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**THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

COMMONWEALTH OF THE NORTHERN)
MARIANA ISLANDS,)
)
Plaintiff,)
)
v.)
)
MARK A. FUNKUGUB,)
)
Defendant.)

Criminal Case No. 01-0228

ORDER

I. PROCEDURAL BACKGROUND

This matter came before the court on May 23, 2001, in Courtroom 223A at 3:30 p.m. for a continuation of the bail hearing originally set for May 22, 2001. Assistant Public Defender Douglas Hartig, Esq., appeared on behalf of the Defendant, Mark A. Funkugub. Assistant Attorney General Elaine A. Paplos, Esq., appeared on behalf of the Commonwealth. The Court, having heard and considered the arguments of counsel and being fully informed of the premises, now renders its decision.

II. FACTS

On May 19, 2001, Defendant Mark A. Funkugub (Defendant) was arrested on suspicion of having committed the offenses of Assault and Battery, in violation of 6 CMC § 1202(a), and Disturbing the Peace, in violation of 6 CMC § 3101(a).

FOR PUBLICATION

1 On May 20, 2001, upon review of a police affidavit, the court found probable cause to detain
2 Defendant and set cash bail in the amount of one thousand five hundred dollars (\$1,500.00).

3 On May 21, 2001, the Commonwealth filed an Information charging Defendant with one count
4 of Assault and Battery, in violation of 6 CMC § 1202(a), and one count of Disturbing the Peace, in
5 violation of 6 CMC § 3101(a). Specifically, the Commonwealth alleges that on May 19, 2001,
6 Defendant did unlawfully strike, beat, wound, or otherwise do bodily harm to another and that such act
7 unreasonably annoyed or disturbed another person, the alleged victim.

8 On May 22, 2001, Defendant came before the court for a bail hearing. Defendant appeared *pro*
9 *se* and informed the court that he was unable to afford an attorney. The court stated that it was inclined
10 to convert the \$1,500.00 cash bail to an unsecured appearance bond, along with other conditions for
11 pretrial release. The Commonwealth represented that there would be danger to the community or to the
12 victim if he was released at this time and that if they had more time that they could present evidence to
13 the court to overcome the presumption that the defendant is entitled to release on an unsecured
14 appearance bond and other conditions. In view of the Commonwealth's request to present such evidence
15 and for the need for the probation office to determine the defendant's eligibility for an indigence
16 determination it was ordered that the bail hearing be continued until May 23, 2001, at 3:30 p.m and that
17 Defendant report to the Probation Office.

18 The court, as an interim measure imposed the following tentative terms and conditions for
19 Defendant's release: (1) a requirement that Defendant post cash bail in the amount of one thousand five
20 hundred dollars (\$1,500.00); (2) a requirement that Defendant return to Court whenever required to do
21 so; (3) a requirement that Defendant obey all Commonwealth laws; (4) a requirement that Defendant
22 surrender all travel documents and not leave the island of Saipan; (5) a requirement that Defendant stay
23 away from all seaports and airports; (5) a requirement that Defendant keep all appointments with his
24 attorney; (6) a requirement that Defendant report to the Probation Office for an indigency determination
25 and (6) a requirement that Defendant shall have no direct or indirect contact with the alleged victim.

26 On May 23, 2001, the court, after hearing arguments of counsel entered a second bail order
27 modifying the May 22, 2001, bail order by allowing Defendant to be released on an unsecured bond in
28 the amount of one thousand five hundred dollars (\$1,500.00). The remaining terms and conditions set

1 forth in the May 22, 2001, bail order were not modified because the Commonwealth’s proffer of proof
2 of a danger to the victim from defendant if he was released was insufficient to meet the clear and
3 convincing standard of proof necessary for the court to find a danger to the victim or to the community.

4
5 **III. ISSUES**

6 1. Whether the court has the discretion to modify the terms and conditions of bail and thereby
7 allow Defendant to be released on an unsecured bond of one thousand five hundred dollars (\$1,500.00)
8 where the Commonwealth asserts that the court is bound by a General Order / Bail Schedule which states
9 that cash bail should be set in the amount of one thousand five hundred dollars (\$1,500.00) in cases in
10 which a defendant is charged with one count of Assault and Battery and one count of Disturbing the
11 Peace.

