



## Committee for Public Counsel Services Youth Advocacy Division

### COURTROOM PRACTICE GUIDE TO DANGEROUSNESS HEARINGS c. 276, § 58A

The preventative detention statute allows the Court to hold a juvenile in certain circumstances without bail no longer than **120 days** if there is **clear and convincing** evidence that no conditions of release will reasonably assure the safety of others or the community. If the juvenile is charged with an enumerated offense and is “**held under arrest**,” which has been interpreted to include individuals who have been arrested and released or who are “subject to an outstanding arrest warrant for an enumerated offense,” *Commonwealth v. Diggs/Commonwealth v. Soto*, 475 Mass. 79 (2016), the Commonwealth may move for dangerousness hearing which must be held on the juvenile’s **first appearance** before the court. After the hearing, the Court may release the juvenile on personal recognizance, release on conditions, or hold without bail. The statute applies to juveniles. *Victor V. v. Commonwealth*, 423 Mass. 793 (1996). This guide is intended for use in juvenile court .

#### Eligible Offenses § 58A (1)

- Burglary and arson whether or not a person has been placed at risk.
- A violation of an order of protection:
  - c. 208, § 18, 34B or 34C (divorce proceeding orders);
  - c. 209, § 32 (probate court order re: spouses);
  - c. 209A, §§ 3, 4, or 5 (abuse prevention orders); or
  - c. 209C, §§ 15 or 20 (probate court orders relative to children born out of wedlock).
- A misdemeanor or felony involving abuse as defined in c. 209A, § 1 or while a 209A order is in effect.
- c. 94C drug offenses with a mandatory minimum term of 3 years or more.
- c. 268, §13B Intimidation of witnesses or jurors.
- c. 269, §10(a), 10(c), 10(m) or 269, §10G Gun charges - Commonwealth cannot move for dangerousness hearing on possession of a large capacity feeding device without a charge of possession of a large capacity weapon.
- A felony offense that has as an element the use, attempted use or threatened use of physical force or any other felony that by its nature, involves a “substantial risk that physical force against the person of another may result.”
- c. 90, § 24 OUI third or subsequent, “within 10 years of the previous conviction for such violation” \*
- Convicted of a violent crime, defined in c. 140 § 121, where a term of imprisonment was served and arrested and charged with a second or subsequent offense of felony possession of a weapon or machine gun as defined in c. 140 § 121

\*Does not apply to juveniles

#### Continuing the Hearing § 58A (4)

The §58A hearing **must be held on the juvenile’s first appearance** unless:

**Commonwealth request for continuance** – must show probable cause to arrest and good cause for a continuance. The court should make a specific finding that good cause has been shown and what the good cause is. The continuance may not exceed 3 days and any further requests for a continuance must be supported by good cause. *Mendonza v. Commonwealth*, 423 Mass. 771, 792 (1996).

The Court must hold a hearing on the Commonwealth’s request for continuance:

- Commonwealth must present **probable cause** by either presenting a properly issued complaint or a reading of the police report;
- Juvenile is represented by counsel and can “make representations” and arguments that probable cause does not exist; and
- Juvenile is **not entitled** to cross-examine witnesses or present evidence but the court has discretion to allow them to do so. *Commonwealth v. Lester L.*, 445 Mass. 250, 261 (2005).

**Juvenile seeks continuance**— unless good cause is shown a continuance shall not exceed 7 days.

**Detention during continuance** – the court does not have discretion to release the juvenile if probable cause exists. *Id.*

**The Hearing § 58A (4), (5)**

At the hearing the **juvenile is entitled to** legal representation, an opportunity to be heard, present witnesses, cross-examine the Commonwealth's witnesses, and present information.

Prior to the summons of an alleged victim or their family member to appear as a witness at the hearing, "a person shall demonstrate to the court a good faith basis for the person's reasonable belief that the testimony from the witness will be material and relevant to support a conclusion that there are conditions of release that will reasonable assure the safety of any other person or the community ."

Once the hearing begins, the juvenile **may** be detained pending its completion.

