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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, Plaintiff, v. ISIDRO R. LIZAMA, Defendant.	Civil Action No. 94-102 **DECISION AND ORDER ON DEFENDANT'S MOTION FOR PRELIMINARY EXAMINATION**

This matter originally came before the Court on August 1, 1994, on Defendant Isidro R. Lizama's oral motion for a preliminary examination regarding the criminal charges pending against him in this Court. Although Defendant's motion was initially denied "on the grounds that Defendant's liberty has not been 'substantially deprived' as required by Rule 5.1 of the Commonwealth Rules of Criminal Procedure," in the interest of justice, the Court subsequently opted to vacate the initial Order and asked both parties to submit memoranda of law on the issue of whether Defendant is entitled to a preliminary examination under CNMI law. After reviewing the memoranda of both parties, the Court now renders its decision.

FOR PUBLICATION

I. FACTS

On July 16, 1994, the Defendant was arrested pursuant to an arrest warrant issued by the Court the previous day. The Court set bail at $250,000.00 in cash. The Defendant was charged in a three-count Information with Conspiracy to Deliver a Controlled Substance, in violation of 6 CMC §§ 303(a) and 2141(a)(1); Delivery of a Controlled Substance, in violation of 6 CMC § 2141(a)(1); and Possession of a Controlled Substance, in violation of 6 CMC § 2142(a). These offenses are punishable, respectively, by: 1) up to ten years imprisonment and a fine of up to $10,000; and 2) up to five years imprisonment and a fine of $2000. Id. Support for the Information exists in an affidavit prepared by an Assistant Attorney General.

The Defendant appeared on July 18, 1994, for an initial appearance and bail hearing. At that time, the Court modified bail by requiring the posting of a $250,000.00 property bond to be secured by the Defendant's residence. A preliminary examination had been temporarily scheduled for August 1, 1994, in the event the Defendant had failed to post the property bond and remained in custody. However, the Defendant successfully posted bond and was released from custody.[1/]

Nevertheless, on August 1, 1994, Defendant made an oral request for a preliminary examination arguing that CNMI law entitles him to a preliminary examination even though he was no

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[1/] In addition to the $250,000 property bond, Defendant was released subject to the same conditions as those imposed in his earlier criminal prosecution, Commonwealth v. *Lizama,* Crim. Case No. 91-106, as well as a specific order that he have no contact with the person described as "Cabrera."

longer incarcerated. The Government has asked the Court to continue its previous practice of denying criminal defendants the right to a preliminary examination when they have been released from custody.

II. ISSUE

Whether a criminal defendant released on bail pending trial is entitled to a preliminary examination under Commonwealth Law.

III. ANALYSIS

A. PRELIMINARY EXAMINATIONS IN FEDERAL COURTS

Three types of pretrial hearings exist in the Federal court system: (1) the probable cause or Gerstein hearing; (2) the initial appearance; and, (3) the preliminary examination. Lawrence M. Furst, Criminal Procedure Project: Preliminary Hearings, 82 GEORGETOWN L. J. 835 (1994) (hereinafter GEORGETOWN). The judicially created Gerstein hearing takes place in an ex parte setting and gives a judicial officer the opportunity to decide whether a prudent person would believe that the suspect committed the offense. Gerstein v. Pugh 95 S.Ct. 854, 862-63 (1975). Such a determination is either made prior to arrest (i.e. when an arrest warrant issues), or if the arrest is not supported by a warrant, within forty-eight hours after the suspect has been detained. County of Riverside v. *McLaughlin*, 111 S.Ct. 1661, 1670 (1991). The Federal courts do not consider the Gerstein hearing a "critical stage" of the prosecution requiring the presence of counsel for the defense. Gerstein, 420 U.S. at 867-68. As a result, this probable cause determination is non-adversarial, and

the defendant has no right to present evidence or cross-examine witnesses. Id.

Next, Rule 5 of The Federal Rules of Criminal Procedure requires an initial appearance during which the arrestee is advised of his or her rights and the charges against him or her. See Fed. R. Crim. P. 5(c). During the initial appearance, the judicial officer must inform the accused of his or her right to a preliminary examination, allow the accused a reasonable time to consult with an attorney, and set or deny bail. Id. Although the defendant's right to representation by counsel begins at the initial appearance, Fed. R. Crim. P. 44(a), at this stage the defendant has still not had the opportunity to be heard on the issue of the existence of probable cause for the arrest.

Finally, unless waived, under federal law an arrestee charged with a non-petty offense is entitled to a public preliminary examination before a federal magistrate within ten days after the initial appearance if the defendant is in custody and no later than twenty days if the defendant is not in custody. Fed. R. Crim. P. 5(c). The formal, adversarial setting of a preliminary examination provides the defendant with an attorney and gives the defendant the opportunity to overcome the non-adversarial (*Gerstein*) probable cause determination by cross-examining witnesses and introducing evidence. GEORGETOWN at 842.