12
13 **ANALYSIS**

14 A. Principles of Law Governing Pretrial Release.

15 The Court takes the present opportunity to elaborate on the principles of law governing the right
16 to pretrial release, principles that this court holds in high esteem. In view of the high regard that this
17 court has for the area of pretrial release, along with its experience in the matter and the fact that there
18 has been very little written by the courts of the Commonwealth on the subject, this Court deems it timely
19 to share some background information and guidelines with the attorneys practicing before it with respect
20 to the pretrial release of a defendant in a criminal case.

21
22 1. Importance of Presumption in Favor of Pretrial Release.

23 “Throughout the world today, there are men, women and children interned indefinitely, awaiting
24 trials which may never come or which may be a mockery of the word, because their governments believe
25 them to be “dangerous.” United States v. Salerno, 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987)
26 (Justice Marshall *dissenting* joined by Justices Brennan and Blackmun). Our founding fathers had the
27 insight at the inception of the Constitution to create a document that would lay the foundation for the
28 future protection of the accused. Bolstering this notion, Justice Marshall went on to state, “Our

1 country's Constitution whose construction began two centuries ago can shelter us forever from the evils
2 of such unchecked power." Id. at 739, 107 S. Ct. at 2095, 95 L. Ed. 2d at 697.

3
4 2. Origins of Bail and the Presumption in Favor of Pretrial Release.

5 The power to grant bail is inherent in the judicial function; and such power is derived not from
6 the constitution but from the common law. Johnson v. District Court of City and County of Denver, 610
7 P. 2d 1064, 1065 (Colo. 1980).

8 The celebrated English Habeas Corpus Act of 1679 protected the right of a criminal accused to
9 pretrial release on bail. The legacy of the act can be traced to the Habeas Corpus clause of the
10 Constitution and to similar provisions in many state constitutions. The Bill of Rights also protects the
11 sanctity of pretrial release. The Bill of Rights prohibition of excessive bail survives in the Eight
12 Amendment to the United States Constitution and similar state constitutional provisions. Historically,
13 the struggle to establish the right to bail was central in the evolution of the English conception of a
14 citizen's liberty.

15 In early English practice, an accused was released in the custody of kinsmen, who obliged
16 themselves to assure the accused's presence for trial. As bailees of the accused's body, they were called
17 bails, and when the custom grew of requiring them to post some valuable security for their obligation,
18 the security posted, as well as the general practice of releasing a defendant on security or bond
19 conditioned upon appearance at trial, came to be called bail.

20 This centuries old concept of the reverence for a citizen's liberty has resulted in constitutions,
21 statutes and court rules of procedure in the federal and state governments, that are intended to implement
22 and ensure the protection of such liberty.

23 The two seminal cases on pretrial release and bail matters are Stack v. Boyle, 342 U.S. 1, 72
24 S.Ct. 1, 96 L.Ed 3 (1951) and United States v Salerno, 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697
25 (1987). Both cases have espoused principles interpreting the laws and constitutional principles that deal
26 with pretrial release matters.

1 Stack v Boyle, emphasized the constitutional principles, law and rules that are intended to allow
2 a charged person to stay out of jail until a trial has found them guilty. In Stack v. Boyle, Justice Jackson
3 and Justice Frankfurter in their decision joining the majority criticized the lower court as follows:

4 Thus, the amount is said to have been fixed not as a reasonable assurance of their
5 presence at the trial, but also as an assurance they would remain in jail. There seems
6 reason to believe that this may have been the spirit to which the courts below have
yielded, and it is contrary to the whole policy and philosophy of bail.

7 Stack v. Boyle, 342 U.S. 1 at 8.

8 Justice Jackson and Justice Frankfurter went on to further state:

9 That the practice of admission to bail, as it has evolved in Anglo-American law, is not
10 a device for keeping persons in jail upon mere accusation until it is found convenient to
11 give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out
12 of jail until a trial has found them guilty. Without this conditional privilege, even those
13 wrongly accused are punished by a period of imprisonment while awaiting trial and are
handicapped in consulting counsel, searching for evidence and witnesses, and preparing
a defense. To open a way of escape from this handicap and possible injustice, Congress
commands allowance of bail for one under charge of any offense not punishable by
death.

14 In allowance of bail, the duty of the judge is to reduce the risk by fixing an amount
15 reasonably calculated to hold the accused available for trial and its consequence.
16 Fed.Rules Crim.Proc.46(c). But the judge is not free to make the sky the limit, because
the Eighth Amendment to the Constitution says: ‘Excessive bail shall not be required.’

