



Committee for Public Counsel Services Youth Advocacy Division

COURTROOM PRACTICE GUIDE TO BAIL REVOCATION

There are **two different statutory** procedures for bail revocation in Massachusetts. *Part I* of this guide addresses the procedure for bail revocation under GL c. 276, § 58, commonly used when a person is released on bail and is alleged to have committed a new offense. *Part II* of this guide addresses the procedure for bail revocation under GL c. 276, § 58B based on a violation of conditions of bail (including an allegation of the commission of a new offense) which are ordered pursuant to GL c. 276, §§ 42A, 58, 58A or 87 or for a new offense if released under G.L. c. 276, § 58A.

The Commonwealth may proceed under **either** c. 276 § 58 or § 58B's revocation provision when a juvenile is accused of committing a new offense and must satisfy the requirements in the statute they chose to proceed under. *Josh J. v. Commonwealth*, 478 Mass. 716 (2018). In *Josh J.* the SJC articulated the distinction: bail may be revoked pursuant to G. L. c. 276, § 58 only where continued release "will seriously endanger any person or the community", and pursuant to G. L. c. 276, § 58B only where "there are no conditions of release that will reasonably assure the person will not pose a danger to the safety of any other person or the community; or the person is unlikely to abide by any condition or combination of conditions of release".

PART I: Revocation Under c. 276, § 58 - NEW OFFENSE if Released Under § 58

The Bail Warning

A Judge or Magistrate must warn any person released on personal recognizance or bail that if they commit a new offense, bail may be revoked and they may be held for a **period not to exceed 60 days**. The court cannot order a lesser or greater time period than 60 days. *Commonwealth v. Pagan*, 445 Mass. 315, 322 (2005).

Proof of Bail Warning: § 58 requires that a bail warning be given at arraignment. At a revocation hearing, the docket entry indicating that a bail warning was provided is prima facie evidence that the warning was given. *para. 6*

When Can the Commonwealth Move to Revoke Bail under § 58?

The Commonwealth may move to revoke bail when a juvenile commits a new offense while released on bail or personal recognizance. The Commonwealth does not have to charge a defendant with a crime in order to show that there is probable cause that a new offense has been committed. *Delaney v. Commonwealth*, 415 Mass. 490 (1993).

Timing of Hearing: The hearing shall be held at the **juvenile's first appearance** in the Court with jurisdiction over the new offense unless the juvenile, "or the attorney for the commonwealth, seeks and the court allows, a continuance because a witness or document is not immediately available." Except for good cause, a continuance on motion of the juvenile shall not exceed seven days and on motion of the attorney for the commonwealth may not exceed three business days. If a continuance is granted, the juvenile **may** be detained. *par. 6*.

What Must a Court Find in Order to Revoke Bail under § 58?

In order to revoke bail, the Court must find:

- Probable cause to arrest for the new offense (while on release for another charge); **and**
- “The release of said person will seriously endanger any person or the community and detention of the person is necessary to reasonably assure the safety of the person or the community.”

A court is not required to revoke bail - “the court *may* revoke bail on the prior charge and *may* order said person held without bail pending the adjudication of said prior charge, for a period not to exceed sixty days.” *par. 6*. Bail revocation under § 58 is limited to cases involving subsequent serious offenses where the nature of the offense constitutes a danger. *Paquette v. Commonwealth, 440 Mass. 121, 128 (2003)*.

Evidentiary Issues at the Hearing

There is no *right* to an evidentiary hearing at revocation. Hearsay, including police reports and witness statements are admissible. Representations of counsel can be offered to establish probable cause. *Paquette*, at 134. However, the Court has the *discretion* to hold an evidentiary hearing, including cross-examination of witnesses, if warranted. *Paquette*, at 133. The Court **must state in writing** the reasons for revoking bail. *par. 6. Paquette*, at 135.

What Factors Does the Court Have to Consider?

In determining whether detention is necessary to protect persons or the community, the Court *must* consider the following factors. *par. 6*.

- The gravity, nature and circumstances of the offense charged
- Person’s record of convictions, if any
- Whether convictions involve the use or threatened use of physical force or violence against any person
- Whether the person is on probation, parole, or other release pending completion of sentence for any conviction
- Whether the person is on release pending sentence or appeal for any conviction
- Person’s mental condition
- Any illegal drug distribution or drug dependency

Remember, while the Court does not have to revoke bail it must consider the above factors when making a decision.