Although the Federal system of preliminary examinations is not mandatory in state courts, most states in the Pacific and western regions of the United States have adopted similar systems and have provided for preliminary examinations in many cases. See People v. Moody, 630 P.2d 74, 76 (1981) (Colorado statutory

provision); State v. *Higley*, 621 P.2d 1043, 1048 (1980) (Montana statutory provision); State v. Coates, 707 P.2d 1163, 1166 (1985) (New Mexico constitutional provision); Thrasher v. State, 324, 325 (1987) (Oklahoma constitutional provision); State v. *Sommers*, 597 P.2d 1346, 1347 (1979) (Utah constitutional provision); State v. Boone, 543 P.2d 945, 948 (1975) (Kansas statutory provision).

B. PRELIMINARY EXAMINATIONS IN THE COMMONWEALTH

In the past, the Court has read Title 6, Section 6303(a) of the Commonwealth Code in conjunction with Rule 5.1 of the Commonwealth Rules of Criminal Procedure to mean that criminal defendants have a right to a preliminary examination only if they are substantially deprived of their liberty (i.e. incarcerated). Having considered the origin and status of § 6303, and for the reasons stated below, the Court now finds that this is an incorrect view of the statute.

No reported Commonwealth decision has scrutinized § 6303. However, the statute is a holdover from the Trust Territory Code, 12 T.T.C. § 204; it is therefore useful to examine Trust Territory law to understand the origin and meaning of the current statute. See Robinson v. Robinson, 1 N.M.I. 81, 88 (1990) (Trust Territory authorities helpful in understanding Commonwealth Code sections handed down from Trust Territory Code). Section 202 of the Trust Territory Code clearly distinguished between an initial appearance and a preliminary examination. Indeed, the statute required the judge to inform the arrested person during the initial appearance itself of his right to a preliminary examination:

> When an arrested person is brought before an official authorized to issue a warrant who is not a court

> competent to try the arrested person for the offense charged, the official shall:
> ...
> (3) Inform the arrested person of his right to have a preliminary examination and his right to waive the examination and the consequences of such waiver....

12 TTC § 202(3) (1972).

The phrase "not a court competent to try the arrested person" refers to the fact that under the Trust Territory, there were three levels of trial court: Community Court, District Court, and High Court. See 5 T.T.C. § 1. The criminal jurisdiction of the Community Court was limited to offenses punishable by a fine of up to $100 and imprisonment of up to six months (§ 151), and the criminal jurisdiction of the District Court was limited to crimes punishable by a fine of up to $5000 or imprisonment of up to five years (§ 101). In contrast, the High Court had general jurisdiction over all criminal matters (§ 53). Based on this schema, the High Court Appellate Division found in *Borja* v. *Sablan,* 6 T.T.R. 584 (1974), that there was no right to a preliminary examination where the initial appearance took place before a "court competent to try the arrested person for the offense charged." Id. at 585 (where defendant's initial appearance was before District Court and District Court had jurisdiction over offense, no right to preliminary examination).

Thus, under the Trust Territory there was a right to a preliminary examination in all cases where the defendant's initial appearance took place before the Community Court but the offense was triable only at the District or High Court level, or where the defendant initially appeared before the District Court but the offense was triable only at the High Court. This structure

effectively limited preliminary examination rights to non-petty[2/] offenses, a result analogous to that of Fed. R. Crim. P. 5(c), where defendants' rights to preliminary examinations are limited to charges of "any offense, other than a petty offense."

Another similarity between the Federal Rules and the Trust Territory Code is that the right to a preliminary examination was not premised on whether a defendant is incarcerated. Title 12 T.T.C. § 204(1) and (2) mandated a preliminary examination in all cases where the right is not waived, regardless of whether a defendant has been incarcerated:

> (1) If the arrested person does not waive preliminary examination, the official shall hear the evidence within a reasonable time.
> (2) A reasonable continuance shall be granted at the request of the arrested person or the prosecution to permit preparation of evidence. The arrested werson has the right to be released on bail as provided by law during the weriod of a continuance.

12 TTC § 204(1-2) (emphasis added). Reading the emphasized language above in the context of the sentence preceding it, the continuance of the preliminary examination clearly survives the Defendant's release on bail. Thus, the right to preliminary examination itself did not dissolve when the arrested person was released on bail.

When the Commonwealth Legislature had the opportunity to create laws of pretrial criminal procedure for the Commonwealth of the Northern Mariana Islands, it opted to adopt Section 204 of the Trust Territory Code verbatim as 6 CMC § 6303. However, the Legislature chose not to adopt the preceding Section 202 of the

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[2/] Exactly what offenses constituted the lower limit of the right to a preliminary examination under Trust Territory law -- and by implication under Commonwealth law -- is not a question presently before the Court. See Note 3, below.

Trust Territory Code, perhaps because the Commonwealth did not elect to continue the tripartite structure of courts described above. One consequence of omitting § 202 from the Commonwealth Code is that the right to a preliminary hearing no longer hinges on whether the court before which the defendant initially appears is "competent to try the offense" as it was under the Trust Territory Code. A less fortunate consequence of this legislative omission is that § 6303, standing alone, is susceptible to the incorrect interpretation that its provisions refer to a defendant's right to an initial appearance or Gerstein-type probable cause determination, rather than the preliminary examination which was clearly called for under the Trust Territory Code. This misinterpretation of § 6303 has in the past caused Commonwealth Courts to refuse to hold preliminary examinations in felony cases where the defendant had previously been released on bail.