17 Congress has reduced this generality in providing precise standards stating that the
18 amount thereof shall be such as in the judgment of the Commissioner or Court or Judge
19 or Justice will insure the presence of the defendant, having regard to the nature and
20 circumstances of the offense charged, the weight of the evidence against him, the
financial ability of the defendant to give bail and the character of the defendant.’
Fed.Rules Crim.Proc. 46(c) . . .the question when application for bail is made relates to
each one’s trustworthiness to appear for trial and what security will supply reasonable
assurance of his appearance.

21 Id. at 8.

22 An oft quoted statement that Chief Justice Vinson wrote for the court in Stack v. Boyle, is stated
23 as follows:

24 Unless this right to bail before trial is preserved, the presumption of innocence, secured
25 only after centuries of struggle, would lose its meaning.

26 Id. at 4.

27 The second seminal case on pretrial release, United States v Salerno, involved a challenge to the
28 Bail Reform Act of 1984 (Act) that allowed a court to consider danger to the community or a victim as

1 a factor in determining pretrial release conditions or in not granting pretrial release. United States v
2 Salerno, 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). The Act requires courts to detain prior
3 to trial arrestees charged with certain serious offenses, and who constitute an identified and articulable
4 threat to an individual or to the community provided that the Government demonstrates by clear and
5 convincing evidence after an adversary hearing that no release conditions will reasonably assure the
6 safety of another person and the community. *Id.*

7 Although the Salerno court acknowledged the long standing principles of the individual's interest
8 in liberty it did find that the interest may be subordinated to greater needs of society, by acknowledging
9 that preventing danger to the community as a legitimate regulatory goal. United States v. Salerno, 481
10 U.S. at 749. However, it also set out that the Government must establish by clear and convincing
11 evidence that no condition or set of conditions of release would ensure the safety of the community or
12 any person. *Id.* at 749.

13 From the passage of the Judiciary Act of 1789, 1 Stat. 73, 91, to the present Federal Rules of
14 Criminal Procedure, Rule 46(a)(1), federal law has unequivocally provided that a person arrested for a
15 non-capitol offense shall be admitted to bail. This traditional right to freedom before conviction permits
16 the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to
17 conviction. *See Hudson v. Parker*, 156 U.S. 277, 285, 15 S.Ct. 450, 39 L.Ed 424 (1895).

18 19 3. Case Law / Principles to be Applied by the Court.

20 There are numerous case authorities, which have added to the words of wisdom and compliment
21 the principles set forth in Stack v. Boyle and United States v. Salerno. For example, “[t]he principle
22 that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and
23 elementary, and its enforcement lies at the foundation of the administration of our criminal law”); Coffin
24 v. United States, 156 U.S. 432, 453, 15 S.Ct. 394, 403, 39 L.Ed. 481 (1895)

25 [o]ur society's belief, reinforced over the centuries, that all are innocent until the state has proved
26 them to be guilty, like the companion principle that guilt must be proved beyond a reasonable doubt, is
27 implicit in the concept of ordered liberty); Palko v. Connecticut, 302 U.S. 319, 325, 58 S.Ct. 149, 152,
28 82 L.Ed. 288 (1937); The defendant has a basic and significant liberty interest in not being confined

1 pending trial. This interest encompasses more than the fundamental loss of freedom for the pretrial
2 period. United States v. Orta, 760 F.2d 887, 892 (8th Cir. 1985) (Pretrial confinement may imperil the
3 suspect’s job, interrupt his source of income, and impair his family relationships); Gerstein v Pugh,
4 infra. (“[d]efendant can be detained before trial only if government shows by clear and convincing
5 evidence that no release condition or set of conditions will reasonably assure safety of community and
6 by preponderance of evidence that no condition or set of conditions will reasonably assure defendant’s
7 appearance; there is no requirement that release conditions guarantee community safety and defendant’s
8 appearance”);

