MARKED, SEALED, AND INTACT: THE ESSENCE OF MANDATORY WITNESSES DURING THE CONDUCT OF MARKING IN CASES INVOLVING ILLEGAL NARCOTICS, IN LIGHT OF THE *NISPEROS* RULING[*]

La Verne V. Jallorina I[**]

ABSTRACT

The Supreme Court's decision in *Nisperos v. People* emerged against a backdrop of rampant acquittals in cases involving illegal narcotics, attributable to law enforcers' persistent failure to abide by the chain-of-custody rule. In response, the Court issued guidelines for the conduct of marking, inventory, and photographing of seized drugs—requiring the presence of compulsory witnesses during the conduct of physical inventory and photographing, but not during the marking of the seized specimen.

This Comment contends that compulsory witnesses must be present as early as the marking stage, as each step in the chain—marking, inventory, and photographing—is interdependent and collectively safeguards the integrity and evidentiary value of the seized narcotics, the *corpus delicti* in drugs cases. Given that these witnesses are already required to be immediately present at the time of the arrest, there is no excuse for their absence during the conduct of marking, a procedure done immediately after apprehension.

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[**] Public Attorney, Public Attorney's Office (2023–present). J.D., De La Salle University (2021); B.A. in Political Science, Far Eastern University (2015).

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I. INTRODUCTION

In the case of *Nisperos v. People*,[1] the Supreme Court adopted guidelines in the conduct of marking, inventory, and photographing of dangerous drugs involved in illegal narcotics operations. The Court clarified that the mandatory witnesses[2] need not be present at the time of the apprehension and confiscation of the drugs or drug paraphernalia, since they "need only be readily available to witness the ensuing inventory."[3] It echoed the Court's earlier sentiments in *People v. Tomawis*,[4] which declared that the mandatory witnesses should be "at or near" the place of apprehension "so that they can be ready to witness the inventory and photographing of the seized and confiscated drugs 'immediately after seizure and confiscation.'"[5]

Thus, in adopting the guidelines, the Court stressed that the marking of the specimen seized from the accused must be done immediately upon confiscation, at the place of the confiscation, and in the presence of the offender, unless he or she eluded arrest.[6] As such, it is only during the conduct of inventory and photographing that the presence of these

[1] [Hereinafter "*Nisperos*"], 931 Phil. 945, 953 (2022).

[2] These witnesses are: (1) an elected public official; and (2) a representative from the National Prosecution Service *or* a media representative. Rep. Act No. 9165 (2002), § 21, *as amended by* Rep. Act No. 10640 (2013), § 1.

[3] *Nisperos*, 931 Phil. at 953.

[4] People v. Tomawis, 830 Phil. 385 (2018).

[5] *Id.* at 409.

[6] *Nisperos*, 931 Phil. at 956.

mandatory witnesses is required by law.[7] But is their presence at those stages enough to preserve the integrity and evidentiary value of the seized evidence?

II. THE *NISPEROS* CASE

Nisperos involved the usual buy-bust operation conducted in illegal narcotics cases. Around the time of the incident, the Philippine National Police (PNP) stationed in Tuguegarao City, Cagayan, received a tip from a confidential informant that a certain "Junjun" of Brgy. Pallua, Tuguegarao City, was peddling *shabu*. Acting on the said information, the PNP formed a buy-bust operation and designated PO1 Michael Turingan as the poseur-buyer. Elements of the PNP then conducted the operation, with PO1 Turingan being introduced to Junjun as a buyer of *shabu*. Junjun then handed him "one (1) heat-sealed transparent plastic sachet containing white crystalline substance."[8]

The Department of Justice (DOJ) representative and a barangay captain witnessed the conduct of the inventory located at the place of transaction. The DOJ representative testified during trial that the specimen was unmarked when presented to them during inventory, but was subsequently marked in front of him by PO1 Turingan.[9]

The defense interposed a denial on the prosecution's allegations and claimed that the chain of custody rule was not followed. The Regional Trial Court (RTC) of Tuguegarao City, Branch 1, however, convicted the accused of the crime of Sale of Dangerous Drugs under Section 5 of Republic Act No. 9165 or the Comprehensive Dangerous Drugs Act, as amended. The Court of Appeals (CA) affirmed the decision of the RTC.[10]

Before the High Court, accused-appellant Nisperos argued, *inter alia*, that the mandatory witnesses were not present at the time of his arrest.[11]

In its pronouncement, the Court reiterated its earlier ruling in *Tomawis* that the presence of the mandatory witnesses for the subsequent conduct of inventory and photographing requires them to be "at or near" the intended place of the arrest. Thus, since they can be "near" the place of

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[7] *Id.*
[8] *Id.* at 947.
[9] *Id.*
[10] *Id.* at 947–48.
[11] *Id.* at 949.

the apprehension, they need not witness the actual arrest and seizure of the drug and non-drug evidence. The witnesses "need only be readily available to witness the ensuing inventory and photographing."[12]

Juxtaposed against this was the factual milieu surrounding the case. In *Nisperos*, while the barangay captain was already present at the place of transaction, the DOJ representative arrived half an hour later to witness the inventory. According to the Court, this tardy arrival was tantamount to an unjustifiable deviation from the chain of custody rule requiring the mandatory witnesses to be readily available at the place of the transaction.[13]

