

CHAPTER 9

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Pretrial Release, Bail, and Pretrial Detention

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§ 9.1 INTRODUCTION

The issue of pretrial release of a person charged with a crime is one of the most important components of a criminal case for both the prosecution and the defense.¹ In Massachusetts, the issue may arise in one of three conceptually distinct formats — bail, preventive pretrial detention, and bail revocation. Although each format has distinct statutory procedures, the underlying stakes are similar. For the defendant, it is a question of the deprivation of the fundamental right to liberty which may also implicate one's job, family, reputation, and other aspects of life.² The most severe consequences may follow what can often be a very summary proceeding. Indeed, in many cases, pretrial incarceration may be the only “time” a defendant ever serves.

Pretrial incarceration may also dramatically affect the defendant's ability to prepare for trial and to participate meaningfully in plea negotiations. An incarcerated defendant faces tremendous obstacles to consulting with counsel, searching for witnesses, investigating details of the Commonwealth's case against him, and earning money for legal fees and expenses. Moreover, a defendant who is held in custody will feel great pressure to seek the earliest possible trial date, perhaps before full investigation and preparation have been completed. A defendant in this situation may also feel much more pressured than a person at liberty to accept a plea bargain. Also, at trial, an incarcerated defendant may be seen by a judge or jury as more likely to be guilty, at least if counsel does not take steps to conceal the fact of a client's incarceration.³

Pretrial proceedings relating to bail and incarceration thus implicate a range of constitutional protections from the presumption of innocence and the right to present a defense to due process and the right to counsel.⁴ These concerns are similar regardless of whether the proceedings are technically denominated as bail proceedings, preventive detention, or bail revocation.⁵ Nevertheless, because the statutory scheme — and to

¹ “The right to be bailed in certain cases is as old as the law of England itself. . . .” *Commonwealth v. Baker*, 343 Mass. 162, 165 (1961), quoting 1 Stephen, *History of Criminal Law of England*, 233 (1883).

² *See generally* *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975).

³ A defendant should not typically appear before the jury in shackles or prison garb. *See Deck v. Missouri*, 544 U.S. 622 (2010); *Estelle v. Williams*, 425 U.S. 501 (1976).

⁴ U.S. Const. amends. 5, 6, 8, 14; Mass. Const. Declaration of Rights arts. 1, 10, 12, 26.

⁵ *Cf. Kansas v. Hendricks*, 521 U.S. 346 (1997) (upholding against various Constitutional challenges the Kansas “Sexually Violent Predator Act,” which may impose lifelong incarceration if finding of mental illness plus dangerousness is made).

some degree the background constitutional norms — differ among these three categories, this chapter will analyze them separately.

§ 9.2 IS THERE A RIGHT TO PRETRIAL RELEASE?

§ 9.2A. STATUTORY RIGHTS: FROM BAIL TO PRETRIAL DETENTION

Until 1982, Massachusetts law provided a statutory right to bail, with a presumption of pretrial release on personal recognizance, except in cases of treason⁶ or first degree murder.⁷ A default no longer removes the presumption of release.⁸ The law was amended in 1982 to authorize revocation of bail for sixty days if a defendant who was free on bail was arrested for another offense.⁹ Then in 1992, a law was passed that authorized certain officials to refuse to release a defendant, or to set a higher amount of bail, if the defendant was found to pose “a danger to the community.” This law was declared unconstitutional by a unanimous decision of the S.J.C. in *Aime v. Commonwealth*.¹⁰ The S.J.C. decision, grounded in the U.S. Constitution, found the law defective primarily because it: (1) failed to limit its application to specifically named, serious crimes; (2) did not require proof of facts against the defendant by at least clear and convincing evidence; and (3) failed to guarantee rights of the defendant to be heard and to cross-examine witnesses. Following the *Aime* decision, the 1994 Bail Reform Act¹¹ radically changed the Massachusetts statutory scheme to its current form of two basic parallel systems — bail and preventive detention — which are delineated more fully below.¹² The provisions of the Bail Reform Act have been found to be constitutional.¹³

As discussed below, there are many statutory provisions bearing upon bail and pretrial detention issues, but the most fundamental provisions are G.L. c. 276, § 57 which addresses superior court proceedings, G.L. c. 276, § 58, which addresses district court proceedings, G.L. c. 276 § 58A, which addresses pretrial detention based on

⁶ G.L. c. 264, § 1.

⁷ Bail is discretionary in first-degree murder cases (*Abrams v. Commonwealth*, 391 Mass. 1019 (1984); *Commonwealth v. Baker*, 343 Mass. 162 (1961)), and the preference for personal recognizance does not apply to such cases. *Commonwealth v. Flaherty*, 384 Mass. 802 (1981); *Abrams, supra*. For other cases, G.L. c. 276 § 58 established “the right of the accused, in most circumstances, to be admitted to bail on personal recognizance without surety.” *Commonwealth v. Roukus*, 2 Mass. App. Ct. 378, 381 (1974). *Accord, Commonwealth v. Pagan*, 445 Mass. 315, 319 (2005); *Delaney v. Commonwealth*, 415 Mass. 490, 495 (1993).

⁸ G.L. c. 276, § 67 once stated that the presumption of release on personal recognizance was forfeited after a default, but this statute was repealed in 1994. However, a default would typically be a violation of a “condition of release,” in which case an order of revocation of bail and detention could result if the judicial officer finds “there are no conditions of release that will “reasonably assure the person will not pose a danger” or that the person “is unlikely to abide by any condition or combination of conditions of release. G.L. c. 276, § 58B.

⁹ *See infra* § 9.5B(2). *See also* *Commonwealth v. Pagan*, 445 Mass. 315 (2005) (Up to 60 days has been interpreted to mean exactly 60 days).

¹⁰ 414 Mass. 667 (1993).

¹¹ G.L. c. 276, § 58A; *see infra* § 9.5B(1).

¹² For bail and pretrial detention procedures relating to juveniles, *see infra* ch. 46.

¹³ *Mendoza v. Commonwealth*, 423 Mass. 771 (1996).

dangerousness, and G.L. c. 276 § 58B, which addresses special conditions that may be imposed if a defendant violates terms of release as imposed under either § 58 or § 58A.

Fugitives subject to a governor's warrant and interstate rendition to another state *may* be granted bail pending a hearing pursuant to G.L. c. 276, § 20D, unless the crime is punishable by death or life imprisonment.¹⁴ *Material witnesses* may be required to post bail pending a trial.¹⁵

Additionally, it should be noted that alternative, noncriminal routes exist for the commitment of a dangerous and mentally ill person,¹⁶ an alcoholic, or a substance abuser.¹⁷ Moreover, arrestees may be subject to detention in *protective custody* if “incapacitated” by virtue of being (1) unconscious, (2) in need of medical attention, (3) likely to suffer or cause physical harm or property damage, or (4) disorderly.¹⁸ Finally, counsel should recognize that clients in immigration or extradition proceedings may face a very different, highly complex set of problems in obtaining release from pretrial incarceration.¹⁹

§ 9.2B. CONSTITUTIONAL PARAMETERS

The bail or preventive detention decision must satisfy federal and state constitutional provisions. Both the eighth amendment to the U.S. Constitution and article 26 of the Massachusetts Constitution Declaration of Rights prohibit the setting of “excessive bail.” The federal clause had long been interpreted to mean that no bail may be set greater than that necessary to ensure the presence of the defendant at trial and possibly to establish an underlying right to bail.²⁰ However, in 1987 the Supreme Court held that the prevention of flight is not the government's sole interest in setting bail and, where public safety required it, pretrial detention without bail does not violate the Eighth Amendment — provided, however, that the jurisdiction's legislative scheme is designed to effectuate that purpose.²¹

¹⁴ Upton Petitioner, 387 Mass. 359, 366 (1982) (bail should be granted where “reasonably certain” Commonwealth will be able to deliver fugitive). *See also supra* § 6.3B.

¹⁵ *See* G.L. c. 276, §§ 45–52, 54. *See also infra* § 13.2E.

¹⁶ *See* G.L. c. 123, §§ 7, 8, 15, 16.

¹⁷ *See* G.L. c. 123, § 35.

¹⁸ G.L. c. 111B, § 3. This statute was passed simultaneously with the repeal of a statute providing for criminal convictions and incarceration based on drunkenness. In one case where the police held an “OUI” defendant in “protective custody,” the Greenfield District Court dismissed the case for “egregious police conduct” because the police sent the defendants to a House of Corrections rather than a noncorrections facility, denied them rights to telephone calls and breathalyzer tests, and failed to follow the statute in other specified ways. *Commonwealth v. Jablonski*, Greenfield District Court Nos. 9141 JC 0275 and 0277 (MLW # 16-033-92) (Oct. 26, 1992).

¹⁹ *United States v. Lui Kin-Hong*, 83 F.3d 523 (1st Cir. 1996) (finding no special circumstances to override presumption against bail in extradition case). *See also infra* ch. 42.

²⁰ *Stack v. Boyle*, 342 U.S. 1 (1951).

²¹ *United States v. Salerno*, 481 U.S. 739, 752–55 (1987). Three years earlier, the Supreme Court had approved a New York law permitting juveniles charged with delinquency to be held before trial to prevent them from committing additional crimes — the first Supreme Court case upholding a type of preventive detention. *Schall v. Martin*, 467 U.S. 253 (1984). *See also, Abbot A. v. Commonwealth*, 458 Mass. 24 (2010).

The only arguable substantive limitation of the Bail Clause is that the Government's proposed conditions of release or detention not be “excessive” in light of the perceived evil. . . . Thus, when the Government has admitted that its only interest is in preventing flight, bail must be set by a court at a sum designed to insure that goal, and no more.²²

Under the Massachusetts statutory scheme, unless the preventive detention procedure is invoked, bail is only authorized when there is reason to believe that otherwise the defendant would flee.²³ Any bail in excess of the amount designed to ensure presence at trial should therefore be opposed both under the federal and state “excessive bail” constitutional clauses.

There are several other constitutional aspects to bail and pretrial detention. *First*, the due process clauses²⁴ require that no one be punished prior to trial.²⁵ While the Supreme Court has approved the federal pretrial detention statute as “regulatory” and not “punitive,”²⁶ and the Supreme Judicial Court has upheld the Massachusetts scheme,²⁷ conditions or duration of incarceration, if excessive for the “regulatory purpose,” might still be found punitive and unconstitutional.²⁸ *Second*, procedures in setting or denying bail might also be inadequate under the due process clauses.²⁹ *Third*, the federal and state equal protection clauses³⁰ may require that an indigent defendant not be incarcerated simply because he cannot afford the same bail as someone else. At the very least, bail must be set in reference to the finances of the defendant.³¹ Acting on

²² United States v. Salerno, 481 U.S. 739, 754 (1987).

²³ An amendment allowing for bail to be set (or denied) based on dangerousness was declared unconstitutional by the S.J.C. *See supra* § 9.2A.

²⁴ U.S. Const. amends. 5, 14; Mass. Const. Declaration of Rights art. 12.

²⁵ Bell v. Wolfish, 441 U.S. 520, 535 n.16 (1979), *cited in* Aime v. Commonwealth, 414 Mass. 667 (1993).

²⁶ United States v. Salerno, 481 U.S. 739, 746–47 (1987).

²⁷ Mendonza v. Commonwealth, 423 Mass. 771 (1996).

²⁸ *See* United States v. Salerno, 481 U.S. 739, 747–48 (1987); Schall v. Martin, 467 U.S. 253, 270 (1984); Bell v. Wolfish, 441 U.S. 520 (1979).

²⁹ Gerstein v. Pugh, 420 U.S. 103 (1975), and Riverside County v. McLaughlin, 500 U.S. 44 (1991) (probable-cause determination by neutral magistrate required within 48 hours to justify continued pretrial detention). In United States v. Salerno, 481 U.S. 739, 747 (1987), 751, 752, the court upheld a preventive detention scheme after noting it included such procedures as: a burden on the prosecution of clear and convincing evidence; rights to counsel, to present evidence, and to cross-examine; specific statutory factors; written findings and written reasons; prompt hearing; immediate appellate review; limits on invocation except for the most serious crimes; and limits of the length of the pretrial period under the Speedy Trial Act. Failure to observe some of these safeguards led the S.J.C. to overturn (on the basis of *Salerno's* due process requirements) the 1992 Massachusetts amendment to § 58 permitting “dangerousness” to provide a basis for denial of, or setting of, bail. Aime v. Commonwealth, 414 Mass. 667 (1993), discussed more fully *supra* at § 9.2A.

³⁰ U.S. Const. amend. 14; Mass. Const. Declaration of Rights art. 1.