9 Further, United States v. Spilotro, 786 F.2d 808 (8th Cir. 1986) (imposition of conditions of
10 release must be supported by reasons why they are necessary to reasonably assure appearance or safety);
11 United States v. Brown, 870 F.2d 1354, 1358 n.5 (7th Cir. 1989) (while the Court enjoys fairly broad
12 discretion in tailoring release conditions to the individual case, the conditions must be related to either
13 assuring appearance or the safety of the community); United States v. Motamedi, 767 F.2d 1403 (9th Cir.
14 1985) (the weight of the evidence against the accused is the least significant factor); United States v.
15 Gray, 651 F. Supp. 432, 436 (W.D. Ark. 1987) (to presume flight from strong evidence of guilt would
16 be “tantamount to a presumption of guilt”); United States v. Gebro, 948 F.2d 1118, 1121 (9th Cir. 1991)
17 (only in “rare circumstances” should pretrial release be denied and “doubts regarding the propriety of
18 release should be resolved in the defendant’s favor” . . . “weight of the evidence is the least important
19 of the factors, and the bail statute neither requires nor permits a pretrial determination of guilt”).

20 In addition to the aforementioned case authorities, the American Bar Association has
21 indicated its support for the above principles by stating that it:

22 Strongly favors the release of defendants pending determination of guilt
23 or innocence and has called upon each jurisdiction to maximize the
24 number of defendants released on their own recognizance. It should be
25 presumed that a defendant is entitled to pretrial release on his own
26 recognizance, which presumption may be overcome by a finding that
there is a substantial risk of nonappearance or a need of additional
conditions to assure the defendant’s appearance in court, protect the
safety of the community, and prevent intimidation of witnesses and
interference with the orderly administration of justice.

27 ABA Standards of Criminal Justice 10-1.1, 10-12, 110-1.3 (2d Ed 1980)

28

1 4. Policies and Procedures to be Implemented by this Court.

2 This court, when presented with a defendant appearing in court for the first time after arrest will,
3 in recognition of the principles and authorities stated in this decision proceed as follows.

4 The defendant will, upon first appearance in this court be entitled to the presumption that he may
5 be released on his or her promise to appear or personal recognizance or upon execution of an unsecured
6 appearance bond in an amount set by the court. This presumption is supported by constitutional
7 principles, policy considerations and practical experience.

8 However, this presumption is not an absolute right and may be overcome by showing a necessity
9 for more restrictive conditions of release or detention in individual cases. In the absence of, or in
10 addition to this showing the Court may also arrive at a similar result by its own questioning of the
11 defendant in order to exercise its discretion in determining that such a release would not reasonably
12 assure the appearance of the defendant as required. In making such determination the court will consider
13 the factors set forth at 6 CMC § 6404.

14 Once the Court makes the determination that more than the above methods of release are required
15 then the court will, either in lieu of or in addition to the above methods of release imposed follow the
16 guidelines as set forth at Com. R. Civ. P. 46. In other words, once the presumption of release on
17 personal recognizance has been overcome, the court will impose restrictive conditions. However, since
18 imposing any condition is a restriction on a defendant's liberty, the court will impose only the least
19 restrictive conditions that are reasonably calculated to assure appearance in court or to reduce potential
20 danger to the community.

21 Consistent with the presumption of innocence, the burden for providing the need for more
22 restrictive conditions of release falls on the prosecution. In view of the fact that liberty is such a
23 fundamental right and the decision to restrict it is such a formidable one, the burden of proof must be
24 clear and convincing evidence. Salerno, 481 U.S. at 749 (liberty is the norm, and detention prior to trial
25 or without trial is the carefully limited exception); *see also* Reynolds v. United States, 80 S.Ct. 30, 32,
26 4 L.Ed.2d 46 (1959) (release on bail cannot be denied for the purpose of punishment).

27 In sum, this court will only deny pretrial release where the court finds that the defendant poses
28 either a substantial flight risk or substantial threat to the safety of the community, that there is a

1 substantial probability that the defendant committed the instant offense and that no condition or set of
2 conditions will minimize the risk. In addition, it is important to remember that every bail proceeding
3 is fact sensitive. The facts surrounding each case will determine the decision. For this reason, every bail
4 proceeding must be decided on a case by case basis.

5
6 B. Court's Discretion to Modify the Terms of Defendant's Pretrial Release in the Present Matter.

7 The Commonwealth, in its "Motion to Deny Bail Modification," asserts that the court lacks the
8 authority to "*sua sponte*" order a bail modification hearing pursuant to Com. R. Crim. P. 46(a). The
9 Commonwealth also asserts that the court improperly modified the bail order entered on May 20, 2001,
10 and that such modification should be stricken on the ground that the court is bound by a General Order
11 / Bail Schedule which states that cash bail should be set in the amount of one thousand five hundred
12 dollars (\$1,500.00) in cases in which a defendant is charged with one count of Assault and Battery and
13 one count of Disturbing the Peace.

