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FOR GREAT

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

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

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. 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**." However, in the interest of justice, the Court later vacated the initial Order and asked both parties to submit supplemental memoranda on whether Defendant is entitled to a preliminary examination under applicable law. After reviewing these memoranda, the Court ruled that Defendant did have such a right. *Decision and Order on*

1 **Defendant's Motion for Preliminary Examination** (Super. Ct. Aug.  
2 24, 1994). The Government then moved for reconsideration of the  
3 **Court's** ruling and submitted additional points and authorities,  
4 including evidence of legislative history not previously before  
5 the Court. The Court has considered this additional information  
6 and now renders its decision on reconsideration.

7  
8 **I. FACTS**

9 On July 16, 1994, the Defendant was arrested pursuant to an  
10 arrest warrant issued by the Court the previous day. The Court  
11 set bail at **\$250,000.00** in cash. The Defendant was charged in a  
12 three-count Information with Conspiracy to Deliver a Controlled  
13 Substance, in violation of 6 CMC §§ 303(a) and 2141(a)(1);  
14 Delivery of a Controlled Substance, in violation of 6 CMC §  
15 2141(a)(1); and Possession of a Controlled Substance, in violation  
16 of 6 CMC § 2142(a). These offenses are punishable, respectively,  
17 by: 1) up to ten years imprisonment and a fine of up to \$10,000;  
18 and 2) up to five years imprisonment and a fine of \$2000. Id.  
19 Support for the Information exists in an affidavit prepared by an  
20 Assistant Attorney General.

21 The Defendant appeared on July 18, 1994, for an initial  
22 appearance and bail hearing. At that time, the Court modified  
23 bail by requiring the posting of a **\$250,000.00** property bond to be  
24 secured by the **Defendant's** residence. A preliminary examination  
25 had been temporarily scheduled for August 1, 1994, in the event  
26 the Defendant had failed to post the property bond and remained in  
27  
28

1 custody. However, the Defendant successfully posted bond and was  
2 released from custody.'/  
3

## 4 **II. ISSUE**

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

## 8 **III. ANALYSIS**

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

10 Three types of pretrial hearings exist in the Federal court  
11 system: (1) the probable cause or Gerstein hearing; (2) the  
12 initial appearance; and, (3) the preliminary examination. Lawrence  
13 M. Furst, Criminal Procedure Project: Preliminary Hearings, 82  
14 GEORGETOWN L. J. 835 (1994) (hereinafter GEORGETOWN). The judicially  
15 created Gerstein hearing takes place in an ex parte setting and  
16 gives a judicial officer the opportunity to decide whether a  
17 prudent person would believe that the suspect committed the  
18 offense. *Gerstein v. Pugh*, 95 S.Ct. 854, 862-63 (1975). Such a  
19 determination is either made prior to arrest (i.e. when an arrest  
20 warrant issues), or if the arrest is not supported by a warrant,  
21 within forty-eight hours after the suspect has been detained.  
22 *County of Riverside v. McLaughlin*, 111 S.Ct. 1661, 1670 (1991).  
23 The Federal courts do not consider the Gerstein hearing a  
24 "critical stage" of the prosecution requiring the presence of  
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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 counsel for the defense. Gerstein, 95 S.Ct. at 867-68. As a  
2 result, this probable cause determination is non-adversarial, and  
3 the defendant has no right to present evidence or cross-examine  
4 witnesses. Id.

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

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

26 Although the Federal system of preliminary examinations is  
27 not mandatory in state courts, most states in the Pacific and  
28 western regions of the United States have adopted similar systems

1 and have provided for preliminary examinations in many cases. See  
2 People v. Moody, 630 P.2d 74, 76 (1981) (Colorado statutory  
3 provision); State v. Higley, 621 P.2d 1043, 1048 (1980) (Montana  
4 statutory provision); State v. Coates, 707 P.2d 1163, 1166 (1985)  
5 (New Mexico constitutional provision); Thrasher v. State, 324, 325  
6 (1987) (Oklahoma constitutional provision); State v. *Sommers*, 597  
7 P.2d 1346, 1347 (1979) (Utah constitutional provision); State v.  
8 Boone, 543 P.2d 945, 948 (1975) (Kansas statutory provision).

9  
10 **B. PRELIMINARY EXAMINATIONS IN THE COMMONWEALTH**

11 Defendant asserts that the language of 6 CMC § 6303, that "if  
12 the arrested person does not waive preliminary examination, the  
13 official shall hear the evidence within a reasonable time,"  
14 confers a substantive right to a preliminary examination  
15 regardless of whether a defendant has been released on bail. The  
16 Government counters that Rule 5.1 of the Commonwealth Rules of  
17 Criminal Procedure provides a right to a preliminary examination  
18 only if a defendant "is substantially deprived of his/her  
19 liberty," i.e., is incarcerated. In the Government's view, § 6303  
20 merely establishes procedures for holding a preliminary  
21 examination if one is mandated by Rule 5.1.

22 On their face, these two provisions are ambiguous. Moreover,  
23 no reported Commonwealth decision has examined them in detail,  
24 despite longstanding disagreement within the criminal bar as to  
25 how they are to be interpreted. The Court must therefore apply  
26 rules of statutory construction, keeping in mind that the Court's  
27 fundamental objective is "to ascertain and give effect to the  
28

1 intent of the legislature." *Commonwealth Ports Authority v.*  
2 *Hakubotan Saipan Enterprises, Inc.*, 2 N.M.I. 212, 221 (1991).

