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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. 19-0123

Plaintiff,

v.

) ORDER DENYING THE  
) COMMONWEALTH'S MOTION TO  
) VACATE PRELIMINARY HEARING

THEODORE O. PEHNOS, JR,

Defendant.

I. INTRODUCTION

THIS MATTER came before the Court on December 17, 2019 at 1:30 p.m. in Courtroom 212B, Marianas Business Plaza, on the Commonwealth of the Northern Mariana Islands' ("Commonwealth") Motion to Vacate Preliminary Hearing ("Motion"). The Commonwealth was represented by Assistant Attorney General J. Robert Glass, Jr. Defendant Theodore O. Pehnos, Jr. ("Defendant") failed to appear, however, he was represented by his attorney, Assistant Public Defender Karie Comstock.

Based on a review of the parties' filings and the applicable law, the Court hereby DENIES the Commonwealth's Motion.

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## II. BACKGROUND

On December 4, 2019, Defendant was charged with two counts of child abuse in violation of 6 CMC § 5312(a)(1). On December 12, 2019, Defendant was released to a third-party custodian (“TPC”) on an unsecured \$5,000.00 appearance bond and subject to pretrial release conditions. In addition to being released to a TPC, his pretrial release conditions require him to return to Court, obey all laws, keep appointments with his attorney, not apply for a passport, stay away from seaports and airports, and not consume or possess alcoholic beverages. Additionally, the Court ordered a home study, as well as home checks conducted by the Division of Youth Services (“DYS”), to ensure Defendant’s compliance. A preliminary hearing was then scheduled for December 17, 2019.

In its Motion, the Commonwealth argues that Defendant is not subject to a substantial deprivation of liberty as required to trigger the right to a preliminary hearing. In his Opposition to the Motion, the Defendant argues that he is subject to a substantial deprivation of his liberty as a direct result of the constraints placed on him by the conditions of his pretrial release.

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## III. LEGAL STANDARD

“A defendant is entitled to a preliminary examination, unless waived, if he/she is substantially deprived of his/her liberty.” NMI R. CRIM. P. 5.1. If the right to a preliminary hearing is not waived, an examination shall be held within a reasonable time. *See* 6 CMC § 6303(a); *see also* NMI R. CRIM. P. 5.1. Additionally, the Commonwealth of the Northern Mariana Islands (“CNMI”) Supreme Court has determined that pretrial release of a defendant does not automatically place a defendant beyond the reach of NMI R. CRIM. P. 5.1. *Babauta v. Superior Ct.*, 4 N.M.I. 309 (1995). “Certain conditions or combinations of conditions of release may work a substantial deprivation of a defendant’s liberty, which would bring the defendant within the purview of NMI R.

1 CRIM. P. 5.1 and entitle him or her to a preliminary examination.” *Id.* at 5. Furthermore, a  
2 determination of what conditions create a “substantial deprivation” is left to the “sound discretion  
3 of the trial judge in each case.” *Id.*

#### 4 5 **IV. DISCUSSION**

6 The Commonwealth argues that none of the conditions of Defendant’s pretrial release  
7 impose a substantial deprivation of liberty. The Court disagrees. While not all conditions of his  
8 pretrial release individually contribute to the substantial deprivation of Defendant’s liberty, when  
9 combined, most of the conditions in this case do. The conditions of Defendant’s pretrial release  
10 require him to remain in the custody of a TPC; to return to Court; obey all laws; keep appointments  
11 with his attorney; not apply for a passport; stay away from seaports and airports; and not consume  
12 or possess alcoholic beverages. Additionally, the Court ordered a home study, as well as home  
13 checks, conducted by DYS, to ensure Defendant’s compliance. Before discussing the conditions  
14 that contribute to a substantial deprivation of Defendant’s liberty, the Court notes that it does not  
15 find the conditions of “obeying all laws” or “returning to court” as contributors to the substantial  
16 deprivation of Defendant’s liberty.  
17

