



Committee for Public Counsel Services Youth Advocacy Department

Courtroom Practice Guide to Bail MGLc. 276 §58

This guide provides a summary of the bail statute and issues that come up at arraignment. This guide can be used in conjunction with the Courtroom Practice Guides to Bail Revocation, 58-A Hearings, and Preliminary Probation Hearings.

Purpose of Bail

The purpose of bail is to ensure that the defendant appears in court. *Querubin v. Commonwealth*, 440 Mass. 108, 113 (2003), *Commonwealth v. Pagan*, 445 Mass. 315 (2005). Attorneys should emphasize the purpose of bail and oppose unnecessary conditions of release that are often difficult for children and adolescents to follow.

Presumption of Personal Recognizance

The bail statute establishes a presumption of personal recognizance unless a judge or magistrate, in her discretion, determines that your client will not appear in court. §58 par. 1 Case law also establishes the presumption of release on personal recognizance and that a juvenile's "dangerousness" or risk to public safety is **not** a consideration under §58.

- *Delaney v. Commonwealth* - in enacting §58 the legislature intended "to protect the rights of the defendant by establishing that he or she will be admitted to bail on personal recognizance without surety..." 415 Mass 490, 495 (1993).
- *Commonwealth v. King* - "section 58 does not provide for consideration of public safety in determining whether to release a person to bail; rather only permissible consideration is whether the defendant is reasonably likely to reappear before the court." 429 Mass 169, 690 (1999) .

Bail Factors

The bail statute specifically provides for the following factors for a judge to consider. §58 par. 1 It is important to remember that each of these factors is only relevant to the extent it bears on the question of risk of flight.

- Nature and circumstances of the offense
- Potential penalty the person faces
- The person's family ties, financial resources, employment record and history of mental illness
- His reputation in the community
- His record of convictions, if any
- Any illegal drug distribution or present drug dependency
- Any flight to avoid prosecution or fraudulent use of an alias or false identification
- Any failure to appear at any court proceeding to answer to an offense
- Whether the person is on bail pending adjudication of a prior charge
- Whether the acts alleged involve abuse as defined in 209A *Abuse Prevention Act*
- Whether the acts alleged involve a violation of a temporary or permanent order issued pursuant to:
 - Chapter 208, sections 18 or 34B *Restraints in divorce proceedings, vacate marital home*
 - Chapter 209, section 15, 30, 32, *Marital restraints*
 - Chapter 209A sections 3, 4 or 5 *Abuse prevention orders*
 - Chapter 209C sections 15 or 20 *Abuse prevention temporary orders or modification of orders*
- Whether the person has any history of orders issued against him pursuant to the aforesaid sections,
- Whether he is on probation, parole or other release pending completion of a sentence for any conviction
- Whether he is on release pending sentence or appeal for any conviction

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Practice Tips on Bail Factors

Defaults: Because the purpose of bail is to make sure that a juvenile will return to court, it is important to stress the juvenile's record if she has no defaults. If a youth has defaults, find out whether the defaults are due to factors that were not caused by her, for example a parent's/guardians work schedule or their transportation problems.

Chins Cases: At arraignment probation may bring up a youth's compliance with parents or DCF on CHINS cases. If a CHINS case is pending you should request that the bail hearing be heard prior to the CHINS case and that the DA leave the courtroom during the CHINS as this proceeding is confidential. Be aware that youth cannot be held at DYS on CHINS cases.

Education: Probation and courts have access to education records at arraignment. *M.G.L.c. 119 §69* You may use this to your advantage to argue that a youth should be released because she is attending school regularly and custody will be detrimental to her educational progress. You should also be aware that if students are charged with a felony, they may be suspended indefinitely from school.

Services in the Community: If your client has a therapist, or is involved in community programs, stress that these services will be interrupted if the youth is placed in custody. There are no treatment programs in DYS detention units. Be aware of the services in your client's community so you can make referrals for youth as an alternative to being detained.

