

No. DAR-_____

Commonwealth of Massachusetts

Supreme Judicial Court

No. 21-P-613

ANTOIWANE HAWKINS-DAVIS

vs.

COMMONWEALTH

No. 21-P-617

JORGE VEGA

vs.

COMMONWEALTH

No. 21-P-618

BOB NUAH

vs.

COMMONWEALTH

ON APPEAL FROM ORDERS OF A
SINGLE JUSTICE OF THE APPEALS COURT

APPLICATION FOR DIRECT APPELLATE REVIEW

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July 21, 2021

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REQUEST FOR DIRECT APPELLATE REVIEW

In a departure from our Commonwealth's presumption of liberty absent a criminal conviction, G.L. c.276, §58A permits pretrial detention without bail, based on dangerousness, for those accused of certain crimes. This practice "has been upheld as constitutional in part because the Legislature 'carefully limit[ed] the circumstances under which detention may be sought to the most serious of crimes,' e.g., a 'specific category of extremely serious offenses.'" *Commonwealth v. Vieira*, 483 Mass. 417, 421 (2019), quoting *United States v. Salerno*, 481 U.S. 739, 747, 750 (1987). The offenses that constitutionally may trigger detention are only those that include "the menace of dangerousness." *Mendonza v. Commonwealth*, 423 Mass. 771, 787 (1996).

In 2009, this Court held that unlicensed possession of a firearm does not manifest that "menace," because it is "a regulatory crime[,] passive and victimless," and "the motive of [the] unlicensed possessor of a firearm is totally irrelevant to criminal liability." *Commonwealth v. Young*, 453 Mass. 707, 714 (2009). The Court therefore held that §58A's then-existing text did not permit detention based on that charge. The Legislature subsequently amended the statute to explicitly include many firearm offenses as predicates. St.2010, c.256, §125.

The 2010 amendment abrogated *Young*'s narrow statutory holding but created a constitutional dilemma: preventive detention only comports with due process for charges with "the menace of dangerousness," *Mendonza*, 423 Mass. at 787, and "unlicensed possession of a firearm ... lacks the 'menace of dangerousness' inherent" in valid predicates, *Young*, 453 Mass. at 716 (quoting the same). Such a charge therefore cannot constitutionally support pretrial detention.

The three applicants face unlicensed firearm possession charges in the trial courts. Although the specifics of their cases vary, none of their charges include as an element the use or brandishing of the firearm they are alleged to have possessed, nor threats or attempts thereof. The Commonwealth has also not alleged any such conduct in connection with any of the applicants' cases. These three presumptively innocent men nevertheless have been jailed without bail.

All three applicants raised constitutional challenges to their detention in the trial courts and again before a single justice of the Appeals Court, whose denials of their petitions under G.L. c.211, §3, they have appealed. Because they share an interest in direct appellate review, they now apply together to this Court, the one best suited to resolve the conflict between its own prior rulings and the Legislature's amendment of §58A to cover regulatory firearms charges. Their arguments pose "questions of first impression" following the amendment of the statute; they concern both "the Constitution of the Commonwealth" and "the Constitution of the United States"; and they are "of such public interest"—not only to these three applicants but also to numerous other defendants detained on firearm charges throughout the Commonwealth, especially given the recent spike in §58A petitions—that "justice requires a final determination by the full Supreme Judicial Court." Mass. R.A.P. 11(a).

FACTUAL AND PROCEDURAL HISTORY

The cases of each applicant are unrelated, and involve different evidence and circumstances at their respective §58A hearings, but the applicants all have this in common: they are all presumed innocent yet are held in jail, without the possibility of bail, based on

mere allegations of unlicensed firearm possession. The particular factual allegations in the three cases are not pertinent to the threshold legal question raised in this application, except for the fact that there is no allegation whatsoever, either formally or in the evidence presented, that any of the applicants used or intended to use the firearms they allegedly possessed for any nefarious purpose.