14
15 1. Procedural Posture / Continuation of May 22, 2001, Bail Hearing.

16 The Commonwealth misapprehends the procedural posture of the present matter. This matter
17 did not come before the court pursuant to an Application for Bail Modification filed under Com. R.
18 Crim. P. 46(a)(4). Rather, this matter came before the court for a continuation of the bail hearing
19 originally set for May 22, 2001 at 3:30 p.m. As such, the Commonwealth's assertion that the court lacks
20 the authority to *sua sponte* order a bail modification hearing is irrelevant and has no bearing on the issues
21 presented.

22 Furthermore, the court notes that it chose to accommodate the concerns expressed by counsel for
23 the Commonwealth in said motion, despite the fact that counsel took it upon herself to calendar the
24 hearing on its said motion without regard to the court's policy and preference that all motion hearings
25 be calendared by the Clerk of Court.

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1 2. Effect of General Order / Bail Schedule on Court’s Discretion to Modify Terms and
2 Conditions of Pretrial Release.

3 On May 20, 2001, the present matter came before the court for a “*Gerstein*” probable cause
4 determination. *See Gerstein v. Pugh*, 420 U.S. 103, 125, 95 S. Ct. 854, 869, 43 L. Ed. 2d 54 (1975)
5 (Fourth Amendment requires as a condition for any significant pretrial restraint on liberty a fair and
6 reliable determination of probable cause made by a judicial officer either before or promptly after arrest).
7 The Court, relying upon a police affidavit, found probable cause to detain Defendant and set conditions
8 for pretrial release, including a condition requiring that Defendant post cash bail in the amount of one
9 thousand five hundred dollars (\$1,500.00).

10 The Court modified the May 20, 2001 bail order on May 23, 2001 by permitting Defendant to
11 be released on a one thousand five hundred dollar (\$1,500.00) unsecured bond, which is within the
12 Court’s discretion pursuant to the Commonwealth code and the criminal rules of procedure. The
13 Commonwealth asserts that the court lacked the discretion to modify the May 20, 2001, bail order on
14 the ground that the Court is bound by a General Order / Bail Schedule which states that cash bail should
15 be set in the amount of one thousand five hundred dollars (\$1,500.00) in cases in which a defendant is
16 charged with one count of Assault and Battery and one count of Disturbing the Peace.

17 However, the General Order / Bail Schedule is not mandatory and does not limit the Court’s
18 discretion to alter the terms and conditions of pretrial release imposed after a “*Gerstein*” probable cause
19 determination. The General Order / Bail Schedule is only a guideline used in situations where the court
20 lacks access to all relevant information and must rely solely on affidavits and police reports. *See*
21 *Gerstein v. Pugh*, 95 S.Ct. at 866. (the initial probable cause determination does not include the full
22 panoply of adversary safeguards, such as right to counsel, confrontation, cross-examination, and
23 compulsory process for witnesses, that are available at a full bail hearing).

24 In addition, the bail schedule provides for bail during the time prior to a defendant’s first court
25 appearance and is based solely on the nature of the charge. The process that permits the consideration
26 of all relevant factors inherent in a bail determination is not present as part of the said bail schedule. Due
27 process considerations require a bail determination by the court to be individualized, supported by sound
28 reasons and evidence and if necessary, subject to a prompt appeal.

1 It is this Court's position that the use of bail schedules negates the individuality of the release
2 decision, however they do serve a limited purpose at the time of arrest and before a defendant is brought
3 to court. However, they are instituted in an effort to speed the release decision and rely only on the
4 nature of the offense charged and do not consider other factors more relevant to the probability of
5 appearance, which this court will do at a defendant's first appearance.

6 Accordingly, the Court finds that it has the discretion to modify the bail order entered on May
7 20, 2001, and thereby permit Defendant to be released on a one thousand five hundred dollar (\$1,500.00)
8 unsecured appearance bond and other conditions if in the judgment of the court, it will ensure the
9 presence of the accused in the future and prevent any danger to the community or to an individual. *See*
10 Com. R. Crim. P. 46(a)(1).

11
12 3. Presumption in Favor of Pretrial Release as set forth in the Commonwealth.

