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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, Plaintiff, vs. RAMON AGUON, et al, Defendants.	CRIMINAL ACTION NO. 90-008 DECISION

FACTS

Sometime during the evening of January 7, 1990 or early morning hours of January 8, 1990, the above named Defendant arid several Co-Defendants were arrested and charged by the pol-ice with several counts of disturbing the peace and tampering with vehicles. On the morning of January 8, 1990, a declared holiday. an assistant prosecutor telephoned a Superior Court judge and informed him of the Defendants' arrests and the charges against them. The judge decided a special bail hearing was unnecessary and set bail pursuant to the Court's previously set bail schedule. The next day, January 9, 1990 was also a declared holiday and the Court was not in session.

FOR PUBLICATION

On the morning of January 10, 1990, the Defendants were brought before the Court. At that time, the Defendants objected to the Court's rulings on the issue of bail. The Defendants based their objections on the theory that since they had been in police custody for more than 24 hours without en Information having been filed, this Court lacked jurisdiction over them. The Defendants cited 6 CMC §6105(a)(3)[1/] as authority for their position. The Court took the matter under advisement and directed the parties tc submit briefs on the issues raised.[2/]

DISCUSSION

The Court noees at the outset of this discussion that there has been considerable disagreement between the Public Defender's Office and the Attorney General's Office concerning the proper construction and application of certain sections of the Commonwealth Code and the Court's Rules of Criminal Procedure. At the forefront of this dispute is the application of the

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1/ This section of the Code makes it unlawful "to fail either to release or charge the arrested person with a criminal offense within a reasonable time, which under no circumstances shall exceed 24 hours."

2/ In their brief, Defendants also take issue with the Government's position that it can hold criminal defendents in custody for up to 10 days without a probable cause hearing. 6 CMC §6303 provides that the preliminary examination shall be used to determine the existence or lack thereof of probable cause "to believe that a criminal offense bas been committed and that the arrested person committed it." Rule 5.1 of the Rules of Criminal Procedure provides that the preliminary examination "shall be held within a reasonable tine but in any event not later than ten (10) days following the initial appearance."

provisions of the Code and Rules to criminal defendants during the period immediately following arrest and leading up to the preliminary examination. While the issues in dispute have arisen in the matter now before the Court, the Court recognizes that they are not confined to this matter and present a number of vexatious questions needful of ultimate resolution. Certain other metters have also been brought to the Court's attention by way of the parties' briefs which the Court shall also address at this time.

In settling the issues presented, the Court must examine the practices and procedures currently followed in the Commonwealth in order to determine whether they comport with the Court's construction of its Rules of Criminal Procedure and Division 6 of Title 6 of the Commonwealth Code. The Court expects that its pronouncements on these issues will be followed by all government agencies responsible for the arrest, detention, defense and prosecution of criminal defendants in the Commonwealth.

The Court also notes that since the portions of the Commonwealth Code in dispute were adopted from the Trust Territory Code, cases decided in this area by tho Trust Territory High Court shall be given particular weight. Likewise, since the Court's rules of criminal procedure parrot the federal rules, federal cases construing the affected rules will also be given particular weight.

With the foregoing in mind, the Court now addresses the procedural issues raised by the Defendants.

I. CHARGE OR RELEASE

The Defendants claim that since a written Information charging then with a criminal offense had not been filed with the Court within *24* hours of their arrests and that they had not otherwise been released during this period, their rights under *6* CMC §6105(3)[3/] were violated. As a result of this alleged violation, the Defendants' maintain that this Court lacked jurisdiction over them.

The Government correctly concludes that the validity of the Defendants' claim rests upon the Court's construction of the word "charge" as used in the statute. In Trust Territory v Kaneshima *4 TTR 340* (1969), the Court had occasion to consider the meaning of the word "charge" as used in Section 464 of the Trust Territory Code.[4/]

In Kaneshima, the captain of an Okinawan fishing vessel was arrested for unlawful entry into Trust Territory waters and the unlawful removal of marine resources. Prior to trial, the Public Defender filed a motion to suppress any statement or admission made by the Defendant to police while in custody and before being brought before the Court. The Defendant's motion was based or the provisions of Section *464* of the Trust Territory Code relating to rights of the accused. The Defendant maintained that he was unlawfully detained after arrest in that he was not released or charged within *24* hours as required by Section *464*.

3/ See n. 1, supra.

4/ This Section of the Trust Territory Code was adopted in its entirety by the CNMI Legislature and is now 6 CMC §6105.

The evidence showed the arrest was made in the early afternoon of April 9, 1969 and a complaint was not issued and the Defendant brought before the Court until April 11, 1969. On the morning of April 10, 1969, the Defendant made a written incriminating admission to the police.

