution of this Court dated May 21, 1951, in the case of Gandicela *vs.* Lutero, *supra* (wherein it was hinted that the addition of the words "without prejudice" or "provisional" to a court's order dismissing a case are *(sic)* without legal effect) contemplates a dismissal on the merits amounting to acquittal or a dismissal after arraignment and plea without the express consent of the accused. This is not true in this case, for the dismissal according to the Justice of the Peace, was premised on the need of the prosecution to have more time in securing a missing piece of evidence necessary for the conviction of the accused. It is important to note that what was sought for by the Provincial Fiscal, to which the accused expressed their agreement, was not a simple or unconditional dismissal of the case, but its provisional dismissal that prevented it from being finally disposed of. Certainly, the accused cannot now validly claim that the dismissal was, in effect, on the merits and deny its provisional character. Even assuming moreover, that there was double jeopardy, they should be considered as having waived the constitutional safeguard against the same.

[44] His opinion was quoted with approval in the subsequent case, People v. Hinaut, *supra*.

[45] People v. Jabajab, 100 Phil 307 (1956). Important to note is the dissenting opinion, at 317-318, of Justice Felix.

> In my humble opinion the decisive fact which determines whether jeopardy attached upon the issuance of the order of dismissal is the provisional nature of the dismissal and the reservation of the right of the fiscal to "refile these two cases if he so desires in the interest of justice." Jeopardy can be invoked only if the case is finally disposed of or terminated. Dismissal under Section 9 of Rule 113 implies final dismissal, a positive termination of the case. If the dismissal contains a reservation of the right to file another action, the case cannot be said to have terminated and jeopardy does not attach. This is the reason for our ruling in Jaca *vs.* Blanco, 86 Phil. 452.[46]

This opinion of Justice Labrador became the essence of the unanimous decision in *People v. Labatete*,[47] where it was held that a dismissal entered even upon the motion of the accused, if not provisional or without prejudice, constitutes first jeopardy. Viewed another way, this position started the total distinction between the concept of provisional dismissal and unconditional dismissal with the express consent of the accused. Provisional dismissal is treated as the opposite of dismissal without the express consent of the accused. On the other hand, unconditional dismissal with the express consent is not treated as such.

To recapitulate, *Gandicela* and its line of cases[48] focused on the absence or presence of the defendant's express consent to dismissal disregarding the use of "without prejudice" or "provisional" while the position of Justice Labrador and the decisions[49] that embodied it emphasize the provisional nature of the order of dismissal. These positions must be contrasted with the group of cases[50] headed by *Jaca* where express consent of the accused is material only when the dismissal is unconditional and it becomes immaterial when the dismissal is provisional. Going to the details[51] and at the expense of being repetitive, for another prosecution for the same offense to lie (which is precisely the effect of provisional dismissal *per se*) only (1) an unconditional dismissal with the express consent of the accused or (2) a provisional dismissal with the express consent of the accused will suffice following *Gandicela.*

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[46] People v. Jabajab, *supra* at 311.

[47] People v. Labatete, 107 Phil 697 (1960).

[48] People v. Fajardo, 49 Phil. 206 (1926)], People v. Golez, 108 Phil. 855 (1960), Esmeña v. Pogoy, 190 Phil. 722 (1981), & Caes v. IAC, G.R. No. 74989, November 6, 1989.

[49] People v. Jabajab, *supra* (Labrador, *J., concurring opinion*); & People v. Labatete, *supra.*

[50] People v. Manlapas, 116 Phil. 33 (1962); Republic v. Agoncillo, 148-B Phil. 367 (1971); & People v. Mogol, 216 Phil. 267 (1984)].

[51] For easy reference the similarities and dissimilarities among the three views are put in table form: "Yes" means subsequent prosecution for the same offense is allowed. "No" means subsequent prosecution for the same offense is proscribed.

Three Views	Unconditional dismissal*		Provisional dismissal	
	with the express consent of the accused	without the express consent of the accused	with the express consent of the accused	without the express consent of the accused
Jaca v. Blanco Group	Yes	No	Yes	Yes
Gandicela v. Lutero Group	Yes	No	Yes	No
J. Labrador's Opinion	No	No	Yes	Yes

* Also called definite or simple or ordinary dismissal.

** Also called dismissal without prejudice or dismissal with the reservation of the right of the prosecution to file another action for the same offense.

On the other hand, following Justice Labrador's opinion, for another prosecution to be allowed, only (1) provisional dismissal with the consent of the defendant or (2) provisional dismissal (since Justice Labrador, did not qualify) without the consent of the accused can be validly relied upon by the accused.[52] In comparison, following *Jaca*, (1) an unconditional dismissal with the express consent of the accused or (2) a provisional dismissal with the consent of the accused or (3) a provisional dismissal without the consent of the accused cannot prevent subsequent prosecution.

The three views crisscrossed the path of judicial history without definite resolution until Rule 117, section 8, was promulgated.

With this brief history of provisional dismissal, the Court of Appeals could not have been totally faulted for its decision, for there were views[53] to the effect that unconditional dismissal with express consent of the accused is the same as provisional dismissal. But that was only valid then because there was yet no specific extant rule for provisional dismissal.

b. On the two-year period

The appellate court continued that since there was a provisional dismissal, the appropriate period provided for in the second paragraph of Rule 117, section 8, must not be exceeded by the prosecution. For the appellate court, the periods provided in the new rule are prescriptive periods; non-compliance with which will definitely bar another prosecution. Since the records show that the two-year period reckoned from the date of the order of dismissal has already lapsed when the second prosecution was begun, then such prosecution can no longer continue.

When the case reached the Supreme Court, the issue was formulated in this way: "whether Rule 117, Section 8 bars the filing of the eleven (11) informations against the respondent Lacson involving the killing of some members of the *Kuratong Baleleng* gang."[54]

The use of the words "bars the filing of the eleven (11) informations" focuses the attention on the second paragraph, specifically on the two-year period,[55] of the new

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[52] This reading of Justice Labrador's position presupposes that dismissal upon motion of the accused is considered dismissal with the express consent of the accused. Needless to say, the presupposition is based on the fact that the Court in People v. Obsania, 132 Phil. 782 (1968), has once and for all resolved that the motion to dismiss of the accused is a form of express consent. Otherwise, Justice Labrador's position can be read to mean that unconditional dismissal, i.e., without a reservation of the right to file another action, with the express consent of the accused, other than through the latter's motion to dismiss, cannot be considered termination of first jeopardy. Such cannot be a right reading for Justice Labrador's opinion explicitly requires a reservation of the right to file another action in the order of dismissal for such dismissal not to bar another prosecution.

[53] See discussion on *Jaca* & *Gandicela* views.

[54] People v. Lacson I, 432 Phil. 113, 127 (2002).

[55] The offenses involved are eleven (11) counts of murder. Murder under article 248 of the Revised Penal Code is punishable by *reclusion perpetua* to death. The offense involved is therefore punishable by more than six years.

rule. But if dissected correctly, the issue can be divided into two tiers. First is whether or not there was provisional dismissal. This issue centers on the first paragraph of the new rule. Second is whether or not the subsequent prosecution for the same offense is already barred by the second paragraph of the new rule. The second inquiry becomes relevant only if the answer to the first is in the affirmative.

The unanimous Court *en banc* corrected the appellate court. Implicit in the decision is that the Court saw the flaw in the reasoning of the CA. The Court focused their inquiry on the first tier. It must first determine whether there was provisional dismissal of the first attempt to prosecute. The Court said:

> However, this Court cannot rule on this jugular issue due to the lack of sufficient factual bases. Thus, there is need of proof of the following facts, *viz.* (1) whether the provisional dismissal of the cases had the express consent of the accused; (2) whether it was ordered by the court after notice to the offended party; (3) whether the 2-year period to revive has already lapsed; and (4) whether there is any justification for the filing of the cases beyond the 2-year period.[56]

Numbers 3 and 4 become relevant only if numbers 1 and 2 are answered in the affirmative. The Court continued by discussing the factual questions one by one and resolving them if the answers are found in the records.

First, the Court found that "there is no uncertainty"[57] that the dismissal bears the express consent of the accused. This is arrived at because "respondent Lacson himself... moved to dismiss the subject cases."[58]

Second, the Court, in scrutinizing the records, could not find a definite answer for no. 2. "The records of the case... do not reveal with equal clarity and conclusiveness whether notices to the offended parties were given before the cases against the respondent Lacson were dismissed by then Judge Agnir."[59]

At this juncture, the inquiry could have ended. The Court could have remanded the case to the lower court to receive evidence touching on the crucial factual issue in no. 2. Unless no. 2 is answered definitely in the affirmative, the questions regarding the second paragraph of Rule 117, section 8, need not be inquired into. But the Court continued to discuss numbers 3 and 4.

Third, number 3 took a new form in the discussion of the Court. It was originally phrased as "whether the 2-year period to revive has already lapsed." But at this point it became a question on *when* to reckon the 2-year period. In the words of the

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Under the second paragraph of Rule 117, sec. 8 the two-year period applies for offenses punishable by more than six years.

[56] People v. Lacson I, *supra* at 127-128.

[57] *Id.* at 128.

[58] *Id.* at 128.

[59] *Id.* at 128.

Court, "[t]he reckoning date of the 2-year bar has to be first determined - whether it is from the date of the Order of then Judge Agnir dismissing the cases or from the dates the Order were received by the various offended parties or from the date of the effectivity of the new rule."[60] The factual question was transformed into a question of law. Interestingly, even if the question is already one of law, the Court still did not definitely rule on it. It clung to the notion that the question remained a factual issue.

Fourth, implicit in the factual question in no. 4 is the ruling of the Court that the periods, one year or two years, are not strictly prescriptive periods. Although the Court referred to the period as a "2-year bar,"[61] it refused to call it a prescriptive period. Instead, the term "timeline"[62] is used. The timeline is not a prescriptive period because, unlike the law on prescription of crimes where the lapse of the period is an absolute bar to prosecution, in the case of the so-called timeline, the State can "present compelling reasons to justify the revival of cases beyond the 2-year bar."[63] Put simply, the 2-year bar is not an absolute bar. "If the cases were revived only after the 2-year bar, the State must be given the opportunity to justify its failure to comply with said timeline. The new rule fixes a timeline to penalize the State for its inexcusable delay in prosecuting cases already filed in courts."[64]

Ultimately, the Court remanded the case to Branch 81 of the Regional Trial Court of Quezon City so that,

> [T]he State prosecutors and the respondent Lacson can adduce evidence and be heard on whether the requirements of Section 8, Rule 117 have been complied with on the basis of the evidence of which the trial court should make a ruling on whether the Informations in Criminal Cases Nos. 01-101102 to 01-101112 should be dismissed or not."[65]

In sum, the Court in *People v. Lacson I* gave a preview of the requisites for the operation of the new rule on provisional dismissal, *i.e.*, factual issues in numbers 1 and 2. It also refused to rule on the question of law as to the nature of the effectivity of the new rule. This was a mistake that the Court would rectify later in *People v. Lacson II* and *III*. The first aftershock of the change brought by the new rule was ushered in by the Court in its characterization of the timeline as different from the legal concept of prescription of crimes. Subsequent aftershocks in other fields of law would be highlighted by the counsel of Lacson and the members of the Court who would take separate ways from the majority in *People v. Lacson II* and *III*.

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[60] *Id.* at 130.
[61] *Id.* at 130.
[62] *Id.* at 130.
[63] *Id.* at 130.
[64] *Id.* at 130.
[65] *Id.* at 131.

2. The Divided Court in *People v. Lacson II*

Not satisfied with the resolution in *People v. Lacson I*, and believing that remanding the criminal cases to the lower court was no longer necessary to determine the factual issues pointed by the Court in the earlier resolution, the People filed a Motion for Reconsideration. Lacson opposed it.

a. The Protagonists

This time the People asked the Court to definitely rule that the new rule on provisional dismissal did not apply to the new informations.

The issues raised by the People were: (1) whether or not Rule 117, section 8, is applicable to the criminal cases at bar and (2) whether or not the time-bar in that rule should be applied retroactively. Therefore, the first issue, a factual one, was concerned with the first paragraph of the new rule. The second issue, on the other hand, was a legal question.

b. The Majority that Reversed Itself

The majority sided with the People on the first issue. According to the majority, since Lacson invoked the new rule, he therefore had the burden of establishing the "essential requisites"[66] thereof. These essential requisites are found in the first paragraph of Rule 117, section 8:

> 1. the prosecution with the express conformity of the accused or the accused moves for a provisional (*sin perjuicio*) dismissal of the case; or both the prosecution and the accused move for a provisional dismissal of the case;
> 2. the offended party is notified of the motion for a provisional dismissal of the case;
> 3. the court issues an order granting the motion and dismissing the case provisionally;
> 4. the public prosecutor is served with a copy of the order of provisional dismissal of the case.[67]

It is noticeable that the number of requisites doubled compared to those previously given by the unanimous Court in *People v. Lacson I*. But qualitatively, there was no big difference. The first two correspond to the express consent of the accused and notice to the offended party, respectively. The subsequent two requisites are but the logical consequences of the first two. Further, the other provisions of the Rules of Court govern the last two.

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[66] People v. Lacson II, G.R. No. 149453, April 1, 2003.
[67] *Ibid.*.

On the question of whether the first requisite was present, the majority agrees with the People that Lacson failed to prove said requisite. This finding is the direct opposite of the finding of the unanimous Court in *People v. Lacson I*. Here, the Court reversed itself. According to the majority, "Irrefragably, the prosecution did not file any motion for the provisional dismissal of the said criminal cases. For his part, the respondent merely filed a motion for judicial determination of probable cause and for examination of prosecution witnesses...."[68] Quoting in verbatim the prayers of Lacson in his motion before Judge Agnir that led to the dismissal of the cases, the majority found that "[t]he respondent did not pray for the dismissal, provisional or otherwise, of Criminal Cases Nos. Q-99-81679 to Q-99-81689. Neither did he ever agree, impliedly or expressly, to a mere provisional dismissal of the cases."[69] The majority also quoted the admissions made by the counsel of Lacson before the Court of Appeals. These statements are to the effect that Lacson did not agree to the provisional dismissal of the cases.

As to the second requisite, the majority found that Lacson did likewise not prove it. Again, on this point the Court reversed itself. In *People v. Lacson I*, the Court remanded the case to the lower court because it believed that the records of the case could not conclusively point out whether notices were given to the offended parties prior to the dismissal of the cases. Now, the majority, based on the same records, conclusively found that there were no notices given to the offended parties.[70]

Parenthetically, it must be noted that it seems unreasonable for the majority to require proof of notices to the offended party. Under the Rules then prevailing, notices to the offended parties were not required. To hide the seeming unreasonableness the majority cited Rule 15, section 4[71]. Under this provision what is required is mere service of copy of the motion to the public prosecutor because the other party in criminal cases is the State, represented by the public prosecutor. Furthermore, the majority requires that "[t]he proof of such service must be shown during the hearing on the motion, otherwise, the requirement of the new rule will become illusory."[72]

Because of the self-explanatory nature of the third requisite, the majority no longer pondered upon it.

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[68] *Ibid.*

[69] *Ibid.*

[70] *Ibid.*

[71] RULES OF COURT, Rule 15, sec. 4 provides:

> Sec. 4. *Hearing of motion.* – Except for motions which the court may act upon without prejudicing the rights of the adverse party, every written motion shall be set for hearing by the applicant.
>
> Every written motion required to be heard and the notice of the hearing thereof shall be served in such a manner as to ensure its receipt by the other party at least three (3) days before the date of hearing, unless the court for good cause sets the hearing on shorter notice.

[72] See People v. Lacson II, *supra*.

As to the fourth requisite, it was necessary, according to the majority, because the public prosecutor could not be expected to comply with the timeline unless he is served with a copy of the order of dismissal. The Court also held that,

> Although the second paragraph of the new rule states that the order of dismissal shall become permanent one year after the issuance thereof without the case having been revived, the provision should be construed to mean that the order of dismissal shall become permanent one year after service of the order of dismissal on the public prosecutor who has control of the prosecution without the criminal case having been revived.[73]

In addition, it must be clarified that according to the majority, the fourth requisite requires only that service of copy of the order of dismissal be made to the public prosecutor. Therefore, service of the same to the offended parties is not an essential requisite. However, unbelievably, a few pages after discussing the fourth requisite the majority stated:

> There is no proof on record that all the heirs of the victims were served with copies of the resolution of Judge Agnir, Jr. dismissing the said cases. In fine, there never was any attempt on the part of the trial court, the public prosecutor and/or the private prosecutor to notify all the heirs of the victims of the respondent's motion and the hearing thereon and of the resolution of Judge Agnir, Jr. dismissing said cases. The said heirs were thus deprived of their right to be heard on the respondent's motion and to protect their interests either in the trial court or in the appellate court.[74]

Obviously the *ponente* is confusing *a priori* notice of the motion with service of copy of the order of dismissal. The former is covered by the second requisite, while the latter is by the fourth requisite. The former must be served on the offended parties, while the latter must be served on the public prosecutor. The offended parties need not be served with the latter document following the essential requisites listed by the majority earlier in its decision.

The majority also discussed the accompanying concept of revival of criminal cases. A case may be revived either by the refiling of the information or by the filing of a new information for the same offense. Generally, no new preliminary investigation is necessary.

The second issue compelled the Court to definitely rule on the nature of the effectivity of the new rule. In *People v. Lacson I*, the Court refused to resolve this issue.

The argument of Lacson was found partly meritorious. The majority disregarded some arguments presented by the People but nevertheless ruled in their favor. The decision may be categorized into two sub-issues: (1) the effect of the new

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[73] *Ibid.*.

[74] *Ibid.*.

rule on State's right to prosecute, i.e., law on prescription of crimes, and (2) the proper operation, retroactive or prospective, of the new rule.

First, on the effect of the new rule on prescription of crimes. Siding with Lacson, the majority ruled that the new rule is different from a statute of limitations or prescription of crimes. "[T]he new rule is not a statute of limitations."[75] Now referring to the periods provided in the second paragraph of Rule 117, section 8, no longer as "timeline" but as "time-bar," the majority characterized the time-bar as "akin to a special procedural limitation qualifying the right of the State to prosecute making the time-bar an essence of the given right or as an inherent part thereof, so that the lapse of the time-bar operates to extinguish the right of the State to prosecute the accused."[76] It continues:

> The time-bar under the new rule does not reduce the periods under Article 90 of the Revised Penal Code, a substantive law. It is but a limitation of the right of the State to revive a criminal case against the accused after the Information had been filed but subsequently provisionally dismissed with the express consent of the accused. Upon the lapse of the timeline under the new rule, the State is presumed, albeit disputably, to have abandoned or waived its right to revive the case and prosecute the accused. The dismissal becomes *ipso facto* permanent. He can no longer be charged anew for the same crime or another crime necessarily included therein. He is spared from the anguish and anxiety as well as the expenses in any new indictments.[77]

> The time-bar may appear, on first impression, unreasonable compared to the periods under Article 90 of the Revised Penal Code. However, in fixing the time-bar, the Court balanced the societal interests and those of the accused for the orderly and speedy disposition of criminal cases with minimum prejudice to the State and the accused. It took into account the substantial rights of both the State and of the accused to due process. The Court believed that the time limit is a reasonable period for the State to revive provisionally dismissed cases with the consent of the accused and notice to the offended parties. The time-bar fixed by the Court must be respected unless it is shown that the period is manifestly short or insufficient that the rule becomes a denial of justice. The petitioners failed to show a manifest shortness or insufficiency of the time-bar.[78]

This is a plain adoption of the Different Planes View posited by the counsel of Lacson. The time-bar applies only when the complaint or information has been filed with the court and later provisionally dismissed by said court after complying with the requisites of the first paragraph of the new rule. On the other hand, the reasoning seems to be that the law on prescription of crimes applies only before a criminal charge is filed because once the case is already with the courts, the running of the prescriptive period is tolled and thus, also the application of the law on prescription. In addition, the Court also said, "a mere provisional dismissal of a criminal case does not terminate a

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[75] *Ibid.*.
[76] *Ibid.*.
[77] *Ibid.*.
[78] *Ibid.*.

criminal case."[79] The majority did not elucidate upon this proposition. The majority also reaffirmed the distinction it made in *People v. Lacson I.* After the lapse of the prescriptive period, prosecution is absolutely barred while the lapse of the time-bar under the new rule will not automatically bar reprosecution. The wall erected by the new rule may be surmounted by the prosecution in this way:

> The State may revive a criminal case beyond the one-year or two-year periods provided that there is a justifiable necessity for the delay. By the same token, if a criminal case is dismissed on motion of the accused because the trial is not concluded within the period therefor, the prescriptive periods under the Revised Penal Code are not thereby diminished.[80]

Second, on the application of the new rule on provisional dismissal. To overcome the argument presented by Lacson to the effect that a penal law, whether substantive or procedural, must be applied retrospectively if it favors the accused, the majority had to use the *ratio legis* rule of statutory construction. According to the majority:

> The new rule was conceptualized by the Committee on the Revision of the Rules and approved by the Court *en banc* primarily to enhance the administration of the criminal justice system and the rights to due process of the State and the accused by eliminating the deleterious practice of trial courts of provisionally dismissing criminal cases on motion of either the prosecution or the accused or jointly, either with no time-bar for the revival thereof or with a specific or definite period for such revival by the public prosecutor....[81]

The majority of the Court, therefore, came to the conclusion that the new rule was promulgated for the benefit of the State and the accused, not for the accused only. Thus, the absolute application of the rule that a favorable law must be given retroactive effect has been shown by the majority to be not applicable in the instant case:

> The Court agrees with the petitioners that to apply the time-bar retroactively so that the two-year period commenced to run on March 31, 1999 when the public prosecutor received his copy of the resolution of Judge Agnir, Jr. dismissing the criminal cases is inconsistent with the intendment of the new rule. Instead of giving the State two years to revive provisionally dismissed cases, the State had considerably less than two years to do so. Thus, Judge Agnir, Jr. dismissed Criminal Cases Nos. Q-99-81679 to Q-99-81689 on March 29, 1999. The new rule took effect on December 1, 2000. If the Court applied the new time-bar retroactively, the State would have only one year and three months[82] or until March 31, 2001 within which to revive these criminal cases. The period is short of the two-year period fixed under the new rule. On the other hand, if the time limit

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[79] *Ibid.*.

[80] *Ibid.*.

[81] *Ibid.*

[82] This must be three months only and not one year and three months. Since the order of dismissal of the cases was received by the public prosecutor on March 31, 1999, from this point to the date of effectivity of the new rule on December 1, 2000, one year and nine months have elapsed. Thus, if given retroactive effect, the prosecution would have only three months within which to revive the cases. The one year and three months result as computed by the majority is a clear and plain mathematical error. The majority confused December 1, 1999 (or January 1, 2000), with December 1, 2000.

> is applied prospectively, the State would have two years from December 1, 2000 or until December 1, 2002 within which to revive the cases. This is in consonance with the intendment of the new rule in fixing the time-bar and thus prevent injustice to the State and avoid absurd, unreasonable, oppressive, injurious, and wrongful results in the administration of justice.
>
> The period from April 1, 1999 to November 30, 1999[83] should be excluded in the computation of the two-year period because the rule prescribing it was not yet in effect at the time and the State could not be expected to comply with the time-bar. It cannot even be argued that the State waived its right to revive the criminal cases against respondent or that it was negligent for not reviving them within the two-year period under the new rule.[84]

Given a prospective application, the second prosecution is not yet barred by the two-year time-bar. The new informations were filed on 6, June 2001. From 1 December 2000 to said date, less than 2 years has elapsed. Therefore, the Court granted the People's motion for reconsideration and reversed the decision of the CA. It also directed the trial court to proceed with the trial of the criminal cases.

c. Justice Bellosillo's Separate Opinion that Saw and Tried to Minimize the Aftershocks

The opinion, filed by Justice Bellosillo, agrees with the conclusion arrived at by the majority. The opinion is appropriately described as "separate" because of the way it answered the issues, sometimes agreeing with the reasoning of the majority and at other times taking the opposite of the latter's view.

ON THE DIFFERENT PLANES VIEW

Not satisfied with the Different Planes View because it did not fully address the violation of the rights to a speedy trial and the speedy disposition of cases, Justice Bellosillo wrote a separate opinion devoted to these two issues.

He began by pitting the concept of provisional dismissal under the new rule and State's right to prosecute.

> Does the provisional dismissal of a criminal case which has become permanent under Sec. 8 effectively foreclose the right of the State to prosecute an accused? I have taken great pains analyzing the position of respondent; regretfully, I am unable to agree for my conscience shivers at its debilitating, crippling if not crushing, impact upon our criminal justice system.[85]

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[83] The period from April 1, 1999, to November 30, 2000, must be excluded and not the one from April 1, 1999, to November 30, 1999. As explained in the immediately preceding note, the majority confused December 1, 1999 (or January 1, 2000), with December 1, 2000. This error was rectified in People v. Lacson III, G.R. No. 149453, October 7, 2003, footnote no. 22.

[84] People v. Lacson II, G.R. No. 149453, April 1, 2003.

[85] *Ibid.*

The effect of the accused's theory is that it unavoidably obliterates the law on prescription of crimes under Article 90 of the Revised Penal Code.[86] Partly because of this, Justice Bellosillo rejects the Different Planes View espoused by the respondent. Another reason given is based on the theory that in a provisional dismissal, the three parties, *i.e.,* the prosecution, the defense and the offended parties, in effect, enter into an agreement to temporarily hold in abeyance the prosecution of the case. Since permanent dismissal is a mere offshoot of provisional dismissal under the new rule and if such permanent dismissal is given the effect of prescription of crimes, then the State's right to prosecute may be said to have been shortened indirectly by provisionally dismissing the case. It must be remembered that the order of provisional dismissal is a result of agreement among the three parties named above. Thus, the law on prescription, which involves matters of public crimes and have direct public interest implications, is made subject to the agreement of the three parties or "held hostage to procedural limitations"[87] which were purposely sought by the parties.

Further, Justice Bellosillo also argues that courts cannot abridge, alter or nullify statutes, like the law on prescription of crimes, by promulgating rules of procedure. More importantly, the concern of the law for prescription of crimes is within the exclusive domain of the legislative branch. Courts cannot interfere with the power of the legislature to surrender, as an act of grace, the right of the State to prosecute crimes. Moreover, the law on prescription of crimes is a substantive law granting substantive rights to both the State — the right to prosecute within the prescriptive period — and the accused — the right to be shielded from further prosecution after the lapse of the appropriate prescriptive period — rights that cannot be diminished, increased or modified through the use of the Supreme Court's rule-making power. [88]

He also rejects the argument that a permanent dismissal, following the Different Planes View, amounts to an acquittal. This interpretation, for him, is forever foreclosed by a reading of the history of the new rule. According to him, the provision was originally worded: "the corresponding order shall state that the provisional dismissal shall become permanent and amount to an acquittal one year after the issuance without the case having been revived."[89] The Supreme Court purposely deleted the words "amount to an acquittal" when it approved the new rule precisely to obviate any interpretation that a permanent dismissal amounts to an acquittal.

After rejecting the Different Planes View and inevitably the majority decision that adheres to it, Justice Bellosillo presents his own interpretation of the new rule vis-à-vis the law on prescription of crimes. Ostensibly, his view also harmonizes the two legal concepts. Concisely, his view is

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[86] *Ibid.*

[87] *Ibid.*

[88] CONST. art. VIII, sec. 5(5).

[89] People v. Lacson II, *supra* (Bellosillo, *J., separate concurring opinion*).

> Article 91 of The Revised Penal Code distinctly speaks of "prescription . . . shall be interrupted by the filing of the complaint or information, and shall commence to run again when such proceedings terminate without the accused being convicted or acquitted, or unjustifiably stopped for any reason not imputable to him." It can readily be seen therefore that the concept of a provisional dismissal is subsumed in Art. 91 since in a provisional dismissal, proceedings necessarily terminate without the accused being convicted or acquitted. Thus, to construe and apply Sec. 8 in the manner suggested above would undeniably result in a direct and irreconcilable conflict with Art. 91.[90]

To support his theory he looks for the purpose of the new rule. After finding it in the books of one of the consultants of the Committee that drafted the new rule quoted in the first part of this paper, he then characterizes the new rule as one, which is "purely administrative or regulatory in character."[91] Justice Bellosillo identifies the new rule's purpose as follows:

> [T]o grant the accused momentary relief from administrative restrictions occasioned by the filing of a criminal case against him. He is freed in the meantime of the dire consequences of his having been charged with a crime, and temporarily restored to his immunities as a citizen, solely for purposes of government clearances. Section 8 imports no intricate nor ornate legal signification and that we need not discern from it a meaning that too far deviates from what it actually purports to convey.[92]

Given this very limited purpose, such may be achieved by simply proscribing the revival, in the limited sense as he earlier explained, after the lapse of the time-bar. This means permanent dismissal simply results in the removal of the case from the docket of the court and the impropriety of reinstating the same by mere motion to revive. To pursue the case, the State must file a new information for the same offense. The process must begin again from preliminary investigation. This is the same interpretation presented by the People. This way there will be no pending case or provisionally dismissed case that will appear in the accused's records in government agencies especially in the National Bureau of Investigation and other law enforcement agencies. The accused can thus continue with his normal life until the State decides to prosecute him again, if still allowed by the other rules[93] that will operate.

ON THE RIGHT TO SPEEDY TRIAL AND SPEEDY DISPOSITION OF CASES

The argument of Lacson is of this tenor:

> [I]t appears that the speedy disposition guarantee of the Bill of Rights is asserted to include the period of delay from the provisional dismissal of the case to its

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[90] People v. Lacson II, G.R. No. 149453, April 1, 2003 (Bellosillo, *J., separate concurring opinion*).

[91] *Ibid.*

[92] *Ibid.*

[93] Law on prescription of crimes, double jeopardy rule and constitutional guarantees of speedy trial and speedy disposition of cases.

> revival or refiling since "respondent is as much entitled to a speedy reinvestigation and refiling of the provisionally dismissed cases against him."[94]

The separate opinion attacks this argument in two ways: (1) the right to speedy disposition of cases does not apply and cannot be invoked in the case at bar and (2) even if a speedy disposition or trial inquiry is allowed, the claim does not pass the balancing test.

The constitutional provision on the speedy disposition of cases cannot be invoked. The provision speaks of speedy disposition "of cases" before all judicial, quasi-judicial, or administrative bodies.

> It clearly and logically contemplates a situation wherein there exists an outstanding case, proceeding or some incident upon which the assertion of the right may be predicated. Evidently, it would be idle, not to say anomalous, to speak of 'speedy disposition of cases' in the absence of anything to dispose of in the first place.[95]

Justice Bellosillo argues that during the hiatus succeeding the dismissal of cases by Judge Agnir, no formal proceeding remained outstanding.

In unequivocal language, he writes:

> The provisional nature of the dismissal of the original criminal cases is quite immaterial. The fact that the cases were dismissed conditionally or "without prejudice" to the subsequent filing of new cases, does not make the order of dismissal any less a disposition of the cases. Although provisional, it nonetheless terminated all proceedings against respondent such that there remained in the meantime no pending case which the court could act upon and resolve, and which could be made the basis for the application of the right to speedy disposition of respondent's cases.[96]

Hence, the period of delay between the dismissal and the filing of the charges should not be included in computing the time and determining whether respondent was denied his right to speedy disposition of cases. Reinvestigation and refiling of cases at some future time are not pending incidents related to the dismissed cases; "they are mere possibilities or expectancies."[97] Only when the State decides to reinvestigate and refile the cases will there be a pending case before a quasi-judicial body for speedy disposition of cases purposes. Thus, "respondent's right to speedy disposition of his criminal cases attached only at that precise moment the Department of Justice constituted a panel of prosecutors and conducted a new preliminary investigation."[98] But even then, the conduct of the prosecutors cannot be assailed as violative of the speedy disposition guarantee because records show that the prosecutors lost no time in

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[94] People v. Lacson II, *supra.*
[95] *Ibid.*
[96] *Ibid.*
[97] *Ibid.*
[98] *Ibid.*

commencing the new preliminary investigation and thereafter filing the corresponding informations.

But assuming *arguendo* that there is a case to be disposed of during the hiatus after the dismissal, the Justice still believes that the claim of Lacson cannot pass the balancing test. As a background, the "balancing test"[99] is a comprehensive but parsimonious test developed by the U.S. Supreme Court in 1972[100] in the case of *Barker v. Wingo*.[101] It was adopted by the Philippine Supreme Court in several early cases.[102] It provides a more concrete guideline to the bench and bar by providing four factors, among others, that must be inquired into to determine whether an accused has been deprived of his right to speedy trial.

In using this test, cases must be approached on an ad hoc basis.[103] The four factors that must be looked into are not exclusive.[104] These are: (1) the length of delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) prejudice to the defendant.[105] None of these factors is either a necessary or sufficient condition to found a conclusion of deprivation of the right to speedy trial.[106] In the words of the Court: "Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process."[107] The first factor is the "triggering mechanism."[108] Unless there is delay, which is presumptively prejudicial, there is no need to inquire into the other factors. However, the length of delay that will trigger an inquiry depends on the circumstances of the case. [109] Reasons

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[99] The formal adoption by the U.S. Supreme Court of the balancing test was predated by some federal court decisions. These cases are: U.S. v. Simmons, 338 F. 2d 804 (1964); U.S. v. Mann, 201 F. Supp. 268 (1968); Hedgepeth v. US, 365 F. 2d 952 (1966); U.S. v. Bishton 463 F. 2d 887 (1972); and, also Dickey v. Florida, 398 U.S. 30, 42 (1970) (Justice Brennan, *concurring opinion*). See also Barker v. Wingo, 407 U.S. 514, 530 footnote no. 30 & 533 footnote no. 36 (1972); & Smith v. Hooey, 393 U.S. 374 (1969).

[100] Although the Speedy Trial Clause of the Sixth Amendment was already part of the U.S. Constitution since 15 December 1791, its judicial history is relatively brief. Barker v. Wingo, *supra*, is the first definitive test devised for the speedy trial right. See Robert W. Mueller, *Negligent Delay and the Sympathetic Defendant – Doggett Defines New Presumption of Prejudice*, 14 MISS. C. L. REV. 609, 611 (1994).

[101] 407 U.S. 514 (1972). This case rejected both of the inflexible approaches — the fixed-time period because it goes further than the Constitution requires; the demand-waiver rule because it is insensitive to a right which is fundamental. For a discussion of the case including the facts see R. Mueller, *op. cit. supra* note 100, at 612.

[102] The balancing test was adopted in these cases: Caballero v. Alfonso, G.R. No. 45647, August 21, 1987; Alvizo v. Sandiganbayan, G.R. No. 101689, March 17, 1993; Hipolito v. CA, G.R. No. 108478-79, February 21, 1994; People v. Leviste, 325 Phil. 525 (1996); & Binay v. Sandiganbayan, 374 Phil. 413 (1999).

