



Committee for Public Counsel Services Youth Advocacy Division

Courtroom Practice Guide to Bail M.G.L c. 276, § 58

This guide provides a summary of c. 276, § 58, the bail statute, and issues that arise at arraignment and is intended to be used as a quick reference guide. This guide is intended for use in **juvenile court** and does not include provisions of § 58 that apply only to adults.

Purpose of Bail

The purpose of bail is to assure the defendant's appearance in court. *Querubin v. Commonwealth*, 440 Mass. 108, 113 (2003), *Commonwealth v. Pagan*, 445 Mass. 315 (2005).

Presumption of Personal Recognizance

The bail statute creates a presumption of personal recognizance that can only be overcome if a judge or magistrate, in their discretion, determines that such release will not "reasonably assure" your client's appearance before the court. § 58 par. 1; *Delaney v. Commonwealth*, 415 Mass. 490, 495 (1993). **Issues of dangerousness or public safety are not considerations under § 58**; the only "permissible consideration is whether the defendant is reasonably likely to reappear before the court." *Commonwealth v. King*, 429 Mass. 169, 174 (1999).

Release at Police Station

If a child between 12-18 is arrested when juvenile court is not in session, the police shall "immediately" notify parent, guardian or custodian, or DCF, if the child is in their custody. The child "shall" be released upon the written promise of the parent/guardian/custodian/DCF to assure the presence of the child in court. However, children **age 14-18** may be detained if the arresting officer requests such detention, and if the court issuing the arrest warrant directs such child be held pending appearance in court. No child between 14-18 shall be detained in a police station or town lock up which has not received written approval from DYS that the detention facility is sight and sound free. c. 119, § 67.

Considerations of Financial Resources to Post Bail

"[B]ail shall be set in an amount no higher than what would reasonably assure the appearance of the person before the court after taking into account the person's financial resources; provided, however, that a higher than affordable bail may be set if neither alternative nonfinancial conditions nor a bail amount which the person could likely afford would adequately assure the person's appearance before the court." § 58 par 1.

A judge must consider a defendant's financial resources in setting bail. If neither nonfinancial conditions nor an amount the defendant can afford will adequately assure defendant's appearance, the judge may set bail at a higher amount, but no higher than necessary to ensure the defendant's appearance. *Brangan v. Commonwealth*, 477 Mass. 691 (2017). Imposition of unaffordable bail is subject to specific due process requirements:

1. The judge may not consider defendant's alleged dangerousness in setting the amount of bail. Dangerousness may be considered as a factor in setting other conditions of release;
2. If it appears that defendant lacks the financial resources to post bail and will likely result in defendant's long term pretrial detention, the judge must, orally or in writing, provide findings of fact and a statement of reasons for the bail decision, § 58 par. 2;
3. When a judge is reconsidering or reviewing a bail order, and defendant has been detained due to the inability to post bail, the judge must consider the length of the defendant's pretrial decision and the equities of the case.

See Also, A Juvenile v. Commonwealth, 480 Mass. 1012 (2018)(Juvenile, in DCF custody, a runaway at time of arrest was held on \$50,000 bail. SJC held there was scant but sufficient evidence to support that there was no reasonable alternative to bail; it was not an abuse of discretion to hold the juvenile on unaffordable bail.)

Bail Factors

In addition to taking into account a person's financial resources, the judge or magistrate must consider the following factors to determine whether a person is likely to appear in court, § 58 par 1:

- 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
- The person's reputation in the community
- The person's 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, §§ 18, 34B *Restraints in divorce proceedings, vacate marital home*
 - Chapter 209, §§ 32, *Marital restraints*
 - Chapter 209A, §§ 3, 4, 5 *Abuse prevention orders*
 - Chapter 209C, §§ 15, 20 *Abuse prevention temporary orders or modification of orders*
- Whether the person has any history of orders issued against them pursuant to the above sections
- Whether the person is on probation, parole or other release pending completion of a sentence for any conviction
- Whether the person is on release pending sentence or appeal for any conviction

No Restraints

Restraints shall not be put on juveniles during court proceedings, and any restraints shall be removed from the juvenile before the appearance in court, unless the judge presiding in the courtroom makes findings on the record that:

1. Restraints are necessary as the juvenile is an immediate and credible escape risk that cannot be curtailed by other means;
2. Juvenile is a threat to their own safety or safety of others;
3. Restraints are reasonably necessary to maintain order in courtroom.

c. 119, § 86

Domestic Violence - 3 hour wait period

If a juvenile is charged with violating c. 208, § 18 or 34B, c. 209, § 32, c. 209A, § 3, 4 or 5, 209C, § 15 or 20 or c. 265, § 13M or 15D, "the commonwealth shall be the only party permitted to move for arraignment, within 3 hours of a complaint being signed by a magistrate or a magistrate's designee." § 58, par. 4.

