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1 **FOR PUBLICATION**

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3 **IN THE SUPERIOR COURT**
4 **FOR THE**
5 **COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

5	COMMONWEALTH OF THE)	CRIMINAL CASE NO. 15-0084
6	NORTHERN MARIANA ISLANDS,)	
7	Plaintiff,)	ORDER DENYING DEFENDANT'S
8	v.)	MOTION FOR A PRELIMINARY
9	PHILIP MANUEL PANGELINAN)	HEARING AS MORE THAN TEN DAYS
10	ROBERTO)	HAVE ELAPSED SINCE HIS INITIAL
	Defendant.)	APPEARANCE AND A REQUEST FOR A
)	LATER HEARING WAS NOT MADE
)	DURING THAT TEN-DAY PERIOD

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12 **I. INTRODUCTION**

13 This matter came before the Court on August 26, 2015 at 9:00 a.m. in Courtroom 220 on
14 Defendant's Motion for Preliminary Hearing. Defendant Philip P. Roberto ("Defendant") was
15 present in custody and was represented by Assistant Public Defender Cindy Nesbit. The
16 Commonwealth was represented by Assistant Attorney General Shannon Foley.

17 Based on a review of the filings, oral arguments, and applicable law, the Court **DENIES** the
18 Defendant's Motion for Preliminary Hearing.¹

19 **II. BACKGROUND**

20 On May 2, 2015, Defendant was arrested and his initial appearance occurred on May 4,
21 2015.² Defendant was released from custody on May 4, 2015 after the Court approved of his

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23 ¹ In the Commonwealth Rules of Criminal Procedure, the preliminary hearing is called a "preliminary examination,"
thus the Court will use this terminology in this order. NMI R. Crim. P. 5.1.

24 ² Defendants must be either charged or released within 24 hours of their arrest. 6 CMC § 6105(a)(3). As the Defendant
was arrested on a Saturday, his initial appearance occurred on Monday. At the initial appearance, defendants are

1 application for bail modification. Defendant's preliminary examination, scheduled for May 13,
2 2015, was vacated, as Defendant was no longer in custody. Defendant subsequently failed to appear
3 for his arraignment on May 18, 2015. As a result of Defendant's failure to appear, the Court issued
4 a bench warrant for his arrest.³ On May 28, 2015, Defendant was arrested and he remains in
5 custody.

6 On June 1, 2015,⁴ Defendant was arraigned before the undersigned judge, the Honorable
7 Joseph N. Camacho.⁵ After being arraigned, Defendant requested a preliminary examination. Judge
8 Camacho did not entertain the motion, as the case was assigned to the Honorable Kenneth L.
9 Govendo at the time.⁶

10 On June 5, 2015, Defendant filed a motion for a preliminary examination before Judge
11 Govendo. Judge Govendo initially granted the motion on June 8, 2015 without first allowing the
12 Commonwealth to respond. The Commonwealth filed its opposition on June 22, 2015, and
13 Defendant filed his reply on June 23, 2015. Judge Govendo heard arguments on the motion on June
14 23, 2015 and granted the motion for preliminary examination before recusing himself from the case.

19 notified of their rights, including their right to counsel. NMI R. Crim. P. 5. The Declaration of Probable Cause,
20 Complaint {Rule 5(a) CRCrP} was signed by the Honorable Judge Teresa Kim-Tenorio on May 3, 2015.
Commonwealth v. Roberto, Crim. No. 15-0084 (NMI Super. Ct. May 4, 2015) (Declaration of Probable Cause,
21 Complaint {Rule 5(a) CRCrP}).

³ The bench warrant was signed by the Honorable Presiding Judge Roberto C. Naraja. *Roberto*, Crim. No. 15-0084
(NMI Super. Ct. May 19, 2015) (Bench Warrant).

⁴ The Defendant was brought to court per the bench warrant.