No. 21-P-613, *Hawkins-Davis v. Commonwealth*

On March 26, 2021, a Suffolk County grand jury returned indictment #2184-CR-146, charging Antoiwane Hawkins-Davis with unlawful possession of a firearm, subsequent offense, G.L. c.269, §10(a)&(d); carrying a loaded firearm, *id.* §10(n); unlawful possession of ammunition, *id.* §10(h)(1); and possession of a large capacity firearm, *id.* §10(m). Mr. Hawkins-Davis was arraigned on April 7, 2021, and pleaded not guilty. The Commonwealth moved for pretrial detention, and the court (Doolin, J.) allowed the motion and ordered Mr. Hawkins-Davis held without bail. On May 11, 2021, Mr. Hawkins-Davis filed a motion to reconsider his pretrial detention, which was denied the following day. Mr. Hawkins-Davis filed a petition for release in the Supreme Judicial Court for Suffolk County pursuant to G.L. c.211, §3, on June 2. The petition was referred to the Appeals Court, where it was entered on June 9, 2021, as No. 21-J-263. A single justice of the Appeals Court (Hanlon, J.) denied the petition on June 29. Mr. Hawkins-Davis timely noticed his appeal on July 6, 2021.

No. 21-P-617, *Vega v. Commonwealth*

On May 10, 2021, Jorge Vega was charged by Dorchester Municipal Court complaint #2107-CR-992 with unlawful possession of a firearm, G.L. c.269, §10(a); similar charges involving a loaded firearm,

id. §10(n), and ammunition, *id.* §10(h)(1); operating a motor vehicle with a suspended license, G.L. c.90, §23; and resisting arrest, G.L. c.268, §32B. The Commonwealth moved for detention based on dangerousness, and on May 14, the court (Kaplanes, J.) ordered Mr. Vega detained without bail. Mr. Vega petitioned to the Superior Court, which on May 21 held a hearing where he raised his constitutional claims, but the court (Doolin, J.) again ordered him detained. Mr. Vega then filed a petition in the County Court pursuant to G.L. c.211, §3, which was transferred for decision to the single justice session of the Appeals Court, where it was entered on June 18, 2021, as No. 21-J-283. The single justice (Hanlon, J.) denied the petition on June 30. Mr. Vega filed a timely notice of appeal on July 6, 2021.

No. 21-P-618, *Nuah v. Commonwealth*

On May 2, 2021, Bob Nuah was charged by Worcester District Court complaint #2162-CR-1579 with unlawful possession of a firearm, G.L. c.269, §10(a); carrying a loaded firearm, *id.* §10(n); unlawful possession of ammunition, *id.* §10(h)(1); and receiving stolen property, G.L. c.266, §60. Mr. Nuah was arraigned on May 3 and pleaded not guilty. The Commonwealth's motion for pretrial detention was heard on May 7, and the court (Power, J.) ordered Mr. Nuah held without bail. Mr. Nuah's petition for review of his detention was denied by the Worcester Superior Court (Wrenn, J.) on May 18 after the court overruled the objections he again raised to his detention. He filed an emergency petition for release in the County Court, which was referred to the Appeals Court and entered on May 27, 2021, as No. 21-J-242. A single justice of that court (Hanlon, J.) denied the petition on June 30, and Mr. Nuah timely noticed his appeal on July 7, 2021.

ISSUE PRESENTED

Whether due process permits the imprisonment without bail of presumptively innocent people who are charged not with using a firearm, or threatening or attempting to use one, but merely possessing one without a license.

Each of the applicants' petitions before the Appeals Court single justice challenged the constitutionality of detention based on such charges, as did their arguments in the trial courts.

ARGUMENT

Allowing pretrial detention based on “regulatory,” “passive,” and “victimless” firearms possession charges stretches the §58A regime beyond the limits of due process, and also invites arbitrary and potentially discriminatory decision-making.

“In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.” *Brangan v. Commonwealth*, 477 Mass. 691, 705 (2017), quoting *Aime v. Commonwealth*, 414 Mass. 667, 677 (1993). Any pretrial infringement on the right to freedom from bodily restraint is subject to strict scrutiny under the due process provisions of the State and Federal Constitutions; a law that results in a deprivation of that most fundamental right must be “narrowly tailored to serve a compelling governmental interest and also be the least restrictive means available to vindicate that interest.” *Foster v. Comm’r of Correction*, 484 Mass. 698, 726 (2020) (cleaned up). See *Aime*, 414 Mass. at 673.