#### 18 **A. Release to a TPC.**

19 Under this condition, Defendant is forced to remain in the custody of another. He is not free  
20 to go wherever he pleases, whenever he pleases. He is beholden to the will of his custodian. And  
21 while his custodian may oblige him with regard to movement, that may not always be the case.  
22 Therefore, as Defendant lacks the autonomy of mobility, the Court finds that this pretrial release  
23 condition contributes to the substantial deprivation of Defendant’s liberty.  
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1 **B. Keeping appointments with attorney.**

2 While keeping appointments with his attorney does benefit Defendant, attaching this as a  
3 condition for pretrial release with the potential of revocation should he fail to keep his appointments  
4 necessarily transforms this condition into another contributor to Defendant's substantial deprivation  
5 of liberty.

6 **C. Inability to apply for a passport, and stay away from seaports and airports.**

7 Defendant has a right to travel and to obtain the necessary documents to do so. However, the  
8 pretrial release conditions set on Defendant prevent him from doing so and substantially limit  
9 Defendant's freedom of movement. Therefore, the Court finds that these conditions contribute to  
10 substantially depriving Defendant of his liberty.

11 **D. Prohibition from consuming or possessing alcoholic beverages.**

12 This condition prohibits Defendant from making the choice to consume or possess alcoholic  
13 beverages should he want to, and therefore is a contributor to the significant deprivation of his  
14 liberty.  
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16 **E. Home study, as well as home checks, by DYS.**

17 Defendant was ordered to undergo a home study by the Court as well as to open his home to  
18 checks by DYS. The Court finds that this condition substantially contributes to the deprivation of  
19 Defendant's liberty as Defendant necessarily suffers an unwanted intrusion into his home.

20 Individually the conditions discussed above may not substantially deprive Defendant of his  
21 liberty. When considered together, however, the Court finds that the conditions of Defendant's  
22 pretrial release, as discussed above, work a substantial deprivation of his liberty.

23 Under the laws of the United States of America, an individual is presumed innocent until he  
24 or she is found guilty in the eyes of the law. While Defendant has been charged with two counts of  
25 child abuse in violation of 6 CMC§ 5312(a)(1), until otherwise determined, Defendant is also

1 afforded the presumption of innocence. Therefore, just as the Court would find the imposition of  
2 the conditions of Defendant's pretrial release to substantially deprive the liberty of an individual  
3 who has not been charged with crimes, so too does the Court find that, when applied to Defendant,  
4 he in fact, suffers substantial deprivation of his liberty.

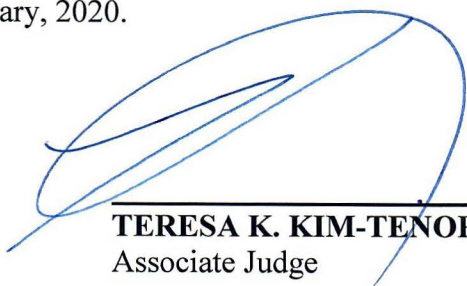
5 Furthermore, the Court notes that the Commonwealth did not expound on its assertion that  
6 the conditions of Defendant's pretrial release do not impose a substantial deprivation of liberty.  
7 Under 6 CMC § 6303(a) and NMI R. CRIM. P. 5.1, a Defendant has a right to a preliminary  
8 examination unless he or she waives this right. In this instance, where Defendant has not waived his  
9 right to a preliminary examination, the onus rests with the Commonwealth to explicitly contend  
10 why he should be deprived of this right. Simply stating that the conditions of Defendant's pretrial  
11 release do not impose a substantial deprivation of liberty does not meet that burden.

12  
13 As the conditions of Defendant's pretrial release are a substantial deprivation of his liberty,  
14 this Court therefore finds that Defendant is entitled to a preliminary examination under NMI R.  
15 CRIM. P. 5.1.

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17 **V. CONCLUSION**

18 Based on the foregoing, the Commonwealth's Motion to Vacate Preliminary Hearing is  
19 **DENIED.**

20 **SO ORDERED** this 6<sup>th</sup> day of January, 2020.

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**TERESA K. KIM-TENORIO**  
Associate Judge