⁵ Each judge is assigned a day of the week to hear bail matters. On June 1, 2015, Judge Camacho was the assigned bail
22 judge.

⁶ It is the Court's practice to avoid ruling on motions in cases assigned to other judges without first consulting the other
23 judge. The Commonwealth Superior Court practice is that the judge that hears the bail handles the bail modifications
24 any motions prior to arraignment. After the arraignment, a case is formally assigned to a judge, who then handles
any motions from that point forward. There is a clear delineation between these two time periods: the time between the
initial appearance and arraignment, and between the arraignment and the final disposition of the case.

1 *Commonwealth v. Roberto*, Crim. No. 15-0084 (NMI Super. Ct. June 26, 2015) (Order Granting
2 Def.'s Req. for Prelim. Hr'g). This case was then re-assigned to Judge Camacho.⁷

3 On June 26, 2015, the parties appeared before Judge Camacho for a status conference.
4 Defendant again requested a preliminary examination, and asked to schedule this preliminary
5 examination. As the Defendant had already been arraigned, Judge Camacho requested supplemental
6 briefing from both the Commonwealth and the Defendant on the issue of whether a preliminary
7 examination may be conducted after an arraignment.⁸

8 Defendant filed his supplemental briefing on July 6, 2015. The Commonwealth filed its
9 response to the supplemental briefing on August 14, 2015. Defendant filed his reply on August 21,
10 2015. The Court heard arguments on this issue on August 26, 2015.

11 III. DISCUSSION

12 Defendant is asking that the Court hold a preliminary hearing, also known as a preliminary
13 examination, to determine whether there is probable cause to hold the Defendant over for trial.
14 Under Title 6 of the Commonwealth Code, “[i]f the arrested person does not waive preliminary
15 examination, the official shall hear the evidence within a reasonable time.” 6 CMC § 6303(a).

16 The Commonwealth Rules of Criminal Procedure elaborate when a preliminary examination
17 should occur under Rule 5.1. “A defendant is entitled to a preliminary examination, unless waived,
18 if he/she is substantially deprived of his/her liberty.” NMI R. Crim. P. 5.1. This preliminary
19 examination “shall be held within a reasonable time but in any event not later than ten (10) days
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23 ⁷ The Presiding Judge assigns cases to individual Commonwealth Superior Court judges. 1 CMC § 3204(b). This
assignment occurs, for example, when a judge recuses from a case, and is in essence a re-assignment. This re-
assignment is separate from the initial assignment that the Presiding Judge makes after arraignment.

24 ⁸ Although Judge Govendo had previously granted an order for a preliminary examination, the Court was concerned
with whether a preliminary examination could be properly held at that point in time in accordance with Rule 5.1 of the
Commonwealth Rules of Criminal Procedure.

1 following the initial appearance.” *Id.*⁹ The Court may extend this ten-day limit “[w]ith the consent
2 of the defendant and upon showing of good cause, taking into account the public interest in the
3 prompt disposition of criminal cases.” *Id.*¹⁰ The Court may also extend this time limit without a
4 defendant’s consent “only upon a showing that extraordinary circumstances exist and that delay is
5 indispensable to the interests of justice.” *Id.*¹¹ This right to a preliminary examination is not
6 guaranteed in the Commonwealth Constitution, nor is it guaranteed in the United States
7 Constitution. *Babauta v. Superior Court*, 4 NMI 309, 313-14 (1995).

8 Defendant argues that, as he consents to having a preliminary examination outside of the
9 ten-day period, he should be granted a preliminary examination, as good cause exists to have his
10 preliminary examination outside of the time limits dictated in Rule 5.1. In particular, Defendant
11 argues that there is good cause, because he has been in custody since May 28, 2015. Supp. Br. at 4.