Additionally, the Court found that the seized items from the accused were not immediately marked, as it was only done during the inventory. This unjustified and belated marking, coupled with the failure of the mandatory witnesses to comply with the immediacy requirement, engendered the acquittal of the accused.[14]

In closing, the Court promulgated the following guidelines:

> 1. The marking of the seized dangerous drugs must be done:
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> a. Immediately *upon* confiscation;
> b. At the place of confiscation; and
> c. *In the presence of the offender (unless the offender eluded the arrest)*;
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> 2. The conduct of inventory and taking of photographs of the seized dangerous drugs must be done:
>
> a. Immediately after seizure and confiscation;
> b. In the presence of the accused, or the person/s from whom such items were confiscated and/or seized, or his/her representative or counsel; and
> c. Also in the presence of the insulating witnesses, as follows:
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> i. if the seizure occurred during the effectivity of R.A. No. 9165, or from July 4, 200244 until August 6, 2014, the presence of three (3) witnesses, namely, an elected public official; a Department of Justice (DOJ) representative; and a media representative;

[12] *Id.* at 952–53. (Citations omitted.)
[13] *Id.* at 953–54.
[14] *Id.* at 955.

> ii. if the seizure occurred after the effectivity of R.A. No. 10640, or from August 7, 201445 onward, the presence of two (2) witnesses, namely, an elected public official; *and* a National Prosecution Service representative or a media representative.
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> 3. In case of any deviation from the foregoing, the prosecution must positively acknowledge the same and prove (1) justifiable ground/s for non-compliance and (2) the proper preservation of the integrity and evidentiary value of the seized item/s.[15]

III. THE CONCEPT OF MARKING: A JURISPRUDENTIAL CREATION

Marking refers to "the placing by the apprehending officer or the poseur-buyer of [their] initials and signature on the items seized."[16] As it is not explicitly mentioned in Section 21 of Republic Act No. 9165, marking "is a creation of jurisprudence,"[17] and is referred to as the "starting point in the custodial link."[18] Its importance was first highlighted in *People v. Coreche*,[19] where the Court, through Associate Justice Antonio T. Carpio, stressed that the purpose of marking the seized drugs was to "separate the marked evidence from the *corpus* of all other similar or related evidence from the time they are seized from the accused until they are disposed of at the end of criminal proceedings, obviating switching, 'planting,' or contamination of evidence."[20]

This jurisprudential creation, however, is also recognized through administrative issuance. Under the 2010 Manual on Anti-Illegal Drugs Operation and Investigation, the marking of the seized drug specimen must be done by inscribing the initials of the apprehending officer/evidence custodian, as well as indicating the date, time, and place the evidence was confiscated/seized.[21] The 2014 Revised PNP Manual on Anti-Illegal Drugs Operations and Investigation also requires the same set of descriptive

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[15] *Id.* at 956–57. (Emphasis supplied.) (Citations omitted.)

[16] People v. Sanchez [hereinafter "*Sanchez*"], 590 Phil. 214, 241 (2008).

[17] *See* People v. Casa [hereinafter "*Casa*"], 928 Phil. 356, 467 (2022) (Kho, Jr., *J.*, *concurring*).

[18] People v. Coreche, 612 Phil. 1238, 1245 (2009).

[19] *Id.*

[20] *Id.*

[21] AIDSTF PNP Manual on Anti-Illegal Drugs Operation and Investigation (2010), § 13(c). *See also* People v. Narvas, 856 Phil. 176, 191 (2019).

information to be inscribed in the confiscated narcotics and non-drug paraphernalia.[22]

As previously mentioned, the guidelines in *Nisperos* do not require the presence of insulating witnesses during the marking of the seized specimen. In arriving at such a conclusion, the *ponencia* harked back to the 2008 case of *People v. Sanchez*, where the Court declared that marking should be done "(1) in the presence of the apprehended violator (2) immediately upon confiscation."[23] This pronouncement in *Sanchez* was a byproduct of the failure of Section 21 of Republic Act No. 9165 to codify the conduct of marking. The said statutory provision only mentioned that the inventory and photographing should be done in the presence of the mandatory witnesses.[24] Even its amendatory law, Republic Act No. 10640, did not mention marking, much less require it to be witnessed.[25]

IV. THE NECESSITY OF THE PRESENCE OF WITNESSES DURING THE MARKING

Nevertheless, the Author's view is that it is during marking, a crucial point in the custodial link, that the insulating presence of these witnesses should be required, and not only during the inventory and photographing of evidence. To support this claim, this Comment outlines 4 main points. First, marking is vital in establishing the identity of the *corpus delicti*. Second, this prevents trumped up charges. Third, marking and inventory are inextricably linked. Fourth, the immediacy requirement aligns with the period for marking.

A. Vital in Establishing the Identity of the *Corpus Delicti*

As part of the stringent chain of custody requirement, marking serves to distinguish the seized specimen from identical contraband using the distinctive marks placed by the apprehending officer. The marking of evidence helps in proving the identity of the *corpus delicti*—which is the seized drugs itself[26]—since it is at this point where the confiscated contraband is initially identified through its inscription. In other words, marking

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[22] PNPM-D-0-2-14 (DO), §§ 2–6, ¶ 2.35. Revised PNP Manual on Anti-Illegal Drugs Operations and Investigation; *see also Casa*, 928 Phil. at 396.