[103] Barker v. Wingo, *supra* at 530.

[104] Christopher S. Elmore, *Glover v. State: A Misinterpretation and Misapplication of the Barker Speedy Balancing Test Results in the Weakening of a Criminal Defendant's Right to a Prompt Trial*, 62 MD. L. REV. 573 footnote no. 87 (2003).

[105] Barker v. Wingo, *supra* at 530. See also 22A C.J.S. *Criminal Law* sec. 583 (1989).

[106] See 22A C.J.S. *Criminal Law* sec. 583 (1989).

[107] Barker v. Wingo, *supra* at 533.

[108] *Id.* at 530.

[109] *Id.* at 530. Different lengths of delay which trigger full inquiry are exhibited by these cases: U.S. v. Villete, 688 F. Supp. 777 (1988); Hutchison v. Marshall, 573 F. Supp. 496 (1984); Dykes v. State, 452 So. 2d 1377 (1984); State v. Johnson, 461 A. 2d 981 (1983) (16-month delay triggers judicial scrutiny), State v. Johnson, 564 A. 2d 364 (1989), State v. Russel, *supra* (23-month delay triggers judicial scrutiny); State vs. Strong, *supra*; Skaggs v. State, 676 So. 2d 897 (1996) (delay of eight months or more is presumptively prejudicial); State v. Powers, 612 S.W. 2d 8

for the delay must be presented by the Government to avoid the determination of denial of the right.[110] Different reasons have different weights.[111] The defendant's assertion of his right is entitled to a "strong evidentiary weight" in the balance.[112] Failure to assert the right, although it will not automatically amount to waiver of the right, will nevertheless make it difficult for a defendant to prove that he was denied a speedy trial.[113] The last factor to be considered is prejudice to the defendant. Defendant's claims of possible prejudice must not be insubstantial, speculative or premature.[114] They must be assessed vis-à-vis the interests of the accused which the right protects. These interests are: (1) prevention of oppressive pretrial incarceration, (2) minimization of anxiety and concern of the accused and (3) limiting of the possibility that the defense will be impaired.[115] If the balance favors the accused, it follows that his right has been violated. He is therefore entitled to a remedy.[116] Because of its character, the only proper remedy, though severe, for its violation is the dismissal of the criminal action.[117]

In applying this test, Justice Bellosillo found that for the first factor, the period of two years and three months between 29 March 1999 and 6 June 2001, if it can even trigger a full scale inquiry, only constitutes the bare minimum needed to provoke a balancing test inquiry "[c]onsidering the serious nature of the charges against respondent, and more importantly, the criminal cases sought to be filed being deeply impressed with public interest, involving as they do high ranking police officers...."[118] As regards the second factor, Justice Bellosillo finds nothing to demonstrate that the delay in reviving the cases was deliberately availed for any improper tactical advantage. On the contrary, he finds that there is reasonable investigative delay for the prosecution needed time to gather evidence, track down witnesses and collect documents to strengthen its case. As to the third factor, he finds:

> Respondent's reliance on Sec. 8, Rule 117, of the 2000 Revised Rules on Criminal Procedure, which some have said is based on the constitutional right to speedy disposition of cases, cannot be equated with a positive assertion of the

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(1980); & State v. Sanderson, 692 P. 2d 479 (1985) (390 day delay triggers speedy trial inquiry). Cited in People v. Lacson II, G.R. No. 149453, April 1, 2003, footnote no. 23 (Sandoval-Gutierrez, *J., dissenting opinion*).

[110] Barker v. Wingo, *supra* at 531. See also 22A C.J.S. *Criminal Law* sec. 585(a) (1989).

[111] See U.S. v. Bishton, 463 F. 2d 887, 890 (1973); and, 22A C.J.S. *Criminal Law* sec. 585(a) (1989).

[112] Barker v. Wingo, *supra* at 531-532.

[113] *Id.* at 532.

[114] 22A C.J.S. *Criminal Law* sec. 587 (1989). The first and fourth factors both deal with prejudice. Presumptive prejudice in the first factor is different from the prejudice contemplated by the fourth factor. The first factor's presumptive prejudice is a mere triggering mechanism for inquiring into the factors to be considered. The seeming misunderstanding about this distinction is discussed in R. Mueller, *op. cit. supra* note 100, in relation to the majority opinion in U.S. v. Dogget, 112 S Ct 2686 (1992).

[115] Barker v. Wingo, *supra* at 532 citing U.S. v. Ewell, 383 U.S. 116 (1966) & Smith v. Hooey, *supra*. See also 22A C.J.S. *Criminal Law* sec. 587 (1989) & U.S. v. Dogget, *supra*, (Thomas, *J., dissenting opinion*) where he clarified and narrowed the meaning of prejudice to the accused. His opinion is summarized by R. Mueller, *op. cit. supra* note 100, at 625.

[116] For application and misapplication of the Barker v. Wingo Balancing Test see C. Elmore, *op. cit. supra* note 104.

[117] See 22A C.J.S. Criminal Law sec. 610 (1989). See also People v. Heider, 80 N.E. 292 (1907); People v. Allen, 14 N.E. 2d 397 (1937); and, Barker v. Wingo, *supra* at 522.

[118] People v. Lacson II, *supra* (Bellosillo, *J., separate concurring opinion*).

> right to speedy disposition. A perusal of the records would reveal that the issue of applicability of Sec. 8, Rule 117, was raised by respondent for the first time before the Court of Appeals, in his Second Amended Petition — undoubtedly a mere afterthought. It was not his original position before the trial court, which centered on the "lack of valid 'complaints' to justify a preliminary investigation of cases which had long been dismissed." It was not even his initial position in the early stages of the proceedings before the Court of Appeals. Within the context of the Balancing Test, respondent's tardy, inexplicit and vague invocation of this right makes it seriously difficult for him to prove the denial thereof.[119]

Finally, even the fourth factor does not favor Lacson. He was never incarcerated during the hiatus of the cases. He did not suffer anxiety of such degree that amounted to oppression. Neither was it shown that his defense was impaired. In sum, the factors are all against his favor. Therefore, considering all the arguments, he votes to grant the motion for reconsideration.

In sum, Justice Bellosillo saw the effects of the new rule on the concepts of prescription of crimes and speedy trial and speedy disposition of cases. As expected of a legal mind, he tried to harmonize the concepts by minimizing the aftershocks brought by the introduction of a new rule. Thus, the conservative tendency of law apparently materialized.

d. The Dissenters who Did not Compromise

Justices Puno, Vitug, Sandoval-Gutierrez and Ynares-Santiago dissented from the conclusions arrived at by the majority. All of them filed their respective dissenting opinions except for Justice Ynares-Santiago, who merely concurred with the opinions of Justices Puno and Sandoval-Gutierrez

JUSTICE PUNO

In voting to deny the motion for reconsideration, Justice Puno presented his own view of the nature, purpose and impact of the new rule on provisional dismissal and at the same time, disagreed with the factual findings of the Court and its conclusion that the new rule must be given prospective effect only.

Justice Puno is of the opinion that the new rule must be applied retroactively. It is elementary that procedural law applies to pending cases. And as such, it has retroactive effect. Further, the instant case does not fall under any of the exceptions for he believes that the new rule will not impair the State's right to prosecute. The time-bar does not prejudice the State because it is given the opportunity to justify its delay in the prosecution of the cases. "If it cannot justify its delay, it cannot complain of unfairness.

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[119] *Ibid.*

No government can claim the right to prosecute at its perpetual pleasure. It cannot file a criminal case and sleep on it."[120]

Juxtaposed with the separate opinion of Justice Bellosillo, Justice Puno's opinion on the nature, purpose and impact of the new rule and on the Different Planes View sounds more like a concurring opinion than a dissent from the majority opinion.

Being the chairman of the Committee on Revision of the Rules of Court, Justice Puno posits that when the Committee approved with minor amendment the Committee's proposal,

> [T]he Court en banc struck a fine balance between the sovereign right of the State to prosecute crimes and the inherent right of the accused to be protected from the unnecessary burdens of criminal litigation. The timeline within which provisionally dismissed cases can be revived forms the crux of the delicate balance.[121]

He adds that among others, the new rule was adopted for the purpose of (1) discouraging hasty and baseless filing of criminal cases and (2) penalizing the State for its inexcusable delay in court. As to the nature of and reason behind the provision on time-bar, he asserts that it is a recognition of a trade-off between the State and the accused.

> I like to underscore that the prohibition against revival is not a free gift by the State to an accused. The right against revival is the result of a trade-off of valuable rights for the accused can exercise it only if he surrenders his right to an early permanent dismissal of the case against him due to the inability of the State to prosecute. In so doing, the accused suffers a detriment for he gives the State one to two years to revive a case which has already been frozen for failure to prosecute. During this waiting period, the accused cannot move to dismiss the charge against him while the State can locate its missing witnesses, secure them if they are threatened and even gather new evidence. In exchange for this period of grace given to the State, the rule sets a timeline for the prosecutors to revive the case against the accused. The timeline is fixed for the accused has suffered an indubitable detriment and the trade-off for this detriment is the duty imposed on the prosecution either to continue or discontinue with the case within the 1 or 2-year grace period. We cannot allow the undue extension of this detriment unless the State can show compelling reasons to justify its failure to prosecute. The open-ended practice under the old rule which makes provisional dismissal permanently provisional is precisely the evil sought to be extirpated by section 8, Rule 117.[122]

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[120] People v. Lacson II, *supra* (Puno, *J., dissenting opinion*). It must be observed that this proposition is contrary to the principle earlier discussed in Part II that unless there is law providing for statute of limitations the State can prosecute a criminal case at any time.

[121] People v. Lacson II, *supra* (Puno, *J., dissenting opinion*).

[122] *Ibid.*

Given these reasons and purposes, he then lays down the proposition that the new rule provides a new and distinct right. In his own words: "Section 8, Rule 117 is a rule that gives an accused a new right that is distinct from, among others, the right to speedy trial and the right against double jeopardy."[123] It is "complete by itself and should not be construed in light of rules implementing other rights of an accused."[124] But he is willing to accept that the new rule does enhance the constitutional rights of an accused to speedy trial and speedy disposition of cases. The new rule was formulated to achieve one of the end-goals of the criminal process — to minimize the burdens of accusation and litigation. The authority behind the promulgation of the new rule that Justice Puno points to is the phrase "powers to promulgate rules concerning protection and enforcement of constitutional rights and legal assistance to the underprivileged" of article VIII, section 5(5) of the Constitution and the inherent judicial power of the courts to regulate the conduct of a criminal case before it.

He takes the view, similar to the majority's, that the new rule does not unduly shorten the prescriptive period under the Revised Penal Code. According to him, the new rule merely regulates the conduct of the prosecution of an offense once it is filed in court. Once a case is filed in court it becomes subject to the rules of procedure, which are within the exclusive[125] power of the Supreme Court to promulgate. The new rule merely provides for the time within which the State must complete its prosecution after the case has been provisionally dismissed. Also, it provides the consequence if the time is not complied with.[126] At this point, it becomes apparent that Justice Puno's dissent is not different from the majority's view. In fact, in the last part of his opinion, he explicitly stated that he agrees with the *ponencia* on this point.[127]

It becomes clear that Justice Puno also adopts the Different Planes View espoused by Lacson. But unlike the majority, Justice Puno devoted space to defend the Different Planes View against the attacks of Justice Bellosillo.

First, according to him, the use of the word "permanent" to describe dismissal after the State fails to revive a provisionally dismissed case within the time-bar, means what it says.

> There can be no hedging on the meaning of the word permanent for the new rule used the word without a bit of embroidery. To be emphatic, the lapse of the one (1) or two (2) years time puts a period to the provisionally dismissed case and not a mere comma.[128]

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[123] *Ibid.*

[124] *Ibid.*

[125] The previous constitutional provisions, i.e., CONST. (1935) art. VIII, sec. 18 & CONST. (1973) art. X, sec. 5(5), which empowered the legislative branch to repeal, alter or supplement the rules of court promulgated by the Supreme Court, is no longer retained in the 1987 Constitution.

[126] People v. Lacson II, G.R. No. 149453, April 1, 2003 (Puno, *J., dissenting opinion*).

[127] *Ibid.*

[128] *Ibid.*

This is in apparent reply to Justice Bellosillo's argument that a permanent dismissal does not deprive the State of its right to prosecute as long as its exercise is still within the period provided by the law on prescription of crimes. He also posits what he thinks is the reason why the original phrase "amount to an acquittal" in the draft of the new rule was deleted. Contrary to Justice Bellosillo's assertion, Justice Puno forwards that,

> The deletion was dictated by the belief that the phrase was a redundancy in light of the clear and unequivocal import of the word 'permanent.' The deletion cannot be distorted to mean that a case permanently dismissed can still be revived. For if that were the intent, the rule could have easily stated that the accused whose case has been permanently dismissed could nevertheless be prosecuted for the same offense.[129]

Second, he does not agree with Justice Bellosillo's proposition that a permanent dismissal precludes only the revival of the case through a motion and not the filing of a new information.

> Section 8, Rule 117 changed the old rule that dismissals which are provisional in character lack the imprimatur of finality, hence, they do not bar the revival of the offense charged or the filing of a new information for the same offense. The old rule was precisely jettisoned by the Committee and by this Court because of its unfairness to the accused. Again, I respectfully submit that the new rule would be useless if it would leave unfettered the discretion of the prosecutor in reviving the same offense under the fig leaf of a new information.[130]

Thus, it can be surmised that Justice Puno agrees with the majority that revival also encompasses refiling of the same information or filing of a new information covering the same offense.

JUSTICE VITUG

The essence of the two-page dissent of Justice Vitug is captured by this passage:

> Once a criminal case is instituted, the issue on prescription is addressed and the rule on prescription as a substantive provision would have then so served its purpose. Thenceforth, assuming the timely filing of the case, the rules of procedure promulgated by the Supreme Court must govern. In fine, while Article 90 and Article 91 of the Revised Penal Code fix the period when the State must file a case against an accused after the discovery of the crime by the offended party, Section 8, Rule 117, of the Rules of Criminal Procedure, however, applies once an action has been instituted. The substantive provisions govern the institution of the case; the procedural rules steps in thereafter.[131]

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[129] *Ibid.*

[130] *Ibid.*

[131] People v. Lacson II, *supra* (Vitug, *J., dissenting opinion*).

This is again an adoption of the Different Planes View. Only Justices Bellosillo and Quisumbing have rejected such view. On this view alone, Justice Vitug should have joined the majority. However because he agrees with the conclusions of Justice Puno that there remain factual issues that cannot be answered by relying solely on the records, he votes to deny the motion for reconsideration and to order the remand of the case to the trial court.

JUSTICE SANDOVAL-GUTIERREZ

The dissenting opinion of Justice Sandoval-Gutierrez is as comprehensive as that of the separate opinion of Justice Bellosillo.[132] She first presented an inquiry applying the balancing test because she believes it to be more dispositive of the case being a claim based on two constitutional rights.

Not dissimilar to the findings of Justice Puno, Justice Sandoval-Gutierrez finds that the first requisite of the first paragraph is present in the case at bar. Relying on the order of dismissal of Judge Agnir, which recites that the third prayer of Lacson's motion is to dismiss the cases should the court find no probable cause, she asserts that the record manifests that Lacson expressly consented to dismissal. Moreover, Lacson invoked *Allado v. Diokno*[133] in his motion, a decision that ruled that if the court finds no probable cause it might dismiss the case. Thus, by inference, Lacson also prayed for the dismissal of the cases. At any rate, if the records are not clear, it becomes more fitting to remand the case for the trial court to receive evidence on such factual issue. With respect to the second requisite, she finds also that the records do not conclusively show whether notices where sent to the offended parties. Therefore, the case must also be remanded for this reason.

She also reaches the same conclusion, as does Justice Puno, that the new rule must be given retroactive effect. But her conclusion is based not on the application of the rule that a procedural law must be given retroactive effect but on the argument of Lacson that a statute favorable to the accused must be given retroactive operation. Moreover, even if the new rule impairs the right of the State, it does not mean that such law may not be passed. "[A] state may constitutionally pass a retroactive law that impairs its own rights."[134]

For the above conclusions reached, remand of the case to the trial court is appropriate. But Justice Sandoval-Gutierrez believes that the issue of whether or not the provisional dismissal contemplated in the new rule shall become permanent one year or two years after the issuance of the order and thus constitutes a bar to a subsequent prosecution for the same offense must not be evaded. Thus, she proceeds to present her position.

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[132] She also forwards the argument that the filing of new informations is a form of persecution. See People v. Lacson II, G.R. No. 149453, April 1, 2003 (Sandoval-Gutierrez, *J., dissenting opinion*).

[133] G.R. No. 113630, May 5, 1994.

[134] People v. Lacson II, *supra* (Sandoval-Gutierrez, *J., dissenting opinion*).

First, as to the conflict between the law on prescription of crimes and the new rule insisted by the People, she refused to see any conflict. "The conflict is non-existent," she writes.[135]

> The law on prescription of crimes refers to the period during which criminal charges must be filed. Section 8 of Rule 117 refers to the period when a provisional dismissal ceases to be temporary and becomes permanent, thus, no longer subject to be set aside by the revival of criminal charges. This rule comes into play only after the State has commenced the prosecution.
>
> The twenty-year prescriptive period for a case punishable by death under Section 90 of the Revised Penal Code is intended to give law enforcers ample time to apprehend criminals who go into hiding. It also enables prosecutors to better prepare their cases, look for witnesses, and insure that correct procedure has been followed. On the other hand, the two-year period under Section 8, Rule 117 is intended to warn the State that once it filed a case, it must have the readiness and tenacity to bring it to a conclusion. The purpose of the period is to encourage promptness in prosecuting cases.[136]

Again this is a plain and simple Different Planes View written another way.

Second, on the effect of permanent dismissal, Justice Sandoval-Gutierrez's argument relies heavily on its nature and purpose. Contrary to the position taken by Justice Puno, she fully accepts respondent's assertion that the new rule seeks to implement the constitutional rights to speedy trial and speedy disposition of cases. In her words: "[I]t draws its life from the constitutional guarantees of speedy trial and speedy disposition of cases."[137] And contrary to the holding of the majority, she believes that the new rule was introduced not so much for the interest of the State but precisely for the protection of the accused against protracted prosecution.[138]

With this as the backdrop, it becomes easy for her to characterize permanent dismissal as different from that forwarded by the People. If the People's argument is followed, then the only sanction for non-compliance with the time-bar is the conduct anew of a preliminary investigation. Justice Sandoval-Gutierrez rejects such reasoning explaining that,

> To say that this "permanent" dismissal prohibits only the "revival" of the case but not the "filing" of new Information, is to render the provision ineffectual, providing only lip service to the accused's constitutional right it seeks to enforce. Indeed, what difference will the provision make if after the lapse of two years, the State can still prosecute the accused for the same offense by merely "filing" a new Information? With the interpretation given, the dismissal cannot really be considered "permanent."[139]

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[135] *Ibid.*
[136] *Ibid.*
[137] *Ibid.*
[138] *Ibid.*
[139] *Ibid.*.

Since the new rule is promulgated to give protection to the accused and to give life to the accused's rights to speedy trial and speedy disposition of cases, the only appropriate meaning that can be given to permanent dismissal is that meaning which will realize the purpose of and give force to the rule. For her, such meaning must be that of a bar to another prosecution for the same offense. Again, this is consistent with the holding of the majority.

What is left to be reviewed is Justice Sandoval-Gutierrez's full-scale inquiry into speedy trial and speedy disposition of cases. The need for inquiry into whether or not there is violation of the two constitutional rights prescinds from the proposition that Rule 117, section 8 is a mere tool to enforce the constitutional guarantees.

Looking into the four factors of the *Barker v. Wingo* balancing test, Justice Sandoval-Gutierrez, starkly opposite to the conclusion of Justice Bellosillo, arrives at a conclusion that all the factors favor the accused. The first factor — length of delay — is found presumptively prejudicial by comparing the delay in the instant case with the lengths of the delay that triggered inquiry into other factors in similar U.S. cases. She concludes that the more than two years of delay is presumptively prejudicial to the accused. She also finds unjustifiable the interval of inactivity of more than two years after the dismissal of the cases on the part of the prosecution. On the third factor, she rules that the People cannot argue that Lacson failed to assert his right.

> It would be ludicrous for him to ask for the trial of his cases when the same had already been dismissed. During the interval, there were no incidents that would prompt him to invoke the right. Indeed, the delay could only be attributed to the inaction on the part of the investigating officials.[140]

But faced with the argument that the right cannot be invoked to cover the *interregnum* after the dismissal because during such time there were no pending cases at all, she finds her answer from the dissenting opinion of Justice Marshall in the case of *U.S. v. MacDonald*.[141] Borrowing the latter's reasoning, she argues that "the anxiety brought by public prosecution does not disappear simply because the initial charges are temporarily dismissed. After all, the government has revealed the seriousness of its threat of prosecution by initially bringing charges."[142] Her opinion is entirely the opposite of Justice Bellosillo's, which proposed that the right cannot be invoked after the dismissal and before the initiation of new preliminary investigation for there was no case or proceeding, which was delayed to speak of. Finally, she finds that the delay caused undue prejudice to Lacson in the form of besmirched reputation, stigma and anxiety resulting from the fact that as a public official he had "to defend himself constantly from the nagging accusations that interfere in the performance of his duties as a Senator."[143] Therefore, there is a clear violation of Lacson's rights to speedy trial and

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[140] *Ibid.*

[141] 456 U.S. 1 (1982)

[142] People v. Lacson II, G.R. No. 149453, April 1, 2003 (Sandoval-Gutierrez, *J., dissenting opinion*).

[143] *Ibid.*

speedy disposition of cases. Needless to state, her conclusions led her to vote to deny the motion for reconsideration.

In sum, the dissenting opinions did not compromise their factual findings and ultimate conclusion embodied in *People v. Lacson I.*

3. The Unmoved *People v. Lacson III*

After defeat in *People v. Lacson II*, it was the respondent's turn to move for reconsideration. His plea was for the Court to reinstate its decision in *People v. Lacson I.*

In *People v. Lacson III*, the *ponencia* gets the unconditional concurrence of Justices Bellosillo and Quisumbing. This may be explained by the fact that the *ponencia* no longer ventures into the Different Planes View.

The majority formulates two issues similar to *People v. Lacson II*: (1) whether or not the new rule should be given retroactive effect, and (2) whether or not the requisites for the operation of the new rule have been complied with. It is noticeable that the Court reverses the sequence of the issues. It can only be surmised that it has realized that if the respondent-movant fails in the first issue, then the second becomes moot and academic. It also bears reiterating that unlike it's decision in *People v. Lacson II*, the Court no longer utilizes the different planes theory in disposing of the first issue.

In resolving the first issue, the majority presents only two counter-arguments. First, citing Justice Cardozo's opinion in *Great Northern Railway Company v. Sunburst Oil and Refining Company*,[144] the Court concludes that matters of procedure are not necessarily retrospective in operation. Paraphrasing the U.S. Supreme Court Justice, the majority writes: "the Court in defining the limits of adherence may make a choice for itself between the principle of forward operation and that of relating forward."[145] The legal bases of the power to choose are article VIII, section 5(5) of the Constitution and a provision in the Rules of Court.

> This constitutional grant to promulgate rules carries with it the power, *inter alia*, to determine whether to give the said rules prospective or retroactive effect. Moreover, under Rule 144 of the Rules of Court, the Court may not apply the rules to actions pending before it if in its opinion their application would not be feasible or would work injustice, in which event, the former procedure shall apply.[146]

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[144] 11 L Ed 360 (1932).

[145] People v. Lacson III, G.R. No. 149453, October 7, 2003.

[146] *Ibid.* RULES OF COURT, Rule 144 provides:

> These rules shall take effect on January 1, 1964. They shall govern all cases brought after they take effect, and also all further proceedings in cases then pending, except to the extent that in the opinion of the court their application would not be feasible or would work injustice, in which event the former procedure shall apply.

Second, in choosing which operation is proper, the Court relies on what it thinks is the purpose of the new rule, *viz.*:

> In this case, when the Court approved Section 8, it intended the new rule to be applied prospectively and not retroactively, for if the intention of the Court were otherwise, it would defeat the very purpose for which it was intended, namely, to give the State a period of two years from notice of the provisional dismissal of criminal cases with the express consent of the accused.[147]

Proceeding, the Court explained,

> It must be noted that the new rule was approved by the Court not only to reinforce the constitutional right of the accused to a speedy disposition of the case. The time-bar under the new rule was fixed by the Court to excise the malaise that plagued the administration of the criminal justice system for the benefit of the State and the accused; not for the accused only.[148]

In supporting its exercise of the power to choose, the Court provides an illustration,

> Consider this scenario: the trial court (RTC) provisionally dismissed a criminal case with the express consent of the accused in 1997. The prosecution had the right to revive the case within the prescriptive period, under Article 90 of the Revised Penal Code, as amended. On December 1, 2000, the time-bar rule under Section 8 took effect, the prosecution was unable to revive the criminal case before then.
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> If the time-bar fixed in Section 8 were to be applied retroactively, this would mean that the State would be barred from reviving the case for failure to comply with the said time-bar, which was yet to be approved by the Court three years after the provisional dismissal of the criminal case. In contrast, if the same case was dismissed provisionally in December 2000, the State had the right to revive the same within the time-bar.... The State would thus be sanctioned for its failure to comply with a rule yet to be approved by the Court....[149]

As an observation, in the first paragraph quoted above, the majority recognizes that after a provisional dismissal is entered the period of prescription commences to run again. This simply means that provisional dismissal refers to termination of the case without the accused being convicted or acquitted under Article 91 of the Revised Penal Code. This observation is further supported by this passage from the *ponencia*, *viz.*:

> Statutes regulating the procedure of the courts will be construed as applicable to actions pending and undetermined at the time of their passage. In that sense and to that extent, procedural laws are retroactive. Criminal Cases Nos. Q-99-

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This provision was not changed by the major amendments made to the Rules of Court in 1985 and 1988 (by the Rules on Criminal Procedure), in 1997 (by the New Rules of Civil Procedure) and in 2000 (by the 2000 Revised Rules of Criminal Procedure).

[147] People v. Lacson III, *supra*.

[148] *Ibid.*

[149] *Ibid.*

> 81679 to Q-99-81689 had long been dismissed by Judge Agnir, Jr. before the new rule took effect on December 1, 2000. When the petitioners filed the Informations in Criminal Cases Nos. 01-101102 to 01-101112 on June 6, 2001, Criminal Cases Nos. Q-99-81679 and Q-99-81689 had long since been terminated. The two-year bar in the new rule should not be reckoned from the March 29, 1999 dismissal of Criminal Cases Nos. Q-99-81679 to Q-99-81689 but from December 1, 2000 when the new rule took effect. While it is true that the Court applied Section 8 of Rule 110 of the RRCP retroactively, it did so only to cases still pending with this Court and not to cases already terminated with finality.[150]

This is therefore a turn-around from the majority's statement in *People v. Lacson II* to the effect that provisional dismissal does not terminate a criminal case. More importantly, this is in consonance with Justice Bellosillo's holding in his separate opinion also in *People v. Lacson II.* There he said that provisional dismissal is "subsumed" by Article 91 of the Revised Penal Code on the commencement again of the prescriptive period. If this is now the opinion of the majority, then the edifice of the Different Planes View built by the majority in *People v. Lacson II* may crumble.

As to the denial of due process, the majority again makes use of its argument based on the purpose of the new rule. Respondent's contention "proceeds from an erroneous assumption that the new rule was approved by the Court solely for his benefit, in derogation of the right of the State to due process."[151] The Court, however, explains that, "The new rule was approved by the Court to enhance the right of due process of both the State and the accused. The State is entitled to due process in criminal cases as much as the accused."[152]

In resolving the second issue, the Court maintains its previous holding. It reaffirms its conclusion that the accused did not move for dismissal when the case was before the Regional Trial Court. He only prayed for the determination of probable cause and holding in abeyance of the issuance of the arrest warrant. The general prayer would not suffice. The majority also maintains its ruling that the judicial admissions of Lacson's counsel before the CA are binding against Lacson. Thus, there is no escaping the conclusion that Lacson did not expressly consent to the dismissal of the cases.

On the second requisite of service of notices to the offended parties, again the majority believes that there is no need to remand the case to the trial court. The Court found no proof that the requisite notices were even served on all the heirs of the victims.[153] When this is compared with the Court's holding in *People v. Lacson I*, a change in attitude of the Court becomes apparent. In *People v. Lacson I* the Court could not find any conclusive proof in the records to support the presence of the second requisite. That is why it ordered the remand of the case. Similarly, in this third resolution, in reviewing the same records, the Court also finds no conclusive proof. But interestingly

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[150] *Ibid.*
[151] *Ibid.*
[152] *Ibid.*
[153] *Ibid.*

enough, the Court immediately jumps to the conclusion that there were no notices given to the offended parties, instead of remanding the case as it did in *People v. Lacson I*. What the Court did in *People v. Lacson I* is fair and just considering that the second requisite was not yet required by the Rules when the cases were dismissed in 29 March 1999. Thus, the records could really not bear any conclusive proof on such matter because the accused was not required to show such proof during that time.

After rejecting all the arguments of the movant, the majority had no choice but to deny the motion for reconsideration. The majority remained unmoved.

II. THE NEW RULE ON PROVISIONAL DISMISSAL IN LIGHT OF *PEOPLE V. LACSON I, II* AND *III*

In light of the discussions and reviews made above, this Part tries to chart the metes and bounds of not only the new rule on provisional dismissal but also the new concept of provisional dismissal that the new rule inevitably creates. In addition, the new rule is compared with statutes and rules in the United States, which are similar to the former in some respects.

Unlike an ordinary dismissal or dismissal with prejudice and quashal of complaint or information,[154] which are governed by specific rules extant in the Rules of Court, the rule on provisional dismissal prior to the present rule[155] grew out of practice of Philippine courts. It can be said that the power to order the provisional dismissal of a criminal case is inherent in the courts. The Supreme Court has held that in the absence of any statutory provision to the contrary, the court may, in the interest of justice, dismiss a criminal case provisionally, without prejudice to reinstating it before the order becomes final or to the subsequent filing of new information for the same offense.[156] If the court has jurisdiction to dismiss a case definitely, it also has the jurisdiction to dismiss the case without prejudice on the part of the prosecutor to file another information.[157]

While the authority to order provisional dismissal is inherent in the courts, the prerogative to move for provisional dismissal, as distinguished from quashal of complaint or information, seems to be historically lodged solely in the executive branch through its prosecution arm. At common law in foreign jurisdictions, the prosecuting attorney, to obtain the dismissal of a criminal case without prejudice to subsequent filing of the same case again, can use a device known as *nolle prosequi*.[158] *Nolle prosequi* means "a declaration that the plaintiff in a civil case or the prosecutor in a criminal case will

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[154] See RULES OF COURT, Rule 117.

[155] RULES OF COURT, Rule 117, sec. 8.

[156] See Jaca v. Blanco, 86 Phil. 452 (1950), People v. Manlapas, 116 Phil. 33 (1962), Republic v. Agoncillo, 148-B Phil. 367, 373 (1971), & Solis v. Agloro, G.R. No. 39254, June 20, 1975.

[157] See Gandicela v. Lutero, 88 Phil. 299 (1951).

[158] See *Comment, Criminal Law-Nolle Prosequi-Trial Court has Power to Dismiss for Want of Prosecution*, 41 N.Y.U. L. REV. 996 (1966) placing the initial appearance of *nolle prosequi* in Stretton & Taylor's Case, 1 Leon. 119, 74 Eng. Rep. 111 (K.B. 1588) cited in Billis v. State, 800 P. 2d 401, 419 (1990).

drop prosecution of all or part of a suit or indictment."[159] Similar to the Philippine concept of provisional dismissal, the power to *nolle prosequi* is ordinarily exercised "in cases in which the indictment cannot be sustained by legal evidence or where it appears that the interests of justice do not require that the defendant be brought to trial."[160] Historically, the decision to *nolle prosequi* a case is within the sole discretion of the prosecuting attorney.[161] Moreover, traditionally, the prosecuting attorney's motion to *nolle prosequi* a case cannot be denied by the courts.[162] A move to *nolle prosequi* is in essence a motion for provisional dismissal. In the Philippine context, it can therefore be likened to a situation where a prosecutor moves for provisional dismissal.[163]

This concept of provisional dismissal has been changed by the new rule on provisional dismissal in Rule 117, section 8.

A. NATURE AND PURPOSE

The opinions of the Justices sketched in the second part above provide different answers on the real nature of the new rule on provisional dismissal. For one, Justice Puno, who was the chair of the Committee on Revision of the Rules that drafted the provision, says that the new rule is a separate and distinct rule from the rules implementing the rights to speedy trial and speedy disposition of cases and the right against double jeopardy.[164] According to him, it is complete in itself and need not be related to other rules.[165] Moreover, the new rule provides a new right to the accused.[166] Further, he characterizes the new rule as a device formulated in order to regulate the conduct of cases before the courts.[167] On the other hand, the other dissenting justices, Sandoval-Gutierrez and Ynares-Santiago, are more precise. They posit that the new rule is a mere implementing rule of the rights to speedy trial and speedy disposition of cases.[168] The majority of the Court, on the other hand, also admits that the new rule "reinforces" the rights to speedy trial and speedy disposition of cases.[169] But they did not stop there. For them the new rule is promulgated to cure the malaise of delay

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[159] AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000) cited in Gertrude Block, 51-SEP Fed. Law. 48 (2004). See also 2 JOEL P. BISHOP, NEW CRIMINAL PROCEDURE OR NEW COMMENTARIES ON THE LAW OF PLEADING AND EVIDENCE AND THE PRACTICE IN CRIMINAL CASES sec. 1387 (1913); 5 RONALD A. ANDERSON, WHARTON'S CRIMINAL LAW AND PROCEDURE sec. 2069 (1957); State v. Anderson, 26 S.W. 2d 174; 22A C.J.S. *Criminal Law* sec. 419 (1989); and, 21 AM. JUR. 2d *Criminal Law* sec. 512 (1981).

[160] LESTER B. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 337 (1947). See also in 22A C.J.S. *Criminal Law* sec. 421 (1989). For the effectiveness of the device in rendering justice see Jacob D. Zeldes, *Connecticut's Most Memorable Nolle*, 68 CONN. B.J. 443 (1994) exulting the then Fairfield County-State's Attorney Homer Stille Cummings', later U.S. Attorney General, *nolle* in State of Connecticut v. Harold Israel.