13 As stated previously, the Commonwealth followed the general law of the United States and the
14 common law in enacting its statute on bail. 6 CMC § 6401, reads as follows:

15 Right to Bail. (a) "Any person arrested for a criminal offense, other than murder in the
16 first degree, shall be entitled as a matter of right to be released on bail before conviction;
17 provided, however, that no person may be so released while so under the influence of
intoxicating liquor or drugs that there is a reasonable ground to believe the person will
be offensive to the general public."

18 6 CMC § 6404, entitled, Amount of Bail, reads as follows:

19 Amount of Bail. "The amount of bail shall be such as, in the judgment of the Court or
20 official fixing it, will insure the presence of the accused on the future. The determination
21 of the Court or official should take into account the nature and circumstances of the
offense charged, the weight of the evidence against the accused, the financial ability of
the accused to give bail and the character of the accused."

22 Commonwealth Criminal Rule of procedure 46 is a mirror image of its federal counterpart Rule
23 46 of the federal rules of criminal procedure and compliments the statute with respect to implementing
24 the presumption of pretrial release.

25 Pursuant to Com. R. Crim. P. 46(a)(1):

26 Any person charged with an offense **shall**, at his/her appearance before
27 a judge, **be ordered released pending trial on his/her personal
28 recognizance or upon the execution of an unsecured appearance
bond in an amount specified by the judge**, unless the judge determines,

1 in the exercise of the judge’s discretion, that such a release will not
2 reasonably assure the appearance of the person as required. . . .

3 See Com. R. Crim. P. 46(a)(1) (emphases added).

4 The plain language of Com. R. Crim. P. 46(a)(1) states “[a]ny person charged with an offense
5 shall, at his/her appearance before a judge, be ordered released pending trial on his/her personal
6 recognizance or upon the execution of an unsecured appearance bond in an amount specified by the
7 judge.” Com. R. Crim. P. 46(a)(1) (emphases added). “Unless the context otherwise indicates[,] the use
8 of the word ‘shall’ . . . indicates a mandatory intent.” Sutherland, Statutory Construction § 25.04 (4th
9 Ed. 1985), *see also* Aquino v. Tinian Cockfighting Board, 3 N.M.I. 284, 292 (1993) (statutory term
10 “shall” creates duty and is mandatory). As such, the court finds that Com. R. Crim. P. 46(a)(1) manifests
11 a presumption in favor of pretrial release.

12 Also, the Bail Reform Act of 1984 codified at 18 USCS § 3142 , which is incorporated by Rule
13 46(a) of the Federal Rules of Criminal Procedure grants a person the right to pretrial release on personal
14 recognizance or unsecured appearance bond unless a judicial officer determines that such release will
15 not reasonably assure the appearance of the person as required or will endanger the safety of any other
16 person or the community.

17 In addition to the plain language of Com. R. Crim. P. 46(a)(1) and the principles codified at 18
18 USCS § 3142 the court further reiterates its prior explanation of the constitutional and statutory
19 principles supporting the presumption in favor of pretrial release.

20 First, “[t]he Fifth and Eighth Amendments' prohibitions of deprivation of liberty without due
21 process and of excessive bail require careful review of pretrial detention orders.” United States v.
22 Motamedi, 767 F.2d 1403, 1405 (9th Cir. 1985). “Doubts regarding the propriety of release should be
23 resolved in favor of the defendant.” United States v. Motamedi, *supra*, *citing* Herzog v. United States,
24 75 S.Ct. 349, 351, 99 L.Ed. 1299 (1955), *see also* United States v. McGill, 604 F.2d 1252, 1255 (9th
25 Cir.1979), *cert. denied*, 444 U.S. 1035, 100 S.Ct. 708, 62 L.Ed.2d 671 (1980).

26 Second, courts are to be mindful of the presumption of innocence and its corollary that the right
27 to bail should be denied only for the strongest of reasons. United States v. Motamedi, 767 F. 2d at 1405.

1 Third, although the applicable statute permits the court to consider the nature of the offense and
2 the evidence of guilt, it neither requires nor permits a pretrial determination that the person is guilty.
3 United States v. Motamedi, citing United States v. Edson, 487 F.2d 370, 372 (1st Cir.1973); United
4 States v. Alston, 420 F.2d 176, 179 (D.C. Cir.1969). These factors may be considered only in terms of
5 the likelihood that the person will fail to appear or will pose a danger to any person or to the community.
6 Id. at 421. Otherwise, if the court impermissibly makes a preliminary determination of guilt, the refusal
7 to grant release could become in substance a matter of punishment. Id. at 421. The purpose of bail is to
8 assure the defendant's appearance at a given time and submission to the judgment of the court. Reynolds
9 v. United States, 80 S.Ct. 30, 32, 4 L.Ed.2d 46 (1959).