[23] *Sanchez*, 590 Phil. at 241. (Emphasis omitted.)

[24] Rep. Act No. 9165 (2002), § 21(1).

[25] *See* Rep. Act No. 10640 (2013), § 1, *amending* Rep. Act No. 9165 (2002), § 21.

[26] People v. Yanson, 858 Phil. 642, 671 (2019).

distinguishes the drug and non-drug evidence by designating a label that will be used as a reference by its succeeding handlers.[27]

In his separate opinion in *Nisperos*, Senior Associate Justice ("SAJ") Marvic M.V.F. Leonen also notes that the importance of marking the seized specimen in cases involving dangerous drugs is highlighted by the nature of illegal narcotics itself.[28] SAJ Leonen, citing *Mallillin v. People*,[29] highlighted the need for strict compliance to prevent evidence tampering.[30] In *Mallillin*, the Court took note of the "unique characteristic of narcotic substances" as not being readily identifiable, since its physical features are similar to substances "familiar to people in their daily lives."[31] Marking the confiscated illegal drugs thus removes its fungible nature since the designation particularizes the evidence.

This distinguishing feature of the seized specimen makes any discrepancy regarding the same fatal to the prosecution's cause, as it produces doubt as to the identity of the *corpus delicti*. In the 2009 case of *People v. Garcia*,[32] one of the reasons for the acquittal of the accused was the seemingly differing marks placed by the seizing officer.[33] The apprehending officer, who acted as a poseur-buyer, testified that he marked a printed paper containing the drug evidence as "RP-1," the suspected marijuana fruiting tops and thirteen small white papers as "RGR-RP1" to "RGR-RP13."[34] What was submitted to the crime laboratory, however, had dissimilar markings: the printed paper as "RGR-1," the small brick of suspected dried marijuana, and the thirteen pieces of small white paper as "RGP-RP1" to "RGP-RP13."[35]

Then came *People v. Kamad*,[36] which was also cited in SAJ Leonen's separate opinion,[37] where the recovered plastic sachets which allegedly

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[27] People v. Dahil, 750 Phil. 212, 232 (2015), *citing* People v. Alejandro, G.R. No. 176350, 655 SCRA, 279, 289–90, Aug. 10, 2011; *see also* People v. Saunar, 816 Phil. 482, 497 (2017).

[28] *Nisperos*, 931 Phil. at 971 (Leonen, *J.*, *separate opinion*).

[29] Mallillin v. People [hereinafter, "*Mallillin*"], 576 Phil. 576 (2008).

[30] *Nisperos*, *citing id.* at 589.

[31] *Mallillin*, 576 Phil. at 588, citing *Graham v. State of Ind.*, 255 N.E.2d 652, 655 (1970).

[32] People v. Garcia, 599 Phil. 416 (2009).

[33] *Id.* at 431–32.

[34] *Id.* at 432.

[35] *Id.*

[36] [Hereinafter "*Kamad*"] 624 Phil. 289 (2010).

[37] *Nisperos*, 931 Phil. at 972–73 (2022) (Leonen, *J.*, *separate opinion*).

contained *shabu* were marked as "ES-1-161009" and "ES-2-161002."[38] The forensic chemist, however, testified that the plastic sachets were marked as "EBC 12 October 02" and "EBC-1 12 October 02."[39] Similar rulings followed in *People v. Cayas*,[40] *People v. Segundo*,[41] *People v. Sanchez*,[42] *Cunanan v. People*,[43] *People v. Ameril*,[44] *People v. Narvas*,[45] and in *People v. Pagaspas*.[46]

In 2023, the Court in *People v. Valencia* acquitted the accused due to doubts surrounding the identity of the *corpus delicti.*[47] The poseur-buyer, after the consummation of the sale, apprehended the accused and marked the specimen.[48] No witnesses were present during the conduct of the marking, but they were present during the ensuing inventory and photographing.[49] The initial markings and the other documents the prosecution proffered in evidence referred to the seized evidence as "FLV/RA-BB-01-16-16."[50] During his direct examination, however, the poseur-buyer testified that he

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[38] *Kamad*, 624 Phil. at 297.

[39] *Id.* at 308–09.

[40] *See* People v. Cayas, 789 Phil. 70, 82-84 (2016). In this case, the subject sachets, marked as "MC" and "MC-P," differed from those indicated in the Request for Laboratory Examination and Chemistry Report as "MC-BB 08 Oct 2003," "MCP-1," and "MC-P2."

[41] *See* People v. Segundo, 814 Phil. 697, 724 (2017). Here, the two informations filed against the two accused described heat-sealed transparent sachets, both bearing the marking "JSI-1," despite the fact that the articles seized from them were admittedly different.

[42] *See Sanchez,* 839 Phil. 960, 972. Here, the *Joint Affidavit of Arrest*, *Inventory of Seized Items*, *Initial Laboratory Report*, *Request for Laboratory Examination*, and chemistry report indicated that the seized sachet of *shabu* was marked as "AI-MS," but was testified on by the poseur-buyer as having been marked as "AI" only.

