

1 Counsel for defendant argues in the alternate that the proposed forfeiture based on the
2 probable cause finding is not supported by CNMI law and would be unconstitutional. The main
3 thrust of defendant's legal arguments are that forfeiture of his bond for anything other than a
4 failure to appear would be unconstitutional. If such a forfeiture were allowed he should be
5 entitled to a trial by jury regarding whether he violated a condition of his release on bailor not.
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7 Counsel for the defendant also submitted a "notice of surrender" by the defendant. When a
8 defendant has been arrested for alleged crimes his custody in jail does not qualify as a surrender.
9 Counsel should exercise caution prior to submission of such a misleading statement in the future.

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11 In the CNMI, a bail forfeiture is required in instances where a breach of condition of a
12 bond occurs.² However the Court may, at its discretion, "direct that a forfeiture be set aside...if it
13 appears that justice does not require the enforcement of the forfeiture".³ Therefore this Court
14 must ultimately decide two issues: whether a breach of the bond occurred and implicates
15 forfeiture and whether justice requires enforcement of the forfeiture.

16 ANALYSIS

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18 In a preliminary hearing regarding arrest or the initiation of criminal charges, such as the
19 one referenced by the government in their motion to forfeit bail, a court may accept hearsay
20 evidence in finding probable cause.⁴ The government must file a bill of information which spells
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24 ² Com. R. Crim. Pro. 46 (e)(I). "If there is a breach of condition of a bond, the court shall
25 declare a forfeiture of the bail." The use of the word shall typically denotes that the Court must act if a certain event
26 occurs. In this instance if a condition of release is breached then the Court shall (or must) declare a forfeiture.
27 Additionally and notably this rule does not restrict forfeiture of bail for failure to appear. Reading the plain language of
28 the Rule it is obvious that if there is a breach of *any* condition then the court shall order a forfeiture.

³ Com. R. Crim. Pro. 46 (e)(2).

⁴ Com. R. Crim. Pro. 4 (b).

1 out the crimes the defendant is being charged with based on the alleged facts.⁵ However it is well
2 established that a Court can find probable cause based upon hearsay evidence, a method which is
3 not allowed in other instances. A preliminary hearing is held in order to accord an arrested person
4 the right to a judicial determination of probable cause as a prerequisite to extended restraint of
5 liberty following arrest. One of the main problems contemplated by the instant case is that in
6 order to forfeit bail most courts have found that the breach of a condition must be proven by a
7 preponderance of evidence, rather than by a mere finding of probable cause. Because the
8 government relied solely on a finding of probable cause to support their forfeiture this Court is
9 unable to grant the motion to forfeit bail.
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12 As the government correctly states there is legal authority to forfeit bail for breach of bail
13 conditions, both within Commonwealth and U.S. law. Bail is used primarily to ensure the
14 defendant's presence at later hearings and to ensure he doesn't flee the jurisdiction. However, the
15 defendant's position that appearance is the *sole* purpose of bail and the only reason for which it
16 may be forfeited is untenable. Precedential authority supports the obey all laws provision as a
17 condition of bail and this Court will follow that interpretation.⁶ This Court further does not agree
18 with defendant's contention that breach of the obey all laws condition isn't sufficient to justify
19 forfeiture of the bond.⁷ As the legal authority cited by the defendant and government states, "We
20 do not agree, however, that forfeiture is limited only to situations where defendants fail to
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25 ⁵ Com. R. Crim. Pro. 7 (c)(1).

26 ⁶ See generally *United States v. Terrell*, 983 F2d 653 (1993); *United States v. Santiago*, 826 F2d 499 (7th Cir.
27 1987); *United States v. Vaccaro*, 51 F3d 189 (9th Cir. 1995).

28 ⁷ See Com. R. Crim. Pro. 46 (e) (1).

appear".⁸ Therefore this Court finds that breaching a condition of bail release, even conditions
2 not relating to appearance, can constitute sufficient grounds for forfeiting bail.

3 "A bail bond is a contract between the government, the defendant, and his sureties, and is
4 governed by general contract principles".⁹ In the event of a breach of a bail condition the
5 defendant has the right to have his breach of bail conditions proven by a preponderance of the
6 evidence.¹⁰ As the Court explains, bond forfeiture is a civil case arising from earlier criminal
7 proceedings and civil actions require findings to be based on a "preponderance of the evidence"
8 standard.¹¹ The Court then continues to hold that "forfeiture of a bond is limited to those cases
9 where it can be shown by a preponderance of the evidence that a defendant has violated a
10 condition of release".¹² The preponderance of the evidence standard in the CNMI states that the
11 "preponderance of the evidence standard is evidence which is of greater weight or more
12 convincing than the evidence which is offered in opposition to it...evidence which as a whole
13 shows that the fact sought to be proved is more probable than not".¹³

14 The government submitted as their only evidence the bill of information of probable
15 cause. The Court finds that the preliminary hearing on March 5, 2008 finding a sufficient factual
16 basis that Mr. Namauleg committed the crimes is an insufficient basis to order a bail forfeiture.

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18 ⁸ The case continues on and says "Various courts have held that forfeiture of bail bond is appropriate for
19 violations of other conditions of release...Moreover, courts have specifically upheld forfeiture for violation of 'break
20 no laws' conditions". *United States v. Vaccaro*, 51 F.3d 189 (9th Cir. 1995).

21 ⁹ *United States v. Figuerola*, 58 F3d 502, 503 (9th Cir. 1995).

22 ¹⁰ *United States v. Vaccaro*, 719 F. Supp. 1510, 1514-1517 (1989). "Where a defendant is charged with breach
23 of a non-appearance related condition, proof problems become more apparent. A certain amount of evidence should be
24 taken when determining whether a defendant has...committed a crime while on release".

25 ¹¹ *Id.* at 1516 citing *United States v. Plechner*, 577 F.2d 596, 597 (9th Cir. 1978).

26 ¹² *Id.* at 1516.

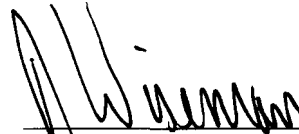
27 ¹³ *In re Estate of Sarcinas*, 4 N.M.I 149 (1994).

1 The Rules of Evidence do not apply in preliminary examinations in criminal cases and thus
2 hearsay evidence may have been allowed in finding probable cause to charge the defendant.¹⁴
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4 This Court finds that the order of probable cause was insufficient evidence to satisfy the
5 preponderance of the evidence standard. It is the government's responsibility to prove that the
6 defendant violated the conditions of his release and the Court finds that the government has
7 failed to meet the standard required. The probable cause finding does not present enough
8 evidence to satisfy the preponderance of the evidence standard and therefore the government's
9 motion to forfeit bail must be denied.
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11 **CONCLUSION**

12 For the foregoing reasons, the Court hereby denies the Government's Motion to Forfeit
13 Bail.
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15 **SO ORDERED** this 4th day of August, 2008

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David A. Wiseman, Associate Judge

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28 ¹⁴ Com. R. Evid. 1101 ©) (2).