10
11 4. Discretion of Judge to Determine Terms and Conditions of Release.

12 On May 22, 2001, Defendant came before the court for a full bail hearing. Defendant appeared
13 *pro se* and informed the court that he was unable to afford an attorney. The court then ordered that
14 Defendant report to the Probation Office for an indigency determination and ordered that the bail hearing
15 be continued until May 23, 2001, at 3:30 p.m. In addition, the court entered a tentative bail order which
16 generally followed the terms and conditions of the bail order entered after the May 20, 2001, "*Gerstein*"
17 probable cause determination.

18 On May 23, 2001, this matter came before the Court for a continuation of the bail hearing.
19 Defendant, represented by counsel, was present as the court determined whether the Commonwealth
20 presented sufficient evidence to rebut Com. R. Crim. P. 46(a)(4)'s presumption in favor of pretrial
21 release.

22 Pursuant to Com. R. Crim. P. 46(a)(2):

23 In determining which conditions will reasonably assure appearance, the
24 judge shall, on the basis of available information, take into account the
25 nature and circumstances of the offense charged, the weight of the
26 evidence against the accused, the accused's family ties, employment,
27 financial resources, character and mental condition, the length of his/her
28 residence in the community, his/her record of convictions, and his/her
record of appearance at court proceedings or of flight to avoid
prosecution or failure to appear at court proceedings.

Com. R. Crim. P. 46(a)(2).

1 Here, the Commonwealth presented insufficient evidence as to any of the aforementioned factors
2 to overcome the presumption in favor of pretrial release. As such, the Commonwealth failed to convince
3 the court that the terms and conditions of Defendant's release should include the imposition of cash bail
4 in the amount of one thousand five hundred dollars (\$1,500.00).

5 Accordingly, the Court exercised its discretion and determined that the following terms and
6 conditions would be sufficient to reasonably assure the appearance of Defendant as required and to
7 prevent any danger to the community or to the alleged victim: (1) an unsecured bond in the amount of
8 one thousand five hundred dollars (\$1,500.00); (2) a requirement that Defendant return to Court
9 whenever required to do so; (3) a requirement that Defendant obey all Commonwealth laws; (4) a
10 requirement that Defendant surrender all travel documents and not leave the island of Saipan; (5) a
11 requirement that Defendant stay away from all seaports and airports; (6) a requirement that Defendant
12 keep all appointments with his attorney; and (7) a requirement that Defendant shall have no direct or
13 indirect contact with the alleged victim and refrain from any criminal activity.

14
15 5. Commonwealth's Assertion that Twenty Four (24) Hour Notice is Insufficient.

16 The Commonwealth asserts that the court lacks the discretion to schedule a bail modification
17 hearing with only twenty four (24) hours notice to the Commonwealth. For reasons stated above the
18 hearing was not set for bail modification, but rather, was a continuance of the previous day's hearing.
19 However, it is this court's position and practice that a defendant in a criminal case incarcerated before
20 trial is entitled to have an immediate review of his bail conditions, notwithstanding Com. R. Crim. P 46
21 (d) This court, therefore, agrees with the decision recently rendered in Commonwealth v. Alfonso F.
22 Riumd which permits a hearing for review of pretrial release conditions within a twenty four (24) hour
23 period. Commonwealth v. Alfonso F. Riumd, Crim. Case No. 01-0194 (N.M.I. Super. Ct. May 1, 2001).
24 As the Court stated in Stack, "Relief must be speedy if it is to be effective." Stack v. Boyle 342 U.S. 1,
25 72 S.Ct. 1, 96 L.Ed 3 (1951)

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V. CONCLUSION

For the foregoing reasons, the court finds that the General Order/Bail Schedule is only a guideline used by the court to set terms and conditions for release after a “*Gerstein*” probable cause determination. The court also finds that the Commonwealth failed to present sufficient evidence to overcome constitutional and statutory presumptions in favor of pretrial release. Accordingly, the court’s bail order entered on May 23, 2001, shall remain in effect.

SO ORDERED this 13th day of June, 2001.

/s/
DAVID A. WISEMAN, Associate Judge