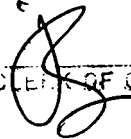


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CLERK OF COURT

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

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

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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

1 I. FACTS

2 On July 16, 1994, the Defendant was arrested pursuant to an  
3 arrest warrant issued by the Court the previous day. The Court  
4 set bail at \$250,000.00 in cash. The Defendant was charged in a  
5 three-count Information with Conspiracy to Deliver a Controlled  
6 Substance, in violation of 6 CMC §§ 303(a) and 2141(a)(1);  
7 Delivery of a Controlled Substance, in violation of 6 CMC §  
8 2141(a)(1); and Possession of a Controlled Substance, in violation  
9 of 6 CMC § 2142(a). These offenses are punishable, respectively,  
10 by: 1) up to ten years imprisonment and a fine of up to \$10,000;  
11 and 2) up to five years imprisonment and a fine of \$2000. Id.  
12 Support for the Information exists in an affidavit prepared by an  
13 Assistant Attorney General.

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

22 Nevertheless, on August 1, 1994, Defendant made an oral  
23 request for a preliminary examination arguing that CNMI law  
24 entitles him to a preliminary examination even though he was no  
25

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26  
27 <sup>1/</sup> In addition to the \$250,000 property bond, Defendant was  
28 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**."

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

## 6 **II. ISSUE**

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

## 10 **III. ANALYSIS**

### 11 **A. PRELIMINARY EXAMINATIONS IN FEDERAL COURTS**

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

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

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

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

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

1 provision); State v. *Higley*, 621 P.2d 1043, 1048 (1980) (Montana  
2 statutory provision); State v. Coates, 707 P.2d 1163, 1166 (1985)  
3 (New Mexico constitutional provision); Thrasher v. State, 324, 325  
4 (1987) (Oklahoma constitutional provision); State v. *Sommers*, 597  
5 P.2d 1346, 1347 (1979) (Utah constitutional provision); State v.  
6 Boone, 543 P.2d 945, 948 (1975) (Kansas statutory provision).

7  
8 **B. PRELIMINARY EXAMINATIONS IN THE COMMONWEALTH**

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

17 No reported Commonwealth decision has scrutinized § 6303.  
18 However, the statute is a holdover from the Trust Territory Code,  
19 12 T.T.C. § 204; it is therefore useful to examine Trust Territory  
20 law to understand the origin and **meaning** of the current statute.  
21 See Robinson v. Robinson, 1 N.M.I. 81, 88 (1990) (Trust Territory  
22 authorities helpful in understanding Commonwealth Code sections  
23 handed down from Trust Territory **Code**). Section 202 of the Trust  
24 Territory Code clearly distinguished between an initial appearance  
25 and a preliminary examination. Indeed, the statute required the  
26 judge to inform the arrested person during the initial appearance  
27 itself of his right to a preliminary examination:

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

1 competent to try the arrested person for the offense  
2 charged, the official shall:

3     ...  
4     (3) Inform the arrested person of his right to have a  
5 preliminary examination and his right to waive the  
6 examination and the consequences of such waiver....

7 12 TTC § 202(3) (1972).

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

25     Thus, under the Trust Territory there was a right to a  
26 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

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

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

11 (1) If the arrested person does not waive preliminary  
12 examination, the official shall hear the evidence within  
a reasonable time.

13 (2) A reasonable continuance shall be granted at the  
14 request of the arrested person or the prosecution to  
15 permit preparation of evidence. The arrested werson has  
the right to be released on bail as provided by law  
during the werioid of a continuance.

16 12 TTC § 204(1-2) (emphasis added). Reading the emphasized  
17 language above in the context of the sentence preceding it, the  
18 continuance of the preliminary examination clearly survives the  
19 **Defendant's** release on bail. Thus, the right to preliminary  
20 examination itself did not dissolve when the arrested person was  
21 released on bail.

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

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27 <sup>2/</sup> Exactly what offenses constituted the lower limit of the  
28 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.

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

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

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



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

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

14 In sum, the Court finds that 6 CMC § 6303 is only properly  
15 understood in the context of its former placement in the Trust  
16 Territory Code. Viewed in that context, § 6303 requires a  
17 preliminary examination for offenses carrying a punishment of over  
18 five years and a fine of over \$5,000,<sup>2/</sup> regardless of whether the  
19 accused is incarcerated.

### 20 21 **C. CRIMINAL RULE 5.1**

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

25  
26 \_\_\_\_\_  
27 <sup>2/</sup> This cutoff tracks the limit of the criminal jurisdiction  
28 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.

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

8 Applying this rule of statutory construction to the conflict  
9 before the Court, the language in 5.1 limiting preliminary  
10 examinations to incarcerated defendants must be disregarded as it  
11 conflicts with the preliminary examination right contained in §  
12 6303. In the case at bar, the Defendant's release from custody  
13 did not act to relieve the Government from its obligation to  
14 provide him with a preliminary examination within a reasonable  
15 time as directed by Section 6303(a).

16  
17 **D. WHAT CONSTITUTES A "REASONABLE TIME"**

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

1 In the case at bar, the Defendant initially appeared before  
2 the Court on July 18, 1994. On August 1, 1994, the Court vacated  
3 the denial of Defendant's motion for a preliminary examination,  
4 set a briefing schedule, and indicated that it would take the  
5 matter under advisement in order to prepare a written decision.  
6 Thus, the thirty day time period which began on July 18, 1994, has  
7 been tolled from August 1st until the date of this Decision and  
8 Order so that this important issue could be briefed by the parties  
9 and resolved by the Court in writing. As a result, only thirteen  
10 days of the thirty day period have passed, and the preliminary  
11 examination for Defendant shall be held no later than September 9,  
12 1994.

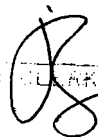
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14 **IV. CONCLUSION**

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

18  
19 So ORDERED this 24<sup>th</sup> day of August, 1994.

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21   
22 ALEXANDRO C. CASTRO, Presiding Judge  
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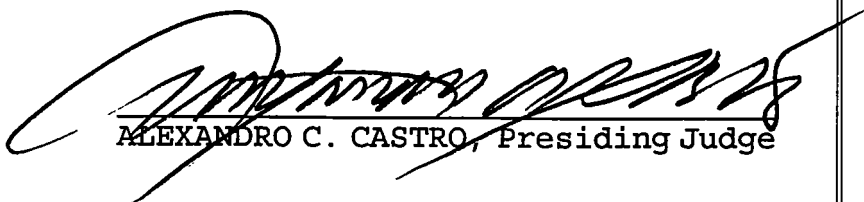
IN THE SUPERIOR COURT  
FOR THE  
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,	)	Criminal Case No. 94-102
Plaintiff,	)	DECISION AND ORDER
v.	)	ON RECONSIDERATION
ISIDRO R. LIZAMA,	)	OF DEFENDANT'S MOTION
Defendant.	)	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 9<sup>th</sup> day of September, 1994.

  
ALEXANDRO C. CASTRO, Presiding Judge