

## COVID-19 EMERGENCY RELEASE PROCESS

Chart based on *Committee for Public Counsel Services v. Chief Justice of Trial Court*, SJC-12926 (April 3, 2020) (hereinafter *CPCS*) and Court Orders — Superior 5-20, District 4-20, BMC 5-20, and Juvenile 5-20 — <https://www.mass.gov/guides/court-system-response-to-covid-19>

| Pre-Trial Defendant Status |   |  | Appendix A  |
|----------------------------|---|--|---|
| Standard                   | Rebuttable Presumption of Release   | No Presumption of Release  |   |
| <b>Eligibility</b>         | <ul style="list-style-type: none"> <li>No 276, § 58A preventive detention;</li> <li>No revoked bail; and</li> <li>Not charged with Appendix A crime.</li> </ul>   | <ul style="list-style-type: none"> <li>Held under § 58A; or</li> <li>Bail revoked; or</li> <li>Charged with Appendix A crime.</li> </ul>   | <b>1. Any felony involving: (i) use, attempt, or threat of physical force or weapon against another; (ii) burglary, extortion, arson, or kidnapping; or (iii) explosives.</b> See 140, § 21. 276, § 58A.  |
| <b>Filing Instructions</b> | <ul style="list-style-type: none"> <li>Email to designated clerk</li> <li>Subject line: Comm. v. _____. Docket # _____.<br/>*Motion for release based on SJC-12926 — PRESUMPTIVE RELEASE<br/>*If so, add AGREED-UPON before Motion</li> <li>Copy to DA and Probation</li> </ul>   | <ul style="list-style-type: none"> <li>Email to designated clerk</li> <li>Subject line: Comm. v. _____. Docket # _____.<br/>Motion for release based on SJC-12926 — NON-PRESUMPTIVE RELEASE</li> <li>Copy to DA and Probation</li> </ul>   | <p>Includes, but not limited to, murder (265, § 1); manslaughter (265, § 13); mayhem (265, § 14); assault with the intent to murder or maim (265, § 15); assault and battery by means of a dangerous weapon (265, §§ 15A, 15B, 15C); strangulation (265, § 15D); assault and battery or attempt by discharge of firearm (265, §§ 15E, 15F); attempted murder (265, § 16); armed robbery (265, § 17); assault with the intent to rob or murder (265, § 18); armed assault in a dwelling (265, § 18A); use of a firearm in the commission of a felony (265, § 18B); home invasion (265, § 18C); unarmed robbery (265, § 19); stealing by confinement (265, § 21).</p> |
| <b>Supporting Reasons</b>  | <p><u>Include in motion:</u></p> <ol style="list-style-type: none"> <li>Defendant/probationer name.</li> <li>Current bail/detention status.</li> <li>Client consent to motion.</li> <li>Client not charged with Appendix A or held on § 58A or bail revocation.</li> <li>No positive test or COVID-19 symptoms; <i>or</i> quarantine for contact with person who tested positive.<br/>Not eligible for release while this factor present (<i>CPCS</i> n. 19).<br/>Sheriffs provide medical records upon timely request (<i>CPCS</i> n. 21).</li> <li>Attorney spoke to prosecutor.</li> <li>Any agreement.<br/>Get Probation input if agreement involves supervision.</li> <li>Attorney email address.</li> <li>Attach docket and CARI (if possible)<sup>1</sup></li> </ol> <p><u>May file other attachments</u> (e.g., police report, CORI).</p> | <p><u>Include in motion:</u></p> <ol style="list-style-type: none"> <li>Defendant/probationer name.</li> <li>On pg. 1: § 58A, pending charges, or bail revocation status.</li> <li>No positive test or COVID-19 symptoms; <i>or</i> quarantine for contact with person who tested positive.<br/>Not eligible for release while this factor present (<i>CPCS</i> n. 19).<br/>Sheriffs provide medical records upon timely request (<i>CPCS</i> n. 21).</li> <li>Any agreement (much harder but not impossible; worth calling ADA).<br/>Get Probation input if agreement involves supervision.</li> <li>Attorney email address.</li> <li>Attach docket and CARI (if possible)</li> </ol> <p><u>May file other attachments</u> (good idea since burden higher for defendant).</p> | <b>2. Any domestic violence</b> , including A&B on family member (265, § 13M); violation of 209A and 258E restraining orders.<br><br><b>3. Intimidation witnesses, jurors, or people furnishing information</b> (268, § 13B).<br><br><b>4. 3<sup>rd</sup> or subsequent OUI</b> within ten years of previous conviction (90, § 24).<br><br><b>5. MV homicide or manslaughter</b> (90, § 24G, 265 § 13½).  |



<sup>1</sup> Superior and BMC specifically direct this in their orders. Makes sense in other courts too.