Although “freedom from bodily restraint has always been at the core of liberty protected by the due process clause,” *id.* at 676, it is not the only thing at stake here: pretrial detention can lead to losing jobs, homes, and children or other family ties. A recent study

showed that pretrial release increased the likelihood of future formal employment by 24.9% compared to those who were detained, even three to four years after the initial hearing. Dobbie et al., *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment*, 108 Am. Econ. Rev. 201, 204 (2018). And pretrial detention greatly increases both the likelihood of conviction and the sentence to be received after conviction. *Id.* at 203. See also Leslie & Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes*, 60 J.L. & Econ. 529 (2017). These impacts fall hardest on Black and Hispanic people. One study in New York City, for example, found that “higher rates of pretrial detention among Black and Hispanic defendants explain 40 percent of the Black-white gap and 28 percent of the Hispanic-white gap in rates of being sentenced to prison.” *Id.* Further, multiple studies have found that any initial reduction in crime (at least reported crime) during the time of incarceration tends to be offset by increased recidivism by those detained following their cases’ eventual dispositions, cancelling out the initial effect. *Id.* See also Dobbie et al., *supra*, at 203. Pretrial detention thus causes great harm without any commensurate benefit arising from the loss of liberty.

This Court previously struck down a dangerousness-based bail system under the due process clause of the Fourteenth Amendment. *Aime*, 414 Mass. at 684. Although the Court later upheld §58A, the statute that replaced the regime struck down in *Aime*, it only did so based on that statute’s limited breadth, and even then with serious reservations. *Mendonza v. Commonwealth*, 423 Mass. 771, 790 (1996).

Those reservations included this Court’s “overriding concern that the distinctiveness of the criminal justice system not be elided,

lest we move in the direction of a regime where persons, and not just particular activities and occupations, are seen as regulated by government, rather than a regime where persons are seen as personally responsible for conforming their conduct to the clearly promulgated standards of the criminal law.” *Id.* at 780, *quoting Opinion of the Justices*, 423 Mass. 1201, 1223 (1996). This Court also noted how §58A pushes the boundaries of procedural due process: our State and Federal constitutions enumerate a battery of procedural rights for trials of criminal charges, which “would have little meaning if the same deprivations could be worked free of their constraints, though under a different rubric than that of the criminal law.” *Id.* at 778–779.

This Court upheld the original version of §58A only because of the statute’s limited nature at the time. Key to the Court’s holding was that §58A only came into play when triggered by “the pendency of a charge of serious crime,” *id.* at 780–781—specifically, “certain felonies and other offenses involving the use, or threatened use, of violence or abuse, or the violation of protective orders.” *Id.* at 773. Responding to a complaint that some of the predicate offenses listed in §58A (particularly misdemeanors related to domestic violence) went beyond those in the analogous Federal statute, this Court noted that “[t]his may exceed the scope of the Federal list in some cases, but the menace of dangerousness is plainly enough present in the excess that the statute does not raise constitutional doubts.” *Id.* at 787.

But regulatory firearm possession offenses, such as those at issue in these cases, are not inherently dangerous, and therefore cannot serve as predicates for detention without violating the constitutional principles previously expounded by this Court. For the first

sixteen years of its existence, §58A was not triggered by charges of unlicensed firearm possession. This Court rejected an argument that such charges fell within the statute’s “residual clause” (a provision that itself was subsequently held unconstitutional), which included any felony that “by its nature involves a substantial risk that physical force against the person of another may result.” *Commonwealth v. Young*, 453 Mass. 707, 713, 716–717 (2009). As the Court explained:

That a person possesses a firearm without a valid license does not itself pose a substantial risk that physical force against another may result. Rather, it is the unlawful *use* of a firearm that involves a substantial risk that physical force against another may result.

While we are cognizant that unlicensed possessors of firearms may use firearms unlawfully, unlicensed possession of a firearm itself is a regulatory crime. It is passive and victimless. ... Because the motive of an unlicensed possessor of a firearm is totally irrelevant to criminal liability, we discern no principled legal distinction between the risk of physical force posed by licensed and unlicensed possessors of firearms.

Id. at 714.

Explicitly quoting *Mendonza*’s description of predicates that pass constitutional muster, the *Young* Court concluded that “possession of a firearm does not manifest a disregard for the safety and well-being of others, and therefore lacks the ‘menace of dangerousness’ inherent in the crimes specifically included in §58A(1).” *Id.* at 716.