[43] *See* Cunanan v. People, 843 Phil. 96, 117 (2018). Here, the confiscated sachets of *shabu* were allegedly marked as "RVB" but were described in the Initial Laboratory Report as having the markings "RB."

[44] *See* People v. Ameril, 849 Phil. 499, 507 (2019). Here, the seized drug specimens were marked as "LLA-1," "LLA-2," and "LLA," but the *Information* described the same as "LAA," "LAA-2," and "LAA."

[45] *See* People v. Narvas, 856 Phil. 176, 192 (2019). Here, the police officers allegedly marked the subject specimens as "CVI-1" and "CVI-2," but identified the same during trial as those with inscriptions "CVI-2" and "AQ-2." Further, the other two sachets recovered from the accused were allegedly marked as "EQ-1" and "EQ-2," but was shown in the photographs as "AQ-1" and "AQ-2."

[46] *See* People v. Pagaspas, 914 Phil. 741, 751 (2021). Here, the poseur-buyer testified that the markings he placed on the *shabu* he bought from the accused was "7-19-17 BB-FYM," but PO1 Agudo's *Kusang Loob na Salaysay* indicated that the subject sachet was marked as "7/19/17 BB-FYM."

[47] People v. Valencia, G.R. No. 250610, slip op. at 17–21, July 10, 2023.

[48] *Id.* at 14.

[49] *See id.*

[50] *Id.* at 19.

marked the same as "FLV-RA-06-16-2016."[51] The confusion was later clarified when it was admitted during trial that the poseur-buyer, who also acted as the investigator, was allowed by the forensic chemist to alter the Letter-Request for Laboratory Examination by removing the "20" in the specimen referred to therein as "FLV-RA-06-16-2016," to conform with the markings the former initially placed.[52] This act of alteration proved to be fatal for the prosecution's case, as it tainted the paper trail that showed the chain of custody of the subject specimen.[53]

It is no surprise that such trivial errors could completely overturn the outcome of a drug case. Such an oversight puts serious doubt not only as to the identity of the substance, but also as to the criminal agency of the accused from the crime charged. In *People v. Roluna*,[54] the Court stated that the *corpus delicti* is made up of two things, namely: (1) the existence of a certain act or result forming the basis of the criminal charge, and (2) the existence of a criminal agency as the cause of this act or result.[55] While the existence of a certain act or result may refer to a dead body or a burned house, criminal agency refers to the fact that some person is criminally responsible for the act.[56]

Thus, the manner of proving the criminal agency of the accused varies depending on the crime charged. In cases of *estafa* by postdating a check,[57] for example, the suspect's connection with the crime may be established by proving the fact that the accused signed the rubber checks.[58] In bigamy, the prosecution may prove the culpability of those charged by offering in evidence their marriage certificate.[59] In libel, the liability of the accused may be shown when the libelous article showing the identity of the author is proffered.[60] These pieces of evidence are authenticated by the

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[51] *Id.*

[52] *Id.* at 19–20.

[53] *Id.* at 20–21.

[54] People v. Roluna, G.R. No. 101797, 231 SCRA 446, Mar. 24, 1994.

[55] *Id.* at 452, *citing* 23 C.J.S. 624.

[56] People v. Barlis, 301 Phil. 433, 442 (1994).

[57] REV. PEN. CODE (amend.), art. 315, ¶ 2(d).

[58] *See, e.g.,* Batac v. People, 832 Phil. 279 (2018); Abalos v. People, 859 Phil. 450 (2019); People v. Isleta, 61 Phil. 332 (1935).

[59] This is, however, a mere evidentiary presumption that does not dispense with the burden of the prosecution to prove the elements of the crime of bigamy beyond reasonable doubt. *See Genio v. People*, G.R. No. 261666, slip op. at 11–15, Jan. 24, 2024.

[60] *See e.g.,* Sazon v. Ct. of Appeals, 325 Phil. 1053 (1996). Here, the libelous article had the name of the petitioner-appellant; Tulfo v. People, 587 Phil. 64 (2008). Here, the

witness who took them or was tasked with its custody and safekeeping, by simply identifying them in court and stating the manner in which they took and kept the evidence.

In cases involving illegal narcotics, however, such criminal agency is not easily established. Due to the peculiar nature of illegal drugs being interchangeable with other chemicals and substances, a more stringent method of authenticating evidence—the chain of custody—was adopted by Philippine law. As part of the chain of custody, marking not only christens the seized specimen but initially establishes the *nexus* between the accused and the confiscated contraband.[61] The seized drugs bearing the initials of the accused and the apprehending officer, together with the date, time, and place of the apprehension, proves the fact of the crime and the suspect's connection with the crime charged.

Admittedly, most types of crimes do not require independent guarantees or insulating mechanisms to properly establish the *corpus delicti*. Cases involving illegal narcotics, however, are unique due to its susceptibility to adulteration. Therein lies the necessity of having mandatory witnesses during the critical stage of establishing the criminal agency or the suspect's connection to the small piece of incriminating evidence: the frequent opacity that shrouds drug operations, stemming from the fungibility of the drug evidence itself. While robbery may easily be connected to the person having possession of the stolen goods, or bloodied stains may provide a link between a person having them and a dead body, a single plastic sachet containing miniscule amounts of an unknown substance cannot be easily pinned to an individual. For his guilt of possessing or selling the same to be established beyond reasonable doubt, his criminal agency should be adequately and independently proven.