Conditions of Release

Under certain circumstances, the court may set conditions of release in addition to personal recognizance and/or cash bail. *For information on revocation procedures, see the Courtroom Practice Guide to Revocation of Bail for New Offense and Violation of Conditions of Release.*

1. New Offense *M.G.L.c. 276 §58 par. 3*

Every person "shall" be given a bail warning at arraignment which informs them that if they are charged with a new offense while their case is pending their bail may be revoked. ***Your client will be held without bail for 60 days (no more, no less) if bail is revoked for a new offense.***

2. Restrictions on Personal Associations or Conduct *M.G.L.c. 276 §58 par.1*

The court can restrict who your client associates with and can place restrictions on her conduct while released. This restriction was included in the bail statute in 2006 presumably as a concern for alleged victims - "the defendant may be ordered to abide by specified restrictions on personal associations or conduct including, but not limited to, avoiding all contact with an alleged victim of the crime and any potential witness or witnesses who may testify concerning the offense, as a condition of release." ***On a violation under this section, your client can be held without bail for a period not to exceed 90 days.***

Practice Tip: *Conditions under §58 do not need the juvenile's consent.* Counsel should argue that conditions under §58 are limited to restrictions on conduct, and to the purpose of preventing contact with victims and witnesses. Although there is no case law interpreting this section of the statute, it can be argued that the court can prohibit conduct but not impose affirmative obligations.

3. Pre-Trial Probation *M.G.L.c. 276 §87*

Conditions of release monitored by probation may be set by Court prior to trial with the juvenile's consent. A revocation procedure is not specified by the statute. However, revocation on a violation of conditions under §87 was addressed in *Jake J. v. Commonwealth*, 443 Mass. 70, 74 (2000) where the court held that the procedure for revocation is under §58B.

Practice Tip: *§87 conditions can be set only if the juvenile consents.* If the juvenile consents to the conditions, the judge should inform her that she is simultaneously being released on bail or personal recognizance and placed on conditions of pretrial probation pursuant to §87. The judge should also explain the consequences for violating any conditions. *Jake J. v. Commonwealth* at 74

Practice Tip: *Do not agree to §87 conditions unless necessary.* Conditions should only be considered when the juvenile faces the risk of being held on bail. Don't agree to conditions that are not related to risk of flight or are vague or undoable. There is no statutory authority for the use of bail conditions as a way to guide, improve or alter the juvenile's general behavior at home or in school.

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Conditions of Release continued

4. Conditions for “Family Trouble” Cases *M.G.L.c. 276 §42A*

A court may set conditions of release including “reasonable restrictions on the travel, association, or place of abode of the defendant.” This section applies in cases where the alleged victim is a family or household member and the crime involves “assault and battery, trespass, threat to commit a crime, nonsupport, or other complaint which involves the infliction or threat of physical harm upon a person’s family or household member” as defined in §209A. ***The statute and the case law do not address the revocation procedure or period of revocation for a violation under this statute.***

Common Conditions as an Alternative to Detention

If your client is charged with a serious offense and is facing detention, your client may consider agreeing to these conditions in order to gain release.

House Arrest

While house arrest may be a way to avoid custody, counsel should carefully craft any house arrest order to make sure the juvenile will be able to comply. The order should clearly state if the juvenile can leave the house with a parent, or alone to attend school, meetings, appointments or activities. Any exception that is not included in the court’s order will be a violation of the order.

Electronic Bracelet (ELMO)

In order to be released on the electronic bracelet, probation must have one available, and the household must have a “land line” dedicated to the bracelet. All features, such as call waiting, must be removed from service.

GPS monitoring

GPS monitoring may be an alternative to the ELMO because it does not require a dedicated land line. GPS can monitor whether a person enters a predetermined exclusion zone, as well as monitor whether a person is home and remains at home for curfew. Probation monitors conditions by receiving reports from a GPS operations center. In the event that your client is charged with a violation, you should obtain and thoroughly review documentation from the GPS operations center before any violation hearing.