[161] People v. McLeod, 1 Hill (NY) 404, 37 Am Dec 328. Also cited in footnote 48 of WILLIAM L. CLARK, JR., HANDBOOK OF CRIMINAL PROCEDURE 54 (1918).

[162] See Billis v. State, *supra* at 418. See also U.S. v. Barredo, 32 Phil 444, 451 (1915).

[163] Galvez v. CA, G.R. No. 114046, October 24, 1994.

[164] People v. Lacson II, G.R. No. 149453, April 1, 2003 (Puno, *J., dissenting opinion*).

[165] *Ibid.*

[166] *Ibid.*

[167] *Ibid.*

[168] People v. Lacson III, G.R. No. 149453, October 7, 2003 (Sandoval-Gutierrez, *J., dissenting opinion*, and Ynares-Santiago, *J., dissenting opinion*).

[169] People v. Lacson III, *supra.*

pervading the criminal justice system. [170] It is developed to benefit both the State and the accused. [171]

In consolidating the three perspectives, it can be summarized that the new rule is founded on the courts' inherent power to regulate the conduct of cases before them and the accused's rights to speedy trial and speedy disposition of cases. The former power is here exercised to remedy the problem of delays in the criminal justice system.

The view of Justice Puno that the new rule grants a new right to the accused cannot be wholeheartedly accepted. This granting of a new right will exceed the rule-making power given to the Court by article VIII, section 5(5) of the 1987 Constitution. This new right cannot be characterized as substantive. If the Court cannot "diminish, increase, or modify substantive rights," it stands to reason that it can neither create them. Thus, the new right can only be a procedural right. But again, this procedural right must not "diminish, increase, or modify a substantive right." This procedural right cannot pass the test if it is juxtaposed with the substantive rights of the State and of the accused enshrined in the law on prescription of crimes. It will suffice for this section to state that as a new and independent procedural right it will result in the diminution of the State's right to prosecute.

The better foundation is the constitutional guarantees of speedy trial and speedy disposition of cases. Under the rule-making power clause, the Supreme Court has the power to "promulgate rules concerning the protection and enforcement of constitutional rights" aside from the duty to "provide a simplified and inexpensive procedure for the speedy disposition of cases." It is therefore more appropriate to say that the new rule is but one of the judicial implementing rules on the rights to speedy trial and speedy disposition of cases. It is in *pari materia* with the other rules implementing the right to speedy trial. However, it must be emphasized that the new rule is different and independent from the other rules in one important aspect. Rule 117, section 8 implements the constitutional rights to speedy trial and disposition of cases, while the provisions of Rules 116,[172] 118[173] and 119[174] implement only the statutory right to speedy trial embodied in the Speedy Trial Act of 1998. The rule on double jeopardy and the new rule on provisional dismissal are procedural rules that directly implement constitutional rights in accordance with the first part of article VIII, section 5(5).

Another point is that the new rule is not the only one that directly implements the constitutional guarantees. It must be remembered that the balancing test developed by jurisprudence seeks also to give life to the same constitutional rights. One formal difference however is that the new rule is a product of the exercise of the rule-making

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[170] *Ibid.*

[171] *Ibid.*

[172] Arraignment and Plea.

[173] Pre-Trial.

[174] Trial.

power of the Supreme Court while the balancing test is a product of jurisprudence. It bears repeating that the constitutional rights to speedy trial and speedy disposition of cases are of a different genre, so to speak, compared to other constitutional rights. These rights are amorphous,[175] such that violation of which cannot be easily determined. More importantly, these rights, especially the right to speedy disposition of cases, pervade a large portion, if not the whole and complete stages, of criminal prosecution from its institution to completion. That is why it is virtually impossible to devise a single rule or system of rules that can totally protect and enforce such rights. Even the balancing test is not that kind of a rule. It is not absolutely precise. At best, the new rule on provisional dismissal should be seen as a "relatively" precise rule that implements the constitutional rights to speedy trial and speedy disposition of cases in just one phase of criminal prosecution. Further, characteristic of the balancing test, it is not circumscribed by an absolute and mathematically precise computation of days of delay.

It may also be added here that because of the nature of the concerned constitutional rights, section 8 of Rule 117 is silent as to when or at what stage of criminal prosecution provisional dismissal can be resorted to. It is arguable that because of the constitutional guarantees' character, provisional dismissal may be availed of at any stage from the filing of the complaint or information to before judgment. Further, at whatever stage the dismissal is availed of, the consequence remains the same. The case may still be revived or another prosecution for the same offense instituted, within the time-bar provided in the second paragraph of the new rule.

The new rule therefore, as to this aspect, is very much different from the common law rule of *nolle prosequi* which may be considered its counterpart in other jurisdictions. That common law rule allows entry of *nolle prosequi* only before trial[176] and at such stage its entry may be made even without notice to the accused,[177] provided it is not done capriciously or vexatiously repetitious.[178] It cannot be done during trial without the dismissal being considered a verdict of acquittal. [179] However, statutes and procedural rules in some states[180] have changed the common law rule by allowing *nolle prosequi* during trial, provided the accused consents to its entry. [181] But the accused must

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[175] Barker v. Wingo, 407 U.S. 514, 522 (1972).

[176] J. BISHOP, BISHOP'S NEW COMMENTARIES ON THE CRIMINAL LAW UPON A NEW SYSTEM OF LEGAL EXPOSITION 610 (1892). See also FRANCIS WHARTON, WHARTON'S CRIMINAL LAW 545 (1932); F. WHARTON, WHARTON'S CRIMINAL LAW AND PROCEDURE 226 (1957); L. ORFIELD, *op. cit. supra* note 160, at 338; 22 C.J.S. *Criminal Law* sec. 226 (1989); and, 21 AM. JUR. 2d *Criminal Law* sec. 515 (1981). However it must be noted that under the common law rule of *nolle prosequi*, such may be entered by the prosecuting attorney in another stage, that is, after the verdict has been handed down but before service of sentence has commenced. See 22A C.J.S. *Criminal Law* sec. 420 (1989).

[177] 22A C.J.S. *Criminal Law* sec. 420 (1989).

[178] See People v. Daniels, 132 N.E. 2d 507.

[179] J. BISHOP, *op. cit. supra* note 177, at. 613. See also F. WHARTON, *op. cit. supra* note 177, at 226 & 545; and, J. BISHOP, *op. cit. supra* note 160, sec. 1394.

[180] See J. BISHOP, *op. cit. supra* note 177, sec. 1017.

[181] L. ORFIELD, *op. cit. supra* note 160, at 339; 22 C.J.S. *Criminal Law* sec. 227 (1989); and, 21 AM. JUR. 2d *Criminal Law* sec. 264 (1981).

insist upon a verdict or his consent to the provisional dismissal will be assumed. [182] One such rule is Rule 48(a),[183] a provision quoted in the margin of the United States Federal Rules of Criminal Procedure. The new rule is comparable to Rule 48(a) with respect to when, but not as to how, a case may be provisionally dismissed. Both allow provisional dismissal at whatever stage of the criminal prosecution from filing of information (or indictment) with the court to just before judgment.

Past decisions of the Philippine Supreme Court only dealt with when a motion for provisional dismissal may be filed and granted. Obviously, the Supreme Court could not have dealt with the time-bar of the new rule, which specifically protects the constitutional guarantees.

In *People v. Bellosillo*,[184] for instance, the motion of the prosecution with conformity of the accused was filed and granted before arraignment and plea. It was given the effect of provisional dismissal especially because the double jeopardy rule could not be invoked in that situation. At this stage of the criminal prosecution, discounting the new rule's requirement of notice to the offended party, the new rule differs from Rule 48(a) of the United States Federal Rules of Criminal Procedure because under such rule at the stage before trial, provisional dismissal or *nolle prosequi* may be entered by the prosecution with leave of court alone and without the necessity of getting the conformity or consent of the accused. On the other hand, under Rule 117, section 8, even at the stages before trial, express consent of the accused is already required for a successful motion for provisional dismissal.

If provisional dismissal is entered during the trial proper and after entry of valid plea, subsequent prosecution will not be barred by the rule on double jeopardy because the dismissal is with the express consent of the accused.[185] Here at this stage the new rule and Rule 48(a) become identical. In *Lauchengco v. Alejandro*,[186] for example, the order of provisional dismissal was issued after the initial presentation of the evidence for the prosecution. Also in another case, *People v. Hinaut*,[187] the provincial fiscal's motion for provisional dismissal was filed and granted by the court even after evidence of the defense has already been offered.

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[182] EDWARD M. DANGEL, CRIMINAL LAW sec. 93 (1951). Rule 48(a) is analogous to state statutes providing for dismissal "in furtherance of justice." The difference however is that Rule 48(a) does not allow the courts to dismiss cases *motu proprio* while in dismissal in furtherance of justice courts may do so. See WAYNE R. LAFAVE AND JEROLD H. ISRAEL, CRIMINAL PROCEDURE sec. 13.3(c) (1984 & Supp 1988).

[183] U.S. Federal Rules of Procedure, Rule 48(a) provides:

> *By Attorney for Government.* The attorney General or the United States attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant.

[184] G.R. No. 18512, December 27, 1963.

[185] This proposition holds true in all three views, i.e., *Jaca, Gandicela* and Justice Labrador's position.

[186] G.R. No. 49034, January 31, 1979.

[187] 105 Phil 303 (1959).

Equally disputed as its nature is the real purpose of Rule 117, section 8. It may be recalled that in *People v. Lacson II* and *III*, the resolution of what kind of operation — prospective only or retrospective also — should be given the new rule hinged on the purpose sought to be achieved by it. Closely related to this is the party/ies or persons that the new rule seeks to protect and give benefit to.

According to one consultant[188] of the Committee that drafted the new rule, whose book was cited by some of the justices[189] in *People v. Lacson II* and *III*, the purpose of the new rule is simple. It is merely to minimize if not totally prevent the prejudice caused to accused who cannot return to their normal lives because their cases are only provisionally dismissed notwithstanding the fact that these cases have been dismissed several years ago.[190] While the cases are provisionally dismissed, the defendants cannot get the required clearance/s before the appropriate government law enforcement agencies. This therefore suggests that the purpose of Rule 117, section 8 is to give protection to the accused.[191] The inquiry must center on the evil from which the accused is sought to be protected. A careful reading will show that ultimately the new rule seeks to protect defendants from unreasonable delay in the prosecution of criminal cases that they are facing. They could have returned to their normal lives if the prosecution arm of the Government immediately completed the prosecution of their provisionally dismissed cases, of course provided they are found innocent. Or they could have returned to their peaceful lives if after a certain period of delay without the prosecution reviving their cases, said cases are deemed permanently dismissed and are obliterated from their records in government law enforcement agencies. But then the next inquiry is why the accused should be protected from unreasonable delay. The answer is that the accused should be protected from unreasonable delay in the prosecution of their cases because they are constitutionally entitled to a speedy trial and speedy disposition of their cases. This answer is also the nature or foundation of Rule 117, section 8 explained above. Therefore, if the purpose elaborated on in this paragraph is considered the real purpose of the new rule, then it will jive with its nature as submitted earlier.

On the other hand, the majority in *People v. Lacson II* and *III* posits that the purpose of the new rule is not merely to protect the accused but also to benefit the State. This is plausible only if the purpose refers to the length of the periods provided in the second paragraph of Rule 117, section 8. For instance, the two-year period or time-bar benefits the accused because after the lapse of such period the cases that he faces will be permanently dismissed. It also benefits the State in the sense that it is given time corresponding to the said period to look for evidence and strengthen its case. This statement of Justice Puno in his dissenting opinion is *apropos* on this point,

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[188] Justice Oscar M. Herrera.

[189] Justices Bellosillo, Sandoval-Gutierrez, Ynares-Santiago.

[190] See also FORTUNATO GUPIT, JR., *op. cit. supra* note 13, at 73.

[191] The same position for FLORENZ D. REGALADO, REMEDIAL LAW COMPENDIUM 442 (2002).

> In promulgating the new rule, the Court *en banc* struck a fine balance between the sovereign right of the State to prosecute crimes and the inherent right of the accused to be protected from the unnecessary burdens of criminal litigation. The timeline within which provisionally dismissed cases can be revived forms the crux of the delicate balance.[192]

However, the argument's validity ends here. The said purpose cannot be made to sweepingly animate the whole of the new rule. If the new rule seeks to benefit the State, then it stands to reason that the State must be worse off prior to the advent of the new rule compared to its present position after the new rule's effectivity. But a simple analysis will not lead to such a situation. Prior to the new rule, the only periods that may defeat the State's right to prosecute crimes are those provided in the law on prescription of crimes. Most of these periods[193] are longer than the one-year and two-year periods provided by the second paragraph of the new rule. Following for the meantime the majority's opinion that if the time-bar in the second paragraph of Rule 117, section 8 lapses, the State will lose its right to prosecute, unless it can justify its non-compliance, then the conclusion that the State would be better off if the new rule had not been promulgated at all inevitably follows. Further, if the State's right to prosecute is extinguished earlier, the party who benefits is no other than the accused. It stands to reason that the new rule is geared to protect the accused from delay in the prosecution after his case's provisional dismissal. Protection from unreasonable delay[194] is essentially the crux of the constitutional rights to speedy trial and speedy disposition of cases. However, it could be argued that there is the possibility that the time-bar under the new rule may be longer than the prescriptive period provided by statutes. For example, under article 90, Revised Penal Code, light offenses prescribe after two months only while under Act 3326, the same period applies in case of violations of municipal ordinances. These periods are much shorter than that provided under Rule 117, section 8. Further, it is also possible that even if the prescriptive period is initially much longer than the time-bar, at the phase when the time-bar operates, the remaining prescriptive period may have become much shorter than the time-bar. Consider the situation where the prescriptive period is twenty years, but it was tolled by filing of the complaint with the prosecutor's office after nineteen years and eleven months have elapsed. Thus, after the case is provisionally dismissed, the remaining period that is needed to extinguish the State's right to prosecute is only one month. This is way too short compared to the two-years under the new rule. It therefore stands to reason that the State in this situation benefits from the new rule because it would have more time to gather evidence and complete the prosecution. Emphasis however must be given to the fact that in this illustration and in the first one discussed, it is assumed that the prescriptive period under the statutes and the time-bar under the new rule run simultaneously after the provisional dismissal of cases. This is problematic because it results in a head-on collision between the new rule, a procedural right issuing from the rule-making power of the Supreme

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[192] People v. Lacson II, G.R. No. 149453, April 1, 2003 (Puno, *J., dissenting opinion*).

[193] See REV. PEN. CODE, art. 90 & Act No. 3326 (1926). Under the Revised Penal Code the length of prescriptive periods range from two (2) months to twenty (20) years while under Act 3326, the length ranges from two (2) months to twelve (12) years.

[194] See Conde v. Rivera, 45 Phil. 650 (1924).

Court, and the law on prescription of crimes. It will diminish or increase substantive rights granted by the statute of limitations. In a situation where the time-bar is shorter than the prescriptive period, the new rule will increase the substantive right of the accused and correspondingly diminish State's right to prosecute. On the other hand, if the time-bar is longer than the prescriptive period, the State's right is increased to the detriment of the accused. A categorical characterization therefore of the effect of provisional dismissal is necessary. It suffices to conclude however that based on the analysis made in this paragraph it seems that the majority's ruling that the purpose of the new rule is also to benefit the State cannot be adequately defended. At most, benefit to the State can be considered merely as an incidental purpose of the new rule. Rule 117, section 8 is promulgated principally to protect the accused in the situation therein contemplated. In the United States, a similar procedural rule as Rule 117, section 8 was construed by federal courts to have been promulgated to protect defendants from harassment by Government through charging, dismissing and re-charging without placing defendant in jeopardy.[195] This purpose may also be said applicable to the new rule where several provisional dismissals are possible.

B. REQUISITES

The majority in *People v. Lacson II* provided a list of essential requisites for the new rule on provisional dismissal. The four requisites, for analysis, can be divided into two groups. The first group is composed of the first two requisites. These two requisites are necessary for there to be a "provisional dismissal" under and as redefined by the first paragraph of the new rule. The second group, composed of the last two requisites, is not really essential to determine whether there is provisional dismissal. They are only necessary for the purpose of determining whether the time-bar has already lapsed or not.

1. Provisional Dismissal

a. First Requisite: Express Consent of the Accused

There are those who believe that the new rule, especially the first paragraph, is based on the decisions of the Supreme Court on provisional dismissals in the context of the rule on double jeopardy.[196] This assertion is only partially correct. Prior to the new rule, there were three views on provisional dismissal and dismissal which can be considered a species of provisional dismissal. One of these views[197] required express consent of the accused for there to be provisional dismissal while other views[198] required only that the dismissal is provisional in nature or without prejudice giving no weight on the presence or absence of defendant's express consent to the dismissal. But nevertheless all of these views agree that an unconditional dismissal must be with the

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[195] See Woodring v. US, 311 F. 2d 417 (1963) & U.S. v. Ammidown, 497 F. 2d 615 (1973).

[196] See F. REGALADO, *op. cit. supra* note 92, at 441-442.

[197] *Gandicela* view.

[198] *Jaca* view and Justice Labrador's view.

express consent of the accused for it to be treated as dismissal that will not bar another prosecution for the same offense. Thus, the conflicting decisions of the Court cannot be treated as having been completely incorporated in the new rule. The correct conclusion should be that the new rule resolved the conflict by choosing among these views.

The first requisite therefore makes it clear when and only when there can be a provisional dismissal, i.e., when the dismissal is with the express consent of the accused. This requisite connects in a way the new rule with the rule on double jeopardy in Rule 117, section 7. Because the new rule requires express consent on the part of the accused, it also satisfies the reverse of the "dismissal or other termination without the express consent of the accused" clause in the rule on double jeopardy.[199]

In addition, as to the first requisite, Rule 117, section 8 is akin to Rule 48(a) of the U.S. Federal Rules of Criminal Procedure. A Rule 48(a) dismissal is a dismissal without prejudice to reindictment.[200] Rule 48(a) modified the common law rule of *nolle prosequi* by, among others, requiring that when trial has already started the executive power of *nolle prosequi* can only be exercised with consent of the accused. Both Rule 117, section 8, and Rule 48(a) seek to protect the accused and not to benefit the State. The only difference between Rule 117, section 8, and Rule 48(a) as regards the first requisite is that in the former, the consent of the accused is always required when provisional dismissal is sought in whatever stage of the prosecution, while in the latter, consent of the defendant is only required in provisionally dismissing a case when trial has already commenced. The difference arises from the purposes of the two rules. Rule 48(a) merely protects the right of the accused against double jeopardy. In the United States, after trial has commenced jeopardy attaches.[201] Thus for jeopardy not to attach, waiver of the right is necessary. On the other hand, Rule 117, section 8, only incidentally reinforces the rule on double jeopardy. It primarily implements and protects the accused's rights to speedy trial and speedy disposition of cases. Thus, it becomes necessary that accused's express consent be given first in whatever stage of criminal prosecution because all the stages of the prosecution are covered by at least one of the two constitutional guarantees.

The meaning of "express consent of the accused" has already been settled by Philippine jurisprudence.[202] The practice of some courts to assure themselves that the

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[199] See ERNESTO L. PINEDA, REVISED CRIMINAL PROCEDURE 398 (2003).

[200] See U.S. v. Arradondo, 483 F. 2d 980 (1973); and, U.S. v. Davis, 487 F. 2d 112 (1973).

[201] See U.S. v. Chase, 372 F. 2d 453 (1967); U.S. v. Biordo, 408 F. 2d 112 (1969); & U.S. v. del Vecchio, 707 F. 2d 1214 (1983).

[202] See the following conflicting cases which were resolved by People v. Obsania, 132 Phil. 782 (1968), after almost two decades. The conflicting decisions are divided into two groups: (1) the Salico group and (2) the Labatete group of cases. The first entrenched the waiver doctrine while the second essentially held that dismissal upon motion by the accused is not tantamount to dismissal with the accused's express consent. The first group includes the following cases: People v. Marapao, 85 Phil 832 (1950); Gandicela v. Lutero, 88 Phil. 299 (1951); People v. Romero, 89 Phil 672 (1951); People v. Pinuela, 91 Phil 53 (1952); Co Te Hue v. Encarnacion, 94 Phil 258 (1954); People v. Togle, 105 Phil 126 (1959); People v. Hinaut, 105 Phil 303 (1959); People v. Duran, 107 Phil 979 (1960); People v. Casiano, 111 Phil. 73 (1961); People v. Fajardo, 49 Phil. 206 (1926); People v. Desalisa, G.R. No. 15516,

accused expressly give their consent and consequently, also to ensure that their order of provisional dismissal could not be a valid basis of a plea of twice put in jeopardy is narrated by the Supreme Court in one case[203] this way, "The Court called for the accused and asked them singly and individually, whether they are willing to have this case dismissed with their express conformity, explaining to them that such dismissal will mean possible revival of this case against them, to which they answered in the affirmative."[204]

Another way which courts satisfy this first requisite in the context of the double jeopardy rule is mentioned in *Esmeña v. Pogoy*,[205] *viz.*:

> It is the practice of some judges before issuing an order of provisional dismissal in a case wherein the accused had already been arraigned to require the accused and his counsel to sign the minutes of the session or any available part of the record to show the conformity of the accused or his lack of objection to the provisional dismissal.
>
> The judge specifies in the order of provisional dismissal that the accused and his counsel signified their assent thereto. That procedure leaves no room for doubt as to the consent of the accused and precludes jeopardy from attaching to the dismissal.[206]

But these instances[207] are not the only ones by which the Court can reasonably determine whether express consent was given by the defendant. They are merely the clear-cut ones. The history of provisional dismissal in relation to double jeopardy shows varied cases where the Supreme Court came to the conclusion that there was express consent of the accused.[208]

December 17, 1966; People v. Obsania, *supra*; People v. Catolico, 148 Phil. 404 (1971)]; People v. Surtida, 150 Phil. 34 (1972); Flordelis v. Castillo, 157 Phil. 290 (1974), People v. Jardin, 209 Phil. 134 (1971), People v. Quizada, G.R. No. 61079, April 15, 1988; Caes v. IAC, G.R. No. 74989, November 6, 1989; People v. Gines, 274 Phil. 770 (1991), Paulin v. Gimenez, G.R. No. 103323 January 21, 1993; & Sta. Rita v. CA, 317 Phil. 578 (1971). For the second group see the following cases: People v. Bangalao, 94 Phil 354 (1954); People v. Diaz, 94 Phil 714 (1954); People v. Abaño, 97 Phil 28 (1955); People v. Ferrer, 100 Phil 124 (1956); People v. Tacneng, 105 Phil 1298 (1959); & People v. Labatete, 107 Phil 697 (1960) (penned by Justice Labrador). This case firmly put in jurisprudence his position in his concurring opinion in the earlier case of People v. Jabajab, 100 Phil 307 (1956). See also M. MORAN, *op. cit. supra* note 37, at 265-266.

[203] Solis v. Agloro, G.R. No. 39254, June 20, 1975.

[204] *Ibid.*

[205] G.R. No. 54110, February 20, 1981.

[206] *Ibid.*

[207] Note however that in the United States, the rule on consent of the accused to dismissal is different. There, consent to dismissal may be implied from the conduct of the accused. Further, consent may not be expressed by counsel alone.

[208] See the following cases: People v. Ylagan, 58 Phil 851 (1933), Pendatun v. Aragon, 93 Phil 798 (1953), People v. Hinaut, *supra*, People v. Pilpa, G.R. No. 30250, September 22, 1977; Caes v. IAC, *supra*; & People v. Vergara, G.R. No. 101557, April 28, 1993.

b. Second Requisite: Notice to the Offended Party

The requisite notice to the offended party prior to the hearing on the motion for provisional dismissal is something new. But it is not unique, for under the second paragraph of Rule 110, section 14, notice to the offended party is also required in case an amendment is made before plea that downgrades the offense charged or excludes any of the accused. These are just instances when the offended party is given a different status relative to the State in a criminal case. It is settled that the plaintiff in a criminal case is the State represented by the prosecutor. The offended party is just a mere witness. Generally, if he has any concern in the criminal case, it is merely with respect to the civil liability arising from the crime.[209] But in case of provisional dismissal, a higher status and more active participation is given to the offended party. Although the new rule itself is silent, it can be deduced that by requiring notice to the offended party, the new rule wants the court to hear the position of the offended party on the motion. In other words, the offended party is given the opportunity to express his agreement or opposition to the motion. More importantly, the offended party is also given the liberty to disagreeing with the prosecutor if the latter concurs with the motion or is the one who files the same.

In *People v. Lacson II*, the majority provided a list of reasons, which the offended party may raise in opposing the motion. These are: (1) collusion between the prosecution and the accused for the provisional dismissal of a criminal case thereby depriving the State of its right to due process; (2) attempts to make witnesses unavailable; or (3) the provisional dismissal of the case with the consequent release of the accused from detention, which would enable him to threaten and kill the offended party or the other prosecution witnesses or flee from Philippine jurisdiction, provide opportunity for the destruction or loss of the prosecution's physical and other evidence, and prejudice the rights of the offended party to recover on the civil liability of the accused by his concealment or furtive disposition of his property or the consequent lifting of the writ of preliminary attachment against his property.[210] The court, in exercising its discretion, must, in turn, consider these reasons. Moreover, to ensure that the purpose of this requisite will be realized, the Court requires that proof of notice must be shown before the lower court can proceed with the hearing on the motion for provisional dismissal.[211]

The majority in *People v. Lacson II* and *III* seems to require a formal notice to the offended party while the dissenting justices are amenable to proof of *a priori* knowledge of the offended parties absent a formal notice. In the context of the case, the position of the dissenters' is reasonable considering that when the cases were dismissed, the court, the accused and the prosecutor could not have sent formal notices to the offended party for the rule then prevailing did not require them to do so. However for cases that are provisionally dismissed after the new rule took effect, the parties are

[209] See RULES OF COURT, Rule 110, sec. 16.
[210] People v. Lacson II, G.R. No. 149453, April 1, 2003.
[211] *Ibid.*

already forewarned of the requirement and may easily comply with it by sending a formal notice to offended party. But the question of whether or not actual knowledge without formal notice is sufficient still remains an open one.

Inevitably, the second requisite veers away from the past rulings of the Court where notice to the offended party is considered unnecessary for a prosecutor's motion to dismiss, provisional or otherwise, to be granted. In one case[212] the Court said:

> Since it was the prosecuting officer who instituted the cases, and who thereafter moved for their dismissal, a hearing on his motion to dismiss was not necessary at all. It is axiomatic that a hearing is necessary only in cases of contentious motions. The motion filed in this case has ceased to be contentious. Definitely, it would be to his best interest if the accused did not oppose the motion. The private complainants, on the other hand, are precluded from questioning the discretion of the fiscal in moving for the dismissal of the criminal action. Hence, a hearing on the motion to dismiss would be useless and futile.[213]

In context, the offense charged in that case is frustrated murder where the offended parties are the victims. The dismissal sought was unconditional. But nevertheless the ruling is sweeping because even in unconditional dismissal the offended parties are already precluded from questioning the prosecutor, then more so in case where the dismissal being sought by the prosecutor is merely provisional which unlike the first would not totally exclude the possibility of the accused being prosecuted again. Thus, under the new rule the past rulings and practice of the courts can no longer be countenanced. However, it must be pointed out that the new rule gives the offended party a different status only prior to the grant or denial of the motion.

2. Time-bar

The time-bar component of Rule 117, section 8, is a unique animal so to speak. It is not a statute of limitations *per se.* It is surmountable. According to the majority in *People v. Lacson II*, the lapse of the time-bar does not absolutely extinguish the State's right to prosecute. The State must still be given the opportunity to present compelling or just reasons for not being able to continue the prosecution within the time-bar. Compelling reasons for the delay therefore preserve the State's right to prosecute. This is very uncharacteristic of the statute of limitations.

c. Third Requisite: Order of Provisional Dismissal

The time-bar begins to run only if there is an order of provisional dismissal. The third requisite therefore will occur only if the first two requisites are complied with. It is submitted that even if the dismissal is termed or described by the order as "provisional," the same cannot be considered provisional dismissal under the new

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[212] People v. Vergara, *supra.*
[213] *Ibid.*

rule if the first two requisites are not complied with. On the other hand, despite the absence of the word "provisional" in the order, the same must be considered provisional as long as the first two requisites are present. It must be remembered that according to the majority, the third requisite is that "the court issues an order granting the motion and dismissing the case provisionally."[214] This implies that the order must be described as "provisional." But this is not a reasonable implication for, paraphrasing the words of Chief Justice Moran,[215] the provisionality of the dismissal is the mere effect of compliance with the first two requisites. Of course, Chief Justice Moran's argument was made prior to the new rule. Before, Chief Justice Moran's argument was doubtful because there was no extant rule describing what provisional dismissal was. But now, with the promulgation of the new rule, the requisites for provisional dismissal are made clear. If those requisites are existent then provisional dismissal results irrespective of the description or absence thereof in the order. Further, under *People v. Lacson I*, whose rulings on law (and on some facts) were not reversed in *People v. Lacson II* and *III*, the Court implied that the order of Judge Agnir, which was not described as provisional, was equivalent to provisional dismissal if the records were only clear on compliance with the first two requisites.

d. Fourth Requisite: Service of Order on the Public Prosecutor

The fourth requisite according to the Court in *People v. Lacson II* is that "the public prosecutor is served with a copy of the order of provisional dismissal of the case."[216] This clearly requires service to the public prosecutor only. But later in the *ponencia* and in the other opinions, it seems that service of the copy of the order must also be given to the offended parties. There is therefore confusion as to the fourth requisite.

According to the majority in *People v. Lacson II*, the purpose of the fourth requisite is to inform the prosecutor of the provisional dismissal so that he can comply with the time-bar if he still wants to continue the prosecution of the accused. Moreover, the receipt of the order by the prosecutor is also the reckoning point for the purpose of computing the time-bar.

The confusion is not totally unfounded. Parenthetically, service of a copy of the order to the offended party is not new for under Rule 110, section 14 service of the order to the offended party is also required to protect the latter's interest. Although, the offended party may not unilaterally revive the case, he must nevertheless be given the opportunity to confer with and convince the prosecutor of the merit of the case against the accused. This becomes realizable if the offended party is notified of the order of provisional dismissal. However, such is no longer essential for the operation of the new

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[214] People v. Lacson II, *supra*.

[215] M. MORAN, *op. cit. supra* note 37, at 273-274.

[216] People v. Lacson II, G.R. No. 149453, April 1, 2003.

rule. The *a priori* notice to the offended party is already sufficient to put him on guard as to the possible resolution of the motion for provisional dismissal. Further, the resulting permanent dismissal after the lapse of the time-bar does not preclude the offended party from pursuing other remedies to protect his interest.

It is interesting to note at this point that the new rule is also silent as to how many times provisional dismissal may be resorted to. Justice Bellosillo in his separate opinion intimates that provisional dismissal may be resorted to several times as long as the requisites are complied with. He is also of the opinion that in each and every provisional dismissal the time-bar runs anew. This makes it different from the law on prescription of crimes where the period commences to run again after it is tolled; and it never runs anew. The other justices and the majority were also silent on this. This may be abused by the State but it must however be remembered that provisional dismissal requires the express consent of the accused. This requirement on the part of the accused is more than sufficient to prevent possible resort to successive provisional dismissals. This view is also subscribed to by one author with regard to Rule 48(a) dismissal under the U.S. Federal Rules of Criminal Procedure [217].

C. ROLE OF THE COURT: SHALL OR MAY?

For easy reference, the first paragraph of Rule 117, section 8, is quoted here again: "A case shall not be provisionally dismissed except with the express consent of the accused and with notice to the offended party."

It is mandatory that a case shall not be dismissed unless the requisites therein provided are satisfied. *A sensu contrario*, using the same mandatory language in the affirmative form, the provision should read: "With express consent of the accused and with notice to the offended party, a case shall be provisionally dismissed." The key word is "shall." A simple literal reading therefore will lead to the conclusion that as long as the requisites are complied with, the court has no option but to provisionally dismiss the case. But this is too narrow a reading.

An analysis of this problem requires the identification of parties involved. Justice Bellosillo in his separate opinion in *People v. Lacson II* identified three actors or participants: (1) the accused, (2) the public prosecutor representing the State, and (3) the offended party who may be represented by a private prosecutor. Generally, in criminal cases, only the accused and the State or the People of the Philippines are considered the contending parties. However, it is apparent that in the new rule on provisional dismissal, the general rule does not apply. The new rule separates the private offended party from the State or the public prosecutor.

The three parties must be viewed before the fourth actor, the court. As usual, the fourth actor is a mere arbiter. But whether it has discretion or not in the direction

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[217] Sheila Kles, *Criminal Procedure II: How Much Further is the Furtherance of Justice?*, 1989 ANN. SURV. AM. L. 413, 419 (1991).

of the plot is yet to be seen. The configurations or possible combinations[218] among the first three parties must be identified. Of course, these configurations must satisfy the requisites so that the role of the court can be isolated.[219] The first scenario is when the public prosecutor moves for provisional dismissal with the consent of the accused and of the offended party (personally or through the private prosecutor). The second scenario is when the public prosecutor moves for provisional dismissal with the consent of the accused but with opposition from the offended party who was notified of the motion. The third is when both the public prosecutor and the offended party oppose the defendant's motion for provisional dismissal. The fourth configuration is when the accused files a motion for provisional dismissal with the concurrence of the public prosecutor but with opposition from the notified offended party. Lastly, the fifth possibility is when the accused himself moves for provisional dismissal with the concurrence of the public prosecutor and the offended party. Since by virtue of the *Salico* doctrine which states that a motion filed by the accused is deemed one with his express consent, then the first and fifth scenario can be treated as one (referred to subsequently as the first scenario). The second and fourth possibilities can also be considered as one scenario alone (referred to subsequently as the second scenario).

The second and third configurations obviously show that the court has discretion in whether or not to grant a motion for provisional dismissal in spite of the fact that the requisites for granting it are present. In these situations the accused gives his express consent while the offended party is notified. However, a conflict arises because one or both parties, other than the accused, oppose the motion. This therefore requires the exercise of discretion of the trial court judge. He is empowered to grant or deny the motion depending on his appreciation of the arguments of both sides.

In the doctrinal case of *Crespo v. Mogul*,[220] the second scenario was present. The public prosecutor's motion to which the accused consented was opposed by the private

[218] The configurations become easily understandable if seen in table form.

