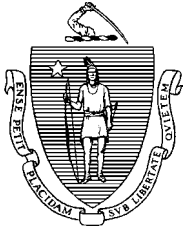


8. District Court Transmittal No. 980, March 19, 2008,
"Revised chart of predicate offenses for a § 58A
dangerousness determination"



Lynda M. Connolly
Chief Justice

**Trial Court of the Commonwealth
District Court Department**

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TRANSMITTAL NO. 980	
Last Transmittal No. to:	
First Justices	979
Other Judges	979
Clerk-Magistrates	—
CPOs	—

MEMORANDUM

TO: District Court Judges
FROM: Hon. Lynda M. Connolly, Chief Justice
DATE: March 19, 2008
SUBJECT: **Revised chart of predicate offenses for a § 58A dangerousness determination**

The materials distributed to each judge at last year’s Northampton judicial conference included a laminated, gray-colored chart summarizing the requirements for “Setting and Revoking Pretrial Conditions & Terms of Release.”

The Committee on Criminal Proceedings, which prepared that very useful chart, has now made one amendment to it, and a revised chart which incorporates that amendment is attached.

In the original chart, the predicate offenses that may trigger a dangerousness determination under G.L. c. 276, § 58A were shown as including “4th or subseq violation of c. 90 § 24.” In the revised chart, that entry has been changed to read “3rd or subseq violation of c. 90 § 24. *Comm. v. Dodge*, 428 M 860, 864 n.7 (1999).”

The actual wording of § 58A that the chart summarizes is as follows:

“Section 58A. (1) The commonwealth may move, based on dangerousness, for an order of pretrial detention or release on conditions fo[other specified charges] . . . or arrested and charged with . . . a thirdr subsequent conviction [sic] for a violation of section twenty-four of chapter ninety.”

The reference to being “arrested and charged with . . . a third or subsequent *conviction*” has been part of § 58A since its original enactment in St. 1994, c. 68, § 6. Its unusual wording has caused some uncertainty as to whether a charge of 3d or subsequent OUI can trigger § 58A eligibility, or only a charge of 4th or subsequent OUI.

The Criminal Committee notes that in a footnote to *Commonwealth v. Dodge*, 428 Mass. 860, 864 n.7, 705 N.E.2d 612, 615 n.7 (1999), the Supreme Judicial Court indicated that the list of predicate offenses in § 58A “specifically includes charges that could result in a third or subsequent conviction for operating while under the influence of liquor.” While this statement is dicta, it is sufficiently definite that the Committee felt that their chart should be amended to reflect that understanding.

We have also reproduced on the other side of the enclosed laminated chart the current list of sex offenses that require sex offender registration or lifetime community parole supervision, or that may trigger eligibility for commitment as a sexually dangerous person.