The Court's interpretation here, that § 6303 describes mandatory preliminary examination procedures as opposed to initial appearance procedures, is bolstered by the language of the statute itself. 6 CMC § 6303(c) allows the arrested person to "cross-examine adverse witnesses and [...] introduce evidence in his or her own behalf." Such adversarial proceedings can only occur at a preliminary examination, not at an initial appearance or at a Gerstein-type probable cause determination.

Sound policy reasons also support the Court's holding here. In jurisdictions which employ a system of indictment by grand jury, the government is required to produce evidence to the satisfaction of the grand jury supporting an indictment for a non-

petty offense. In contrast, where -- as in the Commonwealth -- a person may be charged by the filing of an information only, the judge's initial finding of probable cause is much more limited, based usually on an affidavit by a prosecuting attorney. Under these circumstances, it is important to provide an accused person with the opportunity to rebut the charges against him.

Moreover, this right to an early opportunity to clear one's name should not hinge, as it has until now, upon whether the defendant is incarcerated. To some defendants, the damage a criminal charge may inflict upon one's reputation and professional standing is as great a harm as is incarceration itself. Such a defendant should not have to face the Hobson's choice of a right to bail release or a right to a preliminary examination.

In sum, the Court finds that 6 CMC § 6303 is only properly understood in the context of its former placement in the Trust Territory Code. Viewed in that context, § 6303 requires a preliminary examination for offenses carrying a punishment of over five years and a fine of over $5,000,[3/] regardless of whether the accused is incarcerated.

C. CRIMINAL RULE 5.1

The Defendant correctly points out that the interpretation of 6 CMC § 6303 set forth above creates a conflict with Commonwealth Rule of Criminal Procedure 5.1; while § 6303(a)

[3/] This cutoff tracks the limit of the criminal jurisdiction of the Trust Territory District Court under 5 T.T.C. § 101. Whether under certain circumstances a right to a preliminary examination exists for offenses punishable by imprisonment over six months and fines of over $100 (i.e., the jurisdictional limits of the old Community Courts) is not presently before the Court, and no opinion is here expressed on that issue.

grants all arrested people the right to a preliminary examination within a reasonable time, Rule 5.1 limits the right to only those defendants substantially deprived of their liberty. In the case where a conflict exists between a rule of court and state statute, the statute prevails. Commonwealth v. Bordallo, 1 N.M.I. 208, 216 n.10 (1990) (statute prevails over rule of evidence); 2 SUTHERLAND STATUTORY CONSTRUCTION § 36.06 (1994).

Applying this rule of statutory construction to the conflict before the Court, the language in 5.1 limiting preliminary examinations to incarcerated defendants must be disregarded as it conflicts with the preliminary examination right contained in § 6303. In the case at bar, the Defendant's release from custody did not act to relieve the Government from its obligation to provide him with a preliminary examination within a reasonable time as directed by Section 6303(a).

D. WHAT CONSTITUTES A "REASONABLE TIME"

The Court notes that Rule 5(c) of the Federal Rules of Criminal Procedure has set the outer limit of "a reasonable time" for unincarcerated defendants at twenty (20) days after the initial appearance. Taking into account the limited legal facilities presently available in the Commonwealth to provide preliminary examinations to all criminal defendants, giving incarcerated defendants priority over unincarcerated ones makes sound policy sense. The Court therefore holds that preliminary examinations should be held within ten days of the initial appearance if the defendant is in custody, and within thirty days of the initial appearance if the defendant is not in custody.

In the case at bar, the Defendant initially appeared before the Court on July 18, 1994. On August 1, 1994, the Court vacated the denial of Defendant's motion for a preliminary examination, set a briefing schedule, and indicated that it would take the matter under advisement in order to prepare a written decision. Thus, the thirty day time period which began on July 18, 1994, has been tolled from August 1st until the date of this Decision and Order so that this important issue could be briefed by the parties and resolved by the Court in writing. As a result, only thirteen days of the thirty day period have passed, and the preliminary examination for Defendant shall be held no later than September 9, 1994.

IV. CONCLUSION

For the foregoing reasons, the Court grants the Defendant's motion for a preliminary examination. Such preliminary examination shall be heard on September 6, 1994 at 9:00 a.m.

So ORDERED this 24th day of August, 1994.

ALEXANDRO C. CASTRO, Presiding Judge

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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, Plaintiff, v. ISIDRO R. LIZAMA, Defendant.	Criminal Case No. 94-102 **DECISION AND ORDER ON RECONSIDERATION OF DEFENDANT'S MOTION FOR PRELIMINARY EXAMINATION**

ERRATUM

This Court's Decision and Order, issued September 6, 1994, contained an error in the caption, denominating this case as a civil action. Above is the correct caption for this Decision and Order. This Erratum should be attached to all file copies.

So ORDERED this 9th day of September, 1994.

ALEXANDRO C. CASTRO, Presiding Judge