Configurations	Movant	Accused	Public Prosecutor	Offended Party
First	Public Prosecutor	With consent	With (Movant's) conformity	With conformity
Second	Public Prosecutor	With consent	With (Movant's) conformity	With opposition
Third	Accused	With (Movant's) consent	With opposition	With opposition
Fourth	Accused	With (Movant's) consent	With conformity	With opposition
Fifth	Accused	With (Movant's) consent	With conformity	With conformity of
Sixth	Public Prosecutor	Without consent	With (Movant's) conformity	With conformity
Seventh	Public Prosecutor	Without consent	With (Movant's) conformity	With opposition

[219] The sixth and seventh configurations above, as well as those where the offended party is not notified, need not be inquired into for they cannot effect provisional dismissal. The first and fifth are similar for in those configurations all the three parties agree to a provisional dismissal. The fourth and second can be treated as one because in those configurations all, except the offended party, agree to provisionally dismiss the case.

[220] G.R. No. 53373, June 30, 1987.

prosecutor who was given by the trial court the opportunity to file an opposition to the motion. The Court sided with the trial court judge when the latter denied the motion to dismiss filed by the provincial fiscal upon instructions of the Secretary of Justice giving therefore full discretion to the lower court in the situation. If the court denies the motion, the prosecutor theoretically may question the interlocutory order through a petition for *certiorari* after seeking its reconsideration. But this possibility becomes almost nil as discussed in the succeeding paragraphs.

The third scenario, as mentioned earlier, will also require the exercise of discretion of the court in granting or denying the motion because there are parties, *i.e.,* prosecutor and offended party, arguing for the denial of the motion. This scenario is interesting because there is the possibility of the court granting the accused's motion despite the opposition of the prosecutor who generally must always be given the opportunity to continue prosecuting the accused. If the court grants the motion, the prosecutor could just easily reinstate the same by reviving it the next day. What is interesting is whether the court would really grant a motion for provisional dismissal despite the opposition of the prosecutor. Past cases presented situations where motions for provisional dismissal were granted because the prosecution failed to appear. In one case[221] the Court in a petition for *certiorari* reversed the lower court. It would seem that the court would commit reversible error or grave abuse of discretion if it would grant such motion when the prosecution is able and willing to present evidence. Prosecutors would not oppose accused's motion only when they do not have evidence. To compare, the common law rule of *nolle prosequi* does not allow the court to dismiss a case over the protest or objection of the prosecuting attorney.[222] The court cannot on its own motion without action by the prosecuting attorney enter a *nolle prosequi* but it may advise such entry.[223] Only the prosecuting attorney or the Attorney-General can move to dismiss the indictment and the court cannot interfere with or usurp this prerogative.[224] This is based on the executive branch's prerogative to prosecute and right to prove its case against the accused.

If the court sides with the prosecutor and denies the motion, the accused can avail of the remedy provided by law. However, if the motion is granted against the opposition of the offended party, as in the second and third scenarios, does the latter have any remedy? Here is something unusual with the new rule. It seems that after the court decides on the motion the offended party now exits the picture of the criminal case. He cannot appeal the order granting the dismissal because at that stage he has become a non-party. The adverse party is the State. The prosecution thus can appeal the order later or question it through the remedial vehicle of *certiorari.*[225] But the

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[221] People v. Gomez, 126 Phil 640 (1967).
[222] F. WHARTON, *op. cit. supra* note 177, sec. 2070.
[223] L. ORFIELD, *op. cit. supra* note 160, at 339-340 & 22A C.J.S. *Criminal Law* sec. 420 (1989).
[224] J. BISHOP, *op. cit. supra* note 160, secs. 1388-1389 & 22A C.J.S. *Criminal Law* sec. 420 (1989).
[225] *See* People v. Gomez, *supra.*

offended party still has a remedy as to the civil aspect of the action. In one case[226] the Court held:

> Instead of the appeal that may be interposed by the offended party from the dismissal of the criminal proceeding sought by the fiscal for insufficiency of the evidence, there is open to him the course provided by the law itself for the purpose of enforcing his rights... without impairing the action of the fiscal, and that is to bring the necessary civil action separately, because an adverse judgment or an absolution in a civil action does not imply or later constitute a defense of *res judicata*, nor can it be a bar to a subsequent prosecution of the accused, if after the civil action, said fiscal succeeds in completing his evidence to assure the conviction of the accused in a criminal proceeding.[227]

The first scenario is more problematic. Here, all the three parties are in agreement that the case should be provisionally dismissed. Does this result therefore in the conclusion that the court has no discretion anymore? To answer this, reference to both Philippine and American jurisprudence is needed.

Viewed from an angle where the public prosecutor files the motion for provisional dismissal and save for the notice to the offended party requirement and the time-bar, the new concept of provisional dismissal becomes similar to Rule 48(a) of the U.S. Federal Rules of Criminal Procedure. Rule 48(a) changed the common law concept of *nolle prosequi* in federal courts in the United States.[228] It limits the power of the prosecuting attorney to provisionally dismiss a criminal case at will. It requires leave of court before an indictment may be dismissed or *nol. prossed* so to speak.[229] And even in states where there is no statute limiting the *nolle prosequi* power of the prosecuting attorney, various courts have seen fit that that power could only be exercised by leave of court because it is essential to the due administration of justice and the protection of the people by the enforcement of criminal laws that the prosecuting attorney should not have such power without the consent and approval of the court.[230] The leave of court requirement was held by the federal courts as constitutional and does not infringe on the separation of powers doctrine.[231] The requirement was held to be intended to clothe federal courts with discretion broad enough to protect public interest in fair administration of criminal justice and to modify and condition the absolute power of the executive by erecting a check on the abuse of executive prerogatives.[232] Thus, it merely

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[226] People v. de Moll, 68 Phil 626 (1939).

[227] *Id.* at 633-634.

[228] 21 AM. JUR. 2d *Criminal Law* sec. 516 (1981). See also S. Kles, *op. cit. supra* note 217, at 415-416. For history of Rule 48(b) see Billis v. State, 800 P. 2d 401, 420 (1990).

[229] 22A C.J.S. *Criminal Law* sec. 420 (1989). See also discussion in Randall Lockhart, *The People of the State of Michigan versus Rex Reichenbach - Separation of Powers or Judicial Activism?*, 75 U. DET. MERCY L REV. 355 (1998); and, U.S. v. Bettinger Corp., 54 FRD 40 (1971).

[230] People v. Newcomer, 120 N.E. 244 (1918) discussed in JEROME HALL, CASES AND READINGS ON CRIMINAL LAW AND PROCEDURE 847 (1949). On U.S. cases holding that prosecuting attorney has absolute power to enter a *nolle prosequi* and that leave of court requirement encroaches upon the power of the executive branch see People v. Covelli, 112 N.E. 2d 156 (1953).

[231] U.S. v. Cowan, 524 F. 2d 504 (1974). See also U.S. v. Cox, 342 F. 2d 167 (1965).

[232] U.S. v. Cowan, *supra.*

enhances the separation of powers doctrine by strengthening its corollary doctrine of checks and balances. Whether leave of court must be granted, the court must solely concern itself with principles of justice and not with the guilt or innocence of the accused.[233] Further, courts in exercising their power should not disturb the decision of the prosecution to temporarily end the case unless it is clearly contrary to manifest public interest.[234]

In the Philippines, the Supreme Court's tendency is to give the courts discretion as to whether a case shall be dismissed, provisionally or otherwise. The stage was set by the 1903 case of *U.S. v. Valencia*.[235] There for the first time the discretionary power of the court was pitted against the power of the prosecution arm of the State to withdraw a complaint, which is essentially the same as asking for the dismissal of the case. The Supreme Court through Justice Willard, rejected the contention of one of the convicted accused in ruling that, "after the complaint has been presented, and certainly after the trial has been commenced, the court and not the fiscal has full control of it. The complaint can not be withdrawn by the fiscal without the consent of the court."[236] *U.S. v. Luciano* reinforced the ruling in the same year:[237]

> [W]e hold that under the accusatory system the Government may abandon the criminal action and withdraw the information, if unable to obtain evidence, before the trial has commenced; but after the trial has begun and after the evidence is taken and the defense has been made, the accusation can not be so withdrawn. The judge, in the performance of his duty, may continue the proceeding and render such judgment as he may deem proper under the law, as was done in this case.[238]

The case of *U.S. v. Barredo*[239] adds another dimension. A problem arises when the court denies the motion of the public prosecutor concurred in by the other two parties because now the conflict will be one between the discretionary power of the judicial branch and the power of the executive branch to decide not to continue with the prosecution if it thinks, through the public prosecutor, that further prosecution is not justified. Otherwise put, the public prosecutor may hide behind his inherent power to *nolle prosequi* a criminal case. The Supreme Court, not unexpectedly, ruled in favor of the court:

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[233] 22A C.J.S. *Criminal Law* sec. 420 (1989).

[234] U.S. v. Cowan, *supra*; U.S. v. Biddings, 416 F. Supp. 673 (1976). In the US, a finding that the prosecuting attorney's decision to enter a *nolle prosequi* is clearly contrary to public interest is rarely made. On this point see Peter Krug, *Prosecutorial Discretion and Its Limits,* 50 AM. J. COMP. L. 643 (2002).

[235] U.S. v. Valencia, 1 Phil 642 (1903) reiterated in U.S. v. Barredo, 32 Phil 444 (1915).

[236] U.S. v. Valencia, *supra* at 642. Motion to withdraw a complaint or information has the same effect as a motion to dismiss. Thus, when an information has been withdrawn, there is no more case to dismiss because the case has been already dismissed. See Marcelo v. CA, G.R. No. 106695, August 4, 1994.

[237] U.S. v. Luciano, 2 Phil 96 (1903). See Abela v. Golez, 216 Phil. 12 (1984); and, Assistant Provincial Fiscal of Bataan v. Dollete, 103 Phil 914 (1958).

[238] U.S. v. Luciano, *supra* at 101.

[239] U.S. v. Barredo, 32 Phil 444 (1915). See also U.S. v. Abanzado, 37 Phil 658 (1918); Kwong Sing v. The City of Manila, 41 Phil 103 (1920); U.S. v. Perfecto, 42 Phil 113 (1921); Dimayuga v. Fernandez, 43 Phil 304 (1922); and, People v. Ovilla, 65 Phil 722 (1938).

> We agree with the contentions of counsel that a conscientious prosecuting official, whose investigations have satisfied him as to the innocence of persons charged with the commission of crime, should not institute criminal proceedings against such persons. But we are of the opinion that in the event that criminal proceedings have been instituted, and the investigations of the provincial fiscal have satisfied him that the accused person is innocent, or that evidence sufficient to secure conviction will not be forthcoming at the trial despite the exercise of due diligence to that end, it then becomes his duty to advise the court wherein the proceedings are pending as to the result of his investigations, and to move the court to dismiss the proceedings, leaving it to the court to take such action as may be proper in the premises. In this jurisdiction provincial fiscals are not clothed with power, without the consent of court, to dismiss or *nolle prosequi* criminal actions actually instituted, and pending further proceedings. The power to dismiss is vested solely in the courts, that is to say in the presiding judge thereof....
>
> Upon a motion of the provincial fiscal to dismiss a complaint upon which an accused person has been remanded for trial by a justice of the peace, it rests in the sound discretion of the judge whether to accede to such motion or not. Ordinarily, of course, he will dismiss the action in accordance with the suggestion of an experienced fiscal who has personally investigated the facts. But if he is not satisfied with the reason assigned by the fiscal, or if it appears to him from the record of the proceedings in the court of the justice of the peace, or as a result of information furnished by the private prosecutor, or otherwise, that the case should not be dismissed, he may deny the motion....
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> We conclude that in this jurisdiction, under the uniform practice since the announcement of the rule in the case of United States *vs.* Valencia, . . . provincial fiscals have not the power to dismiss criminal actions pending in Courts of First Instance without leave of court; and that this limitation upon their power extends to the dismissal of complaints upon which accused persons have been committed or admitted to bail to await the action of the judge of the Court of First Instance.[240]

Also in *Barredo*, it was held that it was not improper for the trial court to appoint a special prosecutor to conduct the prosecution of the case if the then provincial fiscal refuses to conduct the proceedings.[241] In similar instances in the United States, when the court refuses to approve the entry of *nolle prosequi*, the court may appoint a member of the bar to proceed with the case.[242]

But the above cases arguably give discretion to the court only when the trial has already begun. Before the trial, there are cases to the effect that the court has no discretion in the first scenario except to give way to the agreement of the three parties.

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[240] U.S. v. Barredo, *supra* at 449-451. But see the seeming contrary holding in Republic v. Bisaya Land Transportation Co., G.R. No. 31490 January 6, 1978. Note however, the facts therein involve *quo warranto* proceeding and not a criminal case.

[241] U.S. v. Barredo, *supra* at 455 citing Act No. 1699, sec. 1, authorizing the judge of the Court of First Instance to appoint a temporary fiscal.

[242] But in one case, the Virginia Supreme Court held that a private prosecutor appointed by a judge cannot enter a *nolle prosequi*. See Cantrell v. Commonwealth, 329 S.E. 2d 22 (1985). See also the arguments presented by one author against the propriety of appointing private prosecutors. Matthew S. Nichols, *No One Can Serve Two Masters: Arguments against Private Prosecutors*, 13 CAP. DEF. J. 279 (2001).

Even in the second scenario, the Court has ruled that prior to the trial, the court must defer to the decision of the public prosecutor not to continue with the prosecution. In *People v. de Moll*,[243] it was held:

> It is not prudent or even permissible for a court to compel the fiscal to prosecute to its termination a proceeding initiated by him by means of an information, or by another, by means of a complaint, if after the preliminary investigation[244] said official finds that the evidence relied upon by him to justify such step is insufficient. To compel the fiscal to do so, ignoring his opinion relative to the insufficiency of his evidence and his recommendation to dismiss the case in the meantime, would be tantamount to urging the acquittal of the accused....[245]

But whatever qualification *de Moll* added to the *Valencia* line of cases, it was totally eradicated by the Court in the doctrinal case of *Crespo*.[246] Although that case presented a factual milieu of the second scenario kind, the Court's holding was sweeping. There the motion filed by the fiscal was upon the direction of the Secretary of Justice, the alter-ego of the President. But nevertheless, the trial court stood its ground and denied the motion. After discussing *de Moll*, in a very broad stroke of his pen, Justice Gancayco, speaking for the unanimous Court *en banc*, stated the doctrine, to wit:

> While it is true that the fiscal has the quasi judicial discretion to determine whether or not a criminal case should be filed in court or not [sic], once the case had already been brought to Court whatever disposition the fiscal may feel should be proper in the case thereafter should be addressed for the consideration of the Court. The only qualification is that the action of the Court must not impair the substantial rights of the accused. [sic] or the right of the People to due process of law.
>
> Whether the accused had been arraigned or not and whether it was due to a reinvestigation by the fiscal or a review by the Secretary of Justice whereby a motion to dismiss was submitted to the Court, the Court, in the exercise of its discretion may grant the motion or deny it and require that the trial on the merits proceed for the proper determination of the case....
>
> The rule therefore in this jurisdiction is that once a complaint or information is filed in Court any disposition of the case as to its dismissal or the conviction or acquittal of the accused rests in the sound discretion of the Court. Although the fiscal retains the direction and control of the prosecution of criminal cases even while the case is already in Court he cannot impose his opinion on the trial

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[243] People v. de Moll, 68 Phil 626 (1939). See also Gonzales v. CFI, 63 Phil 846 (1936); People v. Orais, 65 Phil 744 (1938); People v. Natoza, 100 Phil 533 (1956); People v. Pineda 127 Phil. 150 (1967); and, People v. Jamisola, 141 Phil. 220 (1969).

[244] Under the Rules then the complaint was filed first with the court and then the court would ask the fiscal to conduct a preliminary investigation. This is the reverse of the present procedure except in cases where complaints may be directly filed with the municipal trial court. See RULES OF COURT, Rule 110, sec. 1.

[245] People v. de Moll, *supra* at 633.

[246] Crespo v. Mogol, G.R. No. 46103, October 28,1977. See also Salcedo v. Suarez, G.R. No. 46103, October 28, 1977.

> court.... A motion to dismiss the case filed by the fiscal should be addressed to the Court who has the option to grant or deny the same. It does not matter if this is done before or after the arraignment of the accused or that the motion was filed after a reinvestigation or upon instructions of the Secretary of Justice who reviewed the records of the investigation.[247]

Thus, the dismissal of the case, whether unconditional or provisional, depends on the court's exercise of sound discretion. This discretion becomes more important in provisional dismissal because

> A prosecutor who dismisses an already initiated claim is free to reprosecute it later. To allow on-again, off-again prosecutions that cease before a defendant has been subjected to jeopardy would be to permit the court system to be used for harassment and would expose a defendant to some of the hazards of attachment of jeopardy, *i.e.,* damage to reputation, expense, and threat of criminal sanctions, without the protection that the constitutional prohibition against double jeopardy affords....[248]

Moreover, at any stage of the criminal prosecution, even before entry of plea, a motion for provisional dismissal is subject to the discretion of the court. It therefore follows that in the first and second scenarios, the prosecutor must defer to the exercise of the sound discretion of the trial court judge. He can only hope that the judge will look at the motion his way.

On another point, *Crespo* went further than the *Barredo* ruling. When the Court addressed the possibility of a void that may result when the prosecutor is determined not to prosecute the case, the *ponencia* in *Barredo* simply allowed and upheld the lower court's act of appointing a special prosecutor. But in *Crespo* the Court was of the opinion that the public prosecutor is duty-bound to continue prosecuting the case despite his personal opinion on its merits.[249]

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[247] Crespo v. Mogol, *supra.* The ruling is sweeping. The question as to dismissal, conviction or acquittal depends solely on the discretion of the court. Provisional dismissal, of course, is covered by "dismissal." The Court cannot even be read to be just very cautious given the facts of the case. The facts did not show that the granting of the dismissal will give the accused the protection of being twice put in jeopardy plea. The dismissal was sought before arraignment totally preventing therefore the operation of the rule on double jeopardy even if it can be argued that there was no express consent of the accused to the motion because the latter merely sought the review of the fiscal's decision before the Secretary of Justice.

There is a case which held that motion for reinvestigation filed by the accused which resulted in the prosecutor filing a motion to dismiss is not a manifestation of express consent of the accused. See People v. Vergara, G.R. No. 101557, April 28, 1993.

[248] State v. Connors, 401 N.W. 2d 782 (1987), discussed in YALE KAMISAR, W. LAFAVE AND J. ISRAEL, MODERN CRIMINAL PROCEDURE: CASES-COMMENTS-QUESTIONS 844 (1990).

[249] Resort similar to that provided in Act No. 1699 was not considered by the Court. This may be because there is no more law similar to Act No. 1699 when the case was decided. Section 1 of Act 1699 was expressly repealed by the Revised Administrative Code or Act No. 2711. The Administrative Code of 1987, Executive Order 292, repealed some of the provisions of the Revised Administrative Code but it did not resurrect section 1 of Act No. 1699. However, under section 1679 of the Revised Administrative Code, under circumstances similar to section 1 of Act 1699, the Secretary of Justice, and no longer the court, may appoint an acting provincial fiscal or prosecutor.

> However, one may ask, if the trial court refuses to grant the motion to dismiss filed by the fiscal upon the directive of the Secretary of Justice will there not be a vacuum in the prosecution? A state prosecutor to handle the case cannot possibly be designated by the Secretary of Justice who does not believe that there is a basis for prosecution nor can the fiscal be expected to handle the prosecution of the case thereby defying the superior order of the Secretary of Justice.
>
> The answer is simple. The role of the fiscal or prosecutor as We all know is to see that justice is done and not necessarily to secure the conviction of the person accused before the Courts.[250] Thus, in spite of his opinion to the contrary, it is the duty of the fiscal to proceed with the presentation of evidence of the prosecution to the Court to enable the Court to arrive at its own independent judgment as to whether the accused should be convicted or acquitted. The fiscal should not shirk from the responsibility of appearing for the People of the Philippines even under such circumstances much less should he abandon the prosecution of the case leaving it to the hands of a private prosecutor for then the entire proceedings will be null and void. The least that the fiscal should do is to continue to appear for the prosecution although he may turn over the presentation of the evidence to the private prosecutor but still under his direction and control.[251]

The doctrine laid down in this case was essentially reaffirmed in *Sta. Rosa Mining Company v. Zabala*.[252] In *Sta. Rosa Mining Co.*, after the lower court denied his motion to dismiss twice, the fiscal therein manifested that he would not prosecute the case and he also did not authorize any private prosecutor to appear in said case. Parenthetically, in the federal courts of the United States, this conflict arising from the doctrine of separation of powers is yet to be resolved.[253] Going back to *Sta. Rosa Mining Co.*, faced with a petition for *mandamus* to compel the fiscal to prosecute the case, the Court held that the writ prayed for should be issued. The fiscal must proceed with the

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[250] But it may seem that what the Court asks of the public prosecutors would conflict with their real duty. See Dimatulac v. Villon, 358 Phil 328 (1998). If the public prosecutor, in the exercise of his discretion, thinks that the accused cannot be convicted by the evidence or that the accused is innocent, it is therefore his duty not only to move to dismiss the case but to avoid prosecuting what he believes to be an innocent person. But nevertheless, the discretion of the prosecutor ends where the discretion of the court begins. When the case is already with the court, all the prosecutor must do is to hope that what he thinks to be just is seen the same way by the trial court judge. For further discussion on the duty of prosecutors see the leading case of Suarez v. Platon, 69 Phil 556 (1940).

[251] Crespo v. Mogol, *supra*, at 470-472.

[252] Sta. Rita Mining Company v. Zabala, G.R. No. 44723, August 31, 1987.

[253] S. Kles, *op. cit. supra* note 217, at 421:

> Federally, the separation of powers issue arises when a dismissal motion is denied but the prosecutor refuses to proceed. Courts seem to be without recourse in this situation because the initiation of a prosecution is an exclusive function of the executive branch. Thus, compelling a prosecution to move forward, if performed by the judiciary, would violate the separation of powers doctrine. The judicial inability to compel a prosecution to move forward, however, dilutes the power of the courts to deny a dismissal motion made by the prosecution. This defeats the Congressional purpose in enacting Federal Rule of Criminal Procedure 48(a), which was to limit the absolute power of a prosecutor to dismiss an action. Requiring court leave for an action to be dismissed but failing to implement procedural remedies if upon the denial of a dismissal, the prosecution refuses to proceed, gives the prosecutor as much discretion under Federal Rule 48(a) as he possessed under the common-law "*nolle prosequi*" doctrine. This issue has never been squarely addressed....

prosecution of the case, notwithstanding his personal conviction or opinions.[254] However, the unanimous Court *en banc* softened the strict requirement laid down in *Crespo*. It ordered the provincial fiscal to proceed with the conduct of prosecution but nevertheless allowed him to "turn over the presentation of evidence to another fiscal or a private prosecutor subject to his discretion and control."[255] This is a return to the Court's ruling in an earlier case[256] where through Justice Montemayor, the Court held that it is embarrassing for the public prosecutor to be compelled to prosecute a case when he is in no position to do so because he himself is not convinced of the merits of the case.[257]

The giving of discretion to the court in the first scenario renders implausible the proposition made by Justice Bellosillo to the effect that provisional dismissal is a "tacit agreement for a temporary cessation of hostilities" among the prosecutor, the accused and the offended party. Without the order of the court based on its exercise of sound discretion, there can be no provisional dismissal notwithstanding any agreement among the three parties. Thus, provisional dismissal cannot be properly considered a result of agreement among private parties, but rather it must be characterized as one resulting from the exercise of discretion by the court.

Essentially, the doctrine laid down in *Crespo* remains the rule in Philippine jurisdiction. The doctrine makes the court the protector of public interest and public justice and not only of the accused's rights. This becomes apparent when the situation contemplated by Justice Bellosillo as tacit agreement is maliciously resorted to in order to circumvent the administration and dispensation of justice. This is similar to the rationale behind the leave of court requirement in Rule 48(a) in the United States. Court's approval is required to avoid, prevent or minimize harassment of the accused and to further public justice. Parenthetically, the *Crespo* doctrine is also consistent with the requisite of notice to the offended party. Such notice is required so that the offended party may express his position on the motion for provisional dismissal. Such position will be rendered useless if the court simply defers to and respects the decision of the prosecutor.

It is noteworthy however that the new rule does not provide any guidelines for the exercise of the discretion to grant or not to grant any motion for provisional dismissal. In foreign jurisdictions such as the state of New York, for example, dismissal statutes[258], which are functionally equivalent to provisional dismissal, expressly provide a

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[254] See also Beth A. Brown, *The Constitutional Validity of Pennsylvania Rule of Criminal Procedure 133(B)(2) and the Traditional Role of the Pennsylvania Courts in the Prosecutorial Function*, 52 U. PITT. L. REV. 269 (1990). There the author argued that in Pennsylvania the executive branch historically had no exclusive power of prosecution. The prosecutorial functions have been traditionally encroached upon by Pennsylvania courts.

[255] Sta. Rita Mining Company v. Zabala, *supra*.

[256] Assistant Provincial Fiscal of Bataan v. Dollete, 103 Phil 914 (1958).

[257] It is worth noting, however, that in other jurisdictions there are movements toward the substitution of prosecutors who do not want to prosecute criminal cases filed with them by attorneys hired by offended parties. See Y. KAMISAR, W. LAFAVE AND J. ISRAEL, *op. cit. supra* note 248, at 845.

[258] N.Y. Crim. Proc. Law subsec. 210.40. The statute provides:

list of factors, which courts must consider in ruling on dismissal motions. [259] It must be remembered, however, that the majority in *People v. Lacson II* gives instances of valid grounds on which the offended party may rely in opposing a motion for provisional dismissal. [260]

Another face of the same coin is whether the court can provisionally dismiss a case *motu proprio*, *i.e.*, without the consent of the accused, without notice to the offended party and without motion initiated by any party.

To start with, it cannot be doubted that a court can dismiss a case upon its own motion for failure of the prosecution to appear.[261] In the United States, for example, it is settled that the court has inherent power to dismiss a case for want of prosecution.[262] A specific section of the U.S. Federal Rules of Criminal Procedure, Rule 48(b),[263] recognizes this power. But similar to the Philippines, this rule applies only when there is

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1. An indictment or any count thereof may be dismissed in furtherance of justice... when, even though there may be no basis for dismissal as a matter of law... such dismissal is required as a matter of judicial discretion by the existence of some compelling factor, consideration or circumstance clearly demonstrating that conviction or prosecution... would constitute or result in injustice. In determining whether such compelling factor, consideration or circumstance exists, the court must, to the extent applicable, examine and consider, individually and collectively, the following:
   (a) the seriousness and circumstances of the offense;
   (b) the extent of harm caused by the offense;
   (c) the evidence of guilt, whether admissible or inadmissible at trial;
   (d) the history, character or condition of the defendant;
   (e) any exceptionally serious misconduct of law enforcement personnel in the investigation, arrest and prosecution of the defendant;
   (f) the purpose and effect of imposing upon the defendant a sentence authorized for the offense;
   (g) the impact of a dismissal upon the confidence of the public in the criminal justice system;
   (h) the impact of a dismissal on the safety or welfare of the community;
   (i) where the court deems it appropriate, the attitude of the complainant or victim with respect to the motion;
   (j) any other relevant factor indicating that a judgment of conviction would serve no useful purpose.
2. In addition... a count alleging enterprise corruption... may be dismissed in the interest of justice....
3. An order dismissing an indictment in the interest of justice may be issued upon motion of the people or of the court itself as well as upon that of the defendant. Upon issuing such an order, the court must set forth its reasons therefore upon the record.

[259] See S. Kles, *op. cit. supra* note 217, where a comprehensive review of dismissal statutes, both federal and state, is rendered. The authors also praises the solution brought about by the New York statute.

[260] People v. Lacson II, G.R. No. 149453, April 1, 2003.

[261] RULES OF COURT, Rule 17, sec. 3.

[262] *Ex parte* Altman, 34 F. Supp. 106.

[263] U.S. FEDERAL RULES OF CRIMINAL PROCEDURE, Rule 48(b) provides:

> Rule 48. Dismissal... (b) *By Court.* If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

failure to prosecute, not when there is objection from the prosecution.[264] Put simply, the court on its own accord cannot enter a *nolle prosequi*.[265] Not even the accused can initiate the motion to *nolle prosequi*. He can only give consent to such motion initiated by the prosecuting attorney.[266] The court cannot compel the prosecutor to enter a *nolle prosequi*[267] even if the offended party requests for it.[268] It can only advise such entry to the prosecuting attorney.[269] Further, United States federal courts can only dismiss *sua sponte* cases for want of prosecution only from the period between arrest up to before trial.[270] When trial has commenced, federal courts cannot silence the prosecuting attorney and rule against the objections of the latter to provisionally dismissing a case.

It is therefore arguable whether this inherent power of the court to dismiss *motu proprio* for failure to prosecute can sweep aside the requirements of the new rule.

In some cases preceding the new rule, the Supreme Court allowed *motu proprio* dismissal and even held such dismissal as barring another prosecution in compliance with the rule on double jeopardy. Such dismissal is obviously without the express consent of the accused. Thus first jeopardy attached. An example of such case is *People v. Ladisla*.[271] In other cases, the Court also allowed *motu proprio* provisional dismissal ordered by the trial court. *People v. Manlapas*[272] is a representative case of such rulings. More importantly, the Court there held that the *motu proprio* order of provisional dismissal could not bar another prosecution for the same offense. Put another way, it was provisional dismissal pure and simple even if it was without the express consent of the accused. But *Manlapas*' nemesis, so to speak, is *Fajardo*[273] where the *motu proprio* provisional dismissal made by the judge was not given the effect of a provisional dismissal.

These past decisions are rendered academic by the new rule. Since Rule 117, section 8, expressly requires express consent of the accused and notice to the offended party for there to be a provisional dismissal, then it can only be read to mean that the

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[264] 21 AM. JUR. 2d *Criminal Law* sec. 517 (1981). The classic case for this position is Commonwealth v. Wheeler, 2 Mass 172 (1806).

[265] L. ORFIELD, *op. cit. supra* note 160, at 339-340. See State v. Anderson, 26 S.W. 2d 174 (1930), discussed in J. HALL, *op. cit. supra* note 230, at 853. But there are statutes in some jurisdictions in the United States allowing the courts to essentially *nolle prosequi* a case in the interests of public justice despite the objections of the prosecuting attorney. According to Zanini & Bucci, such statutes encroach upon the power of the executive branch. John P. Zanini & Jeremy Bucci, *"The Interest of Public Justice" and the Judicial Discretion to Terminate Criminal Prosecutions: Silencing the Voice of the People*, 26 NEW. ENG. J. ON CRIM. AND CIV. CONFINEMENT 163, 175-177 (2000). For a contrary view see John F. Wirenius, *A Model of Discretion: New York's 'Interests of Justice" Dismissal Statute*, 58 ALB. L. REV. 175 (1994).

[266] 22A C.J.S. *Criminal Law* sec. 420 (1989).

[267] 21 AM. JUR. 2d *Criminal Law* sec. 864 (1981).

[268] *Ibid.*

[269] 22A C.J.S. *Criminal Law* sec. 420 (1989).

[270] See U.S. FEDERAL RULES OF CRIMINAL PROCEDURE at 365-368. See also U.S. v. Marion, 404 U.S. 307, 478, where Rule 48(b) is said to be limited to post-arrest situations only.

[271] 118 Phil. 795 (1963).

[272] 116 Phil. 33 (1962).

[273] 49 Phil. 206 (1926).

court cannot order provisional dismissal without complying with the requisites. However, it must be clarified that the court *motu proprio* cannot order a provisional dismissal under the new rule but it can nevertheless dismiss the case for failure to prosecute. Rule 117, section 8, however, will no longer govern this. It is not technically a provisional dismissal but it may have the effect of provisional dismissal (the old concept of provisional dismissal) in the sense that such dismissal may not bar subsequent prosecution for the same offense. In the latter case another prosecution is allowed not because of the application of the new rule but because of another rule, specifically the rule on double jeopardy.

In conclusion, the new rule impacts on the role of the court in criminal cases in two ways. First, it conforms to the *Crespo* doctrine regarding the discretion of the court as to the matter of provisional dismissal. Second, it does not lessen the power of the courts to dismiss cases on its own motion for failure to prosecute but it nonetheless makes explicit the requisites that the courts must comply with before a true order of provisional dismissal as contemplated in Rule 117, section 8, may be issued.

D. REVIVAL, REFILING AND FILING

The inquiry into the nature of revival, its forms and scope, is necessarily intertwined with the character of the order of provisional dismissal, i.e., whether the order of provisional dismissal terminates the case or not. Past Supreme Court decisions and even *People v. Lacson I, II* and *III* show conflicting views on this matter. For this section, focus is given on different modes by which a case can be deemed to have been revived.

In the majority opinion in *People v. Lacson II*, it appears that a provisionally dismissed case can be revived by: (1) refiling of the same information or complaint or (2) filing of a new information for the same offense or offense which necessarily includes or which is necessarily included in the provisionally dismissed informations. [274] However, it must be added that by jurisprudence revival may be done through a mere (3) motion to revive or motion to lift order of dismissal or motion to reinstate dismissed case. The first two modes do not necessarily require a new preliminary investigation. But there are several instances[275] when a new preliminary investigation is needed. These are: (1) where after the provisional dismissal of a criminal case, the original witnesses of the prosecution or some of them may have recanted their testimonies or may have died or may no longer be available and new witnesses for the State have emerged; (2) when, if aside from the original accused, other persons are charged under a new criminal complaint for the same offense or necessarily included therein; (3) when, if under a new criminal complaint, the original charge has been upgraded;[276] and, (4) when, if under a

[274] People v. Lacson II, G.R. No. 149453, April 1, 2003.

[275] *Ibid.*.

[276] See Bandiala v. CFI of Misamis Occidental, 146 Phil. 249 (1970); and, Luciano v. Mariano, 148-B Phil. 178 (1971).

new criminal complaint, the criminal liability of the accused is upgraded from an accessory to that as a principal.

Unlike in civil actions where there is an important distinction between a motion to revive and filing of a new complaint,[277] under Rule 117, section 8, as interpreted by the majority of the Court in *People v. Lacson II* and *III*, there is no such distinction. Within the time-bar, the prosecution may choose between the three modes of reviving a provisionally dismissed case.

Also, unlike in some jurisdictions,[278] the new rule does not require approval of the court when a provisionally dismissed case is sought to be revived, save when revival is made through a motion. However, whatever mode is used to revive a case it seems that the court has no discretion to deny such revival as long as revival is sought within the time-bar.

Refiling of the same information and the filing of a new information for the same offense necessarily entails that the prosecution must start anew. It may begin as far backward as preliminary investigation if needed. This is therefore more taxing to all the parties.