³¹ Stack v. Boyle, 342 U.S. 1 (1951) (financial ability is one of factors that must be considered). *See also* Pannell v. United States, 320 F.2d 698 (D.C. Cir. 1963) (Bazelon, C.J., concurring in part and dissenting in part) (small collateral from impecunious defendant as effective as larger collateral from wealthy person); United States v. Mantecon-Zayas, 949 F.2d 548 (1st Cir. 1991) (construing 18 U.S.C.A. § 3142(c)(2) and (i), and holding that court may set bail amount that exceeds defendant's financial means if such bail is necessary to ensure presence

a bail application, Justice Douglas noted the equal protection problems inherent in demanding a substantial bond from an indigent, doubting whether an indigent could “be denied freedom, where a wealthy man would not, because he does not happen to have enough property to pledge for his freedom.”³² Finally the presumption of innocence and constitutional rights to present a defense and to counsel³³ might be abridged by the adverse impact of pretrial incarceration and in some circumstances may require release in the custody of a third person for such purposes as searching for witnesses or unfettered consultation with counsel.³⁴

§ 9.3 WHO MAY SET BAIL AND WHEN

Although pretrial liberty is most often in issue at arraignment, bail or personal recognizance may be set prior to arraignment at the police station³⁵ (where a bail commissioner may set the terms of release and is paid a statutory fee)³⁶ or after arraignment (when either the prosecution or the defendant can move for a change in bail).³⁷ If the arrested defendant is not released from the station house³⁸ on personal

at trial; but when defendant indicates that condition of release is unobtainable, court must explain reasons for determining requirement when adhering to it).

³² *Bandy v. United States*, 81 S. Ct. 197 (1960) (single-justice opinion by Douglas, J.). No Supreme Court case has squarely applied the equal protection clause to bar bail beyond a particular defendant's ability to pay, although in *Tate v. Short*, 401 U.S. 395 (1971) and *Williams v. Illinois*, 399 U.S. 235 (1970), the clause was applied to bar postconviction sentences for indigents that exceeded what nonindigents could receive. In *Pugh v. Rainwater*, 557 F.2d 1189 (5th Cir. 1977), the court, on equal protection grounds, required consideration of nonfinancial forms of release before money bail could be set for an indigent.

³³ U.S. Const. amends. 5, 6; Mass. Const. Declaration of Rights art. 12.

³⁴ *Kinney v. Lenon*, 425 F.2d 209 (9th Cir. 1970); *United States v. Reese*, 463 F.2d 830 (D.C. Cir. 1972). In *United States v. Angiulo*, Crim. No. 83-235-N (D. Mass.), the court ordered the defendant released in the custody of federal marshals for seven and a half hours per day so that he might prepare for trial at counsel's office. Memorandum and Order of Nelson, J., 2/25/85, *aff'd*, No. 85-1161 (1st Cir. March 6, 1985) (unpublished opinion).

³⁵ *But see* *Commonwealth v. Whitcomb*, 37 Mass. App. Ct. 929, 930 (1994) (defendant, who refused to answer booking questions or to avail himself of *Miranda* rights, telephone, Breathalyzer, or medical examination is not entitled to a bail hearing until after booking is completed). *See also* *Commonwealth v. Maylott*, 43 Mass. App. Ct. 516 (1997) (police held to have right to require defendant to complete booking procedure before he could assert statutory rights to telephone call, Breathalyzer, or prompt bail hearing).

³⁶ This fee is a maximum of \$40 regardless of the number of charges, except that an additional \$5 may be charged for each extraterritorial recognizance up to a total fee of \$50. G.L. c. 262, § 24. Under Rule 12 of the Rules Governing Persons Authorized to Take Bail, promulgated by the superior court under authority of G.L. c. 276, § 57, the fee must be waived if the arrestee is unable to pay.

³⁷ *See infra* § 9.8, regarding changing bail based on changed or previously unknown circumstances.

³⁸ A number of cases have dealt with the intersection between the right to a prompt bail hearing and the right of a person arrested for operating a motor vehicle while intoxicated to be examined immediately by a physician of his or her choice under G.L. c. 263, § 5A. *See* *Commonwealth v. King*, 429 Mass. 169, 175 (1999)(bail magistrate's seven hour refusal to come to police barracks to hold immediate bail hearing violated defendant's rights to a prompt medical examination under G.L. c. 263, § 5A because the bail commissioner did not respond “as

recognizance, she must be brought before a court for arraignment and bail proceedings if the court is then in session, or if adjourned, at its next session.³⁹ Even a defendant who is legally incompetent to stand trial must have a bail hearing.⁴⁰

In a 1993 ruling particularly affecting weekend arrestees, the Supreme Judicial Court held that “a warrantless arrest must be followed by a judicial determination of probable cause no later than reasonably necessary,” defined as within twenty-four hours.⁴¹ The *Jenkins* decision was codified in 2004 as Mass. R. Crim. P. 3.1. Under this rule, “[n]o person shall be held in custody more than twenty-four hours following an arrest, absent exigent circumstances,” unless a determination of probable cause for detention has been made by a neutral judicial officer. Thus, no further probable cause determination need be made if the defendant has been arrested pursuant to warrant, or if

promptly as he [was] able”; remanded to determine whether harmless error); *Commonwealth v. Hampe*, 419 Mass. 514 (1995) (police are required to telephone a bail commissioner or to allow intoxicated defendant to do so in a timely fashion). *See also* *Commonwealth v. O’Brien*, 434 Mass. 615 (2001); *Commonwealth v. Priestly*, 419 Mass. 678 (1995); *Commonwealth v. Bailey*, 39 Mass. App. Ct. 908 (1995); *Commonwealth v. Finelli*, 422 Mass. 860 (1996); *Commonwealth v. Chistolini*, 422 Mass. 854 (1996).

³⁹ G.L. c. 276, § 58. Mass. R. Crim. P. 7(a)(1). . In *Commonwealth v. Perito*, 417 Mass. 674 (1994), the defendant was taken into custody but required brief hospitalization. In his absence, a judge that same day in the Wareham District Court set bail and continued the case for ten days. On his release from the hospital the next day, the defendant was taken directly to the house of correction and was thereafter ordered by a district court judge to be committed to Bridgewater for observation. He was first brought to court more than a month after his arrest. During the period of delay, the police had connected the defendant to a series of robberies through fingerprints and photographs taken when he was first arrested. The S.J.C. held that the period of delay was unlawful and that the defendant should have been brought into court immediately upon his release from the hospital. The court refused to order the dismissal of the indictments or suppression of the prints and photographs, however, because the delay was attributable to court practice, not to police misconduct, and the prints and photos would have been taken in any event at booking. The court held dismissal inappropriate because the defendant did not demonstrate actual prejudice to his case and misconduct on the part of the Commonwealth. *Perito, supra*, 417 Mass. at 681–82. *See also* *Commonwealth v. Cunningham*, 405 Mass. 646, 655–56 and n.2 (1989) (raising and avoiding question of suppression for illegal detention due to improper bail procedure under G.L. c. 276 § 57). Additionally, continued detention without a probable cause determination by a neutral magistrate is illegal. *See supra* § 2.1B(3)..

⁴⁰ *Abbott A. v. Commonwealth*, 458 Mass. 24 (2010) (Conducting a bail hearing for a defendant found incompetent to stand trial, even if he is a juvenile, does not per se violate that defendant's due process rights).

⁴¹ *Jenkins v. Chief Justice of the District Court Dep't*, 416 Mass. 221 (1993). *See* further discussion *supra* § 2.1B(4).

The right to a prompt bail hearing is wholly independent of the 24-hour rule of *Jenkins*. *Commonwealth v. Chistolini*, 422 Mass. 854, 856 (1996) (suggesting that the six-hour rule of *Commonwealth v. Rosario* is “suggestive of the permissible outer limit of confinement”). The S.J.C. has held, however, that a motion to dismiss for a violation of this right should not generally be granted absent a showing of prejudice. *Commonwealth v. Viverito*, 422 Mass. 228 (1996) (defendant remained in custody without bail hearing, arraignment, or probable cause determination for over 30 hours). *See also* *Carrington v. Commonwealth*, 455 Mass. 1014 (Mass. 2009); *Commonwealth v. Hampe*, 419 Mass. 514 (1995) (dismissal not required for violation of G.L. c. 263 §5A if there is overwhelming evidence of guilt); *Commonwealth v. Perito*, 417 Mass. 674, 682 (1994) (dismissal not warranted where defendant showed neither prejudice nor intentional violation of right by the Commonwealth to gain tactical advantage).

a complaint has been issued on the basis of a probable cause showing. But if neither exception applies, the defendant is entitled to a probable cause determination pursuant to Rule 3.1(b), which provides that a probable cause determination is to be decided

- 1) in an *ex parte* proceeding within 24 hours of arrest,
- 2) by a neutral judicial officer (e.g. a clerk's ruling suffices),
- 3) upon information presented by the police under oath, "whether or not known at the time of arrest," and applying "the same standard in making the determination of probably cause for detention as in deciding whether an arrest warrant should issue."

But unlike Trial Court Rule XI(c), which had earlier effectuated *Jenkins*, Rule 3.1 makes clear that the question is not whether the police had probable cause to arrest for the crime they charged, but whether probable cause to believe the defendant committed any crime exists at the time of the hearing. Any determination that there is probable cause to believe the person arrested committed an offense must be in writing, filed with the record of the case together with all the written information submitted by the police. A defendant serving a sentence who faces a bailable pending case should have the bail issue heard before release.⁴²

A judge, clerk, or bail commissioner may admit a defendant to bail,⁴³ although a 1992 act prohibits clerks or bail commissioners from releasing defendants "out of court" who are charged with violating valid restraining and protective orders.⁴⁴ If the defendant is arrested on a warrant from another court, he may be admitted to bail in the court of arrest⁴⁵ but will often be returned to the other court instead. Since the implementation of the Warrant Management System in 1995, procedures govern the case of a defendant who is discovered to be subject to another court's warrant.⁴⁶ If the

⁴² The defendant cannot receive jail credit or be released from custody while an outstanding warrant is pending, and having bail set during incarceration will avoid the incarceration following completion of the sentence while the pending bail issue is resolved. The following alternative routes may be used to "habe" a client into court: (1) contact the district attorney's office to have the case put on the first session list; (2) request a status date from the clerk; (3) file a motion for speedy trial. If problems arise, counsel should contact the Office of the Superior Court Bail Administrator.

⁴³ G.L. c. 276, § 57. The statute also provides for bail setting by a master in chancery, an obsolete title. In practice, a bail commissioner only sets bail at the police station. For full discussion on the role and obligations of a bail commissioner, see *Quinn v. State Ethics Commission*, 401 Mass. 210 (1987) (state agency employee cannot be bail commissioner). Although a judge ordinarily sets bail at arraignment, in Suffolk Superior Court the clerk ordinarily does so.

⁴⁴ G.L. c. 276, § 57, as amended in 1992. See also *infra* § 9.5A (para. numbered 8).. But see *Aime v. Commonwealth*, 414 Mass. 667 (1993).

⁴⁵ G.L. c. 276, §§ 29, 30.

⁴⁶ Effective February 1, 1995, the Legislature mandated the establishment of a new computerized "Warrant Management System." The system is a database that makes warrant information instantly available to courts, police departments, and the registry of motor vehicles. Courts and persons authorized to admit to bail (as well as sheriffs and police officers) are required to check the WMS for outstanding warrants before releasing, discharging, or admitting to bail any person before the court on a criminal charge. The major change to prior practice is that the court before which the defendant appears must now make a bail determination for each outstanding warrant disclosed by the WMS. If a court decides to release a person for whom a warrant has been found, it must confer with the court that issued the warrant, arrange an appearance date in that court, enter that date on the WMS, and notify the defendant of that date. The statute provides for a variety of fines and fees, including that the court recalling the warrant

defendant is bound over to superior court, bail is automatically transferred,⁴⁷ but in cases of an intervening direct indictment counsel may need to ask for three days to post bail, during which time the district attorney can *nol prosequere* the district court charge and release the bail.

§ 9.4 TYPES OF PRETRIAL RELEASE

§ 9.4A. OPTIONS AVAILABLE TO THE COURT

The following options exist for a court considering the bail decision. In none of them is an attorney permitted to act as surety or provide bail.⁴⁸

1. Most defendants will seek to be released on their *personal recognizance*: the defendant is at liberty pending trial in return for her pledge to appear at trial.⁴⁹ Although a judge usually sets a financial penalty for failure to show (such as “\$500 R.O.R.”), under personal recognizance the defendant posts no money or collateral for her release; the sum becomes due only on default. The Bail Act mandates a presumption of release on personal recognizance,⁵⁰ and many defendants are released on their own recognizance.

The court may release the defendant on her own recognizance and the court may order release on personal recognizance provided she *complies with certain conditions*. The court is specifically authorized to impose stay-away orders if it finds, after a hearing, that a defendant charged with physical or threatened abuse of a family member poses a danger.⁵¹ Additionally, the court might use pretrial probationary supervision⁵² to require certain conditions during release, such as limitations on travel, continued participation in a treatment program, etc. This statute requires the defendant's consent. More generally, at the determination of the court or bail commissioner, “the defendant may be ordered to abide by specified restrictions on personal associations or conduct.”⁵³ The SJC has similarly held that a Juvenile Court judge presiding in a

is directed to impose a \$50 “fee” unless good cause is shown. St. 1994, ch. 247, § 3; *see, inter alia*, G.L. c. 276, § 23A, 29–32.