Aside from corroborating the criminal agency of the accused, another practical reason for requiring the presence of the mandatory witnesses during the marking stage is to enable them to testify as to the initial condition of the specimen at the time it was seized. Since they are present during the conduct of marking, they can state, with certainty, the physical description of the illegal drugs, where it was contained, an approximate impression as to its quantity, its accompanying non-drug paraphernalia, if

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petitioner-appellant admitted that he wrote the article in question but defended that he did so without malice.

[61] People v. Dahil, 750 Phil. 212, 232 (2015), *citing* People v. Alejandro, G.R. No. 176350, 655 SCRA 279, 289–90, Aug. 10, 2011.

any, and the exact marks placed by the apprehending officer. These components constitute the identity of the substance, and having the mandatory witnesses to corroborate these facts removes any doubt as to its source.

Indeed, it is not enough that the seized specimen be marked *per se*. The requirement of immediacy and particularity, coupled with the existence of an independent guarantee that what was initially marked by the apprehending officer was the one presented in court, is crucial for a successful prosecution of cases involving illegal drugs. In *People v. Coreche*,[62] while the seized drugs were marked as "HVA," "HVA-1" and "HVA-2," there was no evidence on record relating to the manner of marking supposedly done.[63] The subsequent cases of *People v. Alejandro*,[64] *People v. Sabdula*,[65] and *People v. Arposeple*[66] are also illustrative of the essence of testimonies relating to how, when, and where the initial markings were made. Notably, in *People v. Saunar*,[67] the mandatory witnesses were present during the marking of the illegal drugs. However, none of them were presented in court to testify on such matter.[68]

Before the advent of *Nisperos*, a seemingly divergent line of jurisprudence required the presence of the mandatory witnesses as early as the marking stage. In the seminal case of *People v. Mendoza*,[69] the Court acquitted the accused since the poseur-buyer failed to state if the markings were made in the presence of the mandatory witnesses. Similarly, in *People v. Alagarme*,[70] the charges were dismissed due to the lacking testimony of the apprehending officer relating to the presence of the accused and the mandatory witnesses during the conduct of the marking inside a vehicle. Analogous pronouncements followed in *People v. Que*,[71] *People v. Castillo*,[72] and

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[62] People v. Coreche, 612 Phil. 1238 (2009).

[63] *Id.* at 1247.

[64] People v. Alejandro, 671 Phil. 33, 47 (2011). In this case, the seized item already bore the markings "TM-1-010902" when it was examined by the forensic chemist, despite the fact that the testimonies of the apprehending officers do not indicate that they initially marked the seized items.

[65] People v. Sabdula, 733 Phil. 85, 96 (2014). The seized evidence had the markings "BC 02-01-04" but no evidence was offered to show the manner in which the markings were made.

[66] People v. Arposeple, 821 Phil. 340, 365 (2017).

[67] People v. Saunar, 816 Phil. 482 (2017).

[68] *Id.* at 497.

[69] People v. Mendoza, 736 Phil. 749, 767–68 (2014).

[70] People v. Alagarme, 754 Phil. 449, 460 (2015).

[71] People v. Que, 824 Phil. 882, 907–11 (2018).

[72] People v. Castillo, 858 Phil. 1096, 1119 (2019).

in *People v. Fulgado*.[73] In all these cases, the Court equated the absence of the mandatory witnesses during the conduct of marking as a gap in the chain of custody.

The dubiety of the source of the seized narcotics has always been raised due to the vulnerability to "the evils of switching, 'planting' or contamination of the evidence."[74] The first link in the chain of custody—the seizure and marking of the illegal drug recovered from the accused by the apprehending officer[75]—is highly susceptible to these unlawful practices done by erring lawmen, not only because it is when the link between the accused and the drug evidence is created, but also due to the fact that the subject narcotics are yet to be labeled and identified.

Factoring these reasons, and bearing in mind the unique characteristic of dangerous drugs as not being readily identifiable due to its fungibility,[76] the presence of mandatory witnesses during the conduct of marking proves to be vital in sustaining the identity of the *corpus delicti*. Otherwise, the prosecution runs the risk of failing to prove the identity of the seized drugs itself, which ultimately engenders the acquittal of the accused.[77] This remains to be true even if the inventory and photographing are done pursuant to the exacting requirements of the chain of custody rule.[78] These insulating mechanisms, even when done to the letter, do not cure the irregularities earlier made in the marking stage.

B. Validating Trumped-Up Drug Charges through Unwitnessed Marking

The increased number of police operations conducted to curb the proliferation of narcotics in the wake of former President Rodrigo Duterte's war on drugs created an influx of illegal narcotics cases. Aside from the appalling number of deaths related to the war on drugs, hundreds of thousands of drug charges are based on trumped up charges—the falsity of which is uncovered only during trial, or months (or worse, years) after the accused was already apprehended and detained.