Absent the need for a new preliminary investigation, the refiling of the same information or the filing of a new information lacks practical basis. Filing of a new information without a new preliminary investigation cannot legally lead to an information for a graver offense or higher participation. All the things, which have been done in the first case, will have to be repeated. The only rational ground for the prosecutor choosing the mode of refiling is for the case to be raffled-off to another branch of the court. But this seems to have been foreclosed by Supreme Court Circular 7-74,[279] which provides,

> [W]hen a case is dismissed for any cause or reason whatsoever and the same is re-filed, it shall not be included in the raffle anymore but shall be assigned to the branch to which the original case pertained. If, by mistake or otherwise, such case is raffled and assigned to another branch, the latter must transfer the case to the branch to which it originally belonged, in which event another case shall be assigned by raffle as replacement.[280]

The Court, in its past decisions, has sanctioned the filing of a new information. In *People v. Hewald*,[281] the Court said that in order to revive the case the Government

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[277] See Ortigas & Company Ltd. v. Velasco, G.R. No. 109645, July 25, 1994.

[278] In New York State, when an indictment is dismissed by the court "in furtherance of justice," reindictment can only be allowed upon approval of the court. See S. Kles, *op. cit. supra* note 217, at 433.

[279] Dated September 23, 1974. See People v. Lacson III, G.R. No. 149453, October 7, 2003 (Sandoval-Gutierrez, *J., dissenting opinion*).

[280] However, in *People v. Lacson*, the filing of new informations was ordered to be raffled-off again because of the designation of some branches of the Regional Trial Court in Quezon City as special courts for heinous crimes cases.

[281] People v. Hewald, 105 Phil 1297 (1959), unreported case.

would have to file a new case or information for the reason that "the first or old case had already been terminated, definitely and finally."[282] The premise of the decision leads to the conclusion that the filing of a new information is the proper action to revive the case. Such procedure was also done in *Bermisa v. CA*[283] where after more than three years after the case for frustrated murder was provisionally dismissed the assistant provincial fiscal filed a new or second information reproducing exactly the same allegation as in the first information.

Notwithstanding the fact that a new information is filed, a new preliminary investigation is not necessarily required. The reason is that the previous evidence culled during the first preliminary investigation may have remained intact. It can therefore be used again as a sufficient ground to find probable cause.

Revival through motion is also not novel. *Loseo v. Inting*[284] is an authority on the propriety of reviving a case by mere motion to revive or motion to lift the order of dismissal.[285] There, the Court held:

> Petitioner's contentions in this appeal – that the City Fiscal of Davao, instead of asking the City Court of Davao to set aside the order of dismissal, should have allowed it to stand, without prejudice to his re-filing the case with the same court immediately, is a technicality that does not promote the speedy and inexpensive administration of justice.[286]

More categorically the Court through then Justice Fernando stated in one case:[287]

> With the resolution of this petition, it should be clear to all and sundry that the provisional dismissal of a criminal case does not call for the filing of a new information if, as in this case, the parties are clearly made aware, in such order of provisional dismissal, that it is lacking the impress of finality and therefore could be revived and reinstated.[288]

This mode of revival is also advantageous to both the prosecution and the defendant. It favors the accused "because if he is innocent, he would the sooner be cleared of these two charges."[289] Unlike the first two, the third mode results in literal continuation of the provisionally dismissed case.

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[282] *Ibid.*
[283] G.R. No. 32506, July 30, 1979.
[284] Loseo v. Inting, 148-A Phil. 386 (1971).
[285] See the facts of Solis v. Agloro, G.R. No. 39254, June 20, 1975.
[286] Loseo v. Inting, *supra* at 388.
[287] Lauchengco v. Alejandro, G.R. No. 49034, January 31, 1979.
[288] *Ibid.*
[289] People v. Jabajab, 100 Phil 307 (1956).

In the first two modes, save for filing or refiling of complaint before the municipal trial courts outside Metro Manila and chartered cities,[290] revival can be done only by an act of the public prosecutor. However, in the third mode, there may be a private prosecutor representing the offended party. The inquiry therefore leads to whether or not the private prosecutor or the offended party independent of the public prosecutor can move to revive a provisionally dismissed case. A comparison with the first two modes is necessary at this point. In refiling the same information or filing of a new information, the action of the public prosecutor is required because informations must have his signature or approval.[291] Further, in cases where new preliminary investigation is required, the approval of the public prosecutor becomes more important. The result of the preliminary investigation depends on the exercise of his sound discretion. On the other hand, in a mere motion to revive, there is no filing of information needed. Thus, it can be said that the offended party, personally or through the private prosecutor, can initiate the motion for the revival of the case. But despite such difference, still the offended party alone cannot revive the case via a motion.[292] In *Caes v. IAC*,[293] Justice Cruz, speaking for the First Division of the Court, held that a motion to revive cannot be filed by the complaining witness alone.

> [T]he motion for the revival of the cases filed by prosecution witnesses (who never even testified) should have been summarily dismissed by the trial judge. The mere fact that the government prosecutor was furnished a copy of the motion and he did not interpose any objection was not enough to justify the action of these witnesses. The prosecutor should have initiated the motion himself if he thought it proper. The presumption that he approved of the motion is not enough, especially since we are dealing here with the liberty of a person who had a right at least to be notified of the move to prosecute him again....[294]

Caes v. IAC was decided prior to the effectivity of the new rule. Further, the complaining witnesses in that case were not really the offended parties but the police who investigated and arrested the accused. Furthermore, the ruling of the Court is based on the general rule that the plaintiff in a criminal case is the State represented by the public prosecutor and not the complaining witnesses. These distinctions notwithstanding, under the new rule it can be argued that the same conclusion arrived at by Justice Cruz must apply.

It may be said, in support of the position that the offended party on his own accord may move to revive the case, that since under the new rule prior to the case's provisional dismissal, the offended party was given a special status when effectively the new rule requires the judge to hear his side before ruling on the motion for provisional dismissal, then the same special status must be given to the offended party at that period

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[290] See RULES OF COURT, Rule 110, sec. 1 & Rule 112, sec. 1.

[291] See RULES OF COURT, Rule 117, sec. 3(d).

[292] Also the discussion on this submission includes the case where it may be argued that filing of the same or new complaint for the same offense, as distinguished from information, before the municipal trial court may be done without the concurrence of the public prosecutor.

[293] G.R. No. 74989, November 6, 1989.

[294] *Ibid.*

when the case can be revived. In addition, it may be argued that the relative positions of the parties before the decision on the motion for provisional dismissal is the same as their relative positions on the motion for revival. But there is an important distinction between the period before the provisional dismissal and the period after such dismissal or period for revival. In ruling on the motion for provisional dismissal, the court exercises its discretion. This is the reason why the offended party must be given the opportunity to air his side. The court decides to grant or deny the motion after weighing the arguments of the accused, the public prosecutor and the offended party. The judge may properly deny the motion. This should be because the case is already in court and, therefore, within its discretion and control.[295] On the other hand, in the case of motion for revival, the court has no discretion but to revive the case if it is filed within the time-bar. There is no discretion in that phase. It may not even be argued that there must be discretion because the accused, even if the time-bar has not yet lapsed, can invoke his constitutional rights to speedy trial and speedy disposition of cases. The defendant cannot invoke these rights during the time-bar independent of the rule. The supremacy given to these constitutional rights is available only when it is pitted against statutory rights in the same subject, the statutory right of speedy trial, for instance. Thus, in such a situation, the balancing test may still apply even if the statutory time limits have been waived or were complied with. But the new rule, as discussed earlier, does not depend on the statutory right. It directly implements the constitutional rights to speedy trial and speedy disposition of cases. The new rule is therefore at par with the balancing test and the latter cannot be used to supplant the former in the situation contemplated by Rule 117, section 8. It stands to reason that when the trial court judge is faced with a motion for revival, he has no option but to grant the same if it is filed within the time-bar. Thus, if the offended party is allowed to independently file a motion to revive, then there will be no need to hear the position of the public prosecutor. Because, even if the public prosecutor does not believe in the merits of the case or believes that there is no evidence to support a conviction, and airs the same to the judge, the judge would have no option but to grant the revival of the case as long as a simple computation of days showing that the time-bar has not yet lapsed can be presented by the offended party. It will effectively silence the real plaintiff in a criminal case, the State. The correct analogy therefore is between the period before the information is filed with the court by the public prosecutor and the period when the offended party is moving for revival of the case. In these two situations, the offended party must convince first the public prosecutor that he will be exercising his sound quasi-judicial discretion in prosecuting the case, i.e., filing an information or reviving the case. Further, the filing of information is not subject to the discretion of the court. The court cannot refuse the filing of an information in the same manner that it cannot deny a motion to revive which is filed before the time-bar expires.

Continuing the logic then, the offended party cannot move the court to revive the case unless the prosecutor approves of such action because to do otherwise would be equivalent to the offended party, with the aid of the court, compelling the prosecutor

[295] Abela v. Golez, 216 Phil. 12 (1984).

to file an information. Whether an information should be filed in court, or by substitution, whether a motion for revival should be filed, is a matter addressed to the sound discretion of the prosecutor. [296] In Rule 48(a) of the U.S., for instance, even the accused himself cannot compel the prosecuting attorney to move forward and reindict him.[297] It has been held unwise for the court to direct that a prosecution be undertaken.[298] It may result in frivolous prosecutions[299] because prosecutors would be compelled to prosecute cases, which they think upon second look after the order of provisional dismissal would not lead to conviction. Further, it would amount to courts encroaching upon the powers of the executive branch. On a wider viewpoint, it would violate the separation of powers doctrine.[300] It would encroach upon the executive branch's prerogative to determine whether or not a prosecution should be initiated.[301]

Therefore, all the modes of revival require the action of the prosecutor. Such action rests on his exercise of sound quasi-judicial discretion. During the period for revival, as to the parties involved, the new rule follows the general rule that is, only the State and the defendant are the contending parties in a criminal case.

E. A NEW RULE, A NEW CONCEPT

Prior to the new rule the concept of provisional dismissal covered all those instances when a dismissed criminal case can be re-prosecuted. That is why provisional dismissal is loosely termed an exception to the rule on double jeopardy. The instances considered as equivalent to provisional dismissal are instances where the order of dismissal itself is described as provisional or when it is described as without prejudice or with reservation of the right to subsequent prosecution. The old concept also covered the case of unconditional dismissal with the express consent of the accused, which is termed in this paper as a species and ancestor of the new concept of provisional dismissal. Additionally, it may also be said that all kinds of dismissal of criminal cases, which would allow another prosecution, could be considered provisional dismissal. In one case[302] the Supreme Court treated as provisional dismissal an *ex parte* motion to withdraw information filed by the prosecution and granted by the court without hearing neither the accused nor the offended party. It was treated as a provisional dismissal because the accused had not yet been placed in jeopardy when the case was dismissed. It adopted the ruling of the Court in *People v. Vergara*[303] to the effect that,

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[296] *Ibid.*

[297] Accused's wishes to restore his good reputation or simply to see the ordeal of a prosecution end are not sufficient justification to compel the prosecuting attorney to file a reindictment. See S. Kles, *op. cit. supra* note 217, at 419, on this point.

[298] See Inmates of Attica Correctional Facility v. Rockefeller, 477 F. 2d 375 (1973).

[299] People v. Municipal Court, 103 Cal Rptr 645 (1972), discussed in Y. KAMISAR, W. LAFAVE AND JAROLD H. ISRAEL, *op. cit. supra* note 248, at 845.

[300] Y. KAMISAR, W. LAFAVE AND JAROLD H. ISRAEL, *op. cit. supra* note 248, at 841. See also People v. Municipal Court, *supra.*

[301] 21 AM. JUR. 2d *Criminal Law* sec. 516 (1981).

[302] Galvez v. CA, G.R. No. 114046, October 24, 1994.

[303] G.R. no. 101557, April 28, 1993.

> The order of the court granting the motion to dismiss despite absence of a notice of hearing or proof of service thereof, is merely an irregularity in the proceedings. It cannot deprive a competent court of jurisdiction over the case. The court still retains its authority to pass on the merits of the motion. The remedy of the aggrieved party in such cases is either to have the order set aside or the irregularity otherwise cured by the court which dismissed the complaint, or to appeal from the dismissal and not *certiorari*.[304]

Thus, unless the remedies named are resorted to, despite the irregularity, the case remained provisionally dismissed until it is revived.

Further, as an adjunct of the cases dealing with the rule on double jeopardy, the old concept of provisional dismissal has three meanings depending on the school of thought that is used. These three views are the *Jaca* view, the *Gandicela* view and *Justice Labrador's* view, which was adopted by the majority in *People v. Jabajab* and *People v. Labatete*. These schools took root from the concept of "dismissal with express consent of the accused" phrase in the rule on double jeopardy. From this, the three views took separate ways. From the single requirement of express consent of the accused, the concept of provisional dismissal begins to separate from "dismissal with the express consent of the accused" *Gandicela* stuck to the strict view that the concept of provisional dismissal is not different from unconditional dismissal with the express consent of the accused. Thus, whether the order is described as provisional or not does not matter. What matters is that it is with the express consent of the accused. Justice Labrador's position, on the other hand, is that provisional dismissal must be a dismissal which is described as such, that is a dismissal which is termed "provisional" or "without prejudice" or "with reservation to file another prosecution for the same offense." Express consent of the accused is immaterial. On the other hand, *Jaca* considers as provisional dismissal a dismissal that is described as provisional regardless of whether express consent of the accused was given, and unconditional dismissal with the express consent of the accused. From these, it can be deduced that the conflict arises from which factor is material: the provisional nature or description of the dismissal or the presence or absence of express consent of the defendant?

The new rule on provisional dismissal redefined the concept of provisional dismissal. The new rule follows the trend of *Gandicela*, where the material factor is the presence of express consent of the accused to the dismissal. But more than that, the new rule also requires notice to the offended party for there to be a provisional dismissal. Therefore, the new concept of provisional dismissal no longer depends on the nature or description of the order. What matters are the two essential requisites of express consent to the accused and notice to the offended party. Without any or both of these requisites, there will be no provisional dismissal even if the order described the dismissal as provisional.

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[304] *Ibid.*

The first requisite of the new rule is a remnant of the old concept of provisional dismissal. The second requisite, on the other hand, is something new. The second requisite, moreover, changes the prevailing rule to the effect that as to the matter of dismissal of criminal cases, the offended party or private complainant is a non-party. One passage from a case[305] decided by the Supreme Court succinctly captured this old view:

> The witnesses, even if they are the complaining witnesses, cannot act for the prosecutor in the handling of the case. Although they may ask for the filing of the case, they have no personality to move for its dismissal or revival as they are not even parties thereto nor do they represent the parties to the action. Their only function is to testify. In a criminal prosecution, the plaintiff is represented by the government prosecutor, or one acting under his authority, and by no one else.[306]

More important than the extant requisites that changed the concept of provisional dismissal is the fact that the new concept of provisional dismissal is now given an independent status separate and distinct from the old concept, which is an adjunct of the rule on double jeopardy. The new concept is governed by a new rule, which operates by itself and without regard to other rules. However, it does not follow that since a new concept is introduced by the new rule, the old concept must necessarily whither away. Under the present Rules of Criminal Procedure, there are two types of provisional dismissal, the old concept and the new concept. The old concept is still an adjunct of the rule on double jeopardy under Rule 117, section 7, while the new concept is independent of the former and is governed by Rule 117, section 8. Both are provisional dismissal *per se* because both do not proscribe another prosecution for the same offense. But logically speaking, the old concept is broader than the new concept.[307] This means provisional dismissal under the new rule is also provisional dismissal using the old concept. On the other hand, there may be provisional dismissal under the old concept, which cannot be considered provisional dismissal under the new rule.[308]

Although the old concept and the new concept still co-exist it must be pointed out that the new concept affects the old concept in an important way. Under the old concept, following the *Jaca* view and Justice Labrador's opinion, a dismissal characterized as "provisional" in the order is a provisional dismissal. This no longer holds under the new rule. Under the new rule only those that comply with the requisites are to be considered provisional dismissal in law. Thus if a dismissal described as "provisional" is given the effect of not proscribing another prosecution, such effect of provisional dismissal results not because the dismissal is described as provisional but probably because it complies with the requisites of the new rule or of the old concept,

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[305] Caes v. IAC, G.R. No. 74989, November 6, 1989.

[306] *Ibid.*

[307] In logic the relationship between the old concept (O) and the new concept (N) may be described as: All N are O but Only some O are N. The classic example is All dogs are animals but Only some animals are dogs.

[308] To illustrate, a dismissal with the express consent of the accused is a provisional dismissal applying the old concept while for the purpose of the new rule it is not a provisional dismissal unless the notice to the offended party requirement is complied with.

which means it must have been with the express consent of the accused. This therefore leads to the conclusion that the only surviving part of the old concept covers only those situations where there is dismissal with the express consent of the accused. Of course if the old concept of provisional dismissal is construed in the broadest sense, then it may also cover all terminations of cases, whether through conviction or acquittal, which would not prohibit another prosecution because for one reason or another one or more of the requisites of the rule on double jeopardy are not present.

Another point is that under the first paragraph of Rule 117, section 8, as long as the requisites are satisfied the order of dismissal is in law a provisional dismissal regardless of its description by the party-movant or by the court. The new rule therefore makes this pronouncement of the Court five decades ago more appropriate today than at the time it written and when the old concept of provisional dismissal was still starting to evolve:

> [W]e held that courts have no discretion to determine or characterize the legal effects of their orders or decisions, unless expressly authorized by law to do so as provided for in Rule 30, Rules of Court. The addition of such words as "without prejudice", "provisionally," or "definitely" to their order or decision would be a mere surplusage if the legal effect thereof under the law is otherwise, because courts cannot amend the law. So it is not for the court to state in the order or decision that the case is dismissed either definitely or without prejudice. The legal effect of a dismissal depends upon the stage of the trial and the circumstances under which a criminal case is dismissed.[309]

The foregoing Part has tackled the new rule on provisional dismissal enshrined in Rule 117, section 8. It shows the change in the meaning of provisional dismissal from the old to the new concept. More importantly, the new concept of provisional dismissal makes it autonomous, separate and distinct from the old concept, which is still intertwined with the rule on double jeopardy. The separation of the new concept of provisional dismissal under the new rule from the double jeopardy rule marks the turning point in the evolution of the concept of provisional dismissal. Henceforth, provisional dismissal will no longer be seen in the shadow of the rule on double jeopardy.

But the introduction of the new rule, especially the time-bar component thereof, brings with it changes or effects on other fields of law. These other fields of law have already crossed paths with provisional dismissal before. However, with the new rule the second meeting brings with it a new dimension of conflicts, which need to be harmonized.

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[309] Gandicela v. Lutero, 88 Phil 299, 306 (1951).

III. NEW RULE'S EFFECTS ON STATE'S RIGHT TO PROSECUTE AND THE ACCUSED'S RIGHTS TO SPEEDY TRIAL AND SPEEDY DISPOSITION OF CASES

People v. Lacson gave a glimpse of the conflicts and effects that the new rule inevitably brings. In the succeeding paragraphs, the paper focuses on the effects, and possible conflicts, of the new rule on provisional dismissal with the law on prescription of crimes and the rights to speedy trial and speedy disposition of cases.

A. ON LAW ON PRESCRIPTION OF CRIMES

In criminal cases, the State is entitled to due process.[310] Due process here is in the form of giving the State through its prosecution arm the fair opportunity to prosecute a criminal action. This right to due process of the State can therefore be properly termed the State's "right to prosecute."

In foreign jurisdictions, the law on prescription of crimes is called statute of limitations.[311] Prescription of a crime is the extinguishment of the right of the State to prosecute and punish the culprit.[312]

> An act of limitation is an act of grace purely on the part of the legislature, and especially is this case in the matter of criminal prosecutions. The state makes no contract with criminals, at the time of the passage of an act of limitations, that they shall have immunity from punishment if not prosecuted within the statutory period. Such enactments are measures of public policy only. They are entirely subject to the mere will of the legislative power, and may be changed or repealed altogether as that power may see fit to declare.[313]

Once the State has lost or waived such right, the accused may, at any stage of the proceeding, ask and move that the case be dismissed and that he be absolved from the complaint.[314] A judgment for defendant on a plea of prescription of crime is necessarily an acquittal of the charge, not a mere abatement of the action. [315]

The law on prescription of crimes is regarded as both substantive and procedural.[316] Prescription is of the nature of substantive law insofar as it gives an

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[310] But see People v. Lacson III, G.R. no. 149453, October 7, 2003, (Ynares-Santiago, *J., dissenting opinion*), where she argues that the State has no right to due process. See also Galman v. Sandiganbayan, 228 Phil. 42 (1986), where a sham trial that resulted in acquittal of the accused was held to have denied the prosecution, which represents the sovereign people, due process of law.

[311] Qualification, however, must be made for the two concepts are not entirely identical. For example, under the statute of limitations some offenses do not prescribe and it has a different rule on tolling of the prescriptive period.

[312] People v. Moran, 44 Phil 387 (1923).

[313] Commonwealth v. Duffy, 96 Pa. St. 506 (1880) cited in People v. Moran, *supra* at 424 (Malcolm, *J., dissenting opinion*).

[314] People v. Moran, *supra*, at 392. See also 1 RAMON C. AQUINO AND CAROLINA C. GRIÑO-AQUINO, THE REVISED PENAL CODE 89 (1997), citing People v. Villanueva, 93 Phil 927 (1953); People v. Villanueva, 98 Phil 327 (1956); People v. Balagtas, 105 Phil 1362 (1959); and, People v. Castro, 50 OG 4795.

[315] 21 AM. JUR. 2d *Criminal Law* sec. 223 (1981).

[316] But see the dissenting opinion in People v. Moran, *supra* at 433.

accused the right not to be prosecuted after the lapse of the period within which the criminal action must be commenced.[317] It is also characterized as procedural or adjective law insofar as it fixes the time within which such action must necessarily be commenced in order that the prosecution may be legal and the proper penalty may lawfully be imposed.[318]

Only the legislative branch, through a statute, can provide for the prescription of crimes. Any other branch of the government cannot provided for it. The chief executive, however, can achieve the same result in relation to specific individuals, not without qualifications, through the grant of absolute pardon. In the absence of statutes of limitation, a prosecution may be instituted at any time, however long after commission of the criminal act.[319] In Philippine jurisdiction, as to felonies or crimes covered by the Revised Penal Code, Articles 90 and 91 of the same provide for prescription of crimes:

> Art. 90. *Prescription of crime.* – Crimes punishable by death, *reclusion perpetua* or *reclusion temporal* shall prescribe in twenty years.
>
> Crimes punishable by other afflictive penalties shall prescribe in fifteen years.
>
> Those punishable by a correctional penalty shall prescribe in ten years; with the exception of those punishable by *arresto mayor* which shall prescribe in five years.
>
> The crime of libel or other similar offenses shall prescribe in one year.
>
> The offenses of oral defamation and slander by deed shall prescribe in six months.
>
> Light offenses prescribe in two months.
>
> When the penalty fixed by law is compound one, the highest penalty shall be made the basis of the application of the rules contained in the first, second, and third paragraphs of this article.
>
> Art. 91. *Computation of prescription of offenses.* – The period of prescription shall commence to run from the day on which the crime is discovered by the offended party, the authorities, or their agents, and shall be interrupted by the filing of the complaint or information, and shall commence to run again when such proceedings terminate without the accused being convicted or acquitted, or are unjustifiably stopped for any reason not imputable to him.
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> The term of prescription shall not run when the offender is absent from the Philippine Archipelago.

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[317] People v. Moran, *supra* at 401.

[318] *Id.* at 402.

[319] 21 AM. JUR. 2d *Criminal Law* sec. 223 (1981). See also 22 C.J.S. *Criminal Law* sec. 196 (a) (1989).

On the other hand, prescription of offenses punishable by special laws is governed by Act No. 3326,[320] as amended by Act No. 3763. Said law provides:

> Sec. 1. Violations penalized by special acts shall, unless otherwise provided in such acts, prescribe in accordance with the following rules: (a) after a year for offenses punished only by a fine or by imprisonment for not more than one month, or both; (b) after four years for those punished by imprisonment for more than one month, but less than two years; (c) after eight years for those punished by imprisonment for two years or more, but less than six years; and (d) after twelve years for any other offense punished by imprisonment for six years or more, except the crime of treason, which shall prescribe after twenty years; *Provided*, however, that all offenses against any law or part of law administered by the Bureau of Internal Revenue shall prescribe after five years. Violations penalized by municipal ordinances shall prescribe after two months.
>
> Sec. 2. Prescription shall begin to run from the day of the commission of the violation of the law, and if the same be not known at the time, from the discovery thereof and institution of judicial proceedings for its investigation and punishment.
>
> The prescription shall be interrupted when proceedings are instituted against the guilty persons, and shall begin to run again if the proceedings are dismissed for reasons not constituting jeopardy.
>
> Sec. 3. For the purposes of this Act, special acts shall be acts defining and penalizing violations of the law not included in the Penal Code.

Unless the statute contains an exception or condition that will toll its operation, the running of the statute is not interrupted.[321] On the other hand, statutes or provisions suspending or tolling its operation must be construed narrowly or strictly against the Government.[322] The period of prescription of crimes has three stages: (1) when it begins to run, (2) when its running is interrupted, and (3) when it begins to run again. For this paper, it is important to note the third stage.

Prior to the new rule, State's right to prosecute became entangled with dismissal only when the dismissal would trigger the operation of the rule on double jeopardy. It occurs when the premature dismissal effectively denies the State the opportunity to present evidence and later, reprosecute the accused. [323]

But with the new rule, the new concept of provisional dismissal and the law on prescription of crimes cross paths again. However, the crossing of paths occurs in an entirely new dimension. The provisional dismissal itself would not deprive the State of

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[320] Act to Establish Periods of Prescription for Violations Penalized by Special Acts and Municipal Ordinances and to Provide when Prescription shall Begin to Run. It took effect on 4 December 1926. This law does not apply where the special law provides for its own prescriptive period. See People v. Ramos, G.R. No. 25265, May 9, 1978.

[321] 21 AM. JUR. 2d *Criminal Law* sec. 227 (1981). See also 22 C.J.S. *Criminal Law* sec. 202 (1989).

[322] 22 C.J.S. *Criminal Law* sec. 197 (1989).

[323] The leading case of this tenor is People v. Balisacan, G.R. No. 26376, August 31, 1966.

its right. What may deprive it of its right is the expiration of a certain period after the issuance of the order of provisional dismissal. Unlike before where deprivation of the right occurred first before dismissal, now the situation is that there must be a provisional dismissal first which can ultimately lead to extinguishment of the State's right to prosecute.

People v. Lacson II opened the gate for examination of the effect of the new rule on the law on prescription of crimes. The People successfully pointed out that the new rule conflicts with the law on prescription of crimes. Both provide periods, the non-compliance of which would ostensibly result in the extinguishment of State's right to prosecute. The conflict becomes visible when attention is put on the difference between the periods provided by the rule and the statute. Moreover, the conflict becomes more complex because the seemingly conflicting laws have different natures, one a mere procedural law and the other a statutory enactment.

With this conflict as the backdrop, the justices of the Supreme Court, characteristic of the judicial attitude, tried to harmonize the two laws to avoid conflict. The justices produced two solutions. Respondent Lacson's counsel, the majority and the dissenting justices in People v. Lacson II espouse the first. This view is referred to in this paper, following the term used by Justice Bellosillo, as the Different Planes View. The second view, on the other hand, is advanced by Justice Bellosillo in his separate opinion concurred in by Justice Quisumbing. This view for simplicity and easy reference is termed Single Plane View in this paper.[324]

1. Conflicting Views: Different Planes v. Bellosillo, J.

Under Rule 117, section 8, dismissal is used in two senses. First in an order of provisional dismissal. Second, when the provisional dismissal becomes permanent dismissal. Permanent dismissal occurs when the prosecutor, within the time-bar provided by the new rule, does not revive the case.

These two dismissals are the key to analyzing the effect of the new rule on the law on prescription of crimes. The period provided for by the law on prescription of crimes commences to run again when the case "terminate[s] without the accused being convicted or acquitted, or [is] unjustifiably stopped for any reason not imputable to him" under article 91 of the Revised Penal Code. Further, under Act 3326, section 2, prescription "shall begin to run again if the proceedings are dismissed for reasons not constituting jeopardy." These two laws on prescription of crimes[325] contemplate a situation where prescription has already started but is tolled by the filing of complaint with the municipal trial court in certain instances or with the office of the prosecutor[326]

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[324] Justice Bellosillo did not provide a name for his view. However, since he sees no different planes then for him there may only be one or single plane.

[325] To be referred hereinafter as the "law on prescription of crimes."

[326] See RULES OF COURT, Rule 110, sec. 1.

or with the court,[327] and then runs again because the case is "terminated without the accused being convicted or acquitted" or is "unjustifiable stopped for any reason not imputable to him" or "dismissed for reasons not constituting jeopardy." The period when prescription commences to run again may coincide with the period covered by the time-bar of the new rule on provisional dismissal. At this period therefore two sets of rules apply: the time-bar under the new rule and the prescriptive period under the law on prescription of crimes. The conflict arises because the two periods are not equal. Moreover, generally, expiration of any of the two periods extinguishes the State's right to prosecute.

With this conflict as the backdrop, the majority and the dissenting justices in *People v. Lacson II* adopted the Different Planes View advanced by the counsel of accused Lacson in order to harmonize the two laws.[328] The name given to this view is appropriate for it easily pictures how the conflict is avoided. According to the majority,

> The time-bar under the new rule does not reduce the periods under Article 90 of the Revised Penal Code, a substantive law. It is but a limitation of the right of the State to revive a criminal case against the accused after the Information had been filed but subsequently provisionally dismissed with the express consent of the accused.....[329]

Justice Bellosillo, discussed the view in this way: "It is posited that Art. 91 and Sec. 8 operate on 'different planes,' so to speak. The vital distinction being that Sec. 8, Rule 117, contemplates a situation where case had already been filed and was provisionally dismissed."[330] More clearly, Justice Puno explained what the different planes are thus,

> The permanent dismissal of an unrevived case under section 8, Rule 117 does not unduly shorten the prescriptive period of offenses provided for in Articles 90 and 91 of the Revised Penal Code. The new rule merely regulates the conduct of the prosecution of an offense once the case is filed in court. It cannot be doubted that after a case is filed in court, its conduct by the prosecution can be regulated by rules of procedure which are within the exclusive power of this Court to promulgate. More specifically, the new rule regulates the time when the State must complete the prosecution of a pending case after its provisional dismissal. It provides the consequence when the State sleeps on its duty to revive a provisionally dismissed case....
>
> The *ponencia* correctly holds that section 8, Rule 117 of the 2000 Rules of Criminal Procedure is not a statute of limitations. As postulated in the précis, the one-year or two-year bar is a special procedural rule qualifying the right of the State to prosecute cases already filed in court. The time-bar under the new rule does not curtail the periods under Article 90 of the Revised Penal Code. The State

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[327] In case of special penal laws, Act No. 3326, sec. 2, provides that prescriptive period is interrupted by the institution of judicial proceedings against the guilty person.

[328] For brevity the new rule and the law on prescription of crimes are referred to as the "two laws."

[329] People v. Lacson II, G.R. No. 149453, April 1, 2003.

[330] People v. Lacson II, *supra* (Bellosillo, *J., separate concurring opinion*).

> retains the full period under Article 90 of the Revised Penal Code within which to secure the necessary evidence and file the appropriate criminal cases against the accused. But once the State files a criminal case and involves the courts, the constitutional power of this Court to set the rules of procedure for the prosecution of cases cannot be doubted. The power belongs to this Court alone and there are no uncertain umbras and penumbras in its parameters which other branches of the government can claim.[331]

In seeing the different planes, Justice Sandoval-Gutierrez found no conflict.

> Petitioners attempt to create a conflict between the law on prescription of crimes and the rule on provisional dismissal. They argue that substantive law should override or prevail over procedural law. The conflict is non-existent. The law on prescription of crimes refers to the period during which criminal charges must be filed. Section 8 of Rule 117 refers to the period when a provisional dismissal ceases to be temporary and becomes permanent, thus, no longer subject to be set aside by the revival of criminal charges. This rule comes into play only after the State has commenced the prosecution.
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> The twenty-year prescriptive period for a case punishable by death under Section 90 of the Revised Penal Code is intended to give law enforcers ample time to apprehend criminals who go into hiding. It also enables prosecutors to better prepare their cases, look for witnesses, and insure that correct procedure has been followed. On the other hand, the two-year period under Section 8, Rule 117 is intended to warn the State that once it filed a case, it must have the readiness and tenacity to bring it to a conclusion. The purpose of the period is to encourage promptness in prosecuting cases.[332]

The metaphorical use of different planes, therefore, refers to different situations governed by the two laws. It seems that the law on prescription of crimes applies prior to the institution of the criminal prosecution. That is, prior to the filing of the complaint with the office of the prosecutor or the municipal trial court. On the other hand, the new rule contemplates a situation where the case has already been filed with the court and is later provisionally dismissed. At such time the filing of the complaint with the prosecutor's office has already tolled the prescriptive period. Apparently, the two laws do not occupy the same space at the same time. At that space and time when Rule 117, section 8, applies, the law on prescription of crimes has already ceased to operate, *i.e.,* it has already been tolled. And to complete the equation, in situations where the law on prescription of crimes applies, the new rule is non-operative. Thus, conflict is avoided.

The Different Planes View, therefore, presupposes that at no time do the two laws operate or apply simultaneously. This presupposition will exist only if the order of provisional dismissal is not treated to have terminated the case without the accused being convicted or acquitted or to have unjustifiably stopped the case for reasons not imputable to the accused or to have dismissed the case for reasons not constituting

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[331] People v. Lacson II, *supra* (Puno, *J., dissenting opinion*).

[332] People v. Lacson II, *supra* (Sandoval-Gutierrez, *J., dissenting opinion*).

jeopardy. And this is precisely the opinion of Justice Puno when he said that "the new rule regulates the time when the State must complete the prosecution of a pending case after its provisional dismissal."[333] Simply put, the case remains pending despite its provisional dismissal. The majority was not clear as regards this point. However in *People v. Lacson II* it said in passing that "a mere provisional dismissal of a criminal case does not terminate a criminal case,"[334] a pronouncement which it took back in *People v. Lacson III* when it treated the dismissed cases of Lacson as having been already terminated.

To support the proposition that the new rule does not provide for another period of prescription, a law, which only the legislature can provide, Justice Puno founded the time-bar on the inherent power of the court to regulate the cases before it. Since after its provisional dismissal the case remains pending, then it is still within the jurisdiction of the court and can still be regulated by it. The time-bar is just a special procedural limitation.