12 The Commonwealth opposes this motion, arguing that the Defendant has waived his right to
13 a preliminary examination, that a preliminary examination would not be timely at this time, and that
14 the Defendant should not be entitled to a preliminary examination as he is in custody for violating a
15 court order in the present case. Commonwealth’s Resp. to Supp. Br. at 2-5. The arguments from
16 both the Defendant and the Commonwealth miss the Court’s primary concern with regards to the
17 preliminary examination – that is, whether a preliminary examination may even be properly held at
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19 ⁹ The Commonwealth Supreme Court has held that “shall” means “must,” which “has the effect of creating a duty.”
20 *Aquino v. Tinian Cockfighting Bd.*, 3 NMI 284, 293 (1992).

21 ¹⁰ The ten-day time limit allows cases to move forward without unnecessary delay. This limit also prevents surprise and
waste of resources should a defendant decide to suddenly request a preliminary examination months after his or her
initial appearance.

22 ¹¹ Extraordinary circumstances must be *extraordinary*. For example, in *Commonwealth v. Crisostomo*, Crim. No. 13-
0049, the preliminary examination occurred on March 20, 2013, well after Mr. Crisostomo’s initial appearance on
February 22, 2013. This delay occurred because of the challenges in appointing an attorney for Mr. Crisostomo, as at
23 one point “all attorneys in the Commonwealth of the Northern Mariana Islands have conflicted out. The Court will look
to Guam for an attorney for the defendant.” *Crisostomo*, Crim. No. 13-0049 (NMI Super. Ct. March 7, 2013) (Minute
Order). Although Attorney Janet King, a CNMI attorney, was eventually appointed, the delay meant that Mr.
24 Crisostomo’s preliminary examination had to occur outside of the ten-day period. *Crisostomo*, Crim. No. 13-0049 (NMI
Super. Ct. March 13, 2013) (Fifth Amended Order Appointing Counsel).

1 this time. In particular, the Court is concerned with whether this examination may occur beyond the
2 ten-day period outlined in Rule 5.1, if a request for an extension was not made to the Court prior to
3 the close of those ten days.¹²

4 The purpose of a preliminary hearing is “to determine whether there is ‘probable cause’ for
5 the accusation, the nature of which is made known to the accused.” 84 A.L.R.3rd 811 (1978). At the
6 preliminary hearing, the court’s main role is to “determine whether there is sufficient evidence of
7 probable cause to bind the accused over to answer and stand trial.” *Id.* Preliminary hearings thus
8 “weed out groundless or unsupported charges, so that the accused may be relieved of the
9 degradation of a criminal trial and the deprivation of his liberty.” *Lamb v. Loveless*, 86 Nev. 286,
10 289 (Nev. 1970).

11 The Commonwealth Supreme Court has indicated that “incarceration constitutes a
12 substantial deprivation of liberty.” *Babauta*, 4 NMI at 313. Further, pretrial release does not
13 necessarily deprive a defendant access to a preliminary examination, since “[c]ertain conditions or
14 combinations of conditions of release may work a substantial deprivation of a defendant’s liberty.”
15 *Id.* The *Babauta* Court did not outright decide what release conditions would result in a substantial
16 deprivation of liberty. *Id.*

17 Defendant’s initial appearance occurred on May 4, 2015 at his bail modification hearing.
18 Ten business days¹³ after this would have been May 18, 2015—thus, ordinarily his preliminary
19 examination would have had to occur by that date. Defendant was released from custody on May 4,
20 2015, and as a result his preliminary examination was vacated.¹⁴ As the Commonwealth Rules of

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22 ¹² The Court had also been concerned with whether a preliminary examination could be held after an arraignment;
23 however, the Commonwealth Rules of Criminal Procedure are silent as to this issue.

¹³ “When a period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays and legal
24 holidays shall be excluded in the computation.” NMI R. Crim. P. 45(a).