3 1. **Origins of 6 CMC § 6303.** Section 6303 is a holdover  
4 from the Trust Territory Code, 12 T.T.C. § 204; it is therefore  
5 useful to examine Trust Territory law to understand the origin and  
6 meaning of the current statute. *See Robinson v. Robinson*, 1  
7 N.M.I. 81, 88 (1990) (Trust Territory authorities helpful in  
8 understanding Commonwealth Code sections handed down from Trust  
9 Territory Code). Section 202 of the Trust Territory Code clearly  
10 distinguished between an initial appearance and a preliminary  
11 examination. Indeed, the statute required the judge to inform the  
12 arrested person during the initial amearance itself of his right  
13 to a preliminary examination:

14 When an arrested person is brought before an official  
15 authorized to issue a warrant who is not a court  
16 competent to try the arrested person for the offense  
17 charged, the official shall:

18 ...  
19 (3) Inform the arrested person of his right to have a  
20 preliminary examination and his right to waive the  
21 examination and the consequences of such waiver....

22 12 TTC § 202(3) (1972).

23 The phrase "**not** a court competent to try the arrested **person**"  
24 refers to the fact that under the Trust Territory, there were  
25 three levels of trial court: Community Court, District Court, and  
26 High Court. *See* 5 T.T.C. § 1. The criminal jurisdiction of the  
27 Community Court was limited to offenses punishable by a fine of up  
28 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

1 schema, the High Court Appellate Division found in *Borja v.*  
2 *Sablan*, 6 T.T.R. 584 (1974), that there was no right to a  
3 preliminary examination where the initial appearance took place  
4 before a "court competent to try the arrested person for the  
5 offense charged." *Id.* at 585 (where defendant's initial  
6 appearance was before District Court and District Court had  
7 jurisdiction over offense, no right to preliminary examination).

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

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

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

24 **2. The Adoption of the Commonwealth Rules of Criminal**  
25 **Procedure.** In 1983, the Commonwealth Trial Court and the Third  
26 Northern Marianas Legislature jointly revamped criminal procedure  
27 in the Commonwealth. Upon the recommendation of the Court, the  
28 Legislature adopted the Rules of Criminal Procedure and  
simultaneously repealed most of what had been Title 12 of the

1 Trust Territory Code. See Letter from Hon. Robert A. Hefner to  
2 Senate President Olympio T. Borja and House Speaker Benigno R.  
3 Fitial (Oct. 28, 1983) ("Hefner Letter"); Public Law 3-84 (Dec.  
4 12, 1983). Correspondence between the Court and the Legislature  
5 at the time of this action demonstrates that Rules 5 and 5.1 of  
6 the new Rules of Criminal Procedure were intended to replace §§  
7 202, 203, 205 and 206 of the Trust Territory Code. Hefner Letter,  
8 supra, Appendix.<sup>2/</sup> The fact that § 204 was not repealed, but  
9 rather was recodified as 6 CMC § 6303, shows that the Legislature  
10 intended for it to function in tandem with Rules 5 and 5.1, and  
11 that the drafters perceived no conflict between the new Rules and  
12 the old statute.

13 Viewing the various provisions in the light of this expressed  
14 legislative intent, the Court finds that the meaning of 6 CMC §  
15 6303 changed when it was deliberately placed in the context of the  
16 Commonwealth Rules of Criminal Procedure. In that context, it is  
17 Rule 5.1 that governs a defendant's entitlement to a preliminary  
18 examination. By the terms of the Rule, such an examination is  
19 required only when a defendant is incarcerated.<sup>3/</sup> Section 6303  
20 sets forth procedures governing such an examination, when one is  
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22 <sup>2/</sup> It is this correspondence which convinced the Court to  
23 reconsider its August 24 Decision and Order, because the evidence  
24 of legislative intent it contained showed the Court's prior  
25 decision to be clearly erroneous. Thus, reconsideration is  
proper by the standards set forth in *Sablan v. Tenorio*, Civil  
Action No. 94-500 (Super. Ct. Aug. 22, 1994).

26 <sup>3/</sup> Defendant argues that the Rule and the statute can be  
27 harmonized by reading Rule 5.1 to govern only the time period  
28 within which a preliminary examination must be held when a  
defendant is incarcerated. This reading ignores the first  
sentence of the Rule. A Court cannot adopt a construction which  
makes a portion of a provision meaningless. In re Estate of  
Rofag, 2 N.M.I. 18, 29 (1991).



1 required. The statute does not confer any additional entitlement  
2 to a preliminary examination beyond that found in Rule 5.1.<sup>4/</sup>  
3

4 **IV. CONCLUSION**

5 For the foregoing reasons, the Court hereby:

6 1. GRANTS the **Government's** motion to reconsider the **Court's**  
7 Decision and Order issued August 24, 1994;

8 2. VACATES that Decision and Order, which henceforth shall  
9 have no precedential value and which shall not be cited in the  
10 courts of the Commonwealth;

11 3. DENIES Defendant Isidro R. **Lizama's** original motion for  
12 a preliminary examination, on the grounds that Com. R. Crim. P.  
13 5.1 grants a right to a preliminary examination only to those  
14 defendants who are substantially deprived of their liberty pending  
15 trial, whereas Defendant has been released on bond.

16  
17 So ORDERED this 6<sup>th</sup> day of September, 1994.

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20 ALEXANDRO C. CASTRO, Presiding Judge  
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25 <sup>4/</sup> The Court notes that in recycling 12 T.T.C. § 204 as 6 CMC  
26 § 6303, the Trial Court and the Legislature carried over some  
27 procedures that are in outright conflict with the new Rules. In  
28 particular, as noted above, § 6303(b) allows for the defendant to  
be released on bail while he or she is preparing for the  
preliminary examination. But under Rule 5.1, the defendant only  
has a right to a preliminary examination if he or she is  
incarcerated.