⁴⁷ If the defendant is subsequently arraigned in superior court, the bail set in district court is transferred to the superior court. G.L. c. 276, § 58. After bind-over, the superior court has jurisdiction to revise bail pursuant to G.L. c. 218, § 30.

⁴⁸ Super. Ct. R. 11; Superior Court Rules Governing Persons Authorized to Take Bail, Rule 31. *See also* Mass. R. Prof. C. 1.8 (prohibited transactions).

⁴⁹ G.L. c. 276, § 65 (recognizance order shall be framed to create continuing obligation to appear on all continuance dates, to abide final sentence, not to depart without leave, and to appear to prosecute de novo appeal or answer indictment).

⁵⁰ G.L. c. 276, § 58. This is also mandated by the Standards of Judicial Practice: Pretrial Release, Standard 1:02 (District Court Administrative Office, Aug. 1977).

⁵¹ G.L. c. 276, § 42A.

⁵² This is authorized by G.L. c. 276, § 87.

⁵³ Such restrictions, “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,” are authorized by G.L. c. 276, § 58, as amended in 2006. In addition, the use of electronic monitoring to induce a defendant to abide by conditions of pretrial release or to appear in court has been accepted practice since at least 1990. *United States v. Tortora*, 922 F.2d 880 (1st Cir. 1990) (holding that electronic monitoring is valuable in

delinquency matter may release a juvenile on bail pursuant to § 58 and at the same time place him, with his consent, on pretrial probation under § 87, subject to specific, agreed-on conditions of release.⁵⁴

2. *Recognizance with surety (such as bail bond)*: The court may require the defendant to “recognize with surety in the sum of . . . dollars.” This means that the court is requiring a further guarantee beyond the defendant's personal obligation (recognizance).

The defendant may meet this requirement in one of two ways. One way is to avoid the requirement of a surety (coguarantor) by posting the entire amount with the clerk, in the form of cash, bonds, or a properly assigned bankbook. This will be returned to her (or the person who posted it) at the conclusion of the case.⁵⁵

The defendant may also post a surety bond. Anyone with sufficient assets may act as a surety,⁵⁶ or the defendant in rare circumstances may have to rely on a professional registered bondsman. In such a case, the defendant would pay the bondsman a premium that she will not get back under any circumstances. The premium is negotiable but often 5 to 10 percent of the bail; collateral may also be required. The premium is the bondsman's profit, but the bondsman does not post the actual bail money. Rather, he receives a grant of partial “custody” over the defendant,⁵⁷ is held responsible for the defendant's appearance, and only if the defendant fails to show is he theoretically responsible for the full amount, which in practice may not be sought.⁵⁸ The bondsman's obligations, liability, and custodial powers are voided by rearrest of the defendant or by the removal of the default. Because the premium is not refunded, counsel should be sure that there are no outstanding warrants or detainers that might

pretrial release cases, but admitting that it cannot be expected to prevent a defendant from committing crimes within the monitoring radius).

⁵⁴ *Jake J. v. Commonwealth*, 433 Mass. 70 (2000). In such cases, the SJC held, the judge may subsequently revoke bail and place the juvenile in the custody of the Department of Youth Services for his failure to abide by those conditions. To do so, the judge may follow the procedure outlined in G. L. c. 276, § 58B. However, where the Juvenile Court intends to set conditions of release, it must be clear on the record that any agreed-on conditions of probation also constitute the conditions of his release. The judge should also explain the consequences of violating any of the agreed-on conditions.

⁵⁵ G.L. c. 276, § 79. Real estate has not been specified as an option. Bankbooks must be assigned to the clerk and be “satisfactory” to the person admitting the defendant to bail. G.L. c. 276, § 57. Bail money may not generally be used to satisfy other obligations without consent, as detailed *infra* at § 9.4A (subheading “Cash bail alternative”).

⁵⁶ This is only permitted if the surety (1) is a nonprofessional (has acted as surety fewer than five times in a calendar year) approved by the court as having sufficient assets, based on deposited assets or a financial statement, or (2) is a professional who has fulfilled registering requirements. *See* G.L. c. 276, § 61B. The superior court has promulgated detailed Rules Governing Persons Authorized to Take Bail.

Assets offered to qualify as a surety may not be encumbered without incurring criminal penalties under G.L. c. 276, § 61A.

⁵⁷ The legal and technical workings of a surety bond are described in *Commonwealth v. Stuyvesant Insurance Co.*, 366 Mass. 611 (1975).

⁵⁸ The Commonwealth must obtain a judgment for forfeiture of the bond under G.L. c. 12, § 28. Removal of the default under G.L. c. 276, § 36, remission of the penalty under G.L. c. 276, § 69, or partial judgment under G.L. c. 276, § 74, will eliminate or reduce the obligation. *See also Commonwealth v. Stuyvesant Ins. Co.*, 366 Mass. 611 (1975), G.L. c. 276, §§ 65, 71, 74.

prevent release despite the surety bond. The bondsman, sometimes called the “surety,” has authority to physically detain the defendant and to deliver him to court to avoid losing the value of the bond in the event of a default.⁵⁹

In most motor vehicle cases, the defendant has a right to use as surety an arrest bond certificate from an auto club.⁶⁰

3. *Cash bail alternative*: Where the court sets bail, the defendant should always ask for the setting of a cash bail alternative, also known as a cash deposit in lieu of surety. Here, the court will set an amount equal to the ten per cent premium the defendant could pay a bondsman, but this money is paid to the court and is returned to the defendant at the conclusion of the case. For example, the court may set bail of \$5,000 or \$500 cash alternative.⁶¹

Obviously, the cash alternative better serves the purpose of bail because, unlike the premium that the defendant loses to the bondsman in any case, she loses cash bail only if she fails to appear and forfeiture is ordered. (Deposits may not be used for other purposes, such as to satisfy defendant's obligations, without consent.⁶²) Those posting the money for cash bail, often the family of the defendant, have far more incentive and ability than a bondsman to ensure that the defendant does appear.⁶³ The use of cash deposits in lieu of surety is “encouraged” by the District Court Standards.⁶⁴

4. *Release in the custody of a third person*: When the court will not release a defendant on personal recognizance, it may be willing to release the defendant into the custody of a responsible third person, such as the defendant's employer, family, agency, drug or alcohol counselor, or court probation officer — especially in juvenile cases. Although release to a “probation officer as surety” has been used to enforce conditions

⁵⁹ Commonwealth v. Cabral, 443 Mass. 171 (2005); Commonwealth v. Brickett, 25 Mass. 138, 8 Pick. 138 (1829).

⁶⁰ Commonwealth v. Stuyvesant Ins. Co., 366 Mass. 611 (1975); G.L. 276, § 61B. The statute provides that a guaranteed arrest bond certificate of up to \$500 may be used in lieu of bail in all motor vehicle cases except operation under the influence.

⁶¹ In Commonwealth v. Ray, 435 Mass. 249 (2001) the SJC determined that the words “equivalent amount” contained in the penultimate sentence of the first paragraph of G. L. c. 276, § 58, mean an amount “equal in effect,” and that surety bond set at an amount ten times the amount of a cash bail is equal in effect to that cash bail.

⁶² Cash alternative bail deposits must be used solely to insure the defendant's appearance. See In the Matter of King, 409 Mass. 590, 602–03, 607–08 (1991) (Judge King disciplined, in part because he ordered cash alternative bail, deposited by defendant's family members, applied to meet obligations of defendant such as child support); *District Court Dept. Bulletin No. 1-92*, item 5 (Feb. 28, 1992) (even if defendant posts funds, they should not be used for other obligations). Note, however, that the cash bail need not be returned until the defendant has been surrendered or discharged on all obligations arising from the charge, including financial. G.L. c. 276, § 65; G.L. c. 279, § 1. A third-party surety may obtain return of the funds prior to the conclusion of the case by surrendering the defendant into the court's custody. G.L. c. 276, § 68.

⁶³ By amendment in 1981, G.L. c. 276, § 58 requires that cash bail may be met by providing “an equivalent amount in a surety company bond.” While this infinite regression might have effectively eliminated the cash bail alternative by forcing a return to a high bail with surety system, this has not been the case.

⁶⁴ Standards of Judicial Practice: Pretrial Release, Standard 1:07 (District Court Administrative Office, Aug, 1977). The standard also recommends that cash bail alternative be set at 10 percent of the amount of the recognizance.

over a released defendant, the practice is unnecessary given statutory authorization for pretrial probation, and of dubious legality.⁶⁵

5. *Temporary release:* Although almost never sought in the state (as opposed to federal) system, the defendant who does not make bail may ask the court for temporary release for a variety of reasons. Apart from health or family reasons, constitutional rights to prepare and present a defense or to consult with counsel may mandate temporary release in the sheriff's custody if the defendant is necessary to, for example, find witnesses, take tests, hear wiretap tapes, or consult with counsel.

If cash bail is set, counsel may seek it to be ordered “without prejudice,” which allows counsel to move for a later change in status even without changed circumstances.

§ 9.4B. WHEN PRETRIAL RELEASE IS NOT DESIRABLE

In the following exceptional circumstances, personal recognizance or other pretrial release may work to the *disadvantage* of the defendant. If bail rather than recognizance is sought, it is often advantageous to seek “bail without prejudice,” which allows counsel to move for a later change in status even without changed circumstances.

1. *If the defendant is incarcerated on another offense* and not likely to be released, and if additional bail would not have an adverse impact on his institutional status (for example, result in a move to higher security), asking for nominal bail may result in the defendant receiving credit against his future sentence as well as on the case for which he is already incarcerated.⁶⁶

2. *If there are outstanding warrants* for probation or parole violations or for untried cases, personal recognizance on a new case will result in (a) custody under the warrant and (b) an increased likelihood that the current case will be disposed of after resolution of the outstanding case. Whether to seek bail or release in a new case therefore has important consequences and is a complex decision in which client input is crucial. The following considerations may be significant:⁶⁷

a. If the defendant has a *prior untried case* or *probation warrant*, counsel must determine which is the most favorable order of cases. For example, if the defendant has a drug, alcohol, or mental health problem, counsel may determine that the new case poses a better chance of probation conditioned on program participation than the outstanding case. If so, short-term confinement in the new case (either in the jail or in a

⁶⁵ Standards of Judicial Practice: Pretrial Release, Commentary to Standard 1:09 (District Court Administrative Office, Aug. 1977). The standard itself “discourages” use of “probation officer surety” as a means of supervising the defendant.

⁶⁶ A defendant who is serving a sentence at the time bail is imposed on a new case will not typically get credit for time served on the second case. *Commonwealth v. Barton*, 74 Mass. App. Ct. 912 (2009). *Cf. Reno v. Koray*, 515 U.S. 50 (1995) (defendant not entitled to be given credit toward service of term of imprisonment under 18 U.S.C. § 3585(b) when released on bail and ordered confined to a community treatment center); *Commonwealth v. Morasse*, 446 Mass. 113 (2006) (defendant not entitled to be given credit toward service of term of imprisonment when released on bail and held under house arrest as a condition of pretrial release). However, considerations of fair treatment warrant that a defendant who has been sentenced and is being held without bail may have his time in custody during a stay of sentence applied towards his time served. *Commonwealth v. Maldonado*, 64 Mass. App. Ct. 250 (2005).

⁶⁷ The authors are indebted to attorney Mary Prosser for sharing her knowledge and insights on this issue.

drug or alcohol program pursuant to G.L. c. 123, § 35) may permit placement efforts to proceed, and the other court may be more inclined to go along with such placement if already adopted by the first court. Such a course of action is often useful where the defendant has a pending probation warrant, as many district courts offer little opportunity for exploration of commitment alternatives when the client is brought in for a probation surrender.

b. If the client is an *escapee* or has a *parole violation warrant* outstanding, obtaining personal recognizance in the new case means he will be released to the warrant and may resume serving his prior sentence. This allows the court in the new case to order a sentence concurrent with the old one, or to order a Cedar Junction “forthwith” sentence that would wipe out a prior jail or house of correction sentence. If pretrial release is not obtained, these options are eliminated because the prior sentence cannot be resumed until completion of the intervening new sentence, if any.⁶⁸ To ensure these options, counsel must also make sure that the return to the institution is pursuant to the parole warrant and not as a pretrial detainee under G.L. c. 276, § 52A.⁶⁹

On the other hand, if the parole violation warrant is based on the new case and that case is likely to be won, pretrial release to a parole violation warrant may cause some problems. There could be considerable delay between the acquittal and the final revocation hearing at the institution, during which time the client remains incarcerated serving the preparole sentence. Additionally, if there are also other “technical” parole violations, the Parole Board may be less inclined to immediately reparole a returned defendant already in its custody.