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[73] People v. Fulgado, 871 Phil. 531, 545 (2020).

[74] People v. Mendoza, 736 Phil. 749, 764 (2014).

[75] *Kamad*, 624 Phil. at 304; People v. Nandi, 639 Phil. 134, 144 (2010).

[76] *See Mallillin*, 576 Phil. at 588 (2008).

[77] People v. Dela Cruz, 744 Phil. 816, 830 (2014); Lescano v. People, 778 Phil. 460, 472 (2016).

[78] *See* Rep. Act No. 9165 (2002) §21, *as amended by* Rep. Act No. 10640 (2014), § 1.

SAJ Leonen argues in his separate opinion:

> If we were to strictly require the presence of these witnesses only at a very late stage, after the accused has been apprehended or after the items have been seized, their presence would no longer hold significant value for they would have absolutely no personal knowledge of what has transpired in the most crucial moment when their presence is most important—at the very beginning, when the corpus delicti's very existence is put to the test.[79]

The belated presence of the mandatory witnesses during the inventory and photographing of the evidence creates drastic consequences that further undermine the accused.[80] As mentioned, the conduct of inventory involves the itemization of the pieces of evidence allegedly seized by the police officers. The certificate of inventory is thus predicated on the fact that what was listed thereon was what was actually confiscated from the apprehended person. Yet, the witnesses could not possibly attest to the fact that the drug and non-drug evidence sprawled in front of them during the inventory were the items actually recovered from the accused, as they were absent during the initial marking of the evidence, or at the time when the drugs were just seized.

In such a situation, the act of the mandatory witnesses of affixing their signature in the certificate of inventory validates an otherwise illegal operation since they are attesting to a fact based only on the self-serving assurances of the apprehending officers.[81] Far from insulating the whole operation from the evils of switching, tampering, planting, and contaminating the evidence, the belated presence of the mandatory witnesses legitimizes the same and further jeopardizes the life and liberty of the would-be accused.[82]

In *People v. Castillo*,[83] SAJ Leonen describes how the presence of the mandatory witnesses only during inventory and photographing reduces them to mere rubberstamps, *viz.*:

> Having third-party witnesses present only during the subsequent physical inventory and photographing renders the whole

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[79] *Nisperos*, 931 Phil. at 977 (Leonen, *J.*, *separate opinion*).
[80] *See id.*
[81] People v. Castillo, 858 Phil. 1096, 1119–20 (2019).
[82] *Nisperos*, 931 Phil. at 977 (Leonen, *J.*, *separate opinion*).
[83] People v. Castillo, 858 Phil. 1096 (2019).

> requirement of their presence futile. Securing third-party witnesses provides a layer of protection to the integrity of the items seized and forecloses any opportunity for the planting of dangerous drugs. Having their presence only at a very late stage reduces them to passive automatons, utilized merely to lend hollow legitimacy by belatedly affixing signatures on final inventory documents despite lacking authentic knowledge on the items confronting them. They are then reduced to rubberstamps, oblivious to how the dangers sought to be avoided by their presence may have already transpired.[84]

The requirement of having mandatory witnesses was codified in law to insulate illegal narcotics operations from police abuse.[85] If these witnesses are to sign the inventory form without having any first-hand knowledge of where these pieces of evidence came from, relying only on the say-so of crooked law enforcers, they become complicit in the evils which their very presence sought to prevent. Consider a situation where the illegal drugs sought to be switched or planted were already pre-marked: without the presence of the witnesses during the marking stage, done immediately after seizure, they could not attest to the fact such allegedly seized drugs were already pre-marked and are thus of dubious sources.

C. Inextricable Link Between Marking and Inventory

In his concurring opinion in *People v. Casa*, Justice Alfredo Benjamin S. Caguioa briefly discusses how marking and inventory are "two parts of a whole" such that the occurrence of one, without the other, renders the whole process meaningless and would not "serve the purpose for which each was implemented."[86] Being inextricably linked, Justice Caguioa concludes that marking and inventory should be done simultaneously.[87]

True enough, marking and inventory cannot be treated as separate operational components. The conduct of inventory itself is only subsequent to marking, and there can be no valid inventory without marking the seized specimen first.[88] After the marking, the apprehending officers then proceed to inventory the confiscated evidence by itemizing these using the labels

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[84] *Id.* at 1119–20.
[85] *Id.* at 1115.
[86] *Casa*, 928 Phil. at 445 (Caguioa, *J.*, *concurring*).
[87] *Id.*
[88] *See id.* at 493–94.

inscribed earlier and describing its physical appearance.[89] These insulating mechanisms are just parts of the stringent chain of custody rule embodied in Section 21 of Republic Act No. 9165, as amended by Republic Act No. 10640.

The Dangerous Drugs Board (DDB), which is the agency tasked to formulate "policies and programs on drug prevention and control[,]"[90] defines chain of custody in the following manner:

> "Chain of Custody" means the duly recorded authorized movements and custody of seized drugs or controlled chemicals or plant sources of dangerous drugs or laboratory equipment of each stage, from the time of seizure/confiscation to receipt in the forensic laboratory to safekeeping to presentation in court for destruction. Such record of movements and custody of seized item shall include the identity and signature of the person who held temporary custody of the seized item, the date and time when such transfer of custody were made in the course of safekeeping and use in court as evidence, and the final disposition[.][91]

Such a definition lends credence to the fact that marking is part of the chain of custody since it involves the identification of the initial handler of the seized evidence—through the markings inscribed by the apprehending officer, akin to the functions of the physical inventory and photographing.