The proponents of Different Planes View would not have to tread the road if the expiration of the time-bar produces a different effect compared to that arising from the lapse of prescriptive period. But since the proponents were intent in giving the effect of expiration of prescriptive period to permanent dismissal, they were therefore put to task in harmonizing, as they did, the two laws. All the proponents agree that the consequence of permanent dismissal may still be surmounted by the State by presenting compelling or justifiable reasons for the delay. In the words of the unanimous Court in *People v. Lacson I*:

> If the cases were revived only after the 2-year bar, the State must be given the opportunity to justify its failure to comply with said timeline. The new rule fixes a timeline to penalize the State for its inexcusable delay in prosecuting cases already filed in courts. It can therefore present compelling reasons to justify the revival of cases beyond the 2-year bar.[335]

However, there is minute disagreement among the proponents. On the one hand, Justice Puno posited that permanent dismissal amounts to an acquittal. On the other hand, the majority and Justice Sandoval-Gutierrez held that permanent dismissal bars another prosecution for the same offense. In the words of Justice Sandoval-Gutierrez,

> Now, these nuisances may be avoided if we are to give full effect to Section 8 and consider the "permanent" dismissal contemplated therein as a bar to a subsequent prosecution of the accused for the same offense. Not only will it be in consonant with the cardinal principle of justice and fairness, it will also provide force to the rule.[336]

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[333] People v. Lacson II, *supra* (Puno, *J., dissenting opinion*).
[334] People v. Lacson II, *supra*.
[335] People v. Lacson I, 432 Phil. 113, 130 (2002).
[336] People v. Lacson II, G.R. No. 149453, April 1, 2003 (Sandoval-Gutierrez, *J., dissenting opinion*).

In addition to this is the respondent who also argued that permanent dismissal effects a *sui generis* acquittal similar to the effect of a successful plea of twice put in jeopardy and of Rule 119, sections 17 and 18 on discharge of accused to become a state witness,[337] all of these prohibit another prosecution for the same offense.

Technically, acquittal and barring of another prosecution is different. Acquittal may only bar another prosecution if and only if the other requisites of the rule on double jeopardy are satisfied. The classic illustration of this is the case of *Galman v. Sandiganbayan*,[338] where acquittal of the accused was deemed not to have put the double jeopardy rule in operation because the court that handed down the judgment was a court that had lost its jurisdiction. Proscribing another prosecution, on the other hand, is complete in itself. It extinguishes the State's right to prosecute therefore forever freeing the accused from prosecution and punishment for the same offense. However, despite this seeming difference, Justice Puno's opinion quoted below can be read to have meant barring of another prosecution and not mere acquittal.

> The provisional dismissal under section 8 of Rule 119 becomes permanent after the lapse of one or two years depending on the gravity of the offense involved. There can be no hedging on the meaning of the word permanent for the new rule used the word without a bit of embroidery.... In the final version of the provision, however, the phrase "amount to acquittal" was deleted. The deletion was dictated by the belief that the phrase was a redundancy in light of the clear and unequivocal import of the word "permanent." The deletion cannot be distorted to mean that a case permanently dismissed can still be revived. For if that were the intent, the rule could have easily stated that the accused whose case has been permanently dismissed could nevertheless be prosecuted for the same offense.[339]

With the minor disagreement gone, the Different Planes View can be summarized as a theory which posits that permanent dismissal results in the extinguishment of the State's right to prosecute unless the State is able to present compelling reasons for not being able to revive the case within the time-bar provided by the second paragraph of Rule 117, section 8.

> Upon the lapse of the timeline under the new rule, the State is presumed, albeit disputably, to have abandoned or waived its right to revive the case and prosecute the accused. The dismissal becomes *ipso facto* permanent. He can no longer be charged anew for the same crime or another crime necessarily included therein. He is spared from the anguish and anxiety as well as the expenses in any new indictments. The State may revive a criminal case beyond the one-year or two-year periods provided that there is a justifiable necessity for the delay.... But whether or not the prosecution of the accused is barred by the statute of limitations or by the lapse of the time-line under the new rule, the effect is basically the same.....[340]

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[337] People v. Lacson II, supra. (Bellosillo, *J., separate concurring opinion*).

[338] 228 Phil. 42 (1986).

[339] People v. Lacson II, *supra.* (Puno, *J., dissenting opinion*).

[340] *Ibid.*

In order to show a basis of the Court in promulgating a rule that has the effect of an expired prescriptive period, the majority in *People v. Lacson II* had to compare the new rule with the rules and statutes providing for inflexible time limits, which implement the statutory right to speedy trial. "By the same token, if a criminal case is dismissed on motion of the accused because the trial is not concluded within the period therefor, the prescriptive periods under the Revised Penal Code are not thereby diminished...."[341]

It must be remembered that statute of limitations is an act of grace of the State, which only the legislature can make. The Court therefore must found the new rule on something different than the statute of limitations but would have the same effect. Such has been founded by the Court in the implementing rules of the statutory right to speedy trial, which in some jurisdictions[342] provide that violation of which result in a dismissal which bars another prosecution. The Court had to rely on pronouncements in foreign jurisdictions because in the Philippines the implementing rules of Republic Act No. 8493 do not categorically state that non-compliance with any of the time limits therein provided shall result in dismissal which shall bar another prosecution. The implementing rules merely state that in case of violation, the rule on double jeopardy applies. [343]

To conclude therefore, the majority and the dissenting justices advanced one similar proposition underlying the Different Planes View. According to them, permanent dismissal, absent any compelling reasons for the delay, which the State may present, extinguishes the State's right to prosecute. As regards the other underlying proposition, the justices are not clear. Although Justice Puno was explicit in saying that provisional dismissal still makes the case pending and therefore can be reasonably interpreted to mean that provisional dismissal is not a termination of the case without the accused being acquitted or convicted or an unjustifiable stoppage of the case for reasons not imputable to the accused or dismissal for reasons not constituting jeopardy, the other justices, especially those composing the majority, were not clear and precise on such proposition.

2. The Single Plane View

On the other side is the clear and straightforward Single Plane View. Justice Bellosillo forwarded this in his separate opinion to counter the Different Planes View.

Unlike, the Different Planes View, the Single Plane View posits that Rule 117, section 8, and the law on prescription occupy the same plane. In clear defiance of physical law, they occupy the same space at the same time so to speak. The two laws

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[341] *Ibid.*

[342] The majority in People v. Lacson II, *supra*, citing 22 C.J.S. 575 citing People v. Di Franco, 184 N.Y.S. 2d 974.

[343] RULES OF COURT, Rule 119, sec. 9. See also SC Circular No. 38-98, sec. 14.

cannot remain as they are in the legal system for if they do, without any interpretation, head-on collision is inevitable.

> Evidently, respondent's concept of a provisional dismissal that has become permanent under Sec. 8, Rule 117, emasculates and renders illusory its very purpose. It effectively obliterates the different prescriptive periods under Art. 90, which are fixed on the basis of the gravity of the penalty prescribed for the offense, and supplants it with a uniform period of one (1) year or two (2) years, as the case may be. It likewise substantially modifies the manner of computing the period of prescription in Art. 91 since the reckoning of the one (1) or two (2)-year prescriptive period under Sec. 8 is constant and invariable, and without regard to the number of interruptions. Regardless of the number of times the case against an accused is provisionally dismissed, the prosecution would always have a full grace period of two (2) years within which to revive the case; much unlike Art. 91 wherein the period consumed prior to the filing of the complaint or information is tacked to the period consumed after the dismissal of the case for purposes of determining whether the crime has prescribed....
>
> ...Article 91 of The Revised Penal Code distinctly speaks of "prescription... shall be interrupted by the filing of the complaint or information, and shall commence to run again when such proceedings terminate without the accused being convicted or acquitted, or unjustifiably stopped for any reason not imputable to him." It can readily be seen therefore that the concept of a provisional dismissal is subsumed in Art. 91 since in a provisional dismissal, proceedings necessarily terminate without the accused being convicted or acquitted. Thus, to construe and apply Sec. 8 in the manner suggested above would undeniably result in a direct and irreconcilable conflict with Art. 91.[344]

Thus, Justice Bellosillo began with a very clear and precise first proposition: the two laws occupy the same plane, *i.e.,* the same space at the same time. Transmuted into legalese, provisional dismissal terminates the case. This termination is also the one contemplated by the law on prescription of crimes. Therefore, an order of provisional dismissal triggers the running of two periods. First is the time-bar under the new rule and second is the prescriptive period. The time-bar has a fresh start and has relatively shorter periods while the prescriptive period merely commences to run again and has relatively longer periods. Since one is shorter than the other, the expiration of the first triggers an effect, which precludes or renders nugatory the second. Viewed from this, the procedural rule may effectively *nullify* the substantive law on prescription of crimes.

> Courts cannot — by an act of judicial legislation — abridge, amend, alter, or nullify statutes. We do not sit as councils of revision, empowered to judicially reform or fashion legislation in accordance with our own notions of prudent public policy. Certainly, lest we are prepared to ride roughshod over this prerogative of Congress, we cannot interfere with the power of the legislature to surrender, as an act of grace, the right of the State to prosecute and to declare the offense no longer subject to prosecution after certain periods of time as expressed in the statute.[345]

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[344] People v. Lacson II, G.R. No. 149453, April 1, 2003 (Bellosillo, *J., separate concurring opinion*).
[345] *Ibid.*

> It must be stressed that Sec. 8 is nothing more than a rule of procedure. As part of the adjective law, it is only a means to an end — an aid to substantive law — and should accordingly be interpreted and applied in that concept. It was never meant to modify the settled provisions of law on the matter of prescription of offenses; or to unduly curtail the right of the State to bring offenders before the bar of justice. These matters are best left to the wisdom and sound judgment of the legislature.[346]

Viewed from another angle, the shorter period in the time-bar diminishes the right to prosecute of the State enshrined in the law on prescription.

> Furthermore, the right of the State to prosecute criminals is a substantive, nay, inherent right. To unduly limit the exercise of such right for a short period of one (1) or two (2) years through the expedient of a procedural rule is unconstitutional, considering the limitation in our fundamental law on the rule-making power of this Court, that is, its rules must not "diminish, increase or modify substantive rights."[347]

On the other hand, if the time-bar is longer than the prescriptive period, which is also possible, then it results in the increase of the right of the State to prosecute and the consequent diminution of accused's right to be freed from further prosecution. This again, is not possible under the legal system.

With this premise, Justice Bellosillo endeavored to harmonize the new rule with the law on prescription of crimes. The key for him is to be found in the proper characterization of permanent dismissal. Totally opposed to Different Planes View, he posits that after the lapse of the time-bar, the State's right to prosecute is not at all affected. The effect of the expiration of the time-bar is merely to extinguish the revival of the case through the mode of motion for revival. In other words, when the case is permanently dismissed, the State, if still allowed by the law on prescription of crimes, can still prosecute the accused but such prosecution or reprosecution can only be done by filing a new information. This means the State would have to start from scratch but its right to prosecute would not have been affected at all. This argument is based on the narrow reading of the purpose of the new rule made by Justice Bellosillo.

> Clearly, the feverishly contested provision is purely administrative or regulatory in character. The policy embodied therein is simply to grant the accused momentary relief from administrative restrictions occasioned by the filing of a criminal case against him. He is freed in the meantime of the dire consequences of his having been charged with a crime, and temporarily restored to his immunities as a citizen, solely for purposes of government clearances. Section 8 imports no intricate nor ornate legal signification that we need not discern from it a meaning that too far deviates from what it actually purports to convey.[348]

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[346] *Ibid.*
[347] *Ibid.*
[348] *Ibid.*

In order therefore to reconcile the two laws the Single Plane View must differentiate between the modes of revival.

> Once a case is permanently dismissed after the lapse of the prescriptive periods set forth in Sec. 8, the case is dead and, for all intents and purposes, beyond resuscitation. All the on-going proceedings and those still to be had, *e.g.*, preliminary investigation, arraignment, trial, etc., shall cease and be terminated. In the event however that the accused is prosecuted anew with the same offense, albeit under an identical information, the previously terminated proceedings will not be reactivated, the previous case having been set at rest; instead, new proceedings will be conducted as if the accused has been charged afresh. To my mind, the foregoing interpretation of Sec. 8, Rule 117 has in its favor the soundest policy considerations based no less on the fundamental objectives of procedural rules.[349]

To reprosecute the accused for the same offense, a motion to revive is proper if the time-bar has not yet lapsed. This is advantageous to the prosecution because the previous proceeding will only be continued. On the other hand, if the time-bar has already expired, the State, in order to reprosecute the accused, must start from scratch because all the proceedings had during the first case can no longer be continued or cannot be "resuscitated" anymore.

With such a distinction, Justice Bellosillo was able to reconcile the two laws. Although they occupy the same plane, they do not conflict because the new rule does not at all "diminish, increase or alter" the substantive right of the State to prosecute crimes. Permanent dismissal merely results in another procedure, which the State must follow if it still wants to prosecute the same accused for the same offense.

Juxtaposed with the Different Planes View, the disagreements between the two views are apparent with regard to two points. First, while the Different Planes View is not clear as to what the consequence of provisional dismissal is. The Single Plane View is precise in the proposition that provisional dismissal triggers the running again of the prescriptive period so much so that during the period after the provisional dismissal two periods, one procedural, the other substantive, must simultaneously run. Second, while the first view treats permanent dismissal as having the effect similar to prescriptive period, the second view, on the contrary, avoids such characterization of permanent dismissal. Instead, permanent dismissal is merely seen as having the effect of changing the procedure that the State must follow if it desires to reprosecute the accused for the same offense.

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[349] *Ibid.*

3. Different Planes Fortified: A Conflict-free View

The law on prescription of crimes has been in the statute books for several decades.[350] They obviously predate Rule 117, section 8. It is therefore not unusual that the new rule will have an effect on the interpretation of the law on prescription of crimes or vice versa.

Rule 117, section 8, is the new rule that must be reconciled with the old law on prescription of crimes. Further, decisions touching on the law on prescription of crimes and the legal predecessor of the new rule are important tools in the harmonization of the two laws.

Analytically, the bone of contention between the Different Planes View and the Single Plane View is whether the two laws operate on the same or different planes. The pivotal question in the inquiry therefore is whether provisional dismissal triggers the running again of the prescriptive period. If it does, then there is a single plane. Otherwise, there are two planes.

The three key phrases in the law on prescription are: (1) termination without the accused being convicted or acquitted, (2) unjustifiable stoppage of the case for any reason not imputable to the accused, and (3) dismissal for reasons not constituting jeopardy.

Provisional dismissal cannot give rise to unjustified stoppage for reasons not imputable to the accused. There is a dearth of jurisprudence on this key phrase.[351] In *Medrano v. Mendoza*,[352] the delay due to negligence of the prosecutor in filing an amended charge, which if considered to have triggered the running again of the prescriptive period could have extinguished the State's right to prosecute, was not accepted by the Court as an instance of unjustifiable stoppage for reasons not imputable to the defendant.

> Appellant himself caused the stoppage of the proceedings, if any, because of his motion to quash. By this, he, in effect asked for the quashing of one of two offenses included in the complaint....
>
> ...Hence, the delay here cannot be said to have resulted in unjustifiable stoppage of the proceedings for reasons not imputable to the accused because (1) it was at his own insistence that the charge had to be changed, and (2) the municipal court, exercising its discretion, excused the delay and accepted the amended charge filed after the lapse of the five-day period.[353]

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[350] The Revised Penal Code and the amendatory law of Act No. 3326 took effect in 1932 and 1930, respectively.

[351] A very clear example of a case unjustifiably stopped for a reason imputable to the accused is when he has evaded arrest and the case has to be archived by the court. See People v. Parao, 52 Phil 712 (1929).

[352] Medrano v. Mendoza, 130 Phil. 724 (1968).

[353] *Id.* at 727.

If this precedent is applied to a case of provisional dismissal, it is clear that provisional dismissal is not subsumed by article 91 of the Revised Penal Code. The period that runs after the dismissal results from the act of the accused himself. If he is the one who move for provisional dismissal, then the delay is obviously imputable to him. On the other hand, if the prosecutor is the one who filed the motion, the period will still be imputable to the accused because under the new rule he must give his express consent to the provisional dismissal. It is as if he himself sought the delay brought about by provisionally dismissing the case. In addition, the key phrase used the adjective "unjustifiable" to describe the delay or stoppage. The periods provided by the time-bar are not unjustifiable delay or stoppage precisely because they are mandated by the rule. As held by the Court in one case,[354] a delay resulting from faithful compliance with the law is not an unjustifiable stoppage for the purpose of article 91 of the Revised Penal Code.

The remaining two key phrases can be considered as referring to only one thing. Termination of the case without the accused being convicted or acquitted is termination that does not constitute first jeopardy. However, the phrase used by Act 3326 is broader than that found in the Revised Penal Code. Article 91 of the Revised Penal Code covers only (1) termination where the accused is not convicted[355] and (2) termination where the accused is not acquitted;[356] while Act 3326 includes (1) dismissal where the accused is not convicted, (2) dismissal where the accused is not acquitted, and (3) dismissal with express consent of the accused. All of these, their difference in terminology notwithstanding, contemplate a situation where the criminal case ends but it nevertheless does not put an absolute end[357] to the prescriptive period.

The word "terminate" in article 91 has been construed by the Court to mean to put an end to, to make to cease or to end.[358] It connotes finality.[359] It does not merely refer to suspension. Thus, does provisional dismissal under the new rule put an end to a criminal case or does it merely suspend the proceedings?

A survey of the past decisions of the Supreme Court provides three answers to whether or not the prescriptive period commences to run again after the case is provisionally dismissed.

The first group of cases posits the affirmative. The case of *Surbano v. Gloria*[360] is the first in this group. Although it does not squarely deal with an order of provisional

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[354] Caballero v. Alfonso, G.R. No. 45647, August 21, 1987.

[355] Termination or dismissal where the accused is not convicted does not refer to acquittal for then there would be no need for prescriptive period.

[356] Termination or dismissal where the accused is not acquitted does not refer to conviction for then there would be no need for prescriptive period.

[357] Prescriptive period is absolutely ended when the accused is properly convicted or acquitted because then there will be no more need for prescriptive period. If he is properly acquitted or convicted, he can no longer be reprosecuted.

[358] Caballero v. Alfonso, *supra.*.

[359] *Ibid.*

[360] Surbano v. Gloria, 51 Phil 415 (1928).

dismissal, the dismissal in the case however had the effect of a provisional dismissal for the State was allowed to reprosecute the accused for the same offense. The complaint was dismissed on February 18, 1927. The accused was prosecuted again for the same offense. In rejecting the plea based on prescription, the Court held:

> In the present case the period of prescription only commenced to run again on February 18, 1927; and as only twenty-five days elapsed from this last mentioned date until March 15, 1927, when the offended party repeated her denunciation in the Court of First Instance of Tayabas, and not the two months constituting the period of prescription provided by the law (art. 131, par. 5, Penal Code[361]) for misdemeanors, it is clear that the said misdemeanor has not prescribed.[362]

People v. Aquino[363] is the first case that squarely ruled on provisional dismissal in relation to article 91 of the Revised Penal Code. Upon motion of the accused, the case was provisionally dismissed on January 21, 1937. Twenty-three days later, the complaint was filed again. The *ponencia* of Justice Diaz states:

> In the case at bar, according to the facts undisputed by the parties, the offended party was informed of the oral defamation committed against him for the first time on March 4, 1936. This being so, the prescriptive period of six months was not to expire until about September 4, 1936. When the first complaint was dismissed by the court on January 21, 1937, it may be said that the period of six months did not even commence to run because the filing of the complaint on March 4, 1936, had the effect, of interrupting, on that very day, the running of the period of prescription. This is so because it is ordered by said article 91 of the Revised Penal Code. The period of prescription in question commenced to run only from the above-mentioned date, January 21, 1937, and only twenty-three days elapsed from said date to February 13th of the same year. It is clear, therefore, that the appealed order is erroneous because it makes the computation from March 4. 1936, to February 13, 1937, the date of the filing of the last information, when such computation should have been made by it from January 21, 1937, to February 13th of said year.[364]

A more interesting case is *Bermisa v. CA*[365] where the case for frustrated murder was provisionally dismissed upon the instigation of the fiscal with the express consent of the accused. The information was later refiled after more than four years. The accused tried to defeat the unexpired prescriptive period by invoking his right to speedy trial. In rejecting the argument of the accused, the Court reasoned thus: "If petitioner believed that the provisional dismissal deprived him of the right to a speedy trial, then he should

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[361] Article 131 of the Old Penal Code provides that the period of prescription of felonies and misdemeanors is interrupted from the commencement of the proceedings against the offender, and the term of prescription shall commence to run again when such proceedings terminate without the accused being convicted.

[362] Surbano v. Gloria, *supra* at 417.

[363] People v. Aquino, 68 Phil 588 (1939).

[364] *Id.* at 590.

[365] G.R. No. L-32506 July 30, 1979.

have objected to the same instead of having given his consent thereto.... A contrary conclusion would run afoul of the provision on prescription of crimes...."[366]

And in computing the days that have elapsed, the Court added the period from the date of the order of provisional dismissal. "The refiling of the case on September 10, 1969, therefore, was still well within the prescriptive period of twenty years, even considering the interim period of approximately four years when prescription commenced to run again from the date of provisional dismissal up to the refiling of the criminal case."[367]

The first group is similar to the holding in the foreign case of *U.S. v. Grady*,[368] where it was held that the statute of limitations, which was tolled by the filing of the indictment, begins to run again if the indictment is dismissed. The Government must then reindict before the statute runs out or within six months as provided in 18 USCS section 3288, whichever is later.

The first group of cases, therefore, treated the order of provisional dismissal itself as the triggering factor for the commencement of the running again of the prescriptive period. More importantly, the commencement again of the prescriptive period was reckoned from the date of the order itself. This makes the first group slightly different from the second group of cases. Under the second group of cases, prescription commences to run again after the case is provisionally dismissed. But the exact date from which the period should be reckoned is not the date of the order but the date of the finality of the order of provisional dismissal.

In *People v. Hewald*,[369] Justice Montemayor, writing for the Court, ruled that the lower court could no longer entertain a motion for permanent dismissal filed by the accused almost eight months after the issuance of the order of provisional dismissal. The reason given is that the provisionally dismissed case has already been ended or terminated fifteen days after the issuance of the order by the lower court. Justice Montemayor wrote:

> When the trial court issued its order of February 20, 1956, dismissing though provisionally the case, as far as the court was concerned, the case was ended. To revive the case against the same accused or to prosecute them anew on the same acts imputed to them in the case for arbitrary detention, the Government would have to file a new case or information for the reason that the first or old case had already been terminated, definitely and finally. If the dismissal had been permanent, there would be no question that the order of dismissal would have been final, subject to no amendment or modification. The fact that it was provisional merely indicates that the defendants could be again prosecuted without violating the rule on double jeopardy.[370]

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[366] *Ibid.*
[367] *Ibid.*
[368] 544 F. 2d 598, 37 ALR 3d 819.
[369] 105 Phil. 1297 (1959), unreported case.
[370] *Ibid.*

In supporting its ruling, Justice Montemayor for the Court, quoted the rulings from *Pañgan v. Pasicolan*[371] and *Jaca*.[372] The former held: "While the court may find it necessary to hear the views of a private prosecutor before acting on a motion for dismissal filed by the fiscal, it does not follow that it can set aside its order dismissing the case even if the same has already become final."[373] The latter case similarly held: "In the absence of any statutory provision to the contrary, we find no reason why the court may not, in the interest of justice dismiss a criminal case provisionally, i.e., without prejudice to reinstating it before the order becomes final or to the subsequent filing of a new information for the same offense."[374]

The facts of *Hewald* show that the first case was provisionally dismissed upon motion of the prosecutor with conformity of the accused. The issue formulated by the Court was whether the order of provisional dismissal was a mere interlocutory order (and so subject to modification), or a final order terminating the case, which becomes final after the expiration of the period for appeal. The Court as quoted above characterized the order as a final order that terminated the case. It attained finality after the lapse of the fifteen-day period for appeal or reconsideration.

Hewald does not directly deal with provisional dismissal vis-à-vis prescription of crimes. This notwithstanding, it is still instructive as to the character of provisional dismissal. If the order of provisional dismissal terminates the case, then it is termination without the accused being convicted or acquitted. The prescriptive period therefore commences to run again. Such commencement however must be reckoned from the date of finality of the order, i.e., fifteen days after issuance then,[375] since the order may still be reconsidered or appealed. Thus, after fifteen days, the case becomes definitely terminated and would no longer be within the jurisdiction of the court. From that time on, the provisional dismissal becomes the termination contemplated by the law on prescription of crimes.

The reasoning presented above was confirmed in *People v. de Peralta*.[376] The case was dismissed without prejudice by the court. Four days later the prosecutor filed a motion for reconsideration of the dismissal. The lower court decided upon this motion more than seven months later. Within such period the prescriptive period could have elapsed if it was reckoned from the date of the order of dismissal. The issue presented before the Court is whether or not the pendency of the motion for reconsideration suspended the period of prescription. The lower court held in the negative. The Supreme Court reversed the decision ruling that:

> His Honor is of the view that the running (of the period of prescription) should not be deemed to have been tolled by the filing of the motion for reconsideration

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[371] Pañgan v. Pasicolan, 103 Phil 1143 (1958) cited in People v. Hewald, *supra* at 1297.
[372] Jaca v. Blanco, 86 Phil 452 (1950) cited in People v. Hewald, *supra* at 1297.
[373] Pañgan v. Pasicolan, *supra* at 1143-1144.
[374] Jaca v. Blanco, *supra* at 455.
[375] Under the new Rules, it must be from receipt by the parties.
[376] G.R. No. 40837, April 29, 1977.

and during the pendency of the same. For what is the motion, after all, except that it seeks to have the order of dismissal set aside or reconsidered but which order nevertheless and in itself had already terminated the proceedings.

We cannot share such view. We hold that the termination of a criminal case contemplated in Article 91 refers to a termination that is final, in the sense of being beyond reconsideration, as in the cases of an unappealed conviction or an acquittal. His Honor's position could be correct, if the termination of the criminal proceedings were one that amounts to a jeopardy that would bar a subsequent prosecution for the same offense for in such situation, the order becomes immediately final. Such is not the case here.

...Accordingly, the order of dismissal was open to a motion for reconsideration and to an appeal.... And since Section 6 of the same Rule 122 provides expressly that the filing of a motion for new trial interrupts the period for appeal, which is also the period for finality, ...it follows by analogy, in the absence of any express rule to the contrary, that the filing of a motion for reconsideration by the prosecution in the appropriate cases in which it is entitled to appeal should have the order of dismissal contrary to the holding of respondent court in this case....[377]

De Peralta was affirmed in *Cañiza v. People*[378] where the *ponencia* held:

We have held in the past that filing of a motion for reconsideration — except in cases where the accused would be placed thereby in double jeopardy — continues the suspension of the running of the prescriptive period, and that prescription begins to run again only after court proceedings have been finally terminated, in the sense of being beyond reconsideration....[379]

De Peralta faced a severe comment from one author.[380] According to him,

If the "termination x x x refers to a termination that is final, x x x as in the cases of an unappealed conviction or an acquittal," there would be no occasion to speak of prescription of offenses, no matter how long a time has elapsed, because the accused is already convicted (and he does not appeal) or acquitted.

Article 91 may be considered only when the accused, who invokes it, is being charged with and prosecuted for an offense that allegedly has already prescribed. If the proceedings, which began with the filing of the complaint or information, terminate in the conviction of the accused or in his acquittal (the termination being final), how may the question of prescription arise? Or, what period of prescription "shall commence to run again?"

This is why the law says, "without the accused being convicted or acquitted." In such case, the accused may still be prosecuted, but with the previous termination of the proceedings, the question of prescription may still arise,

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[377] *Ibid.*

[378] G.R. No. 53776, March 18, 1988.

[379] *Ibid.*

[380] 1 LUIS B. REYES, THE REVISED PENAL CODE (2001).

> because the period of prescription ran again. At the time of the new prosecution, the crime may have already prescribed.[381]

The comment, however, failed to realize that *de Peralta* does not really require final termination, which is equivalent to conviction or acquittal. What it requires is merely that the order of provisional dismissal must be one that has attained finality. This means the fifteen-day period for appeal or motion for reconsideration must have elapsed first before the prescriptive period can commence to run again. A provisional dismissal that has attained finality is glaringly different from an acquittal or conviction although all the three are final terminations.

The case of *Galvez v. CA*[382] follows the ruling in the second of group of cases. It is however significant for it elucidated on the effect of provisional dismissal and cross-referenced such discussion with the common law rule of ***nolle prosequi***. It therefore warrants quotation *in extenso*.

> It is a general rule that a ***nolle prosequi*** or dismissal entered before the accused is placed on trial and before he is called in to plead is not equivalent to an acquittal, and does not bar a subsequent prosecution for the same offense. It is not a final disposition of the case. Rather, it partakes of the nature of a nonsuit or discontinuance in a civil suit and leaves the matter in the same condition in which it was before the commencement of the prosecution....
>
> ...[T]he dismissal of Criminal Cases... did not amount to an acquittal of herein petitioners. Consequently, the same did not immediately become final, hence petitioners could still file a motion for the reconsideration thereof....
>
> This brings us to the question as to whether or not an order of dismissal may be subsequently set aside and the information reinstated. Again, in American jurisprudence, the authorities differ somewhat as to whether a ***nolle prosequi*** may be set aside and the case reinstated. Some cases hold that the ***nolle prosequi*** may be recalled and that the accused may be tried on the same information, but before it can be retraced, set aside, cancelled, or struck off, the permission or assent of the court must be had and obtained, and such cancellation or retraction must be duly entered. According to other authorities, however, the entry of an unconditional ***nolle prosequi***, not on the ground that the information is insufficient on its face, is an end to the prosecution of that information, and such ***nolle prosequi*** cannot afterward be vacated and further proceedings had in that case.
>
> Still in some cases, it has been held that a ***nolle prosequi*** may be set aside by leave of court, so as to reinstate proceedings on the information, or unless it was entered by mistake. In our jurisdiction, we follow the rule which allows an order of dismissal to be set aside by leave of court. In one case, it was held that in the absence of any statutory provision to the contrary, the court may, in the interest of justice, dismiss a criminal case provisionally, that is, without prejudice to reinstating it before the order becomes final or to the subsequent filing of a new information for the offense.[383]

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[381] *Id.* at 859-860.

[382] G.R. No. 114046, October 24, 1994.

[383] *Ibid.*

The second group of cases effectively made provisional dismissal subject to the rule governing provisional dismissal in civil actions. Under the Rules of Civil Procedure, a dismissal without prejudice is a final order that may be appealed or may be subject to a motion for reconsideration within fifteen days from notice.[384] If no appeal or motion for reconsideration is taken, the order attains finality. It therefore leaves the jurisdiction of the court and becomes beyond the power of the court to amend, modify, change, alter or reverse. In one case[385] involving a civil action, the plaintiff moved to revive the case almost a year after its provisional dismissal. The Court had to characterize the order of dismissal without prejudice in this way:

> The dismissal without prejudice of a complaint does not however mean that said dismissal order was any less final. Such Order of dismissal is complete in all details, and though without prejudice, nonetheless finally disposed of the matter. It was not merely an interlocutory order but a final disposition of the complaint.
>
> Thus, upon said dismissal order attaining finality for failure of either party to appeal therefrom, the jurisdiction which the court had acquired thereon was finally discharged and terminated and any subsequent action filed in accordance with the reservation cannot be considered a continuation of the first action which was dismissed.[386]

Significantly in the year 2000, the First Division of the Supreme Court in the case of *Bañares II v. Balising*[387] explicitly held that the ruling enunciated in the civil cases above cited "applies not only to civil cases but to criminal cases as well."[388] *Bañares* involves a criminal case, which was sought to be revived by the prosecution two months after its provisional dismissal. The accused opposed the motion for revival on the ground that an order dismissing an action without prejudice may attain finality if not appealed within the reglementary period. Justice Kapunan, speaking for the Court, sided with the accused and applying the case law from civil actions, he said that "an order dismissing a case without prejudice is a final order if no motion for reconsideration or appeal therefrom is timely filed."[389] As a final order, the order of provisional dismissal disposes of the subject matter in its entirety or terminates the action completely and leaves nothing more to be adjudicated upon[390].

Bañares leads to the conclusion that the order of provisional dismissal, once it attains finality, triggers the running again of the prescriptive period. When the order attains finality, there is no more case to dispose of. The case is already terminated. Prior to the new rule, the lower court could not even entertain a motion to revive a provisionally dismissed case after it attains finality.

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[384] See RULES OF COURT, Rules 17, 40-42, 44 & Batas Blg. 129, sec. 9, 22, 39 (1980).
[385] Olympia International, Inc. v. CA, G.R. No. 43236, December 20, 1989.
[386] *Ibid.*
[387] Bañares II v. Balising, 384 Phil. 567 (2000).
[388] *Id.* at 579.
[389] *Id.* at 577.
[390] See also the leading U.S. case on final judgment or order, Berman v. US, 302 U.S. 211 (1937).

The first two groups of cases coincide with the effect of *nolle prosequi* in the legal system of other jurisdictions. An entry of *nolle prosequi* constitutes a termination of the particular prosecution. It completely terminates a prosecution.[391] It leads to nullification or a discharge and necessarily, termination of the prosecution.[392] It is as if the charge has never been brought in the first place.[393] Rule 48(a) of the U.S. Federal Rules of Criminal Procedure is even explicit for it provides that upon the dismissal of the indictment, information or complaint by the prosecuting attorney, with leave of court, "the prosecution shall thereupon terminate." It necessarily follows that the period of prescription commences to run again because the situation is similar to that stage where the information or indictment has never been filed yet.[394]

The first and second groups of cases therefore, support the Single Plane View. Provisional dismissal leads to the running again of the prescriptive period simultaneous with the time-bar provided under the second paragraph of Rule 117, section 8. The only difference between these groups of cases is as to the precise time from which the prescriptive period is to be reckoned.

The Different Planes View can rely upon the third group of cases. These cases treat provisional dismissal as an order that does not terminate the case. Prescinding from this, the order will not put into operation the law on prescription of crimes. The case remains pending with court. Thus, the one-year and two-year period after the case's provisional dismissal is on the plane that is the exclusive domain of Rule 117, section 8.

The concurring opinion of Justice Labrador in *Jabajab*[395] is the instance that described provisional dismissal as not terminating a case. According to Justice Labrador "if the dismissal contains a reservation of the right to file another action, the case cannot be said to have terminated and jeopardy does not attach."[396] He cited *Jaca* as his basis. This is confusing because the first case in the second group, *Hewald*, is also based on the *Jaca* decision. *Jaca* enunciated the holding that a provisionally dismissed case can be reinstated before the order becomes final or by subsequent filing of a new information for the same offense. It seems Justice Labrador disregarded the "before the order becomes final" part of the *Jaca* ruling. He distinguished provisional dismissal from "final dismissal" or "positive termination of the case" or "a case which is finally disposed of or terminated." The inevitable conclusion therefore, is that provisional dismissal does not put an end to the case. Consequently, provisional dismissal cannot give rise to the operation of the law on prescription of crimes.