Young was right when it was decided and remains right today. While gun *violence* is a serious problem, there are many non-violent (or at most self-defensive) reasons to carry a firearm. Hunters, police, sport-shooters, and many citizens simply interested in their own protection carry firearms, and with constitutional sanction. See *gen-*

erally *District of Columbia v. Heller*, 554 U.S. 570 (2008). See also Pierre, *The Psychology of Guns*, 5 Palgrave Comms. 159 (2019) (“handgun ownership is associated with past victimization, perceived risk of crime, and perceived ineffectiveness of police protection within low-income communities”). Even when people possess firearms for purposes that might be deemed less worthwhile—feeling strong or impressing others, for instance—those purposes do not necessarily indicate any particular danger to the community. Fundamentally, the failure to obtain a license—the sole difference between this regulatory offense and constitutionally protected conduct—does not itself indicate dangerousness, as *Young* emphatically held. 453 Mass. at 714.

In 2010, however, the Legislature amended §58A(1) to allow preventive detention of those “arrested and charged with a violation of paragraph (a), (c) or (m) of section 10 of chapter 269.” St.2010, c.256, §125. This resolved the statutory-predicate problem but created a constitutional one: because unlicensed firearm possession is a purely regulatory crime without the “menace of dangerousness,” and because *Salerno* and *Mendonza* upheld the constitutionality of pretrial detention only for the most serious crimes with the “menace of dangerousness,” this statutory expansion has stretched the detention regime beyond the bounds of due process.

If due process allows unlicensed-firearm charges to trigger pretrial detention, it is hard to see what offenses could not. For instance, 334 people in Massachusetts died in motor vehicle crashes in 2019, Fed. Highway Admin., State Highway Safety Report: Massachusetts (2019)—more than the 259 deaths from firearms (most of which were suicides), Nat’l Ctr. Health Stats., Firearm Mortality by State (2019).

Would due process permit the Legislature to make unlicensed operation of a motor vehicle trigger §58A detention? Presumably not.

The Commonwealth may, of course, enforce its firearm regulatory scheme through punishment *after conviction*. But it may not constitutionally imprison accused persons *without* convicting them based on purported “dangerousness” stemming solely from an unproved allegation of unlicensed firearm possession. Strict scrutiny requires that §58A’s pretrial detention scheme be limited only to predicate offenses with “the menace of dangerousness”; the charges in these cases cannot suffice.

Making unlicensed firearm possession a predicate for preventive detention also creates constitutional problems at the second stage of the §58A analysis, when a judge must determine whether detention is justified based on “clear and convincing evidence that no conditions of release will reasonably assure the safety of any other person or the community.” §58A(3). Because the crime itself is not inherently dangerous, this inquiry must look beyond the allegations in the case itself, veering into speculation about the character or motives of the defendant. This pushes the courts one step closer to “a regime where persons, and not just particular activities and occupations, are seen as regulated by government.” *Mendonza*, 423 Mass. at 780, *quoting Opinion of the Justices*, 423 Mass. at 1223.

This inquiry is also inherently arbitrary, making the statute unconstitutionally vague as applied to firearm possession charges. *Cf. Aime*, 414 Mass. at 683 n.22 (failure to limit availability of detention to specific serious crimes also sounded in vagueness). Due process “guards against arbitrary or discriminatory law enforcement by in-

sisting that a statute provide standards to govern the actions of police officers, prosecutors, juries, and judges.” *Sessions v. Dimaya*, 138 S.Ct. 1204, 1212 (2018). The list of factors enumerated in §58A(5), however, provides little guidance. The factors are mostly imported verbatim from the bail statute, G.L. c.276, §58, even though the analyses under the two statutes are supposed to be very different, with the former considering the defendant’s dangerousness and the latter considering only flight risk. *Brangan*, 477 Mass. at 706–707. As a result, the list includes factors like “the potential penalty the person faces,” which is relevant to the latter inquiry but not at all to the former. Whatever merits the factors may have in other circumstances, they are particularly useless in evaluating firearm possession allegations, where the “nature and circumstances of the offense charged,” §58A(5), generally will *not* suggest dangerousness for the very reasons elaborated in *Young*. These factors only loosely get at the question of whether the defendant’s possession of firearms is misguided but harmless, or dangerous enough to require detention.

This vagueness opens the door wide for potential discrimination, aggravating already existing racial and ethnic disparities in firearm prosecutions. That excessive discretion may beget discrimination has long been understood. See *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). Asking anyone to evaluate another person’s “dangerousness” naturally creates a large opening for bias to enter the equation, even unconsciously, given the way our country has long stereotyped Black and Latin people as more dangerous and criminal than other groups. See, e.g., Spencer et al., *Implicit Bias and Policing*, 10 Soc. & Personality Psych. Compass 50, 54–55 (2016).