**Rules of Evidence do not apply.** Both parties may offer hearsay evidence during the hearing. *Mendoza*, 423 Mass. at 786. If the Commonwealth proceeds on hearsay evidence alone, said evidence must bear substantial indicia of reliability. *Abbott A. v. Commonwealth*, 458 Mass. 24, 24-26 (2011)(courts to use the same analysis regarding admissibility of hearsay at § 58A hearings as used in probation violation proceedings, see *Commonwealth v. Durling*, 407 Mass. 108 (1990)). The judge "**shall** consider hearsay contained in a police report or the statement of an alleged victim or witness." See Mass. Guide to Evidence § 1101 (c)(3) (Applicability to Evidentiary Sections).

The court **shall consider the following factors** on the basis of any information which it can reasonably obtain:

- nature and seriousness of the danger posed to any person or the community that would result by the juvenile's release;
- nature and circumstance of offense charged;
- the potential penalty;
- juvenile's family ties;
- juvenile's employment record;
- juvenile's history of mental illness;
- juvenile's reputation;
- risk that juvenile will obstruct justice or attempt to obstruct justice;
- risk that the juvenile will threaten, injure or intimidate a prospective witness or juror;
- juvenile's record of convictions;
- any illegal drug distribution or present drug dependency;
- juvenile's bail status in other cases;
- whether allegations involve abuse or a violation of a temporary or permanent order of protection;
- whether juvenile has had orders of protection issued against them; and
- juvenile's probation status and/or parole status and whether juvenile is on release pending sentence or during an appeal from a conviction.

**Court Can Release or Detain After the Hearing § 58A (2), (3), (4)**

The court must find one of the following:

- **release on personal recognizance** will reasonably assure appearance of the juvenile and will assure the safety of any other person or the community;
- personal recognizance will not reasonably assure the appearance of the juvenile or will endanger the safety of any other person or the community but **conditions of release** will reasonably assure the safety of any other person or the community; or
- If the court decides to **detain** the juvenile, it must find by **clear and convincing evidence** that no conditions of release will reasonably assure the safety of any other person or the community.

**Court Can Release or Detain After the Hearing § 58A (2), (3), (4) (cont'd)****Release on conditions:**

If the court decides to release the juvenile on conditions, the court **must** do two things:

- impose the condition that the juvenile not commit a federal, state or local crime; **and**
- impose “the **least restrictive** further condition, or combination of conditions, that [the court] determines will reasonably assure the appearance” of the juvenile and “the safety of any other person or the community” as follows:
  - remain in the custody of a designated person who will supervise the juvenile, report any violation to the court, and who will assure the appearance of the juvenile and that the juvenile will not pose a danger;
  - maintain employment or seek employment;
  - maintain or commence an educational program;
  - stay away from persons or places and restrict travel;
  - stay away from and no contact with victims or witnesses;
  - report on a regular basis to a designated agency;
  - comply with a curfew;
  - refrain from possessing weapons;
  - refrain from excessive use of alcohol, or any use of a narcotic or controlled substance without a prescription;
  - undergo medical, psychological or psychiatric treatment (including substance abuse program) and remain in program if required for that purpose;
  - abide by an agreement to forfeit a specific item of value, or execute a bond to be forfeited, for juvenile’s failure to appear;
  - return to custody for specified hours following release for employment, school, or other limited purposes; and/or
  - any other condition that is reasonably necessary to assure the appearance of the juvenile and to assure the safety of any other person and the community.

A financial condition that results in the pretrial detention of the juvenile cannot be imposed.

Conditions may be amended to impose additional or different conditions of release at any time.

**Detention:**

If the court decides to detain the juvenile the court must:

- issue **written findings** of fact and state the reason for detention;
- direct that the juvenile be “committed to custody or confinement in a corrections facility **separate**, to the extent practicable, from persons awaiting or serving sentence or being held in custody pending appeal”; and
- direct that the juvenile be “afforded reasonable opportunity for **private consultation** with [their] counsel.”

**Other issues:**

If the judge orders detention under § 58A (4) or release on conditions under (3), then the clerk shall immediately notify probation of the order and said order shall be recorded in the juvenile’s criminal record and the domestic violence record keeping system.

The **hearing may be reopened** at any time before trial if the court finds that information exists that was not known at the time of the hearing that has a material bearing on the issue or if there has been a change of circumstances and that such information or change in circumstances has a material bearing on the issue of whether there are conditions of release that will “reasonably assure the safety of any other person and the community.” § 58A(4).