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[391] See Sander v. Ohio, 365 F. Supp 1251.
[392] 22A C.J.S. *Criminal Law* sec. 419 (1989).
[393] *Ibid.*, citing Curley v. State, 474 A. 2d 502.
[394] See People v. Clark, 204 N.W. 2d 332 (1972).
[395] People v. Jabajab, 100 Phil 307 (1956).
[396] *Id.* at 311.

To be added to the third group are the cases of *Agoncillo*,[397] *Surtida*,[398] and *Taladua v. Ochotorena*.[399] Justice Fernando wrote the first and third decisions. The second and the third cases merely adopted the ruling in *Agoncillo* where Justice Fernando, speaking for the Court, ruled that

> [T]he reliance by defendants, now appellees, on this constitutional right is misplaced. It is true jeopardy had attached with a valid complaint having been filed in a court of competent jurisdiction and defendants having been thereafter arraigned and pleaded. It had not terminated, though. There was neither conviction nor acquittal. There was thereafter a dismissal without prejudice. Defendant knew, or ought to have known, that the complaint could thus be filed again. They could have objected; they did not. Had they stood fast on what they conceived to be their rights as defendants, things might have been different. Matters could have definitely ended then and there. The jeopardy clause could have been thereafter invoked. The dismissal would have been unconditional in character. That is not however how things developed. What transpired instead was a dismissal clearly without prejudice. At the very least, defendants were in estoppel.[400]

The passage above must be read in its proper context. Provisional dismissal is considered not to have terminated the case in the context of the rule on double jeopardy. Since dismissal without prejudice or provisional dismissal is not one of the three terminations, then it must not have terminated the case. But such holding has a direct implication on the law on prescription of crimes. Unless it be said that provisional dismissal has dual character, one for the purpose of double jeopardy and the other for the purpose of prescription, then the conclusion that provisional dismissal does not terminate the case must also be applicable for the purpose of the law on prescription of crimes. Since a provisionally dismissed case is not yet terminated, then it is still pending. And since it remains pending it stands to reason that the prescriptive period would not commence to run again at such stage. It remains tolled because of the pendency of the case.

In *People v. Mogol*,[401] an order of dismissal, which was issued to give way to the filing of a complaint for a graver offense, was considered by the Court as an order of dismissal that did not actually terminate or put an end to the prosecution against the accused. Although the order is not really provisional, it is nevertheless akin to provisional dismissal because subsequent prosecution for the same offense is still allowed.

The U.S. case of *Price v. Cobb*[402] is *apropos* at this juncture. *Price* is consistent with the third group of cases. In construing Code section 27-1801 which is the

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[397] Republic v. Agoncillo, 148-B Phil. 367 (1971).
[398] 150 Phil. 34 (1972).
[399] 154 Phil. 478 (1974).
[400] Republic v. Agoncillo, *supra* at 373.
[401] 216 Phil. 211 (1984).
[402] 3 S.E. 2d 131 (1939).

predecessor of Code section 27-601 of Georgia quoted elsewhere earlier, the court concludes that within the period provided within which the prosecuting attorney may reindict the accused, the dismissed case is not yet at an end.

> ...Its effect therefore is not necessarily the ending of the prosecution, but the continuance of the same. Not until the expiration of the six months period within which a new indictment for the same offense may be preferred, or some other act or declaration which amounts to an abandonment, is the prosecution at an end. The law places an indictment which has been quashed or has had a *nolle prosequi* entered thereon, upon the same basis, so far as the prosecution is concerned, as a continuance, unless some other affirmative act or declaration is alleged. Neither irrevocably ends the prosecution....
>
> ...If a subsequent indictment might be returned against the plaintiff for the same offense as charged in this case, and it does not otherwise appear that the prosecutors have abandoned the prosecution and that it may still be brought in the courts and a final verdict of conviction based thereon, the prosecution may not be said at an end.[403]

The three groups of cases are intriguing because the Supreme Court did not categorically rule on which one of the conflicting decisions is the soundest. It does not even seem to be aware of such conflicts because a case falling under one group, except the leading case of *Jaca*, was never cited in subsequent cases belonging to other groups. If there was a citation, what was cited in a later group is a precedent from the same group of cases.

With these three schools of thought, it is therefore not unusual for the majority in *People v. Lacson II* to flip-flop in *People v. Lacson III*. With the new rule and in order to reconcile it with the law on prescription of crimes, a definitive choice must be made among the three groups of cases. If the first two are chosen, then the Single Plane View prevails; while if it is the third group, the Different Planes View applies. If the Single Plane View prevails, there will still be a need for interpretation because the new rule will frontally conflict with the law on prescription. On the other hand, if the Different Planes View is upheld, the conflict ends here. There will be no conflict at all.

It is submitted that the better view is the Different Planes View. However, a clear-cut ruling on the pivotal issue, which the three groups of cases reviewed above tried to resolve, must complement the pronouncement of the majority and the dissenting justices.

For the Different Planes View to hold water it must conclusively state that an order of provisional dismissal does not terminate the case and on the contrary, even after its dismissal the case remains pending with the court and still subject to its jurisdiction. There are several reasons to support this proposition. First, before the advent of Rule 117, section 8, there was yet no definitive ruling on provisional dismissal

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[403] *Id.* at 133-134.

vis-à-vis law on prescription of crimes. Thus, the new rule can be interpreted to have settled the bone of contention of the three groups of cases. In so doing, the holding of the third group must be deemed to have been favored by the new rule. This is consonant with the *interpotare et concordare legibus est optimus interpotandi modus* rule of interpretation. The new rule and the old law on prescription must be interpreted so that harmony among laws and in the legal system in general may be achieved. Second, the new rule cannot be interpreted the other way, for by providing that a provisionally dismissed case may be revived within the appropriate period of the time-bar, it therefore implies that the court may still act on the case before it attains the status of permanent dismissal. This means that within the period of the time-bar the court still has jurisdiction over the case. An implication that necessarily leads to the conclusion that the dismissed case is not yet terminated. Within the one-year or two-year period, the case remains pending with the court. Further, with such, there will be a firmer foundation for the exercise of the rule-making power of the Supreme Court under article VIII, section 5(5) of the Constitution. The pendency of the case makes it subject to procedural rules such as Rule 117, section 8, especially the time-bar component thereof.

It is axiomatic that it is within the inherent power of the court to regulate the time, absent any statute providing for a period, within which a case must be prosecuted or trial conducted.[404] And in providing the time-bar the Supreme Court merely did that. It may be argued however, that the law on prescription of crimes is exactly such statute. But this cannot be. The prescriptive period covers only the period of time prior to the filing of the complaint or information and after the termination of the case without the accused being convicted or acquitted. Those two periods belong to the plane, which is the exclusive domain of statute of limitations. Sandwiched between these two periods is the plane where the new rule operates. Between the periods covered by the law on prescription, is the period where such law is non-operative, suspended or interrupted. That period is the plane for the new rule, once the premise that provisional dismissal does not terminate a case is accepted. Such premise is not even novel nor unconventional. Some states in the United States have procedural rules that do not consider dismissal of a case as equivalent to its termination with the consequent running again of the statute of limitations. In North Carolina, for instance, there is a criminal procedure device of *nolle prosequi* with leave, which is similar to the new rule on provisional dismissal. If the prosecuting attorney petitions for *nolle prosequi* with leave he thereby implies that the proceedings may be continued at a future date. This *nolle prosequi* therefore does not dismiss the case. Consequently, the statute of limitations remains tolled.[405] The new rule arguably is much better than such a procedural device for under Rule 117, section 8, the revival of the case is subject to a definite time-bar. Third, the second group of cases which holds that a provisional dismissal order is a final order which will attain finality after the lapse of the reglementary period can be co-opted

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[404] This is similar to the argument made by Justice Puno. See People v. Lacson II, G.R. No. 149453, April 1, 2003 (Puno, *J., dissenting opinion*).

[405] C. Elmore, *op. cit. supra* note 104, at 3 footnote no. 59. See also State v. Williams, 151 N.S.E. 908 (1909) & Klopfer v. North Carolina, 386 U.S. 213 (1967).

by the new rule. The time-bar component of Rule 117, section 8, can be viewed as the reglementary period provided by the Rules. After the lapse of such period without the case having been revived (provided no compelling reasons are shown by the prosecution), the order of provisional dismissal can be said to have become final and executory. It is indisputable that the reglementary period is within the ambit of the Supreme Court's rule-making power. The exception to this proposition is the reglementary period for appeal,[406] which is statutory because the right to appeal, save for those provided by the Constitution,[407] is purely based on legislation. Neither can it be said that the reglementary period governing the order of provisional dismissal is the reglementary period for appeal provided by law. The statutory period for appeal applies, among others, to final orders. In the first place, the prosecutor need not appeal an order of provisional dismissal because he himself could simply ask for its reinstatement or revival. In the second, the order of provisional dismissal cannot be considered a final order precisely because it does not actually completely dispose of the case. This necessarily calls for the disentanglement of the rules applicable in civil actions from criminal actions. The ruling in *Bañares,* which adopted the rulings applicable to civil actions as illustrated in the cases of *Olympia International v. CA*,[408] and *Ortigas & Company Ltd. v. Velasco*,[409] must be abandoned. More importantly, the void in the criminal procedure (because prior to the new rule there was really no extant provision on provisional dismissal), which was filled by the rules from civil procedure, must be treated as having been occupied by Rule 117, section 8. There is therefore no need for the suppletory application of the Rules of Civil Procedure in criminal cases as regards provisional dismissal.

However, the inquiry shifts to the legal basis in giving an effect to permanent dismissal, which is similar to the effect of prescriptive period that has elapsed. Put otherwise, can the Supreme Court make rules whose effect is to extinguish the right of the State to prosecute? The magnitude of this question can be realized by looking into the fundamental laws of other state. Constitutions of other states expressly prohibit[410] their Supreme Courts from suspending or altering any statute of limitations or of repose. But the 1987 Constitution does not have a similar extant provision. However, it has been settled by jurisprudence that the rights arising from the statute of limitations cannot be altered, modified or increased by procedural rules, such rights being substantive in nature.

It cannot be disputed that courts in effect extinguish the right to prosecute of the State when they convict or acquit. But the extinguishment of the right is not directly caused by the act of the courts. The State's right to prosecute is extinguished or lost because of the constitutional provision on double jeopardy. It can therefore be

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[406] See Batas Blg. 129, sec. 39 (1980).
[407] See CONST. art. VIII, sec. 5.
[408] G.R. No. 43236, December 20, 1989.
[409] G.R. No. 109645, July 25, 1994.
[410] For example, see sec. 10 (c), Article V of the Constitution of Pennsylvania.

proposed that, as a general rule,[411] courts can only compel the extinguishment of the right to prosecute if there is a constitutional provision sanctioning such act.

Following the majority and the dissenting justices, permanent dismissal, discounting for the meantime the compelling reasons exception, effectively extinguishes the right to prosecute of the State. Paraphrasing the majority in *People v. Lacson II*, the effect of permanent dismissal and prescription of crimes is the same. Justice Bellosillo avoided arriving at such effect because on a single plane, which is his premise, head-on collision between the two laws would be inevitable. Consequent to such premise of Justice Bellosillo is the need to lessen or change the effect of permanent dismissal. He achieved such objective by reading a narrow purpose for the new rule. He described the new rule's purpose as merely administrative or regulatory, i.e., merely to allow the accused whose cases have been provisionally dismissed to have their records in government law enforcement agencies cleared so that they may continue with their normal lives. If such is the only purpose, the Supreme Court could not really give the effect similar to prescription of crimes to permanent dismissal. With such limited purpose, there will be no constitutional basis for the courts to deprive the State of its right to prosecute. On the other hand, once it is recognized that the ultimate foundation of the new rule is the amorphous constitutional rights to speedy trial and speedy disposition of cases, then it becomes apparent that the effect sought to be ascribed by the proponents of Different Planes View to permanent dismissal becomes defensible. In the past the Court did not hesitate to characterize dismissal based on denial of the constitutional right to speedy trial as tantamount to an acquittal, and coupled with the requisites of the rule on double jeopardy, as barring another prosecution for the same offense. And in cases applying the balancing test, the Court has barred further prosecution if the inquiry results in a balance favoring the accused. The Congress itself can be said to have recognized that violation of the right to speedy trial could bar another prosecution for the same offense thereby extinguishing the State's right to prosecute. It must be remembered that under Republic Act No. 8493, Congress gave the courts discretion, after considering the factors listed therein, in whether to dismiss a case with prejudice or without prejudice when any of the time limits are not complied with. By allowing the courts to dismiss the cases with prejudice, Congress impliedly allowed the courts to extinguish the State's right to prosecute.[412]

Thus, if the purpose of the new rule is primarily to give life to the constitutional rights to speedy trial and speedy disposition of cases, then there would be no difficulty in giving permanent dismissal the same effect as prescription of crimes. If non-compliance with the time-bar of the new rule extinguishes State's right to

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[411] Rule 119, sec. 18, is a unique animal, so to speak, because it bars prosecution of the discharged accused for the same offense, provided he complies with his commitment, which effectively extinguishes the right of the State to prosecute. But it can be properly viewed as a case of the State waiving its right to prosecute, similar to the statute of limitations, in exchange for the testimony in favor of the prosecution of the discharged accused.

[412] It must also be remembered that the Supreme Court shunned such authority given by Congress by providing in the implementing rules that the dismissal is subject to the rule on double jeopardy. Thus, any extinguishment of the right of the State to prosecute arising from the implementing rule can be argued to be ultimately founded on the constitutional provision on double jeopardy.

prosecute, such effect is not only ordained by Rule 117, section 8, a mere procedural rule, but ultimately by the constitutional guarantees which the procedural rule enforces or implements.

From a simple perspective, the time-bar is itself a statute of limitations, if not for the fact that it may be surmounted by the State by presenting compelling reasons for the delay in continuing the prosecution. This "if" led the Supreme Court in *People v. Lacson I*, to conclude that the new rule merely provides for a special procedural limitation, and is not a statute of limitations *per se*. Effectively, the time-bar is a statute of limitations minus the "if." The result thus is that there are at least two statutes of limitations that the State must comply with or must be cognizant of. One covers the period from provisional dismissal while the general statute covers the periods prior to the filing of the complaint or information and after the case is terminated without the accused being convicted or acquitted.

There is therefore the possibility that the prescriptive period provided by the law on prescription of crimes may be precluded by the new rule or may no longer commence to run again. But the new rule does not totally preclude the law on prescription of crimes. If the State does not revive the case within the time-bar, after the lapse of such time-bar, the prescriptive period will commence to run again. The plane will now belong to the law on prescription of crimes. The State may still revive the case within the prescriptive period, despite the expiration of the time-bar, but it may only do so if it presents compelling reasons for the delay in the revival of the case. If the State presents compelling reasons for the delay, then the new rule is surmounted and the State can continue prosecuting the accused. Otherwise, it will be forever precluded from prosecuting the accused for the same offense.

The preclusion that results is ordained not by virtue of the new rule but by virtue of the constitutional guarantees. Moreover, it must be emphasized that the time-bar component governs only provisional dismissal as redefined by the new rule. In the current set-up, the new concept of provisional dismissal co-exists with the old concept. Thus, a case may be dismissed without prejudice but may nevertheless not be covered by Rule 117, section 8. For example, a case, which was dismissed with the consent of the accused but without a priori notice to the offended party, is not a provisional dismissal for the purpose of the new rule but it nonetheless results in provisional dismissal – the old concept – because it may still be reprosecuted by virtue of the double jeopardy rule. In such instance the time-bar under the new rule does not apply but the law on prescription does because the plane on which the law on prescription of crimes alone operates will now cover the situation.

In sum, the Different Planes View will become a much better view than the Single Plane if a definitive ruling on the pivotal issue on the effect of an order of provisional dismissal under the new rule on the commencement of the running again of the prescriptive period is made. Different Planes View will become conflict-free if provisional dismissal is treated as not a termination of the case without the accused

being convicted or acquitted (or dismissal of the case for reasons not constituting jeopardy). Such characterization of the new concept of provisional dismissal will harmonize the new rule with the old law on prescription of crimes. Further, the validity of the statute of limitations-like effect of permanent dismissal will become tenable if the new rule is considered grounded on the constitutional rights to speedy trial and speedy disposition of cases. If the enforcement of the constitutional guarantees is deemed the purpose that animates the new rule, then it could not be attacked as impairing the State's right to prosecute.

B. ON RIGHTS TO SPEEDY TRIAL AND SPEEDY DISPOSITION OF CASES

As a general rule, within limitations imposed by the Constitution or statute, the court may control the time of trial of an accused, but it is generally the policy of law that prompt disposition be made of criminal cases.[413] Section 14(2) and section 16 of article III of the 1987 Constitution, provide for two procedural rights that assure speedy justice: the right to speedy trial and the right to speedy disposition of cases, respectively:

> Sec. 14. (2) In all criminal prosecutions, the accused... shall enjoy the right... to have a speedy... trial....
>
> Sec. 16. All persons shall have the right to a speedy disposition of their cases before all judicial, quasi-judicial, or administrative bodies.

A speedy trial "is a trial conducted according to the law of criminal procedure and the rules and regulations, free from vexatious, capricious, and oppressive delays."[414] The right to speedy trial is generically different from any of the other rights enshrined in the Constitution for the protection of the accused.[415] The purpose of this right is the prevention of the oppression of an accused by delaying criminal prosecution for an indefinite period of time.[416] This right is a safeguard to prevent undue and oppressive incarceration, to minimize anxiety and concern accompanying public accusations and to limit the possibilities that a long delay will impair accused's ability to defend himself.[417] It also serves the interests of society in seeing that those accused of crime are swiftly brought to justice.[418]

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[413] 22A C.J.S. *Criminal Law* sec. 578 (1989).

[414] Kalaw v. Apostol, 64 Phil 852 (1937). The constitutional guarantee of speedy trial is characterized as a double-edged sword. For this point see JOAQUIN G. BERNAS, S.J., THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 459 (1996). See also Dickey v. Florida, 398 U.S. 30, 42 (1970); Barker v. Wingo, 407 U.S. 514 (1972); and, U.S. v. Marion, 404 U.S. 307 (1971) (Douglas, *J., separate opinion*).

[415] Barker v. Wingo, *supra* at 519.

[416] Dacanay v. People, 310 Phil. 535 (1995).

[417] 22A C.J.S. *Criminal Law* sec. 580 (1989). See also U.S. v. Ewell, 383 U.S. 116 (1966); Smith v. Hooey, 393 U.S. 374 (1969); and, S. Kles, *op. cit. supra* note 217, at 422.

[418] 22A C.J.S. *Criminal Law* sec. 580 (1989). See also Barker v. Wingo, *supra* at 519-520 where the U.S. Supreme Court provides the policy considerations behind the constitutional right to speedy trial.

The right to speedy trial is amorphous.[419] It is necessarily relative.[420] "It is consistent with delays and depends upon circumstances. It secures rights to a defendant."[421] Save for its companion right of right to speedy disposition of cases, it is a more vague concept than other procedural rights.[422] Although it seems counterintuitive, in reality such right can only be invoked and exercised by the defendant once it has been violated. It is consistent with delays because the right receives its vigor when the trial has been delayed by actions of the prosecution.

Unlike the right to speedy disposition of cases, which is granted to all persons, the right to speedy trial is available only to an accused facing criminal prosecution.[423] And unlike the law on prescription of crimes, it does not require the government to discover, investigate and accuse any person within any particular period of time.[424]

Despite the difference between rights to speedy trial and right to speedy disposition of cases, Philippine jurisprudence has settled that the nature of and test applicable to both concepts are the same.[425] The balancing test also applies to right to speedy disposition of cases. Furthermore, the consequence of the violation of these rights or either of them is also the same. Violation of the right to speedy disposition of

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[419] Barker v. Wingo, *supra* at 522.

[420] See Beavers v. Haubert, 198 U.S. 86 (1905). See also U.S. v. Marion, *supra* (Douglas, *J.*, *separate opinion*); Barker v. Wingo, *supra* at 522; & U.S. v. Bishton, 463 F. 2d 887 (1973).

[421] Mercado v. Santos, 66 Phil. 215, 235 (1938), citing Beavers v. Haubert, *supra*, reaffirmed in Gunabe v. Director of Prisons, 77 Phil. 993 (1947).

[422] Barker v. Wingo, *supra* at 521.

[423] See also 22A C.J.S. Criminal Law sec. 580 & sec. 588 (1989) where it is said that the constitutional speedy trial guarantee applies to persons already in prison.

[424] 22A C.J.S. *Criminal Law* sec. 582 (1989).

[425] In Caballero v. Alfonso, G.R. No. 45647, August 21, 1987, reiterated in Binay v. Sandiganbayan, 374 Phil. 413 (1999), it was held:

> However, "speedy disposition of cases" is a relative term. Just like the constitutional guarantee of "speedy trial" accorded an accused in all criminal proceedings, "speedy disposition of cases" is a flexible concept. It is consistent with delays and depends upon the circumstances. What the Constitution prohibits are unreasonable, arbitrary and oppressive delays which render rights nugatory.
>
> In the determination of whether or not the right to a "speedy trial" has been violated, certain factors may be considered and balanced against each other. These are length of delay, reason for the delay, assertion of the right or failure to assert it, and prejudice caused by the delay. The same factors may also be considered in answering judicial inquiry whether or not a person officially charged with the administration of justice has violated the "speedy disposition of cases" guarantee.

And in Gonzales v. Sandiganbayan, G.R. No. 94750, July 16, 1991, reiterated in People v. Tampal, 314 Phil. 35 (1995) & People v. Leviste, 325 Phil. 525 (1996), & Binay v. Sandiganbayan, *supra*, the Court said:

> [T]he right to a speedy disposition of a case, like the right to speedy trial, is deemed violated only when the proceeding is attended by vexatious, capricious, and oppressive delays; or when unjustified postponements of trial are asked for and secured, or when without cause or justifiable motive a long period of time is allowed to elapse without the party having his case tried. Equally applicable is the balancing test used to determine whether a defendant has been denied his right to a speedy trial, or a speedy disposition of a case for that matter, in which the conduct of both the prosecution and the defendant are weighed, and such factors as length of the delay, reason for the delay, the defendant's assertion or non-assertion of his right, and prejudice to the defendant resulting from the delay, are considered.

cases in criminal cases also results in the dismissal of the case. Such dismissal is considered an acquittal.

Partly because of such similarities, the use of the term "right to speedy trial" in this paper, unless qualified, is deemed to include the concept of right to speedy disposition of cases. The other reason for such non-differentiation is that the two concepts are inquired into in this paper in instances covering the period during trial in criminal cases where both of them apply.

Not unlike the first crossing of paths between provisional dismissal and prescription of crimes, this is the first time provisional dismissal became entangled with the right to speedy trial. Before Rule 117, section 8, took effect, speedy trial was linked to provisional dismissal when the ground invoked by the accused in asking for dismissal is denial of his constitutional right to speedy trial. Provisional dismissal then was treated as tantamount to an acquittal.

It may happen that despite the fact that the first case was dismissed unconditionally or even provisionally with the express consent of the accused, a plea of double jeopardy to the second prosecution for the same offense may lie. For such to occur the termination of the first case must be one which is deemed equivalent to an acquittal even if ostensibly it is a "dismissal or other termination with the express consent of the accused." Thus, the first form of termination of first jeopardy is present and not the third one. This happens generally in two ways. One is when the dismissal is based upon the merits of the case. The second is when the dismissal is predicated on violation of accused's right to speedy trial.[426] When the accused is not given a speedy trial, what really happens is that there is failure to prosecute.[427] Even if the dismissal is upon the motion of the accused, it is still considered acquittal if it is based on denial of his right to speedy trial.[428]

The first crossing of paths therefore of provisional dismissal and the right to speedy trial occurred when a denial of right to speedy trial is made the legal basis of defense's motion for provisional dismissal. In such instance, the legal consequence of provisional dismissal is avoided. Provisional dismissal loses its content and becomes merely a shell for an acquittal. Chronologically therefore, the delay prior to the entry of provisional dismissal triggered the successful reliance on violation of the right to speedy trial. Simply put, there was denial of the right first before there was provisional dismissal. With Rule 117, section 8, however, the situation becomes the reverse. That is, the inquiry centers on whether in the period succeeding the order of provisional dismissal, specifically the time-bar, the rights to speedy trial and speedy disposition of cases continue to operate so much so that the delay occurring within the time-bar can trigger a violation of the constitutional guarantees claim.

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[426] People v. Mogol, 216 Phil. 267 (1984).

[427] J. BERNAS, S.J., *op. cit. supra* note 414, at 532.

[428] People v. Diaz, 94 Phil 714 (1954), People v. Abaño, 97 Phil 28 (1955), People v. Robles, 106 Phil 1016 (1959).

The crux of Justice Bellosillo's opinion can be poetically described this way: speedy trial ends where provisional dismissal begins. Or using the metaphorical planes, in relation to the speedy trial inquiry, Justice Bellosillo is now proposing a different plane for the period succeeding an order of provisional dismissal. The direct opposite of this of course is that the two occupy the same plane. This cannot be pictured in the mind in physical terms. In physical law, two things cannot occupy the same space (or plane) at the same time. Metaphorically however, they can. The trick is when one is superimposed over the other.

The speedy trial inquiry, therefore, may be superimposed over the period covered by the time-bar component of Rule 117, section 8. This means simultaneous with the running of the time-bar is the ticking of the clock of speedy trial. This simultaneity, however, presupposes that provisional dismissal does not terminate a case. Earlier, this presupposition has been elucidated upon for the purpose of the law on prescription of crimes. Review therefore of case law in relation to the concerned constitutional guarantees, both foreign and local, on this point is also warranted at this juncture.

A criminal prosecution for the purpose of speedy trial inquiry can be divided into three stages. These are (1) pre-indictment, (2) indictment and trial and (3) post-dismissal or post-termination. In Philippine context, the first stage properly refers to pre-filing of complaint stage because of the speedy disposition clause, which covers cases before quasi-judicial and administrative bodies. A complaint filed before the prosecutor's office for the purpose of preliminary investigation immediately gives rise to a case for the purpose of the speedy disposition of cases clause. The third stage, post-dismissal, may begin at several points. It may commence at the judgment of acquittal or conviction. However, at such point the speedy trial inquiry is no longer appropriate because prosecution has definitely terminated and can no longer be repeated if the double jeopardy clause is applicable. Even if the judgment of conviction is appealed by the accused, jurisprudence holds that the constitutional guarantees at such point cannot be invoked.[429] It may also start at the entry of order of dismissal. Dismissal has several variations. It may be dismissal without the express consent of the accused. In such case no speedy trial inquiry is needed for the double jeopardy clause will become operative. It may also be provisional dismissal. This provisional dismissal refers to two variants – (1) the old concept and (2) the new concept. The third stage, which specifically refers to post-provisional dismissal stage of the second type, corresponds to the one-year or two-year period provided by the second paragraph of Rule 117, section 8. The third stage inquired into in this paper is that that begins in provisional dismissal of both types. The second stage is clearly covered by the scope of speedy trial, constitutional and statutory.

The primary check against delay in the first stage is the statute of limitations although the Government, in criminal prosecution, can also invoke the due process clause against fundamentally unfair treatment.[430] This paper delves into jurisprudence

[429] 22A C.J.S. *Criminal Law* sec. 582 (1989).
[430] U.S. v. Lovasco, 431 U.S. 783 (1977).

on this stage because of its similarity to the third stage. In the first stage, there is no prosecution yet. Thus the accused is free and lives his normal life. This is also somewhat similar to the situation of the accused after his case has been provisionally dismissed. He is freed and can go to his normal life except that his records in government law enforcement agencies will show the status of his case. Moreover, within the time-bar, he may suffer anxiety because the sword of Damocles still hangs over his head so to speak.

US v. Marion[431] is the precedent-setting case with regard to the first stage. There, the accused challenged the indictment, which was handed down by the grand jury more than three years after the U.S. attorney got knowledge of the commission of the alleged offenses, for being violative of their constitutional right to speedy trial. The U.S. Supreme Court sided with the Government. In construing the Constitution, that Court said:

> 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....[432]

Thus, the speedy trial provision becomes applicable only at such point when the putative defendant becomes an "accused." Otherwise stated, the right cannot be invoked against pre-accusation delay. The Court found: "[I]t is readily understandable that it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment."[433]

The Court therefore extended the coverage of the guarantee. The guarantee does not only become operative at the handing down of the indictment or filing of information but it also extends as far backwards as to the actual arrest of the accused. The reason behind this according to the Court is that,

> To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime. Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends....[434]

In not extending the reach of the right beyond or prior to arrest, several reasons were given. Two of these reasons are based on the argument that prior to arrest there are other mechanisms or protections that check the delay that the

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[431] U.S. v. Marion, 404 U.S. 307 (1971).
[432] *Id.* at 313.
[433] *Id.* at 320.
[434] *Ibid.*

prosecution may commit. The first of these is the law on prescription of crimes or the statute of limitations.[435] The Court also hinted that the due process clause of the Fifth Amendment[436] is another protection, which may be utilized by the accused against prosecutorial delay prior to arrest.[437]

In the subsequent case of *United States v. Lovasco*[438] the delay was due to the investigation conducted by the U.S. attorney. The Court held that investigative delay is fundamentally different from delay purposely committed by the Government to gain tactical advantage over the accused. This is so because "investigative delay is not so one-sided."[439]

With these cases as persuasive precedents,[440] it becomes strongly arguable that in the first stage speedy trial analysis is not applicable. This has a significant impact on the subject matter of this section of the paper. If the third stage is treated as similar to the first stage with particular focus on the situation of the accused vis-à-vis the prosecution then it becomes tenable to argue that the rights to speedy trial and speedy disposition of cases, as put forth by Justice Bellosillo, cannot be invoked to cover the post-provisional dismissal stage. Although such argument does not totally foreclose the possibility that provisional dismissal does not terminate a case, it nevertheless makes such possibility narrower.

In the post-provisional dismissal stage of the second kind, the immediate check against delay by the prosecution is the time-bar of the new rule. At this stage the focus is whether the speedy trial inquiry can still be applied. If it can be, then it is a hint that provisional dismissal does not terminate the case. Moreover, it will constitute a material difference between the first and the third stages.

The first time that the Supreme Court was faced with the issue where the accused claimed violation of his constitutional right to speedy trial during the period between provisional dismissal and filing of another information for the same offense was in the case of *Baesa v. Provincial Fiscal of Camarines Sur*.[441] There, the accused invoked the right because six years had passed between the dismissal and the reinstitution of the

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[435] See also footnote no. 8 of the *ponencia* where several federal courts cases, which held that the statute of limitations is the sole safeguard against pre-indictment delay, were cited.

[436] The due process clause of the Fifth Amendment is the counterpart of article III, sec. 14(1) of the 1987 Constitution.

[437] In the result arrived at by the majority, Justices Douglas, Brennan and Marshall concurred due to the fact that the accused were not able to show actual prejudice caused by the delay. But in their separate opinion penned by Justice Douglas, they disagreed with the ruling that the constitutional guarantee does not apply to pre-indictment delay. For them, the Sixth Amendment right to speedy trial is "the right to be brought to trial speedily which would seem to be as relevant to pre-indictment delays as it is to post-indictment delays". U.S. v. Marion, *supra* at 328 (Douglas, *J., separate opinion*).

[438] U.S. v. Lovasco, 431 U.S. 783 (1977).

[439] *Id.* at 795.

[440] Jurisprudence from foreign jurisdiction is not conclusive as to cases of similar import in the Philippines. However, if the Philippine statute is patterned or borrowed from a foreign jurisdiction, such jurisdiction's decisions and precedents on or interpretation of that statute are given more than persuasive weight by Philippine courts.

[441] 147 Phil. 393 (1971).

case. The Court, however, did not rule on the issue and instead based its disposition of the case on jurisdictional grounds.

In the United States, the 1967 case of *Klopfer v. North Carolina*,[442] a pre-*Marion* case, is the leading authority as regards the third stage. In this case, the first indictment was dismissed using the North Carolina criminal procedure device of *nolle prosequi* "with leave." The Court described this device in this way:

> Its effect is to put the defendant without day, that is, he is discharged and permitted to go whithersoever he will, without entering into a recognizance to appear at any other time. . . But the taking of the *nolle prosequi* does not permanently terminate proceedings on the indictment. On the contrary, "When a *nolle prosequi* is entered, the case may be restored to the trial docket when ordered by the judge upon the solicitor's application. . . And if the solicitor petitions the court to *nolle prosequi* "with leave," the consent required to reinstate the prosecution at a future date is implied in the order "and the solicitor (without further order) may have the case restored for trial". . . Since the indictment is not discharged by either a *nolle prosequi* or a *nolle prosequi* with leave, the statute of limitations remains tolled.
>
> ...During that period, there is no means by which he can obtain a dismissal or have the case restored to the calendar....[443]

The accused invoked his right to speedy trial. The Supreme Court of North Carolina and the Attorney General held that the accused's right was in no way violated. The liberal Warren Court, through the Chief Justice himself, ruled that the right to a speedy trial of accused Klopfer was violated.

> The North Carolina Supreme Court's conclusion – that the right to a speedy trial does not afford affirmative protection against an unjustified postponement of trial for an accused discharged from custody – has been explicitly rejected by every other state court which has considered the question. That conclusion has also been implicitly rejected by the numerous courts which have held that a *nolle prossed* indictment may not be reinstated at a subsequent term.
>
> We, too, believe that the position taken by the court below was erroneous. The petitioner is not relieved of the limitations placed upon his liberty by this prosecution merely because its suspension permits him to go "whithersoever he will." The pendency of the indictment may subject him to public scorn and deprive him of employment, and almost certainly will force curtailment of his speech, associations and participation in unpopular causes. By indefinitely prolonging this oppression, as well as the "anxiety and concern accompanying public accusation," the criminal procedure condoned in this case by the Supreme Court of North Carolina clearly denies the petitioner the right to a speedy trial which we hold is guaranteed to him by the Sixth Amendment of the Constitution of the United States.[444]

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[442] Klopfer v. North Carolina, 386 U.S. 213 (1967). See also U.S. v. Merrick, 464 F. 2d 1087 (1972).
[443] Klopfer v. North Carolina, *supra* at 414 & 216.
[444] *Id.* at 219-222.