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[89] AIDSTF PNP Manual on Anti-Illegal Drugs Operation and Investigation (2010), § 13.

> A – Drug Evidence
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> a. Upon seizure or confiscation of the dangerous drugs or controlled precursors and/or essential chemicals (CPECs), laboratory equipment, apparatus and paraphernalia, the operating unit's seizing officer/inventory officer must conduct the physical inventory, markings and photograph the same in the place of operation in the presence of:
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> * * *
>
> e. All the dangerous drugs and/or CPECs shall be properly marked for identification, weighed when possible or counted, sealed, packed and labeled. The items weighed in their gross weight, if already determined, should be noted on the inventory and chain of 'custody forms or' evidence vouchers.
>
> f. Within the same period, the seizing/inventory officer shall prepare a list of inventory receipt of confiscation/seizure to include but not limited to the following:
>
> * * *
>
> 6. Description of packaging, seals and other identifying features.

[90] Rep. Act No. 9165 (2002), § 77.

[91] DDB Reg. No. 1 (2002) § 1(b). Guidelines on the Custody and Disposition of Seized Dangerous Drugs, Controlled Precursors and Essential Chemicals, and Laboratory Equipment.

Notably, the physical inventory and photographing of the seized specimen remains to be the only insulating mechanism in the chain of custody where the presence of third persons is required.[92] This occurs during the first link in the chain as it is at that point where the *corpus* is tied with the perpetrator, such that the illegal drugs seized—fungible as it may be—is linked with the person found to be in possession of the same.

From then on, document preparation regarding the confiscated illegal narcotics is made solely within the hands and eyes of the police. Any independent guarantee that the specimen is intact and will remain unsullied are foregone after the first link.[93] The court will have to rely on the testimonies of the police alone regarding the integrity of the subject narcotics from the second to the fourth links in the chain of custody.

With thus more reason should the statutory requirement of having mandatory witnesses during the conduct of the inventory be extended as early as the marking itself. As "two parts of a whole[,]"[94] the marking and the subsequent inventory, together with the photographing of evidence, are all done to ensure that the subject narcotics were the ones confiscated from the accused, and will remain untainted until it finds its way to court for identification.

That these procedures are interdependent cogs of a whole system of authentication is also bolstered by the fact that the certificate of inventory, which is the repository of the seized evidence, acts as a receipt; the witnesses, together with the accused or his counsel, are required to be given a copy of such.[95] Hence, having the insulating presence of mandatory witnesses during

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[92] *See* Rep. Act No. 9165 (2002), § 21(1).

[93] Rep. Act No. 9165 (2002), § 21(2)–(5).

[94] *Casa*, 928 Phil. at 445.

[95] "(1) The apprehending team having initial custody and control of the dangerous drugs, controlled precursors and essential chemicals, instruments/paraphernalia and/or laboratory equipment shall, immediately after seizure and confiscation, conduct a physical inventory of the seized items and photograph the same in the presence of the accused or the person/s from whom such items were confiscated and/or seized, or his/her representative or counsel, with an elected public official and a representative of the National Prosecution Service or the media *who shall be required to sign the copies of the inventory and be given a copy thereof:* Provided, That the physical inventory and photograph shall be conducted at the place where the search warrant is served; or at the nearest police station or at the nearest office of the apprehending officer/team, whichever is practicable, in case of warrantless seizures: Provided, finally, That noncompliance of these requirements under justifiable grounds, as long as the integrity and the evidentiary value of the seized items are properly preserved by the apprehending officer/team, shall not render void and invalid such seizures and custody

the marking stage dispels uncertainties regarding the origin of the confiscated drugs since they can confirm (or deny) that the pieces of evidence that were initially marked were the ones listed in the certificate of inventory given to them.

To require the presence of mandatory witnesses after marking has already been concluded disjoints these insulating mechanisms and compromises the whole system of authentication itself, as the first phase of the process is not protected from external abuses.

D. Aligning the Immediacy Requirement with the Marking Timeframe

To recall, *Tomawis* and *Nisperos* reiterated that the mandatory witnesses must be "at or near" the place of apprehension to be readily available to witness the ensuing inventory, which must take place "immediately after seizure and confiscation."[96] There is thus no sufficient reason for the mandatory witnesses not to be present during the marking of the seized evidence since it is conducted "immediately upon confiscation." If the requirement of immediacy prevents a vacuum of time where the seized drugs will remain undocumented and therefore susceptible to contamination, it is axiomatic that the marking itself should be witnessed as it is done immediately after the confiscation of the drugs itself, or at the point where the witnesses are already required to be present in the place of the apprehension.