If a juvenile is detained, they “shall be brought to a trial as soon as reasonably possible, but in absence of good cause, the [juvenile] shall not be detained for a period exceeding **120** excluding any period of delay as defined in Mass. R. Crim. Pro. R. 36(b)(2)[speedy trial].” § 58A (3). See *Abbott A. v. Commonwealth, supra* (the time that a juvenile is incompetent is excluded from time calculation but warned that there is a due process limitation on how long an incompetent juvenile may be held prior to trial, when the court issued its opinion the juvenile had been held for 14 months and the court found no due process violation).

**Appeal § 58A (7)**

The juvenile may seek **superior court review** of an order releasing them on conditions or of a detention order. *Commonwealth v. Madden*, 458 Mass. 607, 612 (2010). The superior court must hear the petition for review as “speedily as practicable and in any event within five business days of the filing of the petition.” The superior court justice reviewing the order may consider the record below as well as any supplemental information provided by the parties. *Id.* The superior court may release the juvenile on their own recognizance, release on bail, release on conditions, or continue to hold without bail. *Id.*

A superior court order of detention may be reviewed by application to a **single justice** pursuant to G. L. c. 211, § 3. *Mendonza*, 423 Mass. at 775.

**Other Issues**

If, after a § 58A hearing, the court releases the juvenile on conditions and there is an allegation they **violated the conditions**, the procedures for bail revocation set forth in c. 276, § 58B are followed. (See YAD Courtroom Practice Guide to Bail Revocation, Part II).

**Incompetent Juvenile.** It is not a per se violation of due process for a court to go forward with a dangerousness hearing where the juvenile is incompetent. *Abbott A.* 458 Mass. at 33 (due process might be a bar if the incompetency precluded the court from gaining information to make a reliable determination of dangerousness).

In certain circumstances, a **witness’s prior recorded testimony** from a § 58A hearing may be admissible at a subsequent trial. See *Commonwealth v. Hurley*, 455 Mass. 53 (2009)(court allowed Commonwealth to admit transcript of witness’s prior recorded testimony from § 58A hearing where witness was unavailable (dead) and where the defendant had an adequate opportunity to cross-examine the witness). Compare *Commonwealth v. Arrington*, 455 Mass. 437 (2009)(where court did not allow unavailable (dead) witness’s prior recorded testimony from § 58A hearing because defendant did not have an adequate opportunity to cross-examine the witness). See also, *Commonwealth v. Housewright*, 470 Mass. 665 (2015)(SJC provides guidelines for trial courts to analyze whether a prosecution witness is unavailable because of illness or infirmity).

A **juvenile’s testimony** at a § 58A hearing may be **admissible** at trial. Mass. Guide to Evidence § 804(b)(1)(prior recorded testimony), § 801(d)(2)(admissions).

There are no cases relative to whether the juvenile court must hold a new § 58A hearing on a **youthful offender** arraignment where a juvenile was detained pursuant to § 58A on the underlying delinquency charge. In *Commonwealth v. Murchison*, 428 Mass. 303 (1998), the Court held that where district court charges are dismissed to an indictment, a § 58A detention order does not transfer to the superior court and there must be a new § 58A hearing if the Commonwealth so moves. Because the charges in district court are dismissed, the court reasoned, there is no mechanism to support continued detention in superior court. *Id.* at 307(there is no provision in § 58A that allows a transfer of bail as opposed to §58, the bail statute, which has this transfer provision). The question remains whether *Murchison* applies to youthful offender indictments because, while the underlying delinquency charges are dismissed, the matter stays in the same court. It should be noted that in *Murchison*, the Court held that if § 58A detention is requested at the **superior court arraignment**, the defendant is **entitled to a new hearing** where they can present new information but the Commonwealth may offer the transcript of the prior and the court can give it whatever weight it deems appropriate. *Id.* at 307-308. If detention is ordered, a “new period of ninety days would run.” *Id.*

*This guide is not intended as the final authority on this subject. It is important to keep up-to-date on any changes in the law.*

Wendy Wolf, Director of Training, [wwolf@publiccounsel.net](mailto:wwolf@publiccounsel.net), Holly T. Smith, Esq., [hsmith@publiccounsel.net](mailto:hsmith@publiccounsel.net)

Youth Advocacy Division

44 Bromfield Street, Boston, MA 02108

617-482-6212

[www.publiccounsel.net/ya/](http://www.publiccounsel.net/ya/)