Bail Warning

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. *Commonwealth v. Pagan*, 445 Mass. 315, 323-324 (2005). If your client is released on conditions pursuant to § 58 or § 87 the judge should explain the consequences of violating any of the conditions - they will be held without bail for 90 days. *Jake J. v. Commonwealth*, 443 Mass. 70, 746 (2000).

15 Day Return Date

Juveniles in custody must be returned to the court every 15 days unless the 15 day date is waived by the juvenile. c. 119, § 56.

Conditions of Release

Under c. 276, § 58 - If the court deems it necessary, the juvenile “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.” Violations of a release condition set under § 58, par. 1 are governed by c. 276, § 58B. **On a violation under this section, your client can be held without bail for a period not to exceed 90 days.**

Under c. 276, § 87 - Conditions of release monitored by probation may be set by the judge prior to trial with the juvenile’s consent. *Jake J.* 443 Mass. at 74. If § 87 conditions are set, the judge should inform the juvenile that they are: a) simultaneously being released on bail or personal recognizance; and b) placed on conditions of pretrial probation pursuant to § 87. The judge should also explain the consequences for violating any conditions. *Jake J.* at 76. Violations of a release condition set under § 87 are governed under c. 276, § 58B. **On a violation under this section, your client can be held without bail for a period not to exceed 90 days.**

Review of Conditions

Conditions imposed under § 58 are reviewable by way of a Superior Court Bail Review. Conditions set under c. 276, § 87 are not reviewable by way of a Superior Court Bail Review and a juvenile must file a c. 211, § 3 petition seeking review.

Who Can Post Bail

The bail statute does not include any restrictions on who may post bail on behalf of a juvenile. It is important to note that DCF (Department of Children and Families) and DYS (Department of Youth Services) do not post bail on behalf of youth. A bail that requires DCF or DYS to post bail is in essence an illegal bail that prevents a youth from being released. If the Court orders release only to DCF, the *mittimus* should read “release to DCF only” and not “bail to DCF” or “DCF only bail” which could be interpreted as requiring DCF to post bail.

Bail Review

Bail Set by Clerk or Assistant Clerk - If a Judge is not available at the arraignment and the clerk does not release the juvenile on “personal recognizance without surety” the juvenile “shall” be brought back to court “at the next session” for a review of the bail order. *§ 58, par. 6.*

Superior Court Bail Review - Juveniles have the right to petition for a bail review before the Superior Court. *Comnesso v. Commonwealth*, 369 Mass. 368, 372 (1997). Defense counsel and the prosecutor can raise new facts that were not presented in the juvenile court and the Superior Court judge is not bound by any of the findings in the juvenile court. The Superior Court can order the juvenile released on personal recognizance or any amount of bail (decrease or increase the current bail) and/or remove or add conditions of release. Bail reviews for juveniles 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. *§ 58, par. 6, 7.*

The procedure for obtaining a Superior Court bail review for a juvenile differs by county. The Juvenile Court Clerk’s office will have the procedures which often involve notifying DYS and the Superior Court of the requested hearing. Parents should be present at the bail review.

Single Justice Bail Review - Juveniles can file a petition pursuant to c. 211, § 3 after a Superior Court bail review. While the Court may consider the matter *de novo*, ordinarily the single justice restricts review to errors of law. *Comnesso v. Commonwealth*, 369 Mass. 368, 374 (1975).

Reconsideration of Bail in Juvenile Court

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. *Comesso v. Commonwealth*, 369 Mass. 368, 376 (1975).

Youthful Offender Indictments

A new bail hearing will be held when a youth, who was previously arraigned on a delinquency complaint, is indicted and arraigned on youthful offender charges.

Other Issues: Dismissal Prior to Arraignment

A juvenile court judge has the discretion to allow, prior to arraignment, a juvenile’s motion to dismiss a delinquency complaint if it is not supported by **probable cause** and if dismissal is in the best interests of the child and in the interest of justice. *Commonwealth v. Humberto H.*, 466 Mass. 562 (2013). Accordingly, counsel must be able to review the court filings **prior** to the arraignment and must ask for a continuance of the arraignment if more time is needed to prepare a motion to dismiss.