If the client prefers to be held on bail in the new case, counsel should contact the defendant's parole officer while the new case is pending and argue for a disposition of the parole warrant without return to the institution if the new case is favorably resolved. If the new case results in a conviction, counsel should ask for *release to the parole violation warrant before sentencing on the new offense*, in order to make available the sentencing options discussed above.

§ 9.5 STATUTORY FACTORS IN THE BAIL DECISION

Except as noted below, G.L. c. 276, § 58, the Bail Reform Act creates a presumption for release on personal recognizance without surety. One exception to this rule is the 1981 “bail revocation” amendment, which applies where the defendant has been rearrested while free on bail. The Act has two alternative tracks: (a) bail to assure appearance and (b) revocation of prior bail to assure community safety. The provisions of § 58 govern cases in the district courts while G.L. c. 276, § 57 applies to superior court proceedings.⁷⁰ As a result, in superior court proceedings the court is not required to apply the specific factors outlined in § 58, but is free to exercise its “inherent authority” to order or deny bail, while still being bound to adhere to applicable

⁶⁸ See G.L. c. 127, § 149.

⁶⁹ This statute allows a pretrial detainee with a previous incarceration in a state prison for a felony to be transferred by the jail to a state prison; such a person would still be held on the new case, not on the preparole sentence.

⁷⁰ *Querubin v. Commonwealth*, 440 Mass. 108, 111 (2003); *Serna v. Commonwealth*, 437 Mass. 1003 (2002).

constitutional principles.⁷¹ In addition, § 57 incorporates by reference “rules established by the supreme judicial or superior court” which would include the Rules Governing Persons Authorized to Take Bail, which expressly incorporates fourteen factors to be considered in making a determination as to what form of release shall be set.⁷²

§ 9.5A. BAIL TO ASSURE APPEARANCE

Unless the defendant is found to be subject to pretrial detention⁷³ or was rearrested while free on previous bail or personal recognizance,⁷⁴ the sole purpose of bail is to assure the defendant's presence at trial. In this case, the Bail Reform Act states that a district court justice, clerk, or commissioner “shall admit such person to bail on his personal recognizance without surety unless . . . such a release will not reasonably assure the appearance of the person before the court.” In making this determination, the Act requires that the following factors (which are investigated by the Probation Department)⁷⁵ be taken into account in assessing the risk of nonappearance.⁷⁶

1. Nature, circumstances, and potential penalty of the offense charged;
2. Family ties, financial resources, employment record, and history of mental illness;
3. Reputation and length of residence in the community;
4. Record of convictions (including delinquency adjudications);⁷⁷
5. Illegal drug distribution or present drug dependency;
6. Flight to avoid prosecution,⁷⁸ defaults, or fraudulent use of an alias or false identification;
7. Whether the defendant is on bail for a pending prior charge, on probation or parole, or awaiting sentence or appeal of a prior conviction;
8. Whether the acts alleged involve domestic abuse, violation of a restraining order, or whether the defendant has any history of restraining orders.⁷⁹

⁷¹ Though Mass. Gen. Laws ch. 276, § 57 makes no mention of a bail hearing in the superior court or a defendant's right to participate in such a hearing, it has long been the law in Massachusetts that a “defendant is entitled to a reasonable opportunity to be heard on the matter of bail and to be represented by counsel at such a hearing.” *Matter of Troy*, 364 Mass. 15, 29-30 (1973). The practice of superior court bail hearings is consistent with principles of due process embodied in art. 12 of the Mass. Const. Declaration of Rights and U.S. Const. amend. 14.

⁷² See Rule 2, Rules Governing Persons Authorized to Take Bail (effective May 12, 1996). See also *Querubin v. Commonwealth*, 440 Mass. 108, 114 & n. 6 (2003).

⁷³ See *infra* § 9.5B(1).

⁷⁴ See *infra* § 9.5B(2).

⁷⁵ Mass. R. Crim. P. 7(a)(3); G.L. c. 276, § 57.

⁷⁶ Additionally, a summoned defendant who appears may “not be required to give surety . . . at any stage of the prosecution without a special order.” G.L. c. 276, § 27. This appears of little relevance since the requirement of written reasons under § 58 is probably such a “special order.”

⁷⁷ G.L. c. 119, § 60.

⁷⁸ *Querubin v. Commonwealth*, 440 Mass. 108 (2003).

⁷⁹ These factors were added by a 1992 amendment to § 58. Additionally, the amendment provides that clerks and bail commissioners may not release defendants not in court who are charged with violations of valid restraining and protective orders.

Other factors apply in certain sex offender,⁸⁰ election law,⁸¹ fugitive,⁸² and capital cases.⁸³ A 1992 amendment authorizing officials to consider “dangerousness” as a factor in *any* bail decision was overturned as unconstitutional.⁸⁴

If the district court judge does not set personal recognizance for the defendant, the defendant may appeal to the superior court,⁸⁵ and the district court judge must state in writing the reasons for her failure to follow the presumption. Usually these reasons will appear on a printed checklist of the factors stated above, with the judge checking those she feels applicable.

The 1994 Bail Reform Act, as noted above, made major changes in Massachusetts law regarding bail and pretrial detention. The act both amended the existing bail statute, G.L. c. 276, § 58, and added new preventive detention laws, G.L. c. 276, §§ 58A and 58B. The basic statutory changes to bail practice are as follows:

Dangerousness: Following the *Aime* decision, the Legislature deleted dangerousness as a factor in bail decisions under G.L. c. 276, § 58.

Notice: In bail decisions under G.L. c. 276, § 58, the notice to a defendant released on bail or on personal recognizance that if he or she is charged with a new offense bail may be revoked and sixty days incarceration may be imposed must now be entered on the docket when given to the defendant. This docket entry is *prima facie* evidence that the defendant was given the required notice.

Location of hearing: A revocation hearing based on the defendant being charged with a new offense is to be held before the court in which the new offense is charged.

Sentencing: The sentence, if any, imposed for the new crime must be consecutive to the sentence, if any, for the crime on which the defendant has been released on bail.⁸⁶

Penalties: A defendant who fails to appear after release on bail or personal recognizance for a misdemeanor offense may face a fine of up to \$10,000 and up to one year in the house of correction. For a felony, the penalty may be a fine of up to \$50,000 and up to five years in the state prison or two-and-one-half years in the house of

Another portion of the 1992 amendment, allowing dangerousness to be considered in setting bail for any crime, was struck down in *Aime v. Commonwealth*, 414 Mass. 667 (1993). That case did not, however, address § 5 of the amendment, which contains the above factors.

⁸⁰ G.L. c. 276, § 57. If the court learns that a defendant charged with certain sex offenses had previously been prosecuted for one of them, it must obtain a report from the Department of Mental Health before setting the terms of pretrial release. These offenses are rape, statutory rape, assault with intent to commit rape, unnatural acts, and crimes against nature. Note that the presumption of personal recognizance and other provisions of § 58 apply in this case as well.

⁸¹ Where the defendant is charged with violations of G.L. c. 56, § 33 or § 35, bail must be set at no less than \$500 cash or real estate worth \$1,000 beyond encumbrances. G.L. c. 276, § 57.

⁸² *See supra* § 9.2A

⁸³ *See supra* § 9.2A.

⁸⁴ *Aime v. Commonwealth*, 414 Mass. 667 (1993).

⁸⁵ *See infra* § 9.7.

^{75.5} G.L. c. 279, § 8B.

⁸⁶ G.L. c. 279, § 8B

correction. Any term of imprisonment imposed under this section is to be served “from and after” the sentence imposed on the underlying offense.⁸⁷

§ 9.5B. PREVENTIVE DETENTION AND BAIL REVOCATION

1. Pretrial Detention

The 1994 Bail Reform Act, effective August 13, 1994, created an entirely new system of pretrial detention in Massachusetts. This system has been explicated by the Supreme Judicial Court⁸⁸ in general as:

1. The “preferred pretrial disposition is release on personal recognizance” under G.L. c. 276, § 58. *Serna v. Commonwealth*, 437 Mass. 1003 (2002), raises the question whether this presumption applies in superior court.⁸⁹

2. Only if such release will not reasonably assure the presence of the arrested person at trial or the safety of any other persons may the judge impose the *least restrictive conditions* proposed to him necessary to provide such assurance.⁹⁰

3. Release is then conditioned on the accused's not committing a new crime.

4. Only if the judge determines after a hearing that no condition of release will reasonably assure the safety of any other persons may he order pretrial detention.

5. “The provision should end any tendency to require high bail as a device for effecting preventive detention because [all dangerousness-based decisions must be made] under the procedures set forth for that specific purpose.”⁹¹

The statutory preventive detention scheme, which has been upheld against a variety of constitutional challenges by the Supreme Judicial Court⁹² is as follows:

G.L. c. 276, § 58A provides for pretrial detention of certain defendants. It “sets out a comprehensive scheme of measures available with respect to arrested persons charges with crime.”⁹³ The pretrial detention regime in § 58A “is explicitly ‘predictive’ and ‘seek[s] systematically to identify those who may present a danger to society and to incapacitate tem before that danger may be realized.’”⁹⁴ This procedure is distinctly

⁸⁷ See G.L. c. 276, § 82A.

⁸⁸ See *Mendonza v. Commonwealth*, 423 Mass. 771 (1996).

⁸⁹ In *Serna* the defendant appealed an order of a judge in Superior Court denying him bail contending that he had a statutory right under G.L. c. 276 §58 to have bail set while awaiting trial. A single justice of the Supreme Judicial Court held that G.L. c. 276 §58 does not apply because the terms of the statute do not govern the setting of bail by the Superior Court, rather they govern the District Court. The order the defendant appealed was entered under G.L. c. 276 §57 which applies to justices of the Supreme Judicial Court, the Superior Court and District Court. See also *Commonwealth v. Querubin*, 440 Mass. 108, 112 (2003) (defendant’s appeal denied and a single justice of the Supreme Judicial Court held that defendant’s bail was withheld properly pursuant to G.L. c. 276 §57, citing *Serna*).

⁹⁰ *Mendonza v. Commonwealth*, 423 Mass. 771 (1996) (citing G.L. c. 276, § 58A(2) (emphasis added).

⁹¹ *Mendonza v. Commonwealth*, 423 Mass. 771, 774 (1996).

⁹² *Mendonza v. Commonwealth*, 423 Mass. 771 (1996).

⁹³ *Mendonza v. Commonwealth*, 423 Mass. 771, 774 (1996).

⁹⁴ *Commonwealth v. Young*, 453 Mass. 707, 709 (2009), citing *Mendonza v. Commonwealth*, 423 Mass. 771, 774 (1996), quoting Opinion of the Justices, 423 Mass. 1201, 1219 (1996),

different from a bail hearing. Dangerousness, as noted *supra* in § 9.4, is no longer a factor in deciding bail. A defendant may, however, be held on grounds of dangerousness if she has been charged with and “held under arrest” for a predicate offense listed in the statute.⁹⁵

“The threshold question in every case is whether the defendant has committed a predicate offense under § 58A(1), thereby triggering the Commonwealth’s right to move for a § 58A hearing.” If the offense charged is not specifically delineated as a predicate offense under § 58A(1) it must have “‘*as an element of the offense* the use, attempted use, or threatened use of physical force against the person of another’ or ‘*by its nature* involves a substantial risk that physical force against the person of another may result.’”⁹⁶ The “predicate offense inquiry focuses on the elements of the crime, rather than the particular facts underlying a complaint or indictment.”⁹⁷

⁹⁵ The list includes:

- a. a felony offense that has as an element of the offense the use, attempted use, or threatened use of physical force against the person of another, or
- b. any other felony that by its nature involves a substantial risk that physical force against the person of another may result, including the crimes of burglary and arson whether or not a person has been placed at risk thereof, or
- c. a violation of an order pursuant to section 18, 34B or 34C of chapter 208, (protective orders and orders to vacate issued in divorce actions); section 32 of chapter 209, (orders against restraint of spouse's personal liberty); section 3, 4 or 5 of chapter 209 A, (orders to vacate, have no contact, or refrain from abuse); section 15 or 20 of chapter 209C and 9C, (certain orders in paternity cases); or
- d. arrested and charged with a misdemeanor or felony involving abuse as defined in section 1 of said chapter 209A or while an order of protection issued under said chapter 209A was in effect against such person; or
- e. an offense for which a mandatory minimum term of three years or more is prescribed in chapter 94C (drug offenses); or
- f. arrested and charged with a violation of section 13B of chapter 268 (tampering with a criminal proceeding); or
- g. a third or subsequent conviction for a violation of section 24 of chapter 90 (operating under the influence); or
- h. arrested and charged with a violation of paragraph (a), (c) or (m) of section 10 of chapter 269; provided, however, that the Commonwealth may not move for an order of detention under this section based on possession of a large capacity feeding device without simultaneous possession of a large capacity weapon; or
- i. arrested and charged with a violation of section 10G of said chapter 269.

The pretrial detention provisions of G.L. c. 276, § 58A also apply to juveniles in delinquency proceedings. *Victor V., a Juvenile v. Commonwealth*, 423 Mass. 793 (1996). See *infra* ch. 46.