SAJ Leonen opines that the mandatory witnesses should be present even at the point of seizure.[97] As a counterpoint to the safety issues this will entail as raised in the *ponencia*, SAJ Leonen maintains that a buy-bust operation, being a preplanned activity, should be executed meticulously to protect the third-party witnesses.[98]

Based on the Author's experience as a public attorney handling numerous drug cases, the usual tale in buy-bust operations paints a situation where the mandatory witnesses are with the other law enforcers who are acting as backup, hiding in a vantage point meters away from where the target and the poseur-buyer, accompanied by the confidential informant, are transacting. After consummating the sale, the poseur-buyer sends a pre-

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over said items." Rep. Act No. 9165 (2002), § 21(1), *as amended by* Rep. Act No. 10640 (2014), § 1. (Emphasis supplied).

[96] People v. Tomawis, 830 Phil. at 409; *Nisperos*, 931 Phil. at 945 (2022).

[97] *Nisperos*, 931 Phil. at 962 (Leonen, J., *separate opinion*).

[98] *Id.* at 986.

arranged signal—usually a subtle scratch in the head or the lighting of a cigarette—to the backup police officers, telling them that the transaction was successful and the suspected drug peddling has been confirmed. The backup police officers, together with the mandatory witnesses, then converge to the area while the poseur-buyer arrests the would-be accused.

Such a situation confirms two things. First, that the mandatory witnesses were able to see the purported exchange (albeit from a distance), since they, together with the backup police officers, awaited and confirmed the execution of the pre-arranged signal by the poseur-buyer. Second, that they can readily witness the marking, inventory, and photographing, since they were at the place of the apprehension.

Of course, in a different situation where the mandatory witnesses were not with the backup law enforcers, the period of time from the apprehension of the accused to the arrival of the witnesses will be subject to the stringent time frame set of less than fifteen minutes from the time of arrest in *People v. Flores*.[99] Still and all, the conduct of marking must be done in the presence of the mandatory witnesses.

V. CONCLUSION

The conduct of marking, inventory, and photographing are layers of protection done during the first link in the chain of custody, since it is at this point where a piece of incriminating evidence, fungible in nature, is tied with the alleged perpetrator. Without these mechanisms, a person stands to lose his constitutionally-guaranteed freedoms due to a single plastic sachet—unassuming, and for all intents and purposes, innocent.[100]

As the very first act of documentation, marking is part of a whole process of recording the identity of the *corpus delicti*, together with inventory and photographing. While the processes concerning these mechanisms are different, they are by no means independent from each other. Photographing can only occur during the conduct of inventory, and there would be nothing to inventory if the pieces of seized evidence were not marked.

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[99] *See* People v. Flores, G.R. No. 262686, slip op. at 17, Oct. 11, 2023.

[100] *See* People v. Que, 824 Phil. 882, 896 (2018). The Court pronounced that "[t]he physical similarity of narcotics with everyday objects facilitates their adulteration and substitution."

Calling in the mandatory witnesses only during the stage of inventory and photographing creates a chasm wide enough for the evils of switching, planting, or contamination to "rear their ugly heads."[101] By the time that these witnesses are called for their insulating presence, the abuse had already occurred, and their signature only serves to further incriminate the falsely accused.

Requiring the presence of mandatory witnesses during marking could not be said to be so difficult as to make lawful entrapments virtually impossible to conduct. First, the rules concerning the chain of custody have been so often repeated, "not only on jurisprudence but also on professional and casual exchanges between police officers, that [they] must have been so familiar with them."[102] Second, the marking of the seized evidence coincides with the arrival of these witnesses for the ensuing inventory and photographing. Such a requirement does not presume that all law enforcement operations against illegal drugs are tainted with abuse. On the contrary, their availability at such an early stage not only obviates any doubt as to the source of the seized specimen but also precludes the usual defense of frameup.

Understandably, the Court's hands were tied in arriving at their conclusion in *Nisperos* since the presence of mandatory witnesses is statutorily required only during the inventory and photographing. Marking was not even mentioned under Section 21 of Republic Act No. 9165 or its amendatory law, Republic Act No. 10640.[103] With marking being a jurisprudential creation,[104] having to require witnesses during its conduct could dangerously veer towards judicial legislation.

Justice Caguioa alluded to such criticisms made against *Tomawis* in his Concurring Opinion in *Nisperos*.[105] He defended his *ponencia* by stating that *Tomawis* arrived at the immediacy requirement—or that the mandatory witnesses should be "at or near" the place of apprehension to witness the immediately ensuing inventory and photographing—not through legislation but by applying the doctrine of necessary implication. While extending the statutory requirement of having mandatory witnesses as early as the marking phase could be justified by recognizing marking as an integral part of the first

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[101] People v. Mendoza, 736 Phil. 749, 764 (2014).
[102] People v. Que, 824 Phil. 882, 912 (2018).
[103] *See* Rep. Act No. 9165 (2002) § 21, *as amended by* Rep. Act No. 10640 (2014).
[104] *Casa*, 928 Phil. at 467.
[105] *Nisperos*, 931 Phil. at 996 (Caguioa, *J.*, *concurring*).

link in the chain of custody, such a pronouncement could admittedly invite similar apprehensions.

Calls for further refinement of the law on dangerous drugs should thus be made to Congress, if it wishes to curb the proliferation of illegal narcotics and the criminality that stems from it. Otherwise, it would create a society where the innocent are put behind bars, while the felon is guised in uniform.

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