Drug Testing

There is no authority for the Court to order drug testing as a condition of bail, unless the juvenile agrees to it as a §87 condition. Drug testing can only be ordered as a condition of *probation* if it is reasonably related to the case. *Commonwealth v. Gomes*, 73 Mass App. Ct. 857 (2009).

Who Monitors Conditions of Release?

If a youth is released on conditions, probation will monitor the youth’s compliance. Probation may not change or alter conditions of release without a court order. *Commonwealth v. MacDonald*, 50 Mass App. Ct.220, 224 (2000) If conditions of release are cumbersome, or if your client has done well on release, you can ask the court to amend the conditions of release.

15 Day Return Date for Juveniles

Juveniles in custody must be returned to the court every 15 days unless the 15 day date is waived by the juvenile. *M.G.L.c. 119 §56*. The fifteen days should almost never be waived.

Who can Post Bail

The bail statute does not include any restrictions on who may post bail on behalf of the juvenile. It is important to note that DCF and DYS do not post bail on behalf of children. A bail that requires DCF or DYS to post bail is in essence an illegal bail that prevents a child from being released. Counsel should object to this type of bail. If the Court orders release only to a parent or DCF, make sure the mittimus reads “release to DCF only,” and not “bail to DCF” or “DCF only bail” which could be interpreted as requiring DCF to post bail.

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Bail Review

Superior Court Bail Review

Juveniles have the right to petition for a bail review before the Superior Court in the same way an adult does. *Comnesso v. Commonwealth*, 369 Mass. 368, 372 (1997). This means that defense counsel and the prosecutor can raise new facts that were not presented in the juvenile court, and the judge is not bound by any of the findings in the juvenile court. The Superior Court can order any amount of bail or conditions, and can decrease or increase bail. Bail reviews for juveniles and adults should be held the same day that the petition is filed, or the next day if holding the bail review hearing on the same day is impractical.

Practice Tip: In many juvenile courts it is hard to get a bail review on the same day due to location and transportation issues. It is important to find out the bail review procedure for the court in which you practice. Some courts require the attorney to assemble the documents required for the bail review. **Make sure you file a petition for bail review at the courthouse on the day of arraignment.** Also have a copy of the petition go with the court papers to DYS. In many regions DYS will assist in transporting your client to Superior Court. You should represent your client at the bail hearing.

Single Justice Bail Review

Juveniles have a right to appeal the Superior Court bail determination to a single justice of the SJC pursuant to *M.G.L.c. 211 §3*, *Comnesso v. Commonwealth*, at 372. While the court may consider bail de novo, and the juvenile may be allowed to present new facts to the single justice, ordinarily the single justice restricts review to errors of law. *Comnesso* at 374.

Reconsideration of Bail in the Juvenile Court

Unless otherwise stated, bail is set without prejudice, and can be reargued if there is a change in circumstances.

Changed Circumstances

A court may revisit bail if either party presents changed circumstances. The changed circumstances should be “factors not previously known or presented” to the court, that have a bearing on whether the juvenile will appear for court. *Comnesso* at 368.

Practice Tip: If a client is in custody, counsel can use the 15 day return date to develop a plan that will satisfy the “changed circumstances” criterion. The plan may include staying with relatives, counseling, or after school activities. You may also argue changed circumstances where the Commonwealth has failed to meet discovery deadlines, is not ready for a motion hearing or trial, or other charges have been reduced or dismissed.

Indictment

When a youth is indicted on youthful offender charges, a new bail hearing will be held.

Juvenile Defense Network

The Juvenile Defense Network (JDN) is an initiative of the Youth Advocacy Department. JDN provides training and support for juvenile defenders throughout Massachusetts.

The Youth Advocacy Department (YAD), a department of the state's public defender office, the Committee for Public Counsel Services, has an office in Roxbury and Worcester and represents hundreds of children each year. This year YAD will be opening 6 new offices across the state. YAD integrates the work of attorneys, social workers, and community outreach workers, to fully address the legal and developmental needs of our clients.

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