It should also be noted that the statute lists broad categories of some offenses. The defense should therefore request that the Commonwealth specify exactly on which category it relies. Possible overbreadth, vagueness, and other challenges to these categories may then become apparent. Also, CPCS has advised practitioners of the illogic of subsection g. above. It is unclear how a defendant can face pretrial detention where the statute requires a “conviction.”

⁹⁶ *Commonwealth v. Young*, 453 Mass. 707, 711-712 (2009), quoting G.L. c. 276, § 58A(1) (emphasis in original).

⁹⁷ *Commonwealth v. Young*, 453 Mass. 707, 712 (2009). In *Young* the court determined that unlicensed possession of a firearm was not inherently dangerous – which it

There remains some question about the exact parameters of the “held under arrest” requirement, but a defendant who posts bail at the police station should generally not face a detention hearing at arraignment.⁹⁸

The Commonwealth must move specifically to hold the defendant under the new law and a special hearing will be held.⁹⁹ If, after a hearing, the judge finds by clear and convincing evidence that “no conditions of release will reasonably assure the safety of any other person or the community,”¹⁰⁰ the defendant may be detained prior to trial. A person detained under this law must be brought to a trial as soon as reasonably possible, but unless good cause exists, the person may not be detained for more than ninety days.¹⁰¹ At the hearing, the defendant has rights to appointed counsel, to testify, to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information. The rules concerning admissibility of evidence in criminal trials do not apply at the hearing. Facts found by the judge must be supported by clear and convincing evidence.¹⁰² The hearing may be reopened at any time before trial if the judge finds that material information exists that was not known at the time of the hearing and if there are conditions of release that will reasonably assure the safety of any other person and the community.¹⁰³

defined as involving a “considerable possibility that physical force against another may result.” *Id.* at 714-15 -- and did not qualify as a predicate offense. However, the legislature, effective November 4, 2010, expanded the listed offenses in § 58A to include possession of firearms. See G.L. c. 276, § 58A(1)(h).

⁹⁸ See memorandum to district court judges written by Zoll, J., Chief Justice of the District Court Department, Aug. 10, 1994. *But see* Commonwealth v. Parker, S.J.C. for Suffolk County No. SJ-94-0465 (Nolan J., Oct. 13, 1994) (allowing a detention hearing under certain circumstances even though defendant had not been in custody at arraignment).

⁹⁹ The hearing shall be held immediately on the person's first appearance before the court unless a continuance is granted. Except for good cause, a continuance sought by the defendant may not exceed seven days, and a continuance sought by the Commonwealth may not exceed three business days. To obtain a three-day continuance, the Commonwealth must show good cause for it and the judge must make a specific finding indicating what such cause is. *Mendonza v. Commonwealth*, 423 Mass. 771, 792 (1996). During a continuance, the individual shall be detained on a showing that there existed probable cause to arrest the person.

¹⁰⁰ Commonwealth v. Young, 453 Mass. 707, 711 (2009) quoting G.L. c. c. 276, § 58A(3).

¹⁰¹ The statute excludes any period of delay as defined in Mass. R. Crim. P. 36(b)(2).

¹⁰² In a detention order, the judge must:

(a) include written findings of fact and a written statement of the reasons for the detention;

(b) direct that the person be committed to custody or confinement in a separate corrections facility separate, to the extent practicable, from persons awaiting or serving sentence or being held in custody pending appeal; and

(c) direct that the person be afforded reasonable opportunity for private consultation with his counsel.

¹⁰³ In this determination, at the first hearing or afterward, the judge should take into account the nature and seriousness of the danger posed by the person's release, the nature and circumstances of the offense charged, the potential penalty the person faces, the person's family ties, employment record and history of mental illness, the person's reputation, the risk that the person will obstruct or attempt to obstruct justice or threaten, injure or intimidate or attempt to threaten, injure or intimidate a prospective witness or juror, his record of convictions, if any, any illegal drug distribution or present drug dependency, whether the person is on bail pending

A person who is denied bail or release may petition the superior court for a review of the order and the justice of the district court must immediately notify her of the right to file a petition for review. 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.”¹⁰⁴

The new law presents special problems to defense counsel who may be tempted to advise a client to testify at a detention hearing to avoid pretrial incarceration. This is a dangerous, generally unwise course of action that, in one case, was held to be ineffective assistance of counsel.¹⁰⁵ Justice Wilkins has held, however, that if the Commonwealth relies on the circumstances of the crime charged to support a finding of dangerousness, the defendant has the right to present witnesses, including the alleged victim, concerning the question of whether the defendant was the person who committed the crime.¹⁰⁶ The Supreme Judicial Court has held that a person previously subject to detention under § 58A based on an order of the district court is, if indicted

adjudication of a prior charge, whether the acts alleged involve abuse as defined in § 1 of ch. 209A, or violation of a temporary or permanent order issued pursuant to § 18 or 34B of ch. 208, § 32 of ch. 209, §§ 3, 4, or 5 of ch. 209A, or § 15 or 20 of ch. 209C, whether the person has any history of orders issued against him, whether he is on probation, parole or other release pending completion of sentence for any conviction and whether he is on release pending sentence or appeal for any conviction.

¹⁰⁴ G.L. c. 276, § 58B originally governed procedures only in cases where the Commonwealth sought to revoke a defendant's prior release under G.L. c. 276, § 58A, but it was amended in 2006 to so it now applies whether a defendant was released under § 58 or 58A. If, after a hearing, the judge finds: (1) that there is probable cause to believe that the person has committed a federal or state crime while on release, or clear and convincing evidence that the person has violated any other condition of release; and (2) 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, then the judge shall enter an order of revocation and detention.

If there is probable cause to believe that, while on release, the person committed a federal felony or an offense described in clause (1), a rebuttable presumption arises that no condition or combination of conditions will assure that the person will not pose a danger to the safety of any other person or the community. If the judicial officer finds that there are conditions of release that will assure that the person will not pose a danger to the safety of any other person or the community, and that the person will abide by such conditions, the judicial officer may amend the conditions of release.

The hearing under this section must be held immediately unless the defendant or the Commonwealth seeks a continuance. If there is a continuance the person shall be detained without bail unless the judge finds that there are conditions of release that will reasonably assure that the person will not pose a danger to the safety of any other person or the community and that the person will abide by conditions of release. If the person is detained without bail, except for good cause, a continuance on the defendant's motion may not exceed seven days, a continuance on motion of the Commonwealth or probation may not exceed three business days. A person detained under this subsection shall be brought to trial as soon as reasonably possible, but in the absence of good cause, no more than ninety days excluding any period of delay as defined in Mass. R. Crim. P. 36(b)(2).

¹⁰⁵ *United States v. Frappier*, 615 F. Supp. 51 (D. Mass. 1985).

¹⁰⁶ *Commonwealth v. Cartolano*, No. 94-0619, S.J.C. for Suffolk County (Wilkins, J., Dec. 30, 1994).

based on the same events, entitled to a new hearing on the subject upon arraignment in the superior court.¹⁰⁷

The detention hearing: If the Commonwealth requests a pretrial detention (or “dangerousness”) hearing, the first issue will likely be whether the offense charged and the custody status of the defendant comport with the statutory requirements.¹⁰⁸ Some judges will deny the Commonwealth’s request for a hearing at the outset if it appears obvious that the case is not properly brought under G.L. c. 276, § 58A, or if the court feels that the prospect of success for the government is so minimal that the case should be handled under the “regular” bail procedures. If the case proceeds under § 58A, the next point of contention may be the Commonwealth’s request for a three-business-day continuance. On this point, the language of the Supreme Judicial Court opinion in *Mendonza*,¹⁰⁹ should be studied. The defendant may also challenge whether the “probable cause” requirement of § 58A(4) has been met. A finding of probable cause by a clerk magistrate might not be sufficient in certain cases.¹¹⁰ If the hearing is continued, defense counsel may seek discovery of the Commonwealth’s evidence on the issue of dangerousness. Note that the statute permits the defendant to move for a continuance of up to seven days, or more if good cause is shown.

The defense faces the dilemma at a detention hearing of how much to reveal, either through cross-examination or by affirmative presentation of witnesses, testimony of the defendant or other “information.”¹¹¹ In general, as noted above, given the very early stage of this proceeding, defense counsel would be well-advised neither to present witnesses nor the defendant’s testimony.¹¹²

The rules of evidence do not apply and the Supreme Judicial Court in *Mendonza* indicated that the quality of evidence required is somewhat lower than one might have anticipated, given the high stakes for the defendant. Nevertheless, if the defendant elects not to testify and to present little or no evidence, the quality of the

¹⁰⁷ See *Commonwealth v. Murchison*, 428 Mass. 303 (1998) (holding that the Commonwealth may, if it chooses, submit the transcript and record of the district court proceedings without supplementation but that the defendant has the right to present new information); *Commonwealth v. Hinson*, Middlesex Super. Ct. No. 94-1871-001-004 (Quinlan, J., July 7, 1995).

¹⁰⁸ See *supra* § 9.2A.

¹⁰⁹ *Mendonza v. Commonwealth*, 423 Mass. 771 (1996).

¹¹⁰ See *supra* ch. 2; *Jenkins v. Chief Justice of the District Court Dep’t*, 416 Mass. 221 (1993); *Mendonza v. Commonwealth*, 423 Mass. 771 (1996).

¹¹¹ G.L. c. 276, § 58A(4).

¹¹² It should be noted that prior testimony, as at a 58A pretrial detention hearing, is not generally admissible at trial under the confrontation clause of U.S. Const. amend. 6. *Crawford v. Washington*, 541 U.S. 36 (2004). An exception is made if the declarant is unavailable to testify at trial and the defendant has had an adequate prior opportunity to cross-examine that declarant. This requirement is satisfied when (1) the declarant was under oath at the prior proceeding; (2) the defendant was represented by counsel at the prior proceeding; (3) the prior proceeding was conducted before a judicial tribunal, equipped to provide a judicial record of the hearings; and (4) the prior proceeding was addressed to substantially the same issues as in the current proceeding, and the defendant had reasonable opportunity and similar motivation on the prior occasion for cross-examination of the declarant. *Commonwealth v. Hurley*, 455 Mass. 53 (2009).

Commonwealth's evidence (e.g., a proffer of a hearsay-laden police report) should be vigorously challenged by defense counsel.¹¹³

The statute delineates exactly which facts are to be considered by the court at a pretrial detention hearing;¹¹⁴ and any deviation from its limits should be resisted. If the Commonwealth relies on the alleged offense to prove dangerousness, the scope of cross-examination — and the possible discovery benefits to the defense — could be considerable. The defendant may not be held unless the court finds by “clear and convincing evidence” that “no conditions of release will reasonably assure the safety of any other person or the community.” This standard of proof is high and must be taken seriously as distinctly different from a preponderance of the evidence.¹¹⁵ Also, each element of the standard is meaningful. There must be “no conditions” that could “reasonably assure” safety. As to this point, all of the positive information that defense counsel might argue in a bail hearing should also be presented in a detention hearing.

2. Bail Revocation

In February 1982, a bail revocation amendment to § 58 first took effect. This statute allows prior bail (as opposed to release under § 58A) to be revoked for up to sixty days if the defendant is subsequently arrested for another offense while free on bail *and* his detention is necessary to protect the community. Here the sole focus of bail is to “assure the safety of any person or the community.”¹¹⁶ To revoke prior bail, the court must hold a hearing with counsel to determine that (1) there is probable cause to believe that the defendant committed the new offense (although there is no requirement that the defendant have been formally charged¹¹⁷); (2) releasing the defendant “will seriously endanger any person or the community”; (3) no less restrictive alternative will suffice to “reasonably assure the safety of any person or the community” and (4) a previous release must have been accompanied by an explicit warning that commission of a crime may result in bail revocation.¹¹⁸ Under the statute, any pretrial detention order must expire within sixty days, and the trial must be held “as soon as reasonably possible.”

¹¹³ See *Commonwealth v. Mathis*, Suffolk Sup. Ct. No. 94-11417 (Quinlan, J., Sept. 15, 1994) (holding that the Commonwealth must present witnesses and that a “proffer” is not sufficient).

¹¹⁴ See G.L. c. 276, § 58A(5).

¹¹⁵ See *Mendonza v. Commonwealth*, 423 Mass. 771 (1996).

¹¹⁶ G.L.c. 276, § 58; *Commonwealth v. Pagan*, 445 Mass. 315 (2005) and *Commonwealth v. Cargill*, 445 Mass. 329 (2005) (interpreting the statute’s “up to 60 days” as “exactly 60 days.”) See also *Paquette v. Commonwealth*, 440 Mass. 121 (2003) (holding that “dangerousness” language under § 58 does not violate rights to due process, and defendant does not have a right to an evidentiary hearing before bail is revoked).

¹¹⁷ *Delaney v. Commonwealth*, 415 Mass. 490, 493–94 (1993).