The question raised in Kaneshima was whether the purported unlawful detention (after 24 hours) vitiated the Defendant's statement to police, thereby rendering it inadmissable. The Court concluded that the Defendant's statement was admissable in spite of his detention beyond 24 hours.

The Court began its discussion by citing caselaw for the meaning of the word "charge":

> "Charge means a formal complaint, information or indictment according to People v Lepori, (Cal) 169 P. 692. A federal Court in Hughes V Pfleeng, 138 F. 980, said '... the term "charged with crime" is used in its broad sense and includes all persons accused of crime by legal proceedings ..."

The Court also cited another meaning given the word "charge" which more closely approximated the situation in Kaneshirna and is also applicable to the case at bar:

> "Charge within the statute authorizing arrest without warrant on a charge, made on reasonable cause, of commission of a felony, does not mean a formal written charge presented to proper authority ..." Haggard v. First National Bank, 8 N.W. 2d 5

The Kaneshima Court reasoned that the interpretation of any statute requires ascertainment of a meaning that will produce a reasonable result when possible rather than an absurd and strained result. Upon this reasoning, the Court concluded that the meaning of the word "charge" as used in the statute "is

interpreted in the sense that the accused Is informed. of the accusation to be made against him and not that a .... formal written information has beer filed with the Court*„ Id at 345. The Court found that to ascribe the neaning urged by the Public Defender to the word "charge" (i.e. a formal written information) would be to ignore the physical conditions prevailing in the Trust Territory. Id at 347.

Under the circumstances surrounding the Defendant's arrest in Kaneshima,[5/] the Court found that it would tare been impossible to file *a* written. information with the Court within 24 hours of the Defendant's arrest. In some instances, the physical conditions of the Commonwealth also render it impossible for a criminal defendant to be formally charged with a written information within 24 hours of his arrest. A person arrested on one of the islands north of Saipan must be brought to Saipan where a written information car? be filed and the Defendant brought before the Court. This travel could quite conceivably take Longer than 24 hours. At present, air travel from Rota and Tinian to Saipan is on as; extremely limited basis. Adverse weather conditions or mechanical problems could easily delay a flight for 24 hours or more. The Court is well aware that the Defendants in the instant case were arrested on Saipan, thus distinguishing their situation from the Defendant in Kaneshima

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5/ At the time of his arrest, the Defendant was on board his fishing vessel in the vicinity of Helen's Reef located in the Palau District of the Trust Territory.

and the Court's examples, supra. However, in view of the Kaneshima Court's ruling on the interpretation of the word "charge" as used in the pertinent Trust Territory statute, the Commonwealth Legislature is presumed to be aware o and adopt that interpretation whea it re-enacted the statute without change. Merrill Lynch, Pierce, Fenner and Smith v Curran, 456 U.S. 353, 383, n. 66, 102 S.Ct. 1825, 1841, n. 66, 70 L.Ed. 2d 201 (1982) citing: Albermarle Paper Co. v Moody, 422 U.S. 405, 414, n. 8, 955 S.Ct. 2362, 2370, n. 8, 45 L. Ed. 2d 280 (1980). Further support for this construction is found in Public law 3-90, §8 which provides:

> "The provisions of this Code, as far as they are substantially the same as existing law, shall be construed as continuations thereof and not new enactments."

Therefore, the Court concludes that the word "charge" as used in 6 CMC §6105(a)(3) means that the accused is informed of the accusation to be formally made against him and not that a written complaint or information has been filed with the Court.

The briefs submitted in the instant case do not disclose whether the Defendants were informed of the charges against then by police within the 24-hour period set by 6 CMC §6105(a)(3). Revertheless, even if they were not so informed, this Court has jurisdiction over the Defendants. While the Defendants would not be automatically entitled to acquittals, any evidence obtained as a result of a violation of any provision of 6 CMC Div. 6 would

not be admissable against them at trial.6/

In order to assist the Court in determining whether a violation of 6 CMC 6105(a)(3) has occurred in cases cf warrantless arrests, the arresting officer shall, as soon as possible after the arrest, prepare the arrest report. In the future, such reports shall also include:

-- the date, time and place of the suspect's arrest;7/

-- verification that rne suspect was read his rights pursuant to 6 CKC 6105(b);

-- the crime or crimes charged and the date and time the suspect was so informed of the charge or charges; and

-- the signature of the arresting officer verifying thc information contained in the report.