Issues Relating to Revocation

Timing of Trial: If bail is revoked the trial should be held “as soon as reasonably possible.” *Pagan*, at 323. A juvenile is entitled to a trial within the 60 day revocation period if the juvenile is prepared for trial.

Bail Revoked in District Court on Delinquency Case: If bail is revoked on a delinquency case for a new offense in the District Court, the mittimus should reflect that the youth is to be detained at DYS, not held in an adult jail, and that they will be brought back to juvenile court in 15 days. If bail is set on the new offense, the youth will be held in an adult jail.

Review of Revocation

- There is no right to Superior Court bail review if bail is revoked. *Commonwealth v. Delaney, at 496*.
- The bail order “shall” be reviewed if any of the cases on which bail was revoked have been dismissed, or the juvenile has been acquitted. § 58 *par. 6*. The bail order must be reviewed by the judge who revoked bail. *Pagan*, at 320.
- There is no right to habeas corpus relief. *Sherriff of Suffolk County v. Pires, 483 Mass. 96 (2002)*.
- Revocation may be reconsidered if the juvenile or the Commonwealth can show that “a manifest injustice will result if a bail revocation order is not revisited.” *Pagan*, at 324. The hearing must be before the judge who issued the revocation order. *Id.*

PART I: Revocation Under c. 276, § 58 - NEW OFFENSE if Released Under § 58 (con't)

Review of Revocation (con't)

15 Day Return Date for Juveniles: Any juvenile who is in custody must be returned to court every 15 days. c. 119, § 56. Bail revocation does not invalidate the 15 day rule.

Appeal of Revocation: The juvenile may file an appeal to the single justice on errors of law pursuant to c. 211, § 3.

Expiration of the 60 Day Revocation Period

There is no extension of the bail revocation period. On the 60th day the juvenile must appear in court for a new bail hearing. The original bail is not automatically reinstated. *Pagan*, at 323. At this bail hearing the court may consider the new arrest which triggered the bail revocation. *Pagan*, at 324.

Case Resolved: The bail revocation “automatically terminates” once the **prior charge** is resolved. *Pagan*, at 320. Resolving the **new offense**, which triggered the bail revocation, does not lead to expiration of the bail revocation order. However, in these circumstances, the juvenile may request the judge who revoked the juvenile’s bail to reconsider the bail revocation to prevent a “manifest injustice.” *Pagan*, at 324.

Bail on the New Charge

Bail must be set at arraignment on the new case. The Commonwealth cannot “reserve” its request for a bail hearing on the new charge until after the 60 days are up. *Paquette*, at 135.

PART II: Revocation Under c. 276, § 58B - NEW OFFENSE if Released Under § 58A or for VIOLATION OF CONDITIONS set under c. 276, §§ 58, 87, 58A or 42A

When does the Court use the Procedures Outlined in c. § 58B to Revoke Bail?

The Court follows the procedures outlined in § 58B under the following circumstances:

- When a client released on bail pursuant to a “dangerousness hearing” (c. 276, § 58A) violates conditions or commits a new offense. See c. 276, § 58A (2)(A).
- When a client released on conditions under c. 276, § 87 (pre-trial probation statute) or c. 276, § 42A (certain crimes against family members) and violates conditions.
- When a client released on the narrow conditions specified under § 58 violates conditions: “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.” § 58, *par. 1*.
- When a client is released pursuant to c. 276 § 58, is alleged to have committed a new offense, and the Commonwealth elects to proceed pursuant to §58B. See *Josh J.*, 478 at 719.

What Must the Court Find to Revoke Bail under § 58B?

The court “shall” enter a revocation order if:

- *Probable cause* exists to believe that person has committed a **federal or state crime** while on release (under § 58A) , *or*
- There is *clear and convincing evidence* that the person has violated any **other condition** of release.

AND

- The court finds that there are no conditions of release that will reasonably assure the person will not pose a danger to the safety of any other person or the community, *or*
- The person is unlikely to abide by any condition or combination of conditions of release.