¹¹⁸ G.L. c. 276, §58. The district court judge must make written findings in conjunction with a revocation of bail under §58. See *Garner v. Rouse*, 11 Mass. L. Rep. 361 (Jan. 24, 2000) (found plaintiff unlawfully held without bail because, although the district court identified the reasons for imposing bail on the subsequent offense, no written statement of reasons was issued for the bail revocation; held that increase in amount of bail appropriate, however, after determination that the new offense constituted a change of circumstances which may be considered). *But see Commonwealth v. Tice* SJC 98-0349 (Single justice 7/7/98 Marshall. J.) (no actual warning is required for a revocation decision to be valid). However, many district court judges refuse to revoke bail if the docket sheet does not reflect that a warning was given.

Under the *bail amendments of 2006*, bail may also be revoked for violation of conditions of pretrial release if after a hearing the judicial officer finds (1) that there is probable cause to believe that the person has committed a federal or state crime while on release, or clear and convincing evidence that the person has violated any other condition of release; and (2) the judicial officer 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.¹¹⁹ Under the statute, in the absence of good cause any pretrial detention order, must expire within ninety days, and the trial must be held “as soon as reasonably possible.”¹²⁰

The *probable-cause* determination is a constitutional as well as statutory requirement for continued detention.¹²¹ It offers the defendant an opportunity for substantial discovery before trial on the second charge. Evidence as to the first charge or as to dangerousness generally is irrelevant at this point because the only issue is whether there is probable cause to believe that the defendant committed the new charge. If the court attempts to use hearsay or the fact of a grand jury indictment to constitute probable-cause, counsel should argue that the “sufficient credible evidence” standard of probable cause requires the right to cross-examine prosecution witnesses.¹²²

If probable cause is found, a hearing on *dangerousness* will follow on the defendant’s “first appearance before the court.”¹²³ The SJC has rejected a constitutional challenge to considering whether the defendant’s continued release poses a danger.¹²⁴ In making its determination, the court is directed to consider these factors: (1) the gravity, nature, and circumstances of the offense charged; (2) the prisoner’s record of convictions, if any; (3) whether said charges or convictions are for offenses involving the use or threat of physical force or violence against any person; (4) whether the prisoner is on probation, parole, or other release pending completion of sentence for any conviction; (5) whether he is on release pending sentence or appeal for any conviction; (6) the prisoner’s mental condition; and (7) any illegal drug distribution or present drug dependency. Counsel should be cautious about introducing evidence on dangerousness, which may merely provide discovery to the Commonwealth. However,

¹¹⁹ G.L. c. 276, § 58B.

¹²⁰ If bail is being revoked exclusively based on a new arrest, counsel should argue that §58, not §58B, applies and the revocation period is capped at 60 days instead of 90.

¹²¹ See *supra* ch. 2; see also *Gerstein v. Pugh*, 420 U.S. 103 (1975) (continued pretrial detention requires a finding of probable cause by a neutral magistrate); *Riverside County v. McLaughlin*, 500 U.S. 44 (1991) (requiring the finding within 48 hours); *Jenkins v. Chief Justice of the District Court Dep’t*, 416 Mass. 221 (1993) (Massachusetts requires finding within 24 hours). See further discussion *supra* at § 2.1B(4).

¹²² These rights apply to bind-over probable-cause hearings, and there is no reason why a similar standard would not apply here. See *supra* § 2.1.

¹²³ G.L.c. 276 § 58A. Most judges interpret this to mean the petition has to be filed at the first appearance. By the same statute, the defendant is entitled to a continuance not to exceed 7 days and an evidentiary hearing in which the rules of evidence do not apply.

¹²⁴ *Commonwealth v. Paquette*, 440 Mass. 121, 131 (2003)(finding that the inquiry into dangerousness is narrowly tailored to “further the Commonwealth’s legitimate and compelling interests in assuring compliance with its laws, and in preserving the integrity of the judicial process” by exacting obedience to its conditions of release.” See also *Querubin v. Commonwealth*, 440 Mass. 108, 118 (2003) (holding that determinations of probable cause and dangerousness can be made without a full evidentiary hearing and without significant risk of an erroneous deprivation of liberty).

because the court must also find that no less restrictive alternative than detention is available,¹²⁵ it is important to show that such possibilities as family supervision, treatment programs, supervised chemotherapy, job release, or stay-away orders may be sufficient.

Counsel will probably require a short continuance in order to prepare for the probable-cause hearing,¹²⁶ and even counsel seeking the continuance has a right to keep it short¹²⁷ and have bail set on the new charge pending hearing.¹²⁸

The Supreme Judicial Court has held that revocation of bail *pursuant to the preventive detention provision*, G.L. c. 276, § 58A, is not reviewable in superior court under the normal de novo review procedures detailed *infra* in § 9.7. In the decision, it mentioned but reserved judgment on whether alternative procedural routes, such as an appeal based on due process standards, which already governs revocation of parole or probation, might provide relief.¹²⁹ A defendant has no right to habeas corpus relief to appeal a bail revocation decision.¹³⁰

Once a bail revocation order has been entered, a district court judge is not allowed to vacate it if none of the charges against defendant have been dismissed or resulted in an acquittal and if no manifest injustice exists.¹³¹

Sentencing statute for offense while on bail: Along with the bail revocation amendment, the legislature passed a bill stating that punishment for an offense committed while on pretrial release must be served “consecutively to the earlier sentence for the crime for which he was on release,” not concurrently¹³² — though this is a constitutionally questionable practice.¹³³

¹²⁵ *Cf.* United States v. Patriarca, 948 F.2d 789 (1st Cir. 1991) (under *federal* detention statute 18 U.S.C.S. § 3142(b), (g), the government failed to prove conditions would not remedy dangerousness of Mafia leader defendant).

¹²⁶ See strategy for probable-cause hearings, *supra* § 2.2.

¹²⁷ The following are relevant to the right to a short continuance to prepare: Dist. Ct. Dep’t Suppl. R. Crim. P. 1 guarantees counsel adequate time to prepare a bail argument. G.L. c. 276, § 35, requires that any continuance be no longer than thirty days at any one time against the objections of the defendant. The ALI Model Code of Pre-arraignment Procedure requires a hearing within two court days in these circumstances, and Gerstein v. Pugh, 420 U.S. 103, 124 n.25 (1975), and Riverside County v. McLaughlin, 500 U.S. 44 (1991), require a determination of probable cause within 48 hours by a magistrate where detention is at issue. See also *infra* § 27.1B and ch. 23 regarding speedy trial rights.

¹²⁸ There is no procedure for temporary revocation pending hearing in § 58.

¹²⁹ Delaney v. Commonwealth, 415 Mass. 490, 496–97 (1993). The SJC has also held that, following a probation violation hearing at which there has been a finding of probable cause and an order of custody, a district court judge may not release a probationer on bail for the probation violation pending the final hearing, and that such a probationer has no right to file a bail review petition. Commonwealth v. Puleio, 433 Mass. 39 (2000) (Mass. Dist. Ct. R. Prob. Viol. Proc. 8 held to prohibit a grant of bail and G.L.c. 276, § 58 precluded filing a bail review petition while a final revocation hearing was pending).

¹³⁰ Sheriff of Suffolk County v. Pires, 438 Mass. 96 (2002).

¹³¹ Commonwealth v. Pagan, 445 Mass. 315 (2005). *Pagan* also holds that once a revocation order was entered, it is valid for sixty days. At that time, defendant should be returned to the court with the proper jurisdiction for a new bail hearing.

¹³² G.L. c. 279, § 8B. This section may not apply in the unusual situation where a defendant is sentenced for crimes committed while on bail before being sentenced for the charge on which he made bail. See Commonwealth v. Hickey, 429 Mass. 1027 (1999); see also Commonwealth v. Yancey, 46 Mass. App. Ct. 924 (1999) (“from and after” sentence

§ 9.6 THE BAIL ARGUMENT

If bail is an issue at arraignment, the attorney who has just been appointed to the case has a right to have access to records¹³⁴ and time to interview the defendant and prepare his bail argument.¹³⁵ This is best done by simply asking that the case be held for second call. In rare cases, counsel may seek a day's continuance from the arraignment for bail argument in order to maximize the chance of release by, for example, seeking a program that will take responsibility for the defendant, because bail is difficult to change once set.

In preparation for the bail argument, start by interviewing your client, especially as to factors listed in the Bail Act listed above. What were the facts of the incident? Does the defendant have strong ties to the community? Get his employment, family, and residential history. Verify his current employment with a phone call. What is his prior record? If he has defaults on his record, why did he default?¹³⁶ To ensure that the bail argument is not simply an academic exercise, it is important to ask the defendant what he can afford to post for bail. Investigate also whether the defendant is a fugitive from another charge or is on parole or probation, and whether any detainers or warrants exist against him. Section 9.10 *infra* includes these and other significant factors in a bail interview checklist.

Preparation for bail argument must also include examination of the probation record and, finally, consultation with both the probation officer and the prosecutor as to possible agreed bail or conditions.

In the subsequent bail argument, counsel may be arguing either for presumptive personal recognizance or for a low cash bail alternative. The argument should track the

permissibly imposed pursuant to G.L. c. 279, § 8B despite fact that defendant had been released on bail, as opposed to personal recognizance, even though § 8B and G.L. c. 276, § 58 refer only to such release and not to bail).

¹³³ Counsel should consider a double-jeopardy objection where the first sentence may have been based in part of the second impending charge; and due process and Sixth Amendment objections to a sentence issued essentially for a violation of bail conditions, without the constitutional rights to a jury trial, presentation of a defense, confrontation, etc. *See also* United States v. Dixon, 509 U.S. 688, 700-711 (1993) (defendant released on bail on condition that he not commit “any criminal offense” was arrested and indicted for another crime and sentenced to jail for “criminal contempt” of the earlier order; Supreme Court held further prosecution barred by the double jeopardy prohibition).

¹³⁴ Standards of Judicial Practice: Pretrial Release, Standard 1:01 (District Court Administrative Office, Aug. 1977) (defendant should have access to records); *cf.* Mass. R. Crim. P. 28(d)(3) (before sentencing, presentence report should be available to counsel).

¹³⁵ Dist. Ct. Dep't Suppl. R. Crim. P. 1 guarantees the defendant the right to adequate time to prepare bail argument prior to the bail hearing. *See also* In the Matter of Troy, 364 Mass. 15, 29–30 (1973) (defendant entitled to a reasonable opportunity to be heard and be represented by counsel on bail; cannot set bail first and have hearing later); and Reporter's Notes to Mass. R. Crim. P. 7(a)(1999) (right to prompt appointment of counsel at arraignment and to adequate consultation). Both the defendant and counsel have the right to participate in a bail hearing. Commonwealth v. Perito, 417 Mass. 674 (1994).

¹³⁶ The court may be in error; or the default may not indicate an intent to flee but be technical (failure to pay a fine on time; failure to contact probation; failure to appear at termination of probation, etc).

factors listed in the Bail Reform Act.¹³⁷ The court will be especially concerned with the daily activities of the defendant, and the more detail in this regard, the better the chances. A steady job is one way to account for the defendant's time; if the defendant on release would be entering a program (such as drug, alcohol, or job training) this will also be persuasive to the judge. Recognizance may be more likely in some cases if counsel suggests conditions that might be added to the order, such as reporting to the probation officer, staying in school, or staying away from the alleged victim.¹³⁸

The bail hearing will typically consist of hearsay,¹³⁹ and indeed facts are usually presented by counsel in argument. The Supreme Judicial Court has held that a “bail proceeding under §57 is not intended to be a mini-trial, and the rules of evidence do not apply.”¹⁴⁰ In the rare circumstance that the relevant police officer is present at the bail hearing and provides information about the alleged crime — a practice suggested by the District Court Standards¹⁴¹ — counsel should make limited inquiry of the officer and this opportunity should be used both to mitigate the offense and to

¹³⁷ The following hypothetical example of a bail argument illustrates attention to the factors in the statute and to the importance of quick investigation:

Your Honor, we are proposing \$5,000 bail with \$500 cash alternative. We recognize the seriousness of a charge of assault with a dangerous weapon but would point out that the defendant asserts his innocence and will present evidence of self-defense. In this case the complainant was his landlord and it appears that the trial will be a contest of credibility without any corroborating evidence.

Mr. Allen is twenty-six years old and is employed as a machinist with General Electric in Lynn. I have verified with his supervisor, Fred Alsdorf, with whom I spoke on the telephone today, that Mr. Allen has held this job for over two years. He currently makes \$320 per week. Mr. Allen lives with his mother and sister in Lynn where he has lived all his life. His mother is present in court today, your Honor.

You will note that he has a criminal record that ended five years ago, but I would point out that there were no defaults, which I think indicates the defendant's readiness to face the charges. As to other factors, the defendant has never been drug dependent, has never used aliases, and is not awaiting action on any other case.