Klopfer was subsequently followed in different states of the Union.[445] Its ruling was distilled by the Supreme Court of Indiana which emphatically laid down this doctrine in its jurisdiction: "We hold, therefore, that where a prosecutor *nolles* and later refiles an affidavit or indictment charging the same offense the period between the *nolle* and the refiling will be counted, in resolving the speedy trial issue, as if the accused had been held by recognizance during that period."[446]

The holding of these cases can be read in two ways. One is the reading provided by Justice Sandoval-Gutierrez in the margin of her dissenting opinion in *People v. Lacson III*. This reading posits that the constitutional guarantee of speedy trial is sweeping and it covers all the periods from the beginning of the first attempt of the State to prosecute the accused until such attempt or subsequent attempts are put to an end. The character of the right to speedy trial therefore is the reason for its continuing application despite the dismissal of the indictment or provisional dismissal of the case and not the assumption that the provisional dismissal does not terminate the case. The second reading is that in the above cases the post-provisional dismissal delay was counted because the provisional dismissal itself does not terminate the prosecution in spite of the fact that it results in the release of the accused without recognizance or bail. In this reading the decisive point is the character of the provisional dismissal and not the character of the constitutional right itself.

The holding laid down in *Klopfer*, began to weaken with the promulgation of *Marion* in 1971. *Klopfer* dealt with the third stage while *Marion* was concerned with the first stage. But because of the arguable similarity of the positions of the accused vis-à-vis the prosecution in the first and third stages, some federal courts applied the Marion ruling even in the third stage.

The case of *U.S. v. MacDonald*[447] effectively settled the confusion even though ostensibly it follows the *Marion* case. The *MacDonald* case has an interesting procedural history. MacDonald was a physician in the United States Army. He was accused of murdering his wife and daughters in Fort Bragg, North Carolina. He was charged following the Uniform Code of Military Justice. After investigation, however, his Commanding General dismissed the case against him. The Department of Justice asked the Army's investigating unit to continue the investigation. Almost five years later he was again indicted but this time the indictment was by the grand jury. He questioned the new indictment on the ground of violation of his constitutional right to have a speedy trial.

Before the Court of Appeals for the Fourth Circuit,[448] MacDonald got a favorable judgment. Said federal court applied the *Marion* test of arrest as the point

[445] See footnote no. 2 in Justice Marshall's dissenting opinion in U.S. v. MacDonald where he listed federal courts cases where the period after dismissal of initial charges is included for speedy trial purposes. These cases in essence follow the *Klopfer* ruling.

[446] Johnson v. State, 246 N.E. 2d 181 (1969).

[447] 456 U.S. 1 (1982).

[448] U.S. v. MacDonald, 531 F. 2d 196 (1976).

when the protection of the speedy trial right can be invoked. It held that the military arrest of MacDonald "was the functional equivalent of a civilian arrest allowing him to invoke the sixth amendment's guarantee of a speedy trial."[449] Surprisingly, said court also saw the applicability of *Klopfer* as regards the period between dismissal and another indictment.

> The absence of imprisonment or bail does not always render inoperative the constitutional guarantee of a speedy trial. In Klopfer v. North Carolina . . the Court held that the practice of ***nolle prossing*** an indictment with leave to reinstate it deprived an accused of his right to a speedy trial even though he was not confined or required to post bail. Klopfer differs from this case in one respect: there, an indictment remained potentially effective during the period of delay; here, MacDonald was not indicted until the end of the period. Apart from the absence of an indictment, MacDonald's situation bears a marked resemblance to Klopfer's. After formal arrest and charge, both men contested their accusations with the inconclusive result of Klopfer's mistrial and the dismissal of the charges against MacDonald after the Article 32 proceedings. The prosecution against both men, however, could have forward promptly – Klopfer's by retrial and MacDonald's by court-martial if the commanding general had rejected Colonel Rock's Article 32 report or if the United States Attorney had presented the case to a grand jury. Nevertheless, neither man was held for trial. Consequently, Klopfer and MacDonald were free from imprisonment or the restraints of bail, but at all times they were subject to prosecution. Unlike defendants held pending trial, Klopfer and MacDonald were deprived of any forum in which to vindicate themselves. Most importantly, under the theory advanced by the state in Klopfer and by the federal government here, neither man would be safeguarded by the sixth amendment until the government, at its leisure, renewed the prosecution.[450]

Thus after taking the period at said stage for the purpose of the balancing test, the Court of Appeals ultimately determined that accused MacDonald was denied his right to speedy trial. One circuit judge,[451] however, dissented. According to him there is a significant distinction between the situation of MacDonald and Klopfer.

> My brothers find this case to closely parallel Klopfer v. North Carolina... differing from it in only one respect: "there an indictment remained potentially effective during the period of delay; here, MacDonald was not indicted until the end of the period." I agree that that is the major difference between the cases, but I find the distinction to constitute the centerpiece of the Supreme Court's holding in that case that Klopfer's sixth amendment rights had been violated.[452]

The fundamental difference therefore between the majority and the dissenting judge is centered on the identification of the proper stage where MacDonald's case is situated. For the majority, the case falls under the third stage not dissimilar to that of Klopfer's. On the other hand, because of the "major difference," Judge Craven treated the case as involving the first stage and not the third. Thus for him, the constitutional

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[449] *Id.* at 204.
[450] *Id.* at 205.
[451] Circuit Judge Craven.
[452] U.S. v. MacDonald, 531 F. 2d 196, 212-213 (1976).

protection afforded by the Sixth Amendment cannot be invoked. This is essentially the crux of *Marion*. Parenthetically, the reasoning of Judge Craven was also apparent in the Philippine case of *Bermisa*.[453] There, more than four years after the provisional dismissal of the first case, the fiscal filed a second information for the same offense. The Supreme Court rejected the argument of the accused grounded on the speedy trial clause. The First Division of the Court through Justice Melencio-Herrera said:

> A review of the facts on record constrains us to rule that the right to speedy trial is not invocable in this case. The delay in the refiling of the case was not a delay in trial amounting to a violation of a constitutional right. There was no trial to speak of, in the legal sense, as there was no indictment, as yet.
>
> It has been held that the right to speedy trial cannot be violated by delay between offense and indictment, though it can be violated by an inordinate delay in the return of the indictment after the arrest has been made.[454]

The reasoning of the Supreme Court shows that it treated the third stage similar to the first stage. In the period running subsequent to provisional dismissal, for the Court, the accused is similarly situated as in the first stage where there is no indictment yet. This reasoning also presupposed that provisional dismissal terminates a case.

Returning to *MacDonald*, that case reached the U.S. Supreme Court in 1978. [455] However, the issue that reached that Court was on the legality of the appeal made by MacDonald from the district court to the Court of Appeals. The Supreme Court sided with the Government and nullified the decision of the Court of Appeals on the ground that the appeal was improper. Thus, the case was remanded to the district court, which subsequently found MacDonald guilty.

On appeal to the Court of Appeals,[456] the same argument based on violation of his speedy trial right was again raised by the accused. Not unexpectedly, the Court of Appeals with one judge dissenting[457] upheld MacDonald's argument.

Finally, the second time it reached the U.S. Supreme Court,[458] the issue of speedy trial could no longer be avoided.[459] The Burger Court, through the Chief Justice himself, reversed the Court of Appeals. Unlike the dissenting opinion of Judge Craven, the Court situated the case of MacDonald in the third stage. But despite such categorization, the Court nonetheless ruled that the situation is similar to as if there is no

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[453] Bermisa v. CA, G.R. No. 32506, July 30, 1979.

[454] *Ibid.*

[455] U.S. v. MacDonald, 435 U.S. 850 (1978).

[456] U.S. v. MacDonald, 632 F. 2d 258 (1980).

[457] Senior Circuit Judge Bryan.

[458] 456 U.S. 1 (1982). See also 22A C.J.S. *Criminal Law* sec. 582 (1989). U.S. v. Loud Hawk, 474 U.S. 302 (1986) reaffirmed U.S. v. MacDonald.

[459] See Paul R. Clevenger, *Narrowing the Scope of the Speedy Trial Right: United States v. MacDonald*, 36 SW. L.J. 1213 (1983), for a review of U.S. v. MacDonald, its predecessors and its impact on speedy trial right.

indictment yet. In other words, the facts fall under the third stage but the appropriate ruling must be the same as if what is involved is pre-indictment delay committed by the Government. Thus, effectively the consequence of *Marion* follows.

> Although delay prior to arrest or indictment may give rise to a due process claim under the Fifth Amendment... or to a claim under any applicable statutes of limitations, no Sixth Amendment right to a speedy trial arises until charges are pending.
>
> Similarly, the Speedy Trial Clause has no application after the Government, acting in good faith, formally drops charges. Any undue delay after charges are dismissed like any delay before charges are filed, must be scrutinized under the Due Process Clause, not the Speedy Trial Clause.[460]

The third stage was treated the same as the first stage because the evils sought to be prevented by the right to speedy trial which are not present in the former, are also absent in the latter. In other words, the *raison d'etre* of speedy trial clause is inexistent in both cases.

> The Sixth Amendment right to a speedy trial is thus not primarily intended to prevent prejudice to the defense caused by the passage of time; that interest is protected primarily by the Due Process Clause and by statutes of limitations. The speedy trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges.
>
> Once charges are dismissed, the speedy trial guarantee is no longer applicable. At that point, the formerly accused is, at most, in the same position as any other subject of a criminal investigation. Certainly the knowledge of an ongoing criminal investigation will cause stress, discomfort, and perhaps a certain disruption in normal life. This is true whether or not charges have been filed and then dismissed. Thus was true in Marion, where the defendants had been subjected to a lengthy investigation which received considerable press attention. But with no charges outstanding, personal liberty is certainly not impaired to the same degree as it is after arrest while charges are pending. After the charges against him have been dismissed, "a citizen suffers no restraints on his liberty and is [no longer] the subject of public accusation: his situation does not compare with that of a defendant who has been arrested and held to answer." ...Following dismissal, any restraint on liberty, disruption of employment, strain on financial resources, and exposure to public obloquy, stress and anxiety is no greater than it is upon anyone openly subject to a criminal investigation.[461]

After looking at the facts of the case, the Supreme Court found that the evils sought to be prevented by the constitutional guarantee never visited MacDonald during the post-dismissal stage. The Court of Appeals therefore erred.

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[460] U.S. v. MacDonald, 456 U.S. 1, 7 (1982).

[461] *Id.* at 8-9.

> The Court of Appeals held, in essence, that criminal charges were pending against MacDonald during the entire period between his military arrest and his later indictment on civilian charges. We disagree. In this case, the homicide charges initiated by the Army were terminated less than a year after the crimes were committed; after that, there was no criminal prosecution pending on which MacDonald could have been tried until the grand jury, in January 1975, returned the indictment on which he was tried and convicted. During the intervening period, MacDonald was not under arrest, not in custody, and not subject to any "criminal prosecution." Inevitably, there were undesirable consequences flowing from the initial accusation by the Army and the continuing investigation after the Army charges were dismissed. ...However, once the charges instituted by the Army were dismissed, MacDonald was legally and constitutionally in the same posture as though no charges had been made. He was free to go about his affairs, to practice his profession, and to continue with his life.[462]

The separate opinion of Justice Stevens and the dissenting opinion of Justice Marshall[463] countered the ruling laid down by the majority. Their position is that the period during the third stage until the reindictment is still covered by the constitutional guarantee. The right of the accused is not suspended after dismissal of the initial charges. According to Justice Marshall:

> "In all criminal prosecutions," the Sixth Amendment recites, "the accused shall enjoy the right to a speedy and public trial." On its face, the Sixth Amendment would seem to apply to one who has been publicly accused, has obtained dismissal of those charges, and has then been charged once again with the same crime by the same sovereign. Nothing in the language suggests that a defendant must be continuously under indictment in order to obtain the benefits of the speedy trial rights. Rather, a natural reading of the language is that the Speedy Trial Clause continues to protect one who has been accused of a crime until the government has completed its attempts to try him for that crime.[464]

For the minority therefore, the fact that the first case was dismissed is immaterial. On the other hand, for the majority, dismissal or termination of the first case is pivotal. The formula seems to be that if there is "dismissal in the real sense" then the post-provisional dismissal period is no longer covered by the protection of the speedy trial right. This is shown in the facts of *MacDonald.* On the other hand, if the provisional dismissal of the first case is not "dismissal in the real sense" then the right may be invoked to cover the third stage. This is the factual milieu of *Klopfer.* Thus according to the majority, in the margin of Chief Justice Burger's *ponencia,*

> Klopfer v. North Carolina... is not to the contrary. There, under an unusual state procedure, a prosecutor was able to suspend proceedings on an indictment indefinitely. The prosecutor could activate the charges at any time and have the case restored for trial, "without further order" of the court.... The charges against

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[462] *Id.* at 9-10.

[463] Concurred in by Justices Brennan and Blackmun.

[464] U.S. v. MacDonald, 456 U.S. 1, 15 (1982) (Marshall, *J., dissenting opinion*). This is the same statement written by Justice Sandoval-Gutierrez in her dissenting opinion in People v. Lacson III.

> the defendant were thus never dismissed or discharged in any real sense so the speedy trial guarantee continued to apply.[465]

The fact that the survey charted above is made in order to answer a specific inquiry must not be forgotten. The inquiry is on whether or not the new concept of provisional dismissal terminates a case. Corollary to this is whether the post-provisional dismissal stage can be counted for speedy trial analysis.

The corollary inquiry seems to have been answered by both the majority and the minority of the U.S. Supreme Court in *MacDonald*. For the minority, the third stage is absolutely within the reach of the speedy trial clause. For the majority, on the other hand, the right covers the third stage provided the dismissal is a "dismissal in the real sense." From this it becomes apparent that only the opinion of the majority is relevant as to the main inquiry.

The distinction between "dismissal in the real sense" and "dismissal not in the real sense" corresponds to distinction between termination of the case and its pendency despite dismissal. Otherwise said, "dismissal in the real sense" in Philippine context is provisional dismissal that terminates a case while "dismissal not in the real sense" is provisional dismissal that does not terminate a case. It must be remembered that neither "dismissal in the real sense" nor "dismissal not in the real sense" prohibits another prosecution for the same offense. Thus both actually refer to provisional dismissal.

Is the new concept of provisional dismissal under the new rule a "dismissal in the real sense"? Does it terminate a case? Seen with *Klopfer*, *Marion* and *MacDonald* as a backdrop, the undeniable answer is that the new concept of provisional dismissal does not terminate a case. It may be likened to the procedural device of *nolle prosequi* "with leave" in *Klopfer*.[466] Similar to that device, a case provisionally dismissed following Rule 117, section 8, can be revived by the prosecution as long as revival is sought within the time-bar. Second, like in *Klopfer*, the accused under the new rule cannot on his own volition revive a provisionally dismissed case. Third, in both cases the accused is released without bail or recognizance after the case is provisionally dismissed. Fourth, as elucidated upon in the previous section, the prescriptive period does not run again after provisional dismissal of the case. This is similar to the *Klopfer* device, which continues the tolling of the statute of limitations. Lastly, with the time-bar component of the new rule and with the presumed knowledge of the accused of such, it cannot be doubted that the evils sought to be prevented by the speedy trial clause will visit him. During the time-bar, he still suffers the anxiety and concern brought about by public accusation.

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[465] US. v. MacDonald, 456 U.S. 1, 8 footnote no. 8 (1982).

[466] The only difference between the North Carolina procedural device and Rule 117, sec. 8 is that in the former the case may be revived at any time while in the latter the case may only be revived within the time-bar unless when the exception applies.

Thus the *Klopfer* decision, as clarified in *MacDonald*, is the authority that should be relied upon in properly characterizing the effect of the new concept of provisional dismissal.

The old concept of provisional dismissal must not however be forgotten. In relation to the law on prescription of crimes, it has already been explained that such concept of provisional dismissal terminates a case. Thus, it commences the running again of the prescriptive period. With this characteristic, it becomes different from the *Klopfer* procedural device. Moreover, under the *Klopfer* device, the speedy trial right applies after dismissal while under the old concept of provisional dismissal it cannot be allowed for one simple reason. Under the Philippine context, if the speedy trial clause is allowed to reach the post-termination, then it becomes unavoidable that there will be conflict between the law on prescription and the right to speedy trial and speedy disposition of cases. The same result will occur if the minority view in *MacDonald* is applied. Thus this conflict must be avoided.[467] At this juncture, suffice it to state that the check against Government delay during the period succeeding provisional dismissal not covered by Rule 117, section 8, is the statute of limitations. Parenthetically, if the provisional dismissal is that covered by the new rule, the conflict between prescription of crimes and speedy trial is non-existent. During the time-bar, the new rule and the constitutional guarantees apply while the law on prescription of crimes does not. Using the terms in *People v. Lacson*, the new rule and the constitutional guarantees occupy a plane that is different from that plane where the law on prescription of crimes operates.

To recapitulate, neither the view of Justice Bellosillo nor that of Justice Sandoval-Gutierrez appropriately characterizes the effect of the new concept of provisional dismissal. Justice Sandoval-Gutierrez adopted the minority view while Justice Bellosillo acceded only to part of the majority view in *MacDonald*. For the former, regardless of whether provisional dismissal under the new rule terminates the case or not, the post-provisional dismissal stage is within reach by the constitutional guarantees. On the other hand, for the latter justice, the new concept of provisional dismissal definitely, and without qualification, terminates a case preventing therefore any speedy trial analysis. Put simply and in the terms of *MacDonald*, Justice Bellosillo's position is that provisional dismissal under the new rule is a "dismissal in the real sense."

Since provisional dismissal under the new rule does not terminate a case, then the period of the time-bar is within reach of the constitutional guarantees of speedy trial and speedy disposition of cases. It can therefore be said that the new rule and said constitutional rights operate on the same plane. But such simultaneous operation is metaphorically inexistent because the two are just one.

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[467] Resolution of the conflict between the speedy trial clause (and even of the due process clause in art. III, sec. 14(1) of the Constitution) and the law on prescription at the post-dismissal stage is already beyond the scope of this paper. This paper covers only relations between provisional dismissal and the law on prescription of crimes on the one hand and provisional dismissal and the rights to speedy trial and speedy disposition of cases on the other.

The speedy trial analysis or more particularly the balancing test is a tool to determine violation of the constitutional guarantees. Similarly, the new rule does the same. The application of the balancing test and the new rule is thus geared towards the same thing – enforcement of the constitutional rights to speedy trial and speedy disposition of cases. Therefore it may be said that the two become one because the balancing test is co-opted or absorbed by the new rule in the situation contemplated by the latter, *i.e.,* after provisional dismissal and within the time-bar. The factors of the balancing test are already accounted for by the new rule but with more, but not absolute, precision. The requisite of express consent of the accused already takes care of the assertion of the right factor. Thus by consenting to provisional dismissal the accused can be said to have not asserted his right. But this assignment of value to the third factor is in consideration for the weight given to the fourth factor — prejudice caused by the delay. Because effectively the time-bar lengthens the proceedings which in turn affect the defense by reason of dimming memories or lost documents or witnesses and at the same time gives the prosecution time to gather evidence, then the fourth factor may be treated to have a value adverse to that of the State. The prejudice under the fourth factor must not be confused with presumptive prejudice due to the length of delay alone, which is within the ambit of the first factor. With different values, the third and fourth factors therefore cancel each other out. What remain are the first and second factors, length of delay and reason for the delay, respectively. This must be viewed within the mechanics of the new rule as interpreted by the unanimous Court in *People v. Lacson I.* It must be emphasized that according to the Court when revival is sought beyond the time-bar the State must show compelling reasons to avoid effective extinguishment of its right to prosecute. Viewed using the remaining two factors, if the State seeks to revive the case beyond the time-bar it effectively means that the first factor length of delay – has already reached the threshold where it becomes presumptively prejudicial. Thus the value of the first factor is in favor of the accused. With the other two factors cancelling out each other and the first factor having the value in favor of the accused, the balance therefore is towards the finding of a violation of the constitutional guarantees unless the State presents compelling reasons for the delay that will equalize the situation. If the State presents compelling reasons then the first factor is cancelled out by the second. There will not be a finding of denial of the constitutional rights of the accused because the balance is maintained. Put differently, there is no violation because, with the factors cancelling out each other, the accused is not able to carry his burden of showing deprivation of the constitutional guarantees.[468] Thus, it stands to reason that the basis therefore of the Supreme Court in allowing the State to present compelling reasons for the delay is to accommodate the second factor of the balancing test. [469] Moreover, it also makes the new rule less precise – characteristic of speedy trial analysis.

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[468] The burden of showing violation of rights to speedy trial and speedy disposition of cases lies with the accused. 22A C.J.S. *Criminal Law* sec. 618 (1989). See U.S. v. Navarre, 310 F. Supp. 521 (1969). In *pari materia* is Rep. Act No. 8493 (1998), sec. 13.

[469] On the other hand, if the scenario is that the State seeks to revive the case before the expiration of the time-bar then the balance will definitely be in favor of the State. Since the time-bar is not yet exceeded the delay is not yet presumptively prejudicial. Thus there is no more need for requiring the State to show any reason for the

So far the new rule has been related only to the constitutional rights to speedy trial and speedy disposition of cases. Its effect on the statutory right to speedy trial under Republic Act No. 8493 is yet to be inquired into. A discussion is therefore in order.

In 1998, Republic Act No. 8493[470] or the Speedy Trial Act was enacted. It was patterned after the Speedy Trial Act[471] of the United States passed more than two decades earlier in 1974.[472] The constitutional right to speedy trial must be differentiated from the right to speedy trial granted and governed by a statutory enactment. Although Republic Act No. 8493 seems to implement only the constitutional right, in reality what it does, same as in the United States,[473] is to create a statutory right to speedy trial.[474] It is possible for both rights to be simultaneously violated. It is also possible for the violation of the statutory right to occur without the constitutional right being denied. Conversely, the constitutional right may be denied without the violation of the statutory right.[475] Where statute or procedural rule mandates strict time limits, whether or not such time limits have been violated is not dispositive of the issue of whether or not the constitutional right to speedy trial has been violated.[476]

In addition, the constitutional right is covered by the balancing test developed by jurisprudence while the statutory right is governed by the more precise and mathematical test provided in the sections of the statute granting the same. Aside from other time limits,[477] Republic Act No. 8493 provides for a time limit between filing of information and arraignment and another time limit between arraignment and trial. [478] If any of these time limits is not complied with the remedy of motion to dismiss can be availed of by the accused:

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delay because whether there is valid reason or not the balance will still be in favor of finding a non-violation of the constitutional guarantees.

[470] An Act to Ensure A Speedy Trial of All Criminal Cases before the Sandiganbayan, Regional Trial Court, Metropolitan Trial Court, Municipal Trial Court, and Municipal Circuit Trial Court, Appropriating Funds Therefor and for Other Purposes.

[471] 18 USCA secs. 3161-3174. For a brief information on the U.S. Federal Speedy Trial Act of 1974 see R. Mueller, *op. cit. supra* note 100, at 622.

[472] The U.S. Speedy Trial Act of 1974 was enacted because the U.S. Congress was dissatisfied with the balancing test established in Barker v. Wingo, 407 U.S. 514 (1972). See 22A C.J.S. *Criminal Law* sec. 591 (1989).

[473] 22A C.J.S. *Criminal Law* sec. 591 (1989).

[474] In 22A C.J.S. *Criminal Law* sec. 599 (1989):

> The statutory right to a speedy trial is separate and distinct from the constitutional right. Thus, constitutional standards and analysis have no application when the question is whether defendant has been denied a statutory speedy trial right, and the speedy trial statute may be violated without proof of the violation of the underlying constitutional guaranty.
>
> The legislative intent in enacting these statutes and rules, however, was to protect the constitutionally guaranteed right, and give substance to, and implement, the constitutional protection; and in some instances they afford accused more protection than the Constitution requires.

[475] See Barela v. People, 326 P. 2d 1249, 1255 footnote no. 5 (1992).

[476] 22A C.J.S. *Criminal Law* sec. 584 (1989).

[477] See sec. 6 on time limit for trial and sec. 8 on time limit following an order for new trial.

[478] Rep. Act No. 8493, sec. 7, provides for time limit between filing of information and arraignment, and between arraignment and trial.

> Sec. 13. *Remedy Where Accused is Not Brought to Trial Within the Time Limit.* – If accused is not brought to trial within the time limit required by Section 7 of this Act as extended by Section 9, the information shall be dismissed on motion of the accused. The accused shall have the burden of proof of supporting such motion but the prosecution shall have the burden of going forward with the evidence in connection with the exclusion of time under Section 10 of this Act[479].
>
> In determining whether to dismiss the case with or without prejudice, the court shall consider, among other factors, the seriousness of the offense, the facts and circumstances of the case which led to the dismissal, and the impact of a reprosecution on the implementation of this Act and on the administration of justice. Failure of the accused to move for dismissal prior to trial or entry of plea of guilty shall constitute a waiver of the right to dismissal under this section[480].

But as provided in the first paragraph of section 13, the time limits are subject to exclusions or days that should not be counted for the purpose of determining whether the time limits have not been complied with. Among the periods excluded in ascertaining compliance with the time limits, emphasis must be given to section 10(d)[481], to wit:

> Sec. 10. *Exclusions.* – The following periods of delay shall be excluded in computing the time within which trial must commence: ...(d) If the information is dismissed upon motion of the prosecution and thereafter a charge is filed against the accused for the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

The dismissal in this exclusion refers to provisional dismissal for under it the information may be filed again. The period contemplated is that between the order of provisional dismissal and commencement of the trial for the same offense. Thus, the period after provisional dismissal is not counted. However, it must be pointed out that this contemplates provisional dismissal upon motion of the prosecution and not upon motion of the defendant.

The new rule enforces the constitutional right while Republic Act No. 8493 provides for a statutory right which is sought to be implemented by the procedural rules promulgated by the Supreme Court. The significant provision of Republic Act No. 8493, which directly touches upon provisional dismissal, is section 10(d).[482] Said

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[479] On burden of proof see 22A C.J.S. *Criminal Law* sec. 618 (1989).

[480] As to conflicting U.S. decisions regarding waiver of statutory right see 22A C.J.S. *Criminal Law* sec. 591 & sec. 601 (1989).

[481] This is copied from 18 USCA sec. 2161(h)(6).

[482] Now RULES OF COURT, Rule 119, sec. 3 (d). As to different state speedy trial acts in the United State see 22A C.J.S. *Criminal Law* sec. 606 (1989). In other jurisdictions entry of *nolle prosequi* does not suspend statutory time limits. See State v. Agee, 622 So. 2d 473 (1993). See also Angelica D. Zayas, *Speedy Trial, Speedy Games*, 76-Dec FLA. B.J. 26 (2002). On how State can affect if not circumvent statutory speedy trial time limits see Evelyn G. Baniewicz, *Time Waits for No Man – Especially the Prosecutor: An Overview of the "Fourth Term" Act, Illinois' Speedy Trial Act*, 7-Nov CBA REC. 35 (1993).

provision effectively suspends the running of the statute's time limits.[483] The rationale for such suspension is

> After the Government's dismissal of the complaint against him appellant... was no longer under any restraints associated with arrest and the pendency of criminal charges against him. He was free to come and go as he pleased. He was not subject to public obloquy, disruption of his employment or more stress than any citizen who might be under investigation but not charged with a crime....[484]

Republic Act No. 8493, however, is silent as to the situation where provisional dismissal is successfully sought by the accused. As regards this, the statute fails to provide for a provision similar to 18 USCS section 3161(d)[485] of the U.S. Federal Speedy Trial Act of 1974. Under such provision, when provisional dismissal is granted upon motion of the accused, upon revival of the same case the computation of the statutory time commences anew.[486] The time of delay in favor of the accused that has accumulated during the first case is disregarded. And in one case, section 3161(d) was interpreted by a federal court to mean that when a subsequent complaint is brought, the time limits begin to run from the date of the filing of the subsequent complaint.[487] This ruling is therefore *apropos* for the lacuna in Republic Act No. 8493 and its implementing rules.

With this picture of the statutory right, the next step focuses on the period running after an order of provisional dismissal is granted. It must be said at the outset that the two do not conflict for the statute implements the statutory right while the new rule enforces the constitutional right.[488] Thus, the statute's provision that the period running in the *interregnum* should not be counted only applies for the purpose of the statutory right and not for the constitutional right, which is governed by Rule 117, section 8. Moreover, there is neither overlapping. After provisional dismissal, the statutory time limits are either suspended or would run anew upon revival of the case. Therefore, the period that runs is not counted at all. This clearly fits with the new rule. At such period, only the time-bar of Rule 117, section 8, applies. The plane becomes the sole domain of the new rule. Thus, during such *interregnum* only the new rule may be

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[483] See U.S. v. Hillegas, 578 F. 2d 453 (1978). But in some jurisdictions under similar situation as sec. 10(d), their courts held that if the dismissal by the State is with showing of necessity the statutory time run anew otherwise the statutory time is merely suspended. See State v. Ransom, 673 P. 2d 1101 (1983). See also 22A C.J.S. *Criminal Law* sec. 598 (1989).

[484] U.S. v. Hillegas, *supra* at 458.

[485] This is the full text:

> (d) If any indictment or information is dismissed upon motion of the defendant, or any charge contained in a complaint filed against an individual is dismissed or otherwise dropped, and thereafter a complaint is filed against such defendant or individual charging him with the same offense or an offense based on the same conduct or arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information, as the case may be.

[486] See 22A C.J.S. *Criminal Law* sec. 598 (1989).

[487] U.S. v. Hillegas, *supra,* at 459.

[488] 22A C.J.S. *Criminal Law* sec. 591 (1989).

violated. It means only the constitutional right of the accused can be violated by the State.

On the other hand, if the dismissal is not governed by the new rule but is nevertheless provisional in character, *i.e.,* old concept of provisional dismissal, conflict or overlapping with the provisions of the statute is also non-existent. However, unlike when the provisional dismissal is that covered by Rule 117, section 8, where the time-bar applies, when the provisional dismissal is not governed by the new rule, what operates on the period of *interregnum* is the law on prescription of crimes.[489] This is so because such provisional dismissal, not falling under the new rule, terminates the case without the accused being convicted or acquitted (or for reasons not constituting jeopardy).

In sum, logical consistency is attained if the provisional dismissal under the new rule is characterized as not terminating a case. Such characterization applies when the Rule 117, section 8, provisional dismissal is viewed in relation to the law on prescription of crimes on the one hand and the rights to speedy trial and speedy disposition of cases on the other. Further, by treating it as such, it could now be easily related to the speedy trial analysis or the balancing test. With the purpose of enforcing the constitutional guarantees of speedy trial and speedy disposition of cases and the balancing test superimposed over it, the Court's pronouncement that the State is not barred by the expiration of the timeline in Rule 117, section 8, by showing compelling reasons for the delay could now be defended. Such pronouncement results from the less precise attribute of the new rule that is characteristic of the balancing test. More specifically, it is a consequence of the new rule accommodating the second factor reasons for the delay – of the balancing test. Coincidentally, such accommodation makes the new rule not completely identical with the law on prescription of crimes.

CONCLUSION

Rule 117, section 8, is not a total innovation in law. It incorporates some elements of the old concept but does not obliterate the latter from the statute books. The old concept remains and still co-exists with the new concept. However, some instances which were previously considered facets of provisional dismissal are now no longer so.

Apparently, the new rule was not promulgated to clarify the issues surrounding provisional dismissal. However, it unintentionally removes some confusions. For example, the issue as to whether provisional dismissal must always be issued with the express consent of the accused is one that the new rule settled. Further, the new rule unwittingly created a new concept of provisional dismissal that is autonomous and governed solely by Rule 117, section 8.

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[489] It may also be argued that the due process clause may apply at this period; but the balancing test cannot because there is termination or "dismissal in the real sense" which does not engage the protection of the constitutional guarantees of speedy trial and speedy disposition of cases.

The characteristics of the new rule were explained in Part IV. The ingredients, so to speak, of the self-contained rule are specifically and individually analyzed. Since the rule incorporates some elements of the old concept of provisional dismissal, a review of those elements and a discussion on their applicability on the new concept were presented. The new rule adds new requisites for provisional dismissal. But on the other hand, it maintains the discretion of the court in granting provisional dismissal. Moreover, it gives limited special status to the offended party.

The effects of the new rule are felt in at least two other fields of law. First is the law on prescription of crimes. Second is the constitutional guarantees of speedy trial and speedy disposition of cases. Prior to the new rule, these two have crossed separate paths with provisional dismissal. But with the new rule, the paths took another dimension.

The new dimension is brought about by the novel device of time-bar and the consequent concept of permanent dismissal that are inextricably associated to the new concept of provisional dismissal. Since the time-bar provides for specific periods, its effect on the law on prescription of crimes and the rights to speedy trial and speedy disposition of cases becomes inevitable. The soul of the law on prescription of crimes is undoubtedly the prescriptive periods therein provided. Further, expiration of prescriptive period extinguishes the State's right to prosecute, an effect which also means, not without qualification, permanent dismissal. On the other hand, periods that run may mean delay in the prosecution which in turn is sought to be avoided by the two constitutional guarantees afforded the accused.

People v. Lacson, like all cases, could not, and indeed did not, decide on all the issues that may arise from Rule 117, section 8. It however provides leads on the possible issues and hints on their answers. The discussions of Justice Bellosillo and the dissenting justices, although strictly unnecessary, if not *obiter*, for the disposition of the case, were nevertheless insightful and instructive.

The pivotal issue on this paper centered on the proper characterization of provisional dismissal entered upon compliance with the requisites under Rule 117, section 8. It is submitted that the new concept of provisional dismissal does not terminate a case. Until permanent dismissal occurs, the case remains pending with the court. With the key issue settled, it becomes clear that the new rule and the law on prescription of crimes exist on different planes. On the other hand, since provisional dismissal does not terminate a case, criminal prosecution must be deemed to continue even during the period provided by the time-bar. It therefore stands to reason that the post-provisional dismissal period is within the reach of the rights to speedy trial and speedy disposition of cases of the accused.

Permanent dismissal must be given the effect similar to that of the statute of limitations. This is necessary for the new rule to achieve its purpose. Further, the constitutional foundation of the new rule allows for such characterization. On the other

hand, the mechanism established by the new rule must be seen as co-opting the factors constituting the balancing test. This results in the superimposition of speedy trial analysis over the new rule. By this superimposition, the qualification or exception to the effect of permanent dismissal is adequately explained.

The Supreme Court, in the future, will have to face the issues brought about by Rule 117, section 8. Such issues may still embrace those that have been left unanswered or were answered despite strong opposition in *People v. Lacson*. Of course, being a mere procedural rule, the Court is free to change, amend or totally erase Rule 117, section 8. The nature, purpose and effects of the new rule will be definitively expounded on and clarified by the Supreme Court, either through its judicial or rule-making power, sooner or later. All that needs to be done is to wait. But this does not preclude law students, legal scholars and members of the bench and bar from inquiring into questions surrounding the new procedural device of Rule 117, section 8, and making recommendations thereafter.

This paper is just one such inquiry.

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