II. PROBABLE CAUSE DETERNINATIOK

The Defendants' claim their constitutional rights8/ to a prompt determination of probable cause were violated because

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6/ 6 CMC §6107 provides in pertinent part: "No violation of a provision of this Division shall in and of itself entitle an accused to an ecquittal, but no evidence obtained as a result of any violation may be admitted against the accused."

7/ The 24-hour time limit prescribed in 6 CMC 6105(a)(3) shall begin running as of the time the Defendant is in the custody of an arresting authority.

8/ The U.S. Constitution's Fourth Amendment is made applicable in the Commonwealth by §501(a) of the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America. The Fourth Amendment of the U.S. Constitution is identical to the first part of Art. II §1 of the CNMI Constitution which provides in pertinent part: "The right of the people to be secure in their persons, houses, papers and effects against unreasonable search and seizures shall not be violated...."

under current Commonwealth practice, the earliest judicial determination of probable cause for warrantless arrests is at the [illegible] examination which can take place days after the arrest.[9/]

In Gerstein v Pugh, 420 U.S. 103, 95 S.Ct. 854, 43 L. Ed. 2d 54 (1975), the Supreme Court held that the Fourth Amendment required "as a condition for any significant pre-trial restraint on liberty" a fair and reliable determination of probable cause made by a judicial officer "either before or promptly after arrest". 420 U.S. at 125, 95 S.Ct. at 869 (emphasis added). The Court reasoned "a policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of a crime, and for a brief period of detention to take the administrative steps incident to arrest. Once the suspect is in custody however, the reasons that justify dispensing with the magistrate's neutral judgment evaporate." Id.at 113-14, 95 S.Ct. at 862-63.

Gerstein itself does not specify what constitutes "administrative steps incident to arrest". In Kanekoa v City and County of Honolulu, 879 F.2d 607, 611 (9th Cir. 1989), the Ninth Circuit indentified the Gerstein "administrative steps" as including, "procedures which provide the police with basic information from the suspect such as identity, residence, competence and whether It is safe to release the suspect pending

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9/ See: n. 2, supra.

further proceedings."

The Kanekoa court also cited with approval Fisher v Washington Metropolitan Area Trarsit Authority, 690 F.2d 1133, 1140 (4th Cir. 1982): administrative steps incident to a particular arrest will necessarily vary with geographical factors and with local police and court system practices as well as with inumerable factual exigencies; and Sanders v City of Houston, 543 F.Sup. 694, 700 . Tex. 1982), aff'd mem., 741 F.2d 1379 (5th Cir. 1984): administrative steps include completing paperwork, searching tht suspect, inventorying property, fingerprinting, photographing, checking for prior record, laboratory testing, interogating the suspect, verifying alibis, ascertaining similarities to other related crimes and conducting line-ups. Kanekoa at 611. The court concludes that the Gerstein "administrative steps" may include all of these situations and procedures.

At the completion of these administrative steps incident to arrest, the sole issue then becomes whether there is probable cause for detaining the arrested person pending further proceedings. Gerstein did not prescribe the stage of pre-trial procedure at which the probable cause determination should be made, rather the court recognized the desirability of flexibility and experimentarion by the states in fitting the probable cause determination to their existing pre-trial procedural scheme. Gerstein at 868. "It may be found desirable, for example, to make the probable cause determination at the suspect's first

appearance befcre a judicial officer ..... or the determination may be incorporated into the procedures for setting bail or fixing other conditions of pre-trial release. Id. at 868 (emphasis added).

The Government claims that it has been common practice for an assistant prosecutor to contact a Superior Court judge on weekends or holidays to arrange bail for persons arrested without a warrant. At this time, the judge is also informed of the charges against the Defendant and a probable cause determination is made. This method of probable cause determination is consistent with Gerstein.

The full panoply of adversary safeguards - counsel, confrontation, cross-examination, and compulsory process for witnesses is not essential for the probable cause determination requirec by the Fourth Amendment. Id, at 866.[10/]

In support of this conclusion, Justice Powell wrote:

> "The use of an informal procedure is justified not only by the lesser consequences of a probable cause determination but also by the nature of the determination itself. It does not require the fine resolution of conflicting evidence that a reasonable

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10/ 6 CMC §6303 also requires a probable cause determination to be made at the preliminary examination. At the preliminary examination, the Defendant is afforded all of the advesarial safeguards including the right to counsel. The purpose of this probable cause determination is different from the Fourth Amendment probable cause determination mandated by Gerstein. At the preliminary examination the evidence must establish probable cause for charging and bringing the Defendant to trial. The Fourth Amendment probable cause determination is limited solely to pre-trial custody. Gerstein at 867; see also: Coleman v Alabama, 399 U.S. 1, 90 S.Ct. 1999, 26 L. Ed. 387 (1970).

doubt or even a preponderence standard demands, and credibility determinations are seldom crucial in deciding whether the evidence supports a reasonable belief in guilt." Id. at 867.