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|---|--|--|--|
| <b>Opposition</b>                       | <u>Within 1 day</u> of receipt of motion.  | <u>Within 7 calendar days</u> of receipt.  | <b>Appendix A Continued</b><br><br>6. <b>All minimum mandatory offenses involving illegal possession of a gun or feeding device</b> (269, § 10).<br><br>7. <b>Listed sex crimes:</b> Aggravated and rape (265, § 22); child rape and aggravated under 16 (265, § 22A or 22B); statutory rape and aggravated (265, § 23 or § 23A); assault with intent to rape (265, § 24); assault child with intent to rape (265, § 24B); kidnap child (265, § 26); indecent A&B child under 14 and aggravated (265, 43 § 13B or 13B½); indecent A&B intellectually disabled (265, § 13F); indecent A&B 14 or over (265, § 13H); enticement child under 16 (265, § 26C), electronic enticement child under 18 (265, § 26D); sex trafficking (265, § 50); subsequent viol (265, § 52); enticement for prostitution (272, § 2); drug for intercourse (272, § 3); induce minor prostitute (272, § 4A); pimp for minor prostitute (272, § 4B); incest (272, § 17); create child pornography (272, § 29A); lascivious act child under 16 (272, § 35A).<br><br>8. <b>Traffick cocaine/heroin over 200 grams</b> [94C, § 32E(b)(4), (c)(4)]; or <b>fentanyl/carafentanil</b> [94C, § 32E(c½), (c¾)].<br><br>9. <b>Any attempt, conspiracy, or accessory after the fact to any of the above offenses.</b> |
| <b>Judge Process &amp; Ruling</b>       | <u>Agreed.</u> Allow by notation, no hearing; or<br><br><u>Contested.</u> Conduct video/phone hearing: <ul style="list-style-type: none"> <li>• No later than 2 days after filing;</li> <li>• Defendant need not be present;</li> <li>• Other appropriate evidence permitted;</li> <li>• Presume release unless <i>proof by preponderance</i> of unreasonable danger to community or very high flight risk;</li> <li>• May impose conditions (e.g., GPS, probation supervision);<sup>2, 3</sup></li> <li>• Decision must “prompt;”</li> <li>• Based on “totality of circumstances.”<sup>4</sup> <ul style="list-style-type: none"> <li>✓ Risk of exposure in custody;</li> <li>✓ Safety risk to anyone if defendant released;<sup>5</sup></li> <li>✓ Vulnerability due to pre-existing medical condition or advanced age;</li> <li>✓ If probation violation, is it technical or new crime;</li> <li>✓ Defendant’s release plan.</li> </ul> </li> </ul> | <u>Deny without hearing</u> (“on the papers”); or<br><br><u>Allow video/phone hearing:</u> <ul style="list-style-type: none"> <li>• No time mandated;</li> <li>• Defendant need not be present;</li> <li>• Other appropriate evidence permitted;</li> <li>• No presumption of release;</li> <li>• May impose conditions;</li> <li>• Decision must “prompt.”</li> <li>• Same “totality of circumstances” factors should be argued. <i>CPCS</i> does not preclude a judge from considering them in a non-presumption case — if vulnerability to COVID-19 can be linked to a good release plan, court may feel compelled to release.</li> </ul> |  |
| <b>Appeal</b>                           | <u>SJC single justice under 211, § 3.</u>  | <u>No special appeal process.</u>  |  |
| <b>Post-Conviction Defendant Status</b> |  |  |  |
| <b>Options</b>                          | Once convicted, defendant may raise COVID-19 concerns: <ol style="list-style-type: none"> <li>1. <u>Post-trial motion:</u> (i) stay sentence pending appeal or motion for new trial [ADA has 14 days to respond]; (ii) motion for new trial [ADA has 30 days to respond]; or (iii) revise or revoke sentence under Mass. R. Crim. P. 29 — must file within 60 days of sentence [ADA has 14 days to respond]; or</li> <li>2. <u>Release on parole:</u> <i>CPCS</i> at 38-39 discusses early parole in which COVID-19 concerns may be raised. Juveniles can bring their concerns to DYS. See Juvenile Order 5-20.</li> </ol>   |  |  |

*Feel free to disseminate this chart!*

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<sup>2</sup> Must be consistent with SJC Order Concerning GPS Monitoring (March 23) and Trial Court Emergency Order 20-2 Concerning Probation Conditions as a Result of COVID-19 (March 16).

<sup>3</sup> Arrest warrant may be issued for violation of release condition on motion of ADA or Probation.

<sup>4</sup> These specific considerations appear in *CPCS* at 32, so advocates may want to specifically address each in a contested hearing before a judge.

<sup>5</sup> ADA’s inability to notify victim pursuant to Chapter 258B is *not* a reason to hold defendant. *CPCS* at 32.