



Trial Court of the Commonwealth District Court Department

Administrative Office
Edward W. Brooke Courthouse
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Paul C. Dawley
Chief Justice

TRANSMITTAL NO.	1280
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First Justices	1279
Other Judges	1279
Clerk-Magistrates	1279
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MEMORANDUM

TO: District Court Judges, Clerk-Magistrates, Assistant Clerk-Magistrates, and Chief Probation Officers

FROM: Hon. Paul C. Dawley, Chief Justice

DATE: March 18, 2020

SUBJECT: **Amendment and Guidance on District Court Standing Order 2-20**

As a result of many questions arising from the issuance of yesterday's District Court Standing Order, I am writing to amend the Order and to provide guidance on the following issues:

- Hearings to be held on G.L. c. 276, § 58A motions filed at arraignment
- Plaintiffs seeking an order of protection under G.L. c. 209A or G.L. c. 258E to enter courthouses as provided below
- Authorization of police to enter courthouses as provided below. This authorization for access continues to be subject to compliance with the Supreme Judicial Court Order, dated March 13, 2020, entitled "Order Regarding Access to State Courthouses and Court Facilities," as well as screening protocols issued to court officers by court security.

1. Ex Parte Protection Order Proceedings

Any person attempting to access the court for the filing of a protection order pursuant to G.L. c. 209A, G.L. c. 258E or G.L. c. 140, §§ 131S & T, may be heard by telephone. Alternatively, if the Court Officer determines the person is not precluded by the SJC Standing Order referenced above or the health screening protocol conducted by the Court Officer, individual courts may, allow the person to enter the building and direct them to an area designated by the Clerk-Magistrate. If possible, the designated area shall be located in the immediate vicinity of the entrance to the courthouse and have telephone access to the clerk's office. Within the designated area, the person will be provided with paperwork consisting of the application for the requested protective order. Once completed by the person, the clerk will provide the documents to the judge. If a telephone is available to the petitioner, the judge may conduct a telephonic ex parte hearing. Such proceeding shall be recorded. If necessary and ordered by the judge, the petitioner will be escorted to the courtroom for a hearing. The judge will consider all information and issue a decision, a copy of which will be provided to probation, the petitioner,

and faxed to police for service on the defendant as in the normal course. If the proceeding is held in a courtroom, the proceeding shall be conducted in a manner that permits appropriate spacing of all participants. All parties will be provided notice of the two party hearing to be conducted telephonically in 10 days which will include instructions on how to participate in the telephonic conference call.

- 2. 58A Hearings.** I am asking that Courts conduct § 58A hearings by telephone or videoconference when the Commonwealth files a motion on a § 58A eligible offense and suggest the following procedures:

Commonwealth and Defendant to Identify Witnesses and Documentary Evidence to be Offered

The court should inquire whether the parties will proceed on documentary evidence. To the extent either party seeks witness testimony, they should identify to the court what witnesses they seek to call with a proffer and the court should rule on such request. Additionally, the parties should submit any documentary evidence they wish to submit at the hearing by email or fax to the clerk prior to the hearing, cc'ing opposing counsel. (the Commonwealth and defense counsel should exchange emails and the clerk should provide the fax and/or email address for the submission of documentary evidence). The judge should determine which witnesses to allow to testify and can rule on the admissibility of such evidence during the hearing.

Defense Counsel

It is expected that defense counsel will either be at the police station or will be able to speak with the defendant directly by telephone. After having sufficient time to consult, the hearing can be conducted either by utilizing the Polycom system or a telephone conference call line.

Telephonic / Videoconference Hearing & Witnesses

All parties should be on the designated line at the designated time with the police department facilitating the defendant's presence by video or telephone. If the hearing was continued and the defendant held at the jail, arrangements should be made with the jail to facilitate the defendant's appearance by video. If defense counsel is not in the same location as the defendant, the police should provide the defendant an opportunity to privately speak to defense counsel on a separate unrecorded line as needed during the hearing.

If the Commonwealth seeks to present witnesses other than police witnesses, they will need to arrange their ability to access the video or telephonic conference, and verify their identity to the court's satisfaction.

If defense counsel seeks to present witnesses, they will need to arrange their ability to access the video or telephonic conference, and verify their identity to the court's satisfaction.

If the judge allows a request for a witness other than police witnesses and that witness is unavailable or unable to participate by videoconference or telephonic conference call, the hearing may be continued to hear from any additional witnesses the court determines would be relevant. During such continuance the defendant should remain in custody.

Witnesses and counsel should participate by telephonic or videoconferencing.

Court Record

The judge and clerk should be in the courtroom. The proceeding should be recorded by FTR, and the case should be docketed in MassCourts. If conducting the hearing by telephone, each person must identify themselves prior to talking.

Order Without Prejudice / Next Date

Any order of detention under § 58A after a hearing by videoconference or telephone is to be issued without prejudice to the defendant's right to request an in-person hearing to be held when the current health emergency is over.