As the police officer pointed out, the case commenced with a phone call by Sergeant Eliot calling the defendant and asking him to come down to the station. Mr. Allen's doing so would again indicate his readiness to answer the charges here. Your Honor, given Mr. Allen's steady employment, life-long residence in this community with his family, and his demonstrated readiness to answer the charges, I think that the Commonwealth's recommendation is grossly excessive to ensure the presence of the defendant, and is in fact prohibitive. Mr. Allen and his family simply do not have the money to put up for that bail. We feel that \$500 cash bail is a realistic figure.

¹³⁸ *See supra* sec. 9.4A

¹³⁹ Double hearsay at a bail hearing was approved in *Commonwealth v. Snow*, 404 Mass. 1007 (1989) (rescript).

¹⁴⁰ *Querubin v. Commonwealth*, 440 Mass. 108, 118 (2003). Although a “full-blown evidentiary hearing that includes the right to present and cross-examine witnesses is not needed or required...such a hearing, or some variation, may be held in the discretion of the judge when the circumstances of a particular case warrant.” *Id.*

¹⁴¹ Standards of Judicial Practice: Pretrial Release, Standard 1:01 (District Court Administrative Office, Aug. 1977). This standard also states that persons questioned need not be put under oath. The accompanying commentary recommends questioning of those present, including police and witnesses, but not in a formal adversary manner.

obtain possible discovery. One especially useful question is whether the defendant made any statements or admissions.

§ 9.7 APPEAL OF BAIL AND OTHER REMEDIES

If the bail decision of the district court is unacceptable, the defendant may appeal at any time to the superior court.¹⁴² The review is a *de novo* determination¹⁴³ and can result in either a reduction or increase in the bail amount. Some caution is therefore in order if the difference between high bail and higher bail might be prohibitive. A single justice opinion has held that the “bail appeal” procedure does not apply to a defendant who is being held on a default warrant.¹⁴⁴

If the defendant wishes to appeal, he may obtain the petition form from the clerk of the district court at the time bail is set or at any other time from the jail personnel. After filing the petition with the clerk or detaining authority, the defendant's appeal must be heard by the superior court on the same day or if this is impossible, on the next business day.¹⁴⁵ (In some courts, bail appeals are now conducted using closed circuit television, with the defendant communicating with the court from his jail cell. This raises several issues for defense counsel, including whether the client should waive his right to appear personally at the hearing, and if so whether counsel should appear in the courtroom or with the client at the jail. These and other issues are addressed in the margin.¹⁴⁶) In Suffolk County, contacting the Bail Appeal Project can

¹⁴² G.L. c. 276, § 58. Bail in a first-degree murder case has also been reviewed by the superior court. *See Commonwealth v. Flaherty*, 384 Mass. 802 (1981). Conditions of release on bail can be reviewed even if the defendant is released at the time he petitions. *See Commonwealth v. Madden*, 458 Mass. 607 (2010).

¹⁴³ G.L. c. 276, § 58; *Comnesso v. Commonwealth*, 369 Mass. 368, 373 (1975).

¹⁴⁴ *Santos v. Commonwealth*, Memorandum and Order of 4/4/88 (Lynch, J.) (S.J.C. No. 88-103 Civ.). *See infra* § 9.9.

¹⁴⁵ G.L. c. 276, § 58. The statute also states that when the petition is filed the clerk or detaining authority must “forthwith” forward the petition, complaint, and judge's reasons for denial to the superior court and must telephone the probation officer and clerk of the district court, the district attorney, the prosecuting officer, the superior court clerk, and the defendant's counsel. The probation officer must transmit the relevant papers “forthwith,” and the district court or detaining authority must deliver the defendant to the superior court the same day or, if impossible, the morning of the next business day.

¹⁴⁶ Under Superior Court Administrative Directive 93-1 #5 (7/6/93), concerning Suffolk bail appeals, the defendant has a right to appear personally in court, but may waive this right. (The right to personally appear is also guaranteed by the state and federal constitutions, as detailed *infra* at ch. 28). To have the client appear in court, counsel should notify both the clerk's office and the court officers (or, if the client is in jail, the Legal Services office at Nashua St. jail). If the client will remain at the jail, as happens in 99 percent of cases in Suffolk County, the court must send six documents to the jail—the complaint, notice of assignment of counsel or entry of appearance, the probation intake report, the defendant's record, the police report, and the judge's statement of reasons for bail—or a judge's signature waiving the production of these documents. If the client remains at the jail, the proceeding will be videotaped and kept for six years. Counsel may speak to the client on a scrambled private telephone line between the courtroom and the jail.

Some clients prefer remaining at the jail rather than being transported to the court lockup, but the right to be personally present may be a valuable one, particularly in bail appeals where the import of the decision may be less apparent with an absent defendant.

facilitate and expedite the bail process considerably.¹⁴⁷ In some superior courts, bail reviews are rotated among the judges on a daily or weekly basis, so the timing of the petition may affect its result.

A dissatisfied defendant may appeal from the superior court to the Supreme Judicial Court, ordinarily but not necessarily solely on errors of law.¹⁴⁸ After exhausting these state remedies, the defendant may attempt to obtain pretrial release from the United States District Court under its habeas corpus jurisdiction.¹⁴⁹ However, the federal constitutional issues detailed *supra* in § 9.2 must have been raised in the state forum to obtain federal habeas relief.

Finally, where bail has been set at a level that ensures continued pretrial incarceration, counsel should remember remedies apart from the bail appeal. The thirty-day rule guarantees a court date in district court within thirty days.¹⁵⁰ Additionally, continued pretrial detention requires a determination of probable cause by a neutral magistrate.¹⁵¹ Massachusetts requires such a determination to be made within twenty-four hours of a warrantless arrest.¹⁵²

§ 9.8 CHANGE IN BAIL

The defendant or the Commonwealth may move for a change in bail at any time based on new circumstances or information.¹⁵³ For the defendant, reduction in the amount of bail will have negligible benefit if he was released on a surety bond, since he does not get the premium back in any case. However, a defendant released on “cash bail alternative” will obtain the return of some of the cash bail if bail is reduced.

¹⁴⁷ The telephone number of the Suffolk County Bail Appeal Project is (617) 635-1100 ext. 3030. The Project will provide counsel with copies of the papers (criminal complaint, judge's statement of reasons for setting bail, and probation record), arrange for delivery of the papers and transportation of the defendant to the superior court, organize video bail appeals, and in some cases prepare the petition and represent the defendant.

¹⁴⁸ The defendant would petition the S.J.C. single-justice session for review under G.L. c. 211, § 3; further review by the full bench is also possible. The single justice has the *power* to consider the matter anew and take further evidence, but ordinarily “it is the practice of the single justice to review the matter only with reference to errors of law. . . . In the full court, review is more strictly limited to errors of law.” *Comnesso v. Commonwealth*, 369 Mass. 368, 373–74 (1975). *See also* *Preston v. Commonwealth*, 391 Mass. 1017 (1984) (rescript) (full court review limited to errors of law and abuse of discretion).

Review of a pretrial bail appeal must go to the S.J.C.; however, after conviction, review of bail pending appeal may be heard by the Appeals Court. *See infra* § 39.2C.

¹⁴⁹ 28 U.S.C. § 2241(c)(3); *Rivera v. Concepcion*, 469 F.2d 17 (1st Cir. 1973). For fuller discussion, *see* AMSTERDAM, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES §§ 57-A, 61, 71 (A.L.I.-A.B.A. 4th ed.).

¹⁵⁰ G.L. c. 276, § 35. *See* full discussion *infra* at § 23.2G.

¹⁵¹ *Riverside County v. McLaughlin*, 500 U.S. 44 (1991); *Gerstein v. Pugh*, 420 U.S. 103, 124 n.25 (1975).

¹⁵² *Jenkins v. Chief Justice of the District Court Dep't*, 416 Mass. 221 (1993). *See* further discussion *supra* at § 2.1B(4).

¹⁵³ However, the provisions of G.L. c. 276, § 58 relating to revision of bail if circumstances change do not apply to bail for a person charged with murder in the first degree. *Magraw v. Commonwealth*, 429 Mass. 1004 (1999). The question of bail throughout such cases is “a matter of discretion.” *Id.*

Counsel should move for reduction when the Commonwealth is unprepared and seeks a continuance, the Commonwealth has taken an interlocutory appeal (which may trigger personal recognizance pursuant to Mass. R. Crim. P. 15(c)), or the defendant has shown his reliability by repeated appearances in the case, or whenever new circumstances warrant.¹⁵⁴

The Commonwealth may move for an increase in bail, but bail cannot be increased unless the court finds changed circumstances or other factors not previously known when the original order was made.¹⁵⁵ Hearsay statements may be used by the judge in decisions regarding increasing bail.¹⁵⁶ The district court may not revoke or revise bail or a recognizance order because the defendant has appealed or has been bound over to the superior court after a probable-cause hearing.¹⁵⁷ However, § 58 allows revocation on default¹⁵⁸ or surrender by a probation officer, and as noted the statute does allow revocation of bail in some circumstances where the defendant has been arrested for a second charge while free on bail.

Bail is discretionary and may be changed following a verdict, finding, or plea.¹⁵⁹

Finally, counsel should *not* assume that a summoned defendant who appears will be released on the same terms and should be ready to argue for personal recognizance or low bail based on his appearance.¹⁶⁰

§ 9.9 FAILURE TO APPEAR

A defendant who fails to appear on her court date in accordance with a recognizance order incurs a series of risks. *First*, often a *default warrant* will be issued for the defendant's arrest,¹⁶¹ and it is presumed that any bail posted will be ordered

¹⁵⁴ Standards of Judicial Practice: Pretrial Release, Standard 2:02 (District Court Administrative Office, Aug. 1977) (bail may be reduced at any time, especially if the Commonwealth has sought a continuance); *Comnesso v. Commonwealth*, 369 Mass. 368 (1975) (trial court apparently reduced bail because Commonwealth's continuance request justified a greater risk of default).

¹⁵⁵ G.L. c. 276, § 58. Where changed circumstances warrant an increase, the section provides that the original bail order remains in effect and a further order is added. *See also* Standards of Judicial Practice: Pretrial Release, Standard 2:01 (District Court Administrative Office, Aug. 1977).

¹⁵⁶ *Commonwealth v. Snow*, 404 Mass. 1007 (1989) (rescript).

¹⁵⁷ G.L. c. 276, § 58(6). *See also* *Comnesso v. Commonwealth*, 369 Mass. 368, 373, 375 (1975). However, *Comnesso, supra*, 369 Mass. at 376 held that an increase in bail was not error because the circumstances of the offense may have “looked quite different after the probable cause hearing, and that after the hearing the proof was evident or the presumption great.”

¹⁵⁸ *See infra* § 9.9, regarding bail after default.

¹⁵⁹ Mass. R. Crim. P. 28(b) (verdict, finding, or plea) and 31(a) (stay of execution). *See infra* § 39.2 (stay of sentence).

¹⁶⁰ A summoned defendant may not be required to give surety except by “special order” under G.L. c. 276, § 27. Although this contemplates liberal treatment for a summoned defendant, in practical effect it is likely that the written reasons required by § 58 would satisfy this requirement.

¹⁶¹ However, “the issuance of a default warrant for the arrest of a person is never to be treated as a matter of routine.” If no one answers the list when the case is called, there must be

forfeited. Counsel should ask that the forfeiture be delayed until the defendant appears because it can always be accomplished at that time and the defendant may have an extraordinary reason that prevented her appearance.¹⁶² If so, the default can be removed¹⁶³ and forfeiture avoided.

Second, a defendant whose failure to appear is willful and “without sufficient excuse” may be (but often is not) charged with the *substantive offense of “bail jumping.”*¹⁶⁴ The penalty is incarceration and a fine,¹⁶⁵ but incarceration cannot exceed the penalty for the crime on which she defaulted. Section 58 requires that at the time of pretrial release, the defendant be warned of this penal consequence of failure to appear.

Third, although of questionable legality, some courts have punished defaults as *contempt*.¹⁶⁶

Fourth, the court may impose costs on a defaulting defendant when she is brought back to court.¹⁶⁷

Fifth, though the court is not necessarily barred from releasing a defaulting defendant on bail or recognizance,¹⁶⁸ some courts are detaining defaulting defendants by refusing to remove the default and recall the warrant. The defendant is thereby held

at least a brief investigation as to the reason. *Commonwealth v. Pacifico*, 27 Mass. App. Ct. 254, 256 n.2 (1989).

¹⁶² Standards of Judicial Practice: Pretrial Release, Standard 3:01 (District Court Administrative Office, Aug. 1977) suggests that if the security consists of a personal bond or surety bond, forfeiture should not be ordered until the defendant next appears and the court decides the default was not excusable; but that if the security was in the form of cash, bankbooks, or bonds held by the court, it be forfeited immediately unless the court has reason to believe the default may be excusable. The standards seek to avoid “wasted effort” in the former case, because forfeiture there requires a judgment on the bond pursuant to G.L. c. 276, § 36.

¹⁶³ G.L. c. 276, § 36.