While the Court concludes that the government's practice of contacting a Superior Court judge for baii purposes and a probable cause determination is consistent with Gerstein, in order for the overall procedure to comport with Gerstein's requirements, the police must immediately inform the Attornev General's Office of the Defendant's arrest as one of the administrative steps incident to arrest. As soon as the government is so informed, a prosecutor must immediately contact a Superior Court judge for the Gerstein probable cause determination. This procedure shall be followed for all warrantless arrests whether they occur on a weekday, weekend or holiday and regardless of the time of day.

III. INITIAL APPEARANCE

Rule 5 of the Commonwealth Superior Court Rules of Criminal Procedure entitle certain arrested persons to an initial appearance before a Superior Court judge.[11/] Although the Defendants raise no issue regarding the timeliness or procedural requirements of their initial. appearance, the Court finds it

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11/ Rule 5 of the CNMI Superior Court Rules of Criminal Procedure provides that, "An officer making an arrest under a warrant issued upon a complaint or any person making a warrantless arrest shall take the arrested person without unnecessary delay before the nearest available judge of the Commonwealth Superior Court". In cases of warrantless arrests, a complaint "shall be filed forthwith".

necessary at this time to clarify the requirements of this rule.

Rule 5(a) requires that persons arrested under a warrant issued upon a complaint or without a warrant to be brought before the "'nearest available judge of the Commonwealth Superior Court" without "unnecessery delay". (emphasis added). Rule 5 parrots Rule 5 of the Federal Rules of Criminal Procedure. The words "without unnecessary delay" as used in the Federal Rule 5 does not require that the arrested person be taken before the judge except during his regular office hours. Symons v U.S., 178 F.2d 615, 621 (9th Cir. 1949), Cert den 339 U.S. 985, 70 S. Ct. 1006, 94 L. Ed. 1388.

For purposes of Commonwealth Rule 5, the Court concludes that "without unnecessary delay" means that an arrestee entitled to Rule 5 procedures shall be brought before a Superior Court judge at or before 9:00 a.m. at the next regular session of the Court if he is ready for presentment at a time other than when the Court is in session.

Rule 5(a) also requires that, "if a person arrested without a warrant is brought before a judge, a complaint shall be filed forthwith which shall comply with the requirements of Rule 4(a) with respect to the showing of probable cause."

The Court notes that the Attorney General's current practice of filing an Information within 72 hours of the initial appearance does not comply with the rule's requirement that *a* "complaint shall be fiied forthwith". The word "forthwith" as

used in Rule 5(a) means that a complaint shall be prepared and filed by the Attorney General at the initial appearance.12/

The Attorney Genera; nay then supplant the complaint by filing an Information after the initial appearance on a date set by the Court. An Assistant Attorney General must be present at all initial appearances.13/

IV. PRELIMINARY EXAMINATION

Commonwealth Superior Court Rule of Criminal Procedure 5.1 entities a criminal defendant to a preliminary examination unless waived, "if he/she is substantially deprived of his/her liberty." In arguments on other matters before this Court, the Office of the Public Defender has maintained that a defendant released on bail under certain Court imposed conditions and restrictions is entitled to a preliminary examination, The Public Defender argues that the Court imposed conditions and restrictions cause the defendant to be "substantially deprived of his/her liberty" within the meaning of Rule 5.1. The Court disagrees. This phrase was meant to cover those situations where a defendant, unable to make bail, remains in police custody. It is however, within the Court's discretion to afford a defendant released on bail a preliminary examination.

12/ The Court has provided a sample complaint form for use at the initial appearance at Appendix "A" to this opinion.

13/ Pursuant to Article III, Section 11 of the CNMI Constitution, the Attorney General is responsible for prosecuting all violations of CNMI law.

Rule 5.1 also provides that the preliminary examination "shall be held within a reasonable time but in any event not later than ten (10) days following the initial appearance." The Defendants claim that "no reasonable reading of this rule justifies the position that it is always 'reasonable' to hold a person in custody for ten (10) days .... without a preliminary examination." The Court agrees. Tf in order, a preliminary examination date is set at the initial appearance. As stated in Section II of this opinion supra, the preliminary examination affords the defendant all of the adversary safeguards such as the right to counsel, confrontation, cross-examination and compulsory process for witnesses. The preliminary examination is used to determine whether the evidence is sufficient to proceed to trial. The importance of this proceeding to both the government and the defendant justifies the presentation of witnesses and full exploration of their testimony on cross-examination. Gersteir: v Pugh, *95* S.Ct. 854, *866,* 420 U.S. 103, 120, 43 L. Ed. 2d *54* (1975) citing ALI, Model Code of Pre-arraignment Procedure, Commentary on Art. 330, pp. *33-34* (Tent. Draft No. 5, 1972). And, as the hearing assumes increased importance and the procedures become more complex, the likelihood that it can be held promptly after arrest diminishes. Id.