SETTING AND REVOKING PRETRIAL CONDITIONS & TERMS OF RELEASE

	C. 276 § 58A(2) Pretrial Probation Conditions of Release, if dangerous and not detained after § 58A detention hearing	C. 276 § 87 Pretrial Probation Conditions	C. 276 § 42A Pretrial Terms of Release to protect family or household member (209A definitions apply)	C. 276 § 58 ¶ 3 Bail Revocation for commission of new offense
Predicate offenses	Felony w/element of use, attempted or threatened use of phys force; any other felony involving a substantial risk that phys force against a person may result (incl burglary & arson); viol of order under 209 §32; 209A § 3, 4, 5; 209C § 20; 208 § 18; 34B, 34C; Arrested & charged w/misd or felony involving 209A-type abuse, or while 209A in effect; drug offenses w/min mand sent NLT 3 yrs; intim wit; 3rd or subseq violation of c. 90 § 24. <i>Comm. v. Dodge</i> , 428 M 860,864,n.7 (1999)	Any offense	A&B, trespass, threats, nonsupport, any offense involving infliction or imminent threat of infliction of phys harm to family or household member	
Requirements for Setting Conditions	Pers Recog will not reasonably assure appearance or will endanger the safety of any other person or the community. (See Reasons for Bail form.)	Def must -consent to conditions (<i>Com v Dodge</i> 428 M 860) -be advised bail could be revoked for violation	Release terms appropriate to insure safety of family or household member & prevent recurrence of abuse or threat of abuse	Prob cause to believe def would seriously endanger a person or community.
Hearing requirements	Right to counsel, to testify, to present witnesses and info, to cross-examine, to 7 day continuance (3 days for Comm if there was PC to arrest); Rules of evidence do not apply	Same as bail hearing	Same as bail hearing	Must be at first appearance in arresting court
Hearing standard	STANDARD: Prob cause to believe crime committed <u>or</u> Clear/convincing ev that condition violated; AND no condition of release will reasonably assure D will not pose danger to others [<i>rebuttable presumption if PC found that D committed crime</i>] <u>or</u> D unlikely to abide by any conditions of release	Clear & convincing ev that -def advised of consequences for viol and -violated condition See <i>Jake J. v. Comm.</i> , 433 M 70 (2000)	Must hold hearing & make findings: -Clear & convincing ev of viol -Unlikely to abide by new conditions See <i>Jake J. v. Comm.</i> , 433 M 70 (2000)	Prob cause to believe crime committed
Violation consequences	Revoke bail and detain for up to 90 days After 90 days new bail hearing	Revoke bail until trial pursuant to inherent power to enforce; - may set new cond - may set new bail	Revoke bail until trial pursuant to inherent power to enforce; - may set new cond - may set new bail	Revoke bail for up to 60 days and return def to court on 60 th day for bail hearing (for bail or new conditions)
Possible conditions	Required: Obey all laws & ●remain in custody of designated person who agrees to supervise/report violations ●maintain or seek work or schl ● restrictions on personal associations, place of abode or travel; ●no contact w/victim & witnesses; ●report to law enf agency, pretrial service agency or other; ●curfew, no weapons; ●refrain from excessive use of alcohol or drugs w/out prescription; ●undergo available medical, mental health or S/A treatment (in or out-pt); ●cash property or surety bail or bond; ●return to custody after job, schl or limited releases; ●any other condition reasonably necessary to assure appearance and assure safety of another or community.	Whatever conditions the court deems proper	Conditions appropriate to insure safety of family or household member and prevent recurrence of abuse or threat of abuse	No conditions; recognizance revoked