A Court is not required to revoke bail under this section unless it specifically finds that the juvenile is unlikely to abide by conditions or poses a danger. An alternative to revocation of bail is to craft additional conditions that will alleviate the court’s concerns. § 58B para. 2

Bail Warning

Unlike § 58, § 58B does not have a bail warning provision. However, if a juvenile is released on conditions under § 58 or § 87 they should be advised of the consequences of violating any of the conditions - that they will be held without bail for **90 days**. See *Jake J. v. Commonwealth*, 443 Mass. 70, 76 (2000).

Time Limit for Pre-trial Detention under § 58B

“A person shall not be detained for a period exceeding **90 days** excluding any period of delay as defined in Mass. R. Crim. P 36(b)(2).” If bail is revoked your client should be brought to trial “**as soon as reasonably possible.**” § 58B, par. 2. Periods of delay, which toll the 90 days, may include agreed upon continuances and incompetency. In order to keep the clock running you must state unequivocally that you are ready for trial and object to any continuances.

Does 90 days mean 90 days? There is no case that specifically address whether the juvenile must be held for the full 90 day period, however, in *Commonwealth v. Pagan*, *supra*, the court addressed the length of time for detention under § 58, and held that “not to exceed 60 days” meant 60 days exactly.

The Revocation Hearing under § 58B

The hearing should be held upon the juvenile’s **first appearance** unless there is a request for a continuance.

Continuance of the Hearing: The Commonwealth may request a continuance for up to three days. The juvenile may request a continuance for up to seven days. Any continuance that exceeds these time periods must be for “good cause.” The juvenile *may be released* on conditions during the continuance, if the Court determines that there are conditions that the juvenile will abide by, and that will not pose a danger to another person or the community. § 58B, par. 2.

Evidence at the Hearing: There are no cases on the type of evidence that can be submitted during a § 58B revocation hearing. The standard of proof for finding a violation of conditions (not a new offense) is “clear and convincing evidence.” Counsel may argue that the hearing should be similar to a hearing on revocation for a new offense, or that an evidentiary hearing may be necessary if the proof offered at the hearing is not reliable or if due process requires confrontation.

Jake J. v. Commonwealth, 433 Mass. 70 (2000).

Revocation for a New Offense

If the revocation is for a new offense for a person released on conditions under § 58A and there is probable cause to believe that a new crime was committed, there is a **rebuttable presumption** that no conditions “will assure that the person will not pose a danger to the safety of any other person or the community.” § 58B, *par.2*. Bail revocation pursuant to § 58B after release pursuant to § 58, “requires not only a showing that the person will pose a danger to any other person or the community but also that there are no conditions of release that will reasonably assure the person will not pose such a danger.” *Josh J.* at 723 (emphasis added). Arguably, the rebuttable presumption applies only to those already found dangerous pursuant to § 58A and not those released pursuant to § 58. See *Josh J.* fn 7, (“the rebuttable presumption in § 58B may be difficult to reconcile with the presumption recognized in § 58 that an individual will be released on bail or personal recognizance.”)

Amending Conditions of Release

If the Court finds that the juvenile has violated a condition of release or committed a new offense while released on conditions under § 58A, the Court is not required to revoke bail. The Court may amend conditions of release if the juvenile will abide by new conditions, and those conditions provide assurance that the person will not be a danger to any person or the community. § 58B, *par. 2*. If there are no conditions of release that will protect the community, the court *shall* revoke bail.

Appeal of Revocation:

The juvenile may file an appeal to the single justice on errors of law pursuant to *c. 211, § 3*.

Dangers of Detention for Youth

c. 119, § 53 states:

“ the care, custody and discipline of the children brought before the court shall approximate as nearly as possible that which they should receive from their parents and that, as far as practicable, they should be treated, not as criminals, but as children in need of aid, encouragement and guidance.”

Detention has been shown to be harmful to youth. Revocation requires that youth spend at least 60 or 90 days in detention and can restrict the judge’s ability to release youth to the community if programs or services become available. Options such as setting a cash bail allow the judge more flexibility to comply with the juvenile court’s mandate to provide “aid, encouragement and guidance.”

This guide can be used in conjunction with the YAD Courtroom Practice Guides to Bail 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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