¹⁴ Preliminary examinations in the Commonwealth Superior Court typically occur only when the defendant is in
custody, and as a result is “substantially deprived of his/her liberty.” NMI R. Crim. P. 5.1. Although pre-trial release

1 Criminal Procedure do not proscribe hearing a preliminary examination following the arraignment,
2 the Court will look to whether it may hear a preliminary examination beyond the ten-day period
3 described in Rule 5.1.

4 The key issue here is whether the Court may extend the time period for a Defendant's
5 preliminary examination beyond the ten days described in Rule 5.1. The Court views the ten-day
6 limit in Rule 5.1 as jurisdictional, similar to the 120-day jurisdictional time limit¹⁵ to move to
7 reduce a criminal sentence pursuant to Rule 35(b). *Commonwealth v. Laniyo*, 2012 MP 1 ¶ 19. "A
8 motion to reduce a sentence may be made, or the court may reduce a sentence without motion,
9 within 120 days after the sentence is imposed or probation is revoked." NMI R. Crim. P. 35(b)
10 (emphasis added). The time limit under Rule 35(b) is jurisdictional and thus the Commonwealth
11 Superior Court cannot address any motions regarding reduction of sentences once 120 days has
12 elapsed from the date the Court imposed the sentence. *Laniyo*, 2012 MP 1 ¶ 19.

13 Similarly, notice of appeals before the Commonwealth Supreme Court must be filed within
14 30 days of the judgment or order being appealed. NMI Sup. Ct. R. 4(a); NMI Sup. Ct. R 4(b). If a
15 party seeks an extension, they must make their request within that 30-day period, unless there is a
16 showing of "excusable neglect or good cause." NMI Sup Ct. R. 4(a)(5); see also NMI Sup. Ct. R
17 4(b)(4). Thus, the Court declines to grant a request for a preliminary examination made after the
18 initial ten-day period from Rule 5.1 of the Commonwealth Rules of Criminal Procedure.

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21 may, in some circumstances "substantially deprive" a defendant of liberty, these circumstances are left to the discretion
22 of the trial judge. *Babauta*, 4 NMI at 313. Rule 5.1 does not expressly state that a defendant must be in custody, only
23 that a defendant must have a preliminary examination within ten days. NMI R. Crim. P. 5.1.

24 ¹⁵ "When a time limit is jurisdictional, the court generally lacks jurisdiction to adjudicate outside of that time period."
Laniyo, 2012 MP 1 ¶ 18 n6. Jurisdictional time limits aim to "achieve a broader system-related goal, such as facilitating
the administration of claims, limiting the scope of a governmental waiver of sovereign immunity, or promoting judicial
efficiency." *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008) (citations omitted). If a time limit is
jurisdictional, courts are restricted from "consider[ing] whether certain equitable considerations warrant extending a
limitations period." *John R. Sand & Gravel Co.*, 552 U.S. at 134. Non-jurisdictional time limits, in contrast, are focused
on "case-specific interest[s] in timeliness." *Id.* at 133.

1 Although a preliminary examination may be heard beyond the ten days outlined in Rule 5.1,
2 any extension must be requested or otherwise initiated during this initial ten-day period. During the
3 ten business days between May 4, 2015 and May 18, 2015, the Defendant did not request a
4 preliminary examination, nor did he request an extension.¹⁶ Thus, although the Defendant is in
5 custody, and the Defendant is consenting to having a preliminary examination beyond the ten-day
6 period, the Court simply is unable to entertain this request as it was not made within the ten days
7 listed in Rule 5.1. Simply put, the deadline to have requested a preliminary examination has come
8 and gone.

9 **IV. CONCLUSION**

10 Accordingly, the Defendant's Motion for Preliminary Hearing is **DENIED**.

11 **IT IS SO ORDERED** this 15th day of September, 2015.

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JOSEPH N. CAMACHO
Associate Judge

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24 ¹⁶ The issue is not whether the Defendant is in custody or not, but rather whether the Defendant received his preliminary examination within ten days, or in the alternative whether he requested an extension before the end of the ten-day period.