¹⁶⁴ G.L. c. 276, § 82A. In *Commonwealth v. Love*, 26 Mass. App. Ct. 541 (1988), the court found that the statute was not unconstitutionally vague and that burden is on the defendant to produce sufficient evidence of the excuse, a position which prevailed on federal habeas review. *Love v. Butler*, 952 F.2d 10 (1st Cir. 1991). *See also Sclamo v. Commonwealth*, 352 Mass. 576 (1967) (conviction under statute requires panoply of due process rights).

¹⁶⁵ A defendant who fails to appear after release on bail or personal recognizance for a misdemeanor offense may face a fine of up to \$10,000 and up to one year in the house of correction. For a felony, the penalty may be a fine of up to \$50,000 and up to five years in the state prison or two-and-one-half years in the house of correction. Any term of imprisonment imposed under this section is to be served consecutive to any sentence imposed on the underlying offense. *See* G.L. c. 276, § 82A, as amended on August 13, 1994.

¹⁶⁶ The legality of this is questioned in *Sclamo v. Commonwealth*, 352 Mass. 576, 578 (1967), and using the contempt power is discouraged by the Standards of Judicial Practice: Pretrial Release, Standard 3:05 (District Court Administrative Office, Aug. 1977). A contempt conviction for violation of conditions of release has been upheld by the S.J.C. *Commonwealth v. Dodge*, 428 Mass. 860, 865 (1999). If the court proceeds by contempt rather than the substantive offense, due process rights still apply. *See infra* ch. 46.

¹⁶⁷ These costs must be the reasonable and actual expenses due to the default. G.L. c. 280, § 6.

¹⁶⁸ G.L. c. 276, § 67, as amended in 1989, was repealed in 1994. It had provided that a defaulting defendant brought back to court is not entitled to the presumption of release on personal recognizance, and if the charge is punishable by incarceration for more than 100 days, may not again be released on bail or recognizance on the same charge except by a judge of the court in which she defaulted.

in lieu of bail on the default warrant (*mittimus*), denying the defendant: (1) any bail status; (2) a bail review in superior court; and (3) in rearrest cases, the procedural rights under the preventive detention/bail revocation provisions of § 58. A single justice opinion holds that § 58 has no application in this situation, but that appeal lies to a single justice of the Supreme Judicial Court under G.L. c. 211, § 3. This means that instead of a *de novo* review, the Supreme Judicial Court will only look to whether the denial of bail was an abuse of discretion.¹⁶⁹

Sixth, a defendant convicted of an offense committed while on pretrial release, whether personal recognizance or bail, will be sentenced “consecutively to the earlier sentence for the crime for which he was on release,” not concurrently.¹⁷⁰

Seventh, a defendant tried under the former *de novo* system could lose her appeal to the *de novo* jury session through a default, as detailed *supra* in ch. 3.

Eighth, in certain circumstances testimony may be taken in the absence of a defaulting defendant and used at trial.

Ninth, any default will be relied upon in future bail arguments and a default could invite the deleterious “consciousness of guilt” instruction at trial.

Certain protections exist for the defaulting defendant. *First*, the defendant may be able to demonstrate that the default was excusable or due to Commonwealth error.¹⁷¹

¹⁶⁹ Santos v. Commonwealth, Memorandum and Order of 4/4/88 (Lynch. J.) (S.J.C. No. 88-103 Civ.). See also Standards of Judicial Practice: Pretrial Release, Standard 3:04 (District Court Administrative Office, Aug. 1977); Commonwealth v. Stuyvesant Insurance Co., 366 Mass. 611 (1975) (effect of removal of default).

¹⁷⁰ See *supra* § 9.5.

¹⁷¹ The default can be removed for good cause pursuant to G.L. c. 276, § 36. What constitutes “good cause” may be vigorously debated, but defense counsel can obtain guidance from abundant case law arising from the old *de novo* system because a defendant could be denied her *de novo* jury trial for failure to appear only if her default were “solid.” A default is *not* “solid” if:

(1) There are mitigating circumstances or other good cause. Commonwealth v. Coughlin, 372 Mass. 818, 821 (1977) (defendant appeared on several occasions on which his trial was continued, and had been defaulted after appearing late on only a single occasion); Commonwealth v. Bartlett, 374 Mass. 744, 763–64 (1978) (defendant never received notice to appear). Commonwealth v. Gomez, 78 Mass. App. Ct. 569 (2011) (defendant unable to appear before the court due to being in government custody for a new offense). *But see* Commonwealth v. Higgins, 23 Mass. App. Ct. 552, 558–59 (1987) (default judged “solid” when defendant had signed notice of transfer of his criminal cases and was warned of the consequences of any failure to appear).

(2) It is based on excusable lateness. In Commonwealth v. Coughlin, 372 Mass. 818 (1977), a sentencing under § 24 was reversed as “capricious” where the defendant had appeared on several occasions and was defaulted for appearing several hours late on one court date. But where lateness was due to failure to act “responsibly” following luncheon recess the trial court properly entered a solid default and filed written findings. Commonwealth v. Parillo, 29 Mass. App. Ct. 969, 971–72 (1990). And in Commonwealth v. Espinoza, 28 Mass. App. Ct. 65, 69 (1989), the court found tardiness enough if it demonstrates that the defendant “consciously disregarded the duty to be present.”

(3) The Commonwealth failed to meet its burden of proving notification to the defendant of the court date (Commonwealth v. Shea, 35 Mass. App. Ct. 717 (1994) (where the Commonwealth failed to sustain burden of proving defendant was notified of the date of *de novo* trial either while in federal prison or after his release, defendant's failure to appear was not a “solid default” warranting imposition of sentence pursuant to G.L. 278, § 24); Commonwealth v. Bartlett, 374 Mass. 744, 747–48 (1978) (mailed to wrong address); Commonwealth v.

Second, the default cannot be a factor in the sentence imposed on the original crime.¹⁷² *Third*, the default may not be used at trial, except *perhaps* after a showing that it was motivated by a choice to avoid trial.¹⁷³

Although the issue is far from clear, according to an ABA opinion, counsel is not obligated to disclose his defaulting client's location.¹⁷⁴

§ 9.10 CHECKLIST OF CLIENT INTERVIEW QUESTIONS RELEVANT TO A BAIL HEARING OR REVIEW ¹⁷⁵

Identifying information

1. Name.
2. Address.
3. Phone number.
4. Date and place of birth.
5. Social security number.

McVicker, 20 Mass. App. Ct. 713 (1985) (same)), *unless* lack of notice is attributable to the defendant's failure to keep the court informed of a change of address. Commonwealth v. O'Clair, 374 Mass. 759, 763–64, *appeal dismissed*, 439 U.S. 805 (1978); Commonwealth v. Francis, 374 Mass. 750, 753–54 (1978), *appeal dismissed*, 439 U.S. 805 (1978). *Francis* suggests that at the time appeal is taken, the clerk notify the defendant of his obligation to keep the court informed of his current address, and that the court and district attorney send notice of the trial date to both the defendant and counsel of record.

(4) The default was entered without following procedural requirements. If no one answers the call of the case, there must be at least a brief investigation into the reason for the absence before a default warrant may issue. Commonwealth v. Pacifico, 27 Mass. App. Ct. 254, 256 n.2 (1989). In “nonroutine” cases, the court should state its reasons for entering or maintaining the default. Commonwealth v. Coughlin, 372 Mass. 818, 822 n.7 (1977); Commonwealth v. Bartlett, 374 Mass. 744, 746 n.3 (1978). A finding that a default is “solid” has “portentous consequences for a defendant . . . [and] is not to be arrived at casually or capriciously.” Commonwealth v. Espinoza, 28 Mass. App. Ct. 65 (1989) (citing *Coughlin, supra*).

¹⁷² Commonwealth v. Sitko, 372 Mass. 305, 313 (1977).

¹⁷³ Commonwealth v. Hightower, 400 Mass. 267, 269 (1987) (reversal based on prosecutor's use of default in closing argument since no evidence defendant defaulted to avoid trial; whether default ever admissible to show consciousness of guilt reserved).

¹⁷⁴ Opinion No. 84-349, ABA Standing Committee on Ethics and Professional Responsibility. Cf. Mass. Bar Ass'n Ethics Opinion 77-12, 62 MASS L.Q. 191 (1977) (if defendant fled *after* counsel's representation began, *and* constitutes a fraud on court, duty of disclosure under Mass.R.Prof.C. 1.2, 1.6, 1.10, 3.3, 4.1, and 9.1. See also Lefstein, *Confidentiality and the Fugitive Client*, 1 CRIMINAL JUSTICE (1986) (A.B.A. Section on Criminal Justice); and BURKOFF, CRIMINAL DEFENSE ETHICS § 6.5(a)(2) (1988).

¹⁷⁵ See also *infra* § 11.9 (defendant interview checklist regarding allegations and dispositions). The checklist in this § 9.10 is a revised version of a checklist included in the CRIMINAL PRACTICE INSTITUTE TRIAL MANUAL (1986), published by the D.C. Public Defender Service and the Young Lawyers Section of the D.C. Bar Association. The author gratefully acknowledges the CPI for its permission to utilize and adapt the checklist.

The questions included here are clearly exhaustive, and many may have to be deferred until a future time when privacy and time constraints are alleviated.

Criminal case history

6. Current charges, including allegations and defenses.
7. Re: arrest
 - a. Date of arrest.
 - b. Cooperation, force, injuries during arrest.
 - c. Postarrest procedures, including show-ups, searches and seizures, statements, etc.
8. Date of first appearance before the court.
9. Name of judge.
10. Amount of bail set at first appearance.
11. Date of second and subsequent appearances in court.
12. Name of judge presiding at second and subsequent appearances in court.
13. Amount of bail set at second and subsequent appearances.
14. Status of case (whether pending trial, probable-cause hearing, pretrial conference, grand jury action, appeal, etc.)

Personal history

15. Whether a United States citizen. If not, obtain INS alien number, place and date of entry, and immigration status.
16. Residential history for last five years, including place and length of each residence, and roommates.
17. Address at time of arrest (include phone number).
18. Person or persons living with defendant at the time of arrest, including for each the relationship to the defendant, place of employment, and current address and phone number.
19. Home ownership?
20. Marital and family history (include common law)
 - a. Number and duration of marriages.
 - b. Name of spouse.
 - c. Presently living with spouse?
 - d. Number and ages of children.
 - e. Supporting spouse?
 - f. Supporting children?

Employment history

21. Employment at time of arrest
 - a. Name of employer.
 - b. Address of employer (include phone number).
 - c. Nature of work performed (include any title).
 - d. Length of time employed.
 - e. Name of supervisor.
 - f. Possibility of being able to return to work if released.
 - g. If unemployed at time of arrest, (i) length of time of unemployment, (ii) reason why unemployed, (iii) phone number of any prospective employer and date prospective employment is to begin.

22. Prior employment (include information in Items 21a–21e and reasons for leaving each job).

23. If attending school at time of arrest: name of school, type of study, hours attending each day, address, phone number, and length of time attended.

Contacts

24. Names and addresses of all relatives in Massachusetts with whom defendant maintains significant contact (include phone numbers at home and at place of employment together with nature of employment).

25. Names and addresses of nonrelatives in Massachusetts area with whom defendant maintains significant contact (include phone numbers at home and at place of employment together with nature of employment).

26. Those people in items 24 and 25 willing to help make bail or take third-party custody of defendant.

Prior court involvement

27. All prior arrests (including charge, specific court, and date).

28. All prior releases on monetary or nonmonetary conditions (include the conditions of release, any forfeiture of money bond or revocation of nonfinancial conditions, the reasons, the court, the date, the offense, and the docket number).

29. All prior convictions (include the offense, case number, court, date, and sentence imposed).

30. All prior periods of probation (include the court, offense, case number, judge who placed on probation, date, probation officer, conditions of probation, whether probation ever revoked, and if so the date and reasons for revocation).

31. All prior records of parole (include the court, offense, case number, parole officers, parole conditions, date paroled, date time expires, whether parole ever revoked, and if so the date and reasons for revocation).

32. Defendant presently on probation or parole (include the court, offense, case number, date paroled or placed on probation, name of judge if on probation, conditions, probation or parole officer, degree of compliance with conditions, date time expires).

33. All other pending charges (including date of arrest, offense, case number, status of case, next court date, judge, conditions of release, name and address of attorney).

34. All prior defaults and any explanations. Were the defaults technical (such as failure to pay fine, probation default, failure to appear at termination of probation, etc.).

Health

35. Present condition of health (excellent, good, fair, or poor, with reasons if health is fair or poor) and present medical needs.

36. Prior hospitalization for a mental condition (if yes, include details relating to dates, places, names of doctors, diagnosis, treatment received, and date of discharge).

37. Present or past use of narcotics (include length of use, type of drug, treatment received, place of treatment together with address, phone number of counselor, duration of treatment, tests conducted, and length of time since last used).

Financial resources

38. Financial resources available at present time (include amount of money on hand, in banks or available from friends or relatives together with their names, addresses, and phone numbers).

39. What does client think he can afford to post as bail?