Children can be placed in a diversion program prior to arraignment for eligible offenses. c. 119, § 54A.

Children can be diverted to a community based restorative justice program prior to arraignment. The charge is dismissed upon successful completion of the program. c. 276B, § 2.

Juveniles Are Different

The application of these statutes to juveniles must be done through the lens of c. 119, § 53 which mandates that juveniles “as far as practicable . . . shall be treated, not as criminals, but as children in need of aid, encouragement and guidance.” In Massachusetts, the courts “recognize that the juvenile justice system ‘is primarily rehabilitative, cognizant of the inherent differences between juvenile and adult offenders, and geared toward the correction and redemption to society of delinquent children.’” *Commonwealth v. Humberto H.*, 466 Mass. 562, 576 (2013), quoting *Commonwealth v. Magnus M.*, 461 Mass. 459, 461 (2012).

Children are different than adults. Acknowledging the neuroscience that supports this fact, the United States Supreme Court has held that in certain legal applications, age and its attendant characteristics, must be taken into account. See *Roper v. Simmons*, 543 U.S. 551 (2005). One fundamental distinction is that adolescents are in the process of developing who they are. As the Court noted more than thirty years ago: “Youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage.” *Id.*, at 570, quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982).

Given this important and fragile time in a youth’s development, it is not surprising that the detention of a juvenile has a negative impact on future life outcomes for the juvenile and is often counterproductive to societal goals. Recognizing this serious issue, there is a national initiative to reduce unnecessary detention and there have been studies that show the harm that detention does to juveniles. Defense counsel, prosecutors and judges must be mindful of these during the arraignment process.

Juvenile Detention Alternative Initiative (JDAI)

The Juvenile Detention Alternative Initiative (JDAI) is a national public safety partnership supported by the Anna E. Casey Foundation, focusing on reducing the unnecessary and harmful use of secure detention for low-risk juveniles. In Massachusetts, JDAI, with DYS as the lead agency for the initiative, is working to ensure that the “right youth is in the right place for the right reason.” It has been rolled out in six counties (Worcester, Suffolk, Middlesex, Essex, Bristol and Hampden), and Juvenile Court Judges and Probation Officers across the Commonwealth are learning about the dangers of detention and the need to find alternatives to detention for low-risk offenders.

Juveniles are Different**Dangers of Detention¹**

Disruption in Education and Services - Detention causes a disruption in social services being provided to youth and denies them access to the educational curriculum received in school.²

Detention Can Increase Drop-out Rates - For youth receiving remedial education services in detention, 43% do not return to school after release, and another 16% drop out within five months.³

Detention Can Increase Recidivism - Studies have shown that recidivism rates are higher for detained youth as opposed to those who are not detained. Keeping kids in their community promotes their healthy development.⁴

Aging Out (“Desistance Rate”) - Juveniles tend to grow out of delinquent behavior. Incarcerating juveniles may interrupt and/or delay this process, since detainment removes natural socialization engagement with family, school, and employment.⁵

Youth Are Impressionable - Children who are detained are likely to interact with others who are detained for more serious issues, which can adversely affect impressionable youth and lead to re-offending.⁶

Trauma - Some studies show that 75-93% of youth entering the justice system have experienced some level of traumatic victimization. Many aspects of the detention process can be traumatizing; from strip searches, to the loss of privacy and liberty, to being removed from ones home and community. For juveniles with a history of trauma, these experiences can aggravate prior trauma symptoms.⁷

Disproportionate Minority Impact - Nationwide, African-Americans represent 26% of juveniles arrested but represent 44% of youth who are detained.⁸

¹Justice Policy Institute, *The Dangers of Detention: The impact of Incarcerating youth in Detention and Other Secure Facilities*, 2006.

²*Id.*

³*Id.*

⁴*Id.*

⁵*Id.*

⁶*Id.*

⁷Justice Policy Institute, *Healing Invisible Wounds: Why Investing in Trauma Why Investing in Trauma-Informed Care for Children Makes Sense*, 2010.

⁸NAACP, Criminal Justice Fact Sheet, 2009-2015, <http://www.naacp.org/pages/criminal-justice-fact-sheet>

This guide can be used in conjunction with the YAD Courtroom Practice Guides to Bail Revocation and Courtroom Practice Guide to Dangerousness Hearings and is not intended as the final authority on this subject. It is important to keep up-to-date on any changes in the law.

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