Additionally, G.L. c. 276, § 58A provides that “[t]he hearing may be reopened by the judge, at any time before trial, or upon a motion of the commonwealth or the person detained if the judge finds that: (i) information exists that was not known at the time of the hearing or that there has been a change in circumstances and (ii) that such information or change in circumstances has a material bearing on the issue of whether there are conditions of release that will reasonably assure the safety of any other person or the community.”

The case should be given a 30-day review date, and the Clerk-Magistrate should forthwith fax to the holding facility the required mittimus or writ of habeas corpus for the next review date.

Other General Considerations

- Standard

If the Commonwealth files a motion for detention under G.L. c. 276, § 58A for a defendant who has been charged with a § 58A eligible offense, the court can hold a hearing by videoconference or telephone conference at which the Commonwealth must prove, by clear and convincing evidence, “that no conditions of release will reasonably assure the safety of any other person or the community.” G.L. c. 276, § 58A. (Hearings that were scheduled prior to the issuance of Standing Order 2-20 should be held on their scheduled date consistent with the below procedures, unless there is good cause to reschedule the hearing).

- Conditions

Although § 58A sets forth a list of conditions that can be considered, due to the limited resources as a result of the pandemic, electronic monitoring is the only reliable supervised condition currently available. Release with set conditions that are not actively monitored, would only provide a basis to take action upon learning of violations (e.g., prosecutor or police aware of stay away condition and initiate action upon learning of a violation).

- Hearsay Admissible

“The rules concerning admissibility of evidence in criminal trials shall not apply to the presentation and consideration of information at the hearing and the judge shall consider hearsay contained in a police report or the statement of an alleged victim or witness.” G.L. 276, s. 58A.

- Hold on First Appearance if Possible / Continuance Only on Good Cause

The hearing must be held on the defendant’s first appearance unless the Commonwealth establishes good cause to continue the hearing or the defendant requests a continuance.

If there is good cause to continue the hearing, the court should make a finding that there is probable cause of an eligible offense which would require the defendant to continue be held pending the hearing. The Commonwealth may make the probable cause to arrest showing by means of a complaint issued in accordance with court rules or alternatively, by means of a police report. See *Commonwealth v. Lester*, 445 Mass. 250, 256, 261 (2005) (a properly issued complaint carries with it a finding by a judicial officer of “sufficient evidence to establish the identity of the accused . . . and probable cause to arrest him” for one of the specific offenses enumerated in the statute).

If not all witnesses are available on the defendant’s first appearance, the court can consider commencing the hearing and continuing it to accommodate being able to hear from other witnesses the court determines are relevant.

3. Police Entry into Courthouses

Police officers should be permitted access into the courthouse upon approval by a judge or clerk Magistrate to conduct the business being allowed in the courthouse during the pendency of the Supreme Judicial Court’s Order Limiting In-Person Appearances In State Courthouses That Cannot Be Resolved Through A Videoconference Or Telephonic Hearing and District Court Standing Order 2-20 or for any other reason deemed necessary by a judge or clerk-magistrate.

Subscribing to the Complaint

Pursuant to G.L. c. 276, § 22, the complainant is required to sign the complaint. Clerks may “examine on oath” the complainant via videoconference or telephonically if necessary, but the original complaint must be subscribed to by the complainant. To the extent that subscribing to the complaint requires the police to come into the courthouse to do so, they should be permitted entry. If the arraignment on the new complaint is deferred to a later date, Clerk-Magistrates may delay the police signing of the complaint until that date.

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In-person Application for a Warrant or Search Warrant

Notwithstanding § I of District Court Standing Order 2-20, police should be permitted, with the authorization of a judge or Clerk-Magistrate, to enter the courthouse to apply for a warrant or search warrant so long as the officer is not prohibited from entry pursuant to the Supreme Judicial Court's Order Regarding Access to State Courthouses & Court Facilities and the Magistrate agrees that the officer should be permitted entry into the building to apply for the warrant. Note, however, that, during the pendency of the Supreme Judicial Court's Order Limiting In-Person Appearances In State Courthouses That Cannot Be Resolved Through A Videoconference Or Telephonic Hearing and District Court Standing Order 2-20, police may not be required to come into the courthouse to do so. Under art. 14 and G.L. c. 276, § 2B, the oath and personal appearance are required to support the affidavit that establishes probable cause for the warrant except where the officer seeking the warrant exhausted all reasonable efforts to find a magistrate or judge before whom he could personally appear. *Commonwealth v. Nelson*, 460 Mass. 564, 573 (2011). District Court Standing Order 2-20 recognizes that the circumstances presented by the COVID-19 virus may qualify as the "rare case" in which an officer may rely on communication by telephone and facsimile transmission or secure email to obtain an otherwise valid search warrant. *Nelson*, 460 Mass. at 573. Individual magistrates may determine and establish the best process to receive warrant applications remotely during the pendency of these orders if police are unable to physically appear before a magistrate.

Please do not hesitate to contact this office with any questions, and thank you for your dedication and hard work as the District Court works through this unprecedented process. The Administrative Office will continue to provide updated guidance as additional issues arise.