The 10-day limit for setting the preliminary examinetion date recognizes both the defendant's and government's need to prepare their cases. It takes into account that such preparation sometimes includes a more thorough investigation of facts and

locating and serving process on witnesses. In some criminal cases, such preparations may be unnecessary and the preliminary examination may be held shortly after the initial appearance. However, other criminal cases may require the full 10-day eilotment to prepare and the Court taking this into consideration may hold the preliminary examination at the end of the 10-day period.

The Court realizes that in the case at bar, much of the Defendants' concern and interest in a prompt preliminary examination stems from their assumption that the preliminary examination is their first opportunity for a probable cause determination under the mandate of Gerstein, supra. As Section II of this opinion makes clear, the Gerstein probable cause determination takes place shortly after arrest thus eliminating the need for a hastily scheduled preliminary examination.

V. OTHER PROCEDURAL MATTERS

In its brief, the government cites 6 CMC §6103(d)[14/] as supporting its position that a police officer can "arrest, or at least 'temporarily detain', a suspicious person without any evidence that a specific crime has beer, committed. And after examination, if he cannot find evidence of a crime with which to

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14/ This section provides: "Police officers, even in cases where it is not certain that a criminal offense has been committed, may, without warrant, temporarily detain for examination, persons who may be found under such circumstances as justify a reasonable suspicion that they have committed or intend to commit a felony."

charge the suspect, that suspect must be released within 24 hours ...." This is a gross mistatement of §6103(d) end completely ignores the Law Revision Commission comment following this section, The Commission's comment informs the reader that subdivision (d) has been modified from, "arrest and detain for examination" to "temporarily detain for examination", For a more in-depth explanation of the reasoning behind such a modification, the Commission cites Terry v Ohio, 392 U.S.1, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968).

In Terry, the Supreme Court decided thai a police officer has the power, consistent with the Fourth Amendment, to stop ar individual suspected of criminal activity, question him briefly, and perform a limited search for weapons. There is no arrest involved, A police officer may, in appropriate circumstances and in an zppropriate matter approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest. Id. at 20, 21.

The brief period of detention authorized by the Supreme Court in Terry was limited to on the street "stop and frisk" situations, not twenty-four (24) hours of police custody thst Fay sometimes be allowable after an arrest which in any event always requires probable cause. The government's position is untenable and without any legal basis and has no place in a society protected by the Fourth Amendment's guarantee against unreasonable search and seizure.

Finally, it has been brought to the attention of the Court

that persons arrested on waekends or holidays who are unable to retain private counsel are not provided the servkces of a public defender until their iritial appearance. Under 6 CMC §6105(a), it is unlawful to den;. an arrested person the "right to see at reasonable intervals, and for a reasonable time at the place of detention, the person's counsel ....." Additionally, 6 CMC §6105(b)(2) and (3) provide that the police, upon the arrested person's request shall, "call counsel to the place or' detention and allow the individual to confer with counsel there before the person is questioned further, and allow the person to have counsel present while being questioned by police; and that the services of a public defender are available for these purposes without charge."

Pursuant to these provisions, an arrested person has the right to speak with a public defender for a reasonable time at reasonable intervals at the place of detention seven (7) days a week including weekends and holidays. Consistent with this right, the Office of the Public Defender shall see that its attorneys are available at reasonable hours during these times upon the request of an arrested perecn.

Now therefore, IT IS HEREBY ORDERED:

1. The Defendants' objection to the Court's bail rulings on the basis that it lacks of jurisdiction over them is hereby OVERRULED;
2. The Department of Public Safety, Office of the Attorney General and Office of the Public Defender shall be in

COMPLIANCE with all parts of this opinion commencing Tuesday, March 13, 1990 at 12:01 a.m.;

3, The Clerk of Court shall cause a copy of this opinion to be TRANSMITTED to the Director of the Department of Public Safety;

4. The Attorney General shall ENSURE that the Department of Public Safety is AWARE of the applicable parts of this opinion and in COMPLIANCE with its terms by the deadline set forth above.

Entered this 9 day of March, 1990.

Alexandre C. Castro
Associate Judge