Sex Offenses Requiring Notification

Statute	Offense Code	Offense Description <i>(Bolded offenses are within the District Court's final jurisdiction)</i>	Sex Offender Registration (G.L. c. 6 §178E)		Subsequent Offense Requires Lifetime Community Parole Supervision (G.L. c.265 §45; c.275 §18)	May Trigger SDP Eligibility (G.L. c.123A §1)
			Required	Exemption May Be Available		
c.6 §178H	6/178H/A 6/178H/B	SEX OFFENDER FAIL TO REGISTER SEX OFFENDER FAIL TO REGISTER, SUBSQ.OFF. <i>where (1) offender is a level 2 or 3 sex offender, or (2) underlying sex offense was G.L. c. 265, §§ 13B, 13F, 22A, 23, 24B, or 26 ¶4, or conspiracy or accessory to such an offense, or a like violation in another jurisdiction.</i>			✓ (whether first or subsequent offense) ¹	
c.265 §13B	265/13B/A 265/13B/B	INDECENT A&B ON CHILD UNDER 14 INDECENT A&B ON CHILD UNDER 14, SUBSQ.OFF.	✓		✓	✓
c.265 §13F	265/13F/A 265/13F/B	INDECENT A&B ON RETARDED PERSON INDECENT A&B ON RETARDED PERSON, SUBSQ.OFF.	✓		✓	✓
c.265 §13H	265/13H	INDECENT A&B ON PERSON 14 OR OVER	✓	✓	✓	✓
c.265 §22	265/22/A 265/22/D 265/22/B 265/22/C	RAPE RAPE, SUBSQ.OFF. RAPE, AGGRAVATED RAPE, AGGRAVATED, SUBSQ.OFF.	✓		✓	✓
c.265 §22A	265/22A/A 265/22A/B	RAPE OF CHILD WITH FORCE RAPE OF CHILD WITH FORCE, SUBSQ.OFF.	✓		✓	✓
c.265 §23	265/23/A 265/23/B	RAPE OF CHILD, STATUTORY RAPE OF CHILD, STATUTORY, SUBSQ.OFF.	✓		✓	✓
c.265 §24	265/24/A 265/24/B	ASSAULT TO RAPE ASSAULT TO RAPE, SUBSQ.OFF.	✓		✓	✓
c.265 §24B	265/24B/A 265/24B/B	ASSAULT TO RAPE CHILD c265 §24B ASSAULT TO RAPE CHILD, SUBSQ.OFF.	✓		✓	✓
c.265 §26	265/26/A 265/26/B 265/26/C 265/26/D 265/26/E 265/26/F 265/26/G	KIDNAPPING (¶1) KIDNAPPING FOR EXTORTION (¶1) KIDNAPPING FOR EXTORTION, ARMED (¶2) KIDNAPPING WITH SERIOUS INJURY, ARMED (¶3) KIDNAPPING WITH SEXUAL ASSAULT, ARMED (¶3) KIDNAPPING, ARMED (¶2) KIDNAPPING OF CHILD UNDER 16 (¶4) <i>with intent to violate §§13B, 13F, 13H, 22, 22A, 23, 24 or 24B</i>				✓
	265/26/G	KIDNAPPING OF CHILD UNDER 16 (¶4)	✓		✓	
c.265 §26C	265/26C	ENTICE CHILD UNDER 16	✓			
c.272 §2	272/2	PROSTITUTION/UNLAW SEX, ABDUCT PERSON FOR	✓	✓		✓
c.272 §3	272/3	SEXUAL INTERCOURSE, DRUG FOR	✓		✓	✓
c.272 §4A	272/4A	PROSTITUTION, INDUCE MINOR TO	✓			✓
c.272 §4B	272/4B	PROSTITUTION, DERIVE SUPPORT FROM CHILD	✓			✓
c.272 §16	272/16/A	LEWDNESS, OPEN AND GROSS				✓
	272/16/B	LEWDNESS, OPEN AND GROSS, SUBSQ.OFF. <i>where offense is second or subsequent criminal, delinquency or juvenile offender conviction or adjudication, exclusive of any first-offense delinquency adjudication before 8/1/92</i>	✓	✓		✓
c.272 §17	272/17	INCEST c272 §17	✓	✓		
	272/17	INCEST c272 §17 <i>where victim is under age 21</i>	✓	✓		✓
c.272 §28	272/28/A 272/28/B 272/28/C	OBSCENE MATTER TO MINOR OBSCENE MATTER TO MINOR, 2ND OFF. OBSCENE MATTER TO MINOR, 3RD OFF.	✓			✓
c.272 §29A	272/29A/A 272/29A/B	CHILD IN NUDE, LASCIVIOUS POSE/EXHIBIT CHILD IN SEXUAL ACT, POSE/EXHIBIT	✓			✓
c.272 §29B	272/29B/A 272/29B/B	CHILD IN NUDE, DISTRIB MATERIAL OF CHILD IN SEXUAL ACT, DISTRIB MATERIAL OF	✓			✓
c.272 §29C	272/29C/A	CHILD PORNOGRAPHY, POSSESS	✓	✓		✓
	272/29C/B 272/29C/C	CHILD PORNOGRAPHY, POSSESS, 2ND OFF. CHILD PORNOGRAPHY, POSSESS, 3RD OFF.	✓	✓		✓
c.272 §35A	272/35A/A	UNNATURAL ACT WITH CHILD UNDER 16	✓		✓	✓
	272/35A/B	UNNATURAL ACT WITH CHILD UNDER 16, SUBSQ.OFF.	✓		✓	✓
c.272 §53	272/53/D	ACCOST/ANNOY PERSON OF OPPOSITE SEX				✓
	272/53/E	LEWD, WANTON & LASCIVIOUS CONDUCT				✓
c.274 §6	274/6	ATTEMPT TO COMMIT CRIME <i>for any substantive crime listed above</i>		same as substantive crime above		✓
		OUT-OF-STATE ATTEMPT OFFENSES		same as substantive crime above		✓

¹ Lifetime community parole supervision is also required for anyone convicted of failing to register as a sex offender if: (1) they have been categorized as a level 2 or 3 sex offender, or (2) their underlying sex offense was G.L. c. 265, §§ 13B (indecent A&B on a child under 14), 13F (indecent A&B on a retarded person), 22A (rape of a child with force), 23 (statutoryrape), 24B (assault to rape a child), or 26 ¶ 4 (kidnapping of a child under 16), or conspiracy or accessory to such an offense, or a like violation in another jurisdiction. G.L. c. 6, § 178H(a)(1)-(3).