Moreover, though Black and Hispanic people make up roughly 9% and 12% of the state's population, respectively, they have represented 53% and 27.8% of those convicted in Superior Court of mandatory-minimum firearm offenses such as G.L. c.269, §10(a). *Compare* U.S. Census Bureau QuickFacts: Massachusetts, *with* Massachusetts Sentencing Commission, Survey of Superior Court Sentencing Practices FY18, at 42 (Oct. 2019). *See generally* Bishop et al., Racial Disparities in the Massachusetts Criminal Justice System 50 (Harvard Criminal Justice Policy Program, Sept. 2020). Therefore, the vagueness of the inquiry for evaluating dangerousness in firearm possession cases compounds the problem that firearm charges primarily involve Black and Hispanic people in the first place.

In sum, triggering §58A detention based on regulatory firearm offenses stretches that statute beyond what due process allows and exacerbates existing racial disparities in our criminal legal system.

WHY DIRECT APPELLATE REVIEW IS APPROPRIATE

These appeals present “questions of first impression ... concerning the Constitution[s] of the Commonwealth [and] of the United States,” which are “of such public interest that justice requires a final determination by the full Supreme Judicial Court.” Mass. R.A.P. 11(a).

For a glimpse of the importance of this issue: in Suffolk County, where two of the three cases arise, there has been a policy shift toward pursuing §58A detention for those charged with firearm offenses. *See* Editorial Board, *Rachael Rollins Takes a Bold Step with Guns*, Boston Herald (Oct. 28, 2020). Although §58A filings may have slowed somewhat in recent months, Suffolk County has still had a massive increase in detention requests, rising over 500% from

FY2020 to FY2021. Massachusetts Trial Court, Department of Research and Planning, Dangerousness Hearings Dashboard (accessed July 11, 2021), *available at* <https://public.tableau.com/app/profile/drap4687/viz/MassachusettsTrialCourtDangerousnessHearings/MainDashboard>.

This increase has been concentrated in specific neighborhoods. In Roxbury, which had nineteen §58A motions in all of FY2020, there were 104 in FY2021. The jump was even more dramatic in Dorchester, which went from six to 103, a more than sixteenfold increase. Not every county saw such dramatic increases, but statewide the numbers rose 16.5% from 3,518 filings in the district and municipal courts to 4,098. The data do not break down those that were based on firearm possession charges alone, nor those leading to detention, but even a small fraction would amount to hundreds of people detained without bail each year—hundreds who constitutionally should have the opportunity to prepare for trial out of custody, in their communities and with their families.

CONCLUSION

For the reasons stated above, the three applicants request direct appellate review. Although their cases and circumstances may lead to slightly different arguments, necessitating separate briefing at the merits stage, they share an interest in review before this Court and ask that the Court grant it.

Respectfully submitted,

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July 21, 2021

APPEALS COURT

Single Justice
Case DocketCOMMONWEALTH vs. ANTIOWANE HAWKINS-DAVIS
THIS CASE CONTAINS IMPOUNDED MATERIAL OR PID
2021-J-0263

CASE HEADER

Case Status	Disposed: Case Closed
Status Date	06/29/2021
Nature	Transferred c 211, s 3
Entry Date	06/09/2021
Pet Role Below	Defendant
Single Justice	Hanlon, J.
Brief Status	
Brief Due	
Case Type	Criminal
Lower Ct Number	
Lower Court	Suffolk Superior Court
Lower Court Judge	Michael Doolin, J.

INVOLVED PARTY

Commonwealth
Plaintiff/RespondentAntiowane Hawkins-Davis
Defendant/Petitioner

ATTORNEY APPEARANCE

[Cailin M. Campbell, Assistant District Attorney](#) - Withdrawn
[Benjamin Shorey, Assistant District Attorney](#)[Robert H. Tobin, Jr., Esquire](#)

DOCKET ENTRIES

Entry Date	Paper	Entry Text
06/09/2021		IMPOUNDMENT NOTE: PORTION OF PAPER #8 is TOTALLY IMPOUNDED pursuant to Mass. Gen. Law. c. 276, § 100
06/09/2021		Superintendence c. 211, s. 3 transfer from the Supreme Judicial Court.
06/09/2021	#1	Petition for Relief Pursuant to G. L. c. 211, § 3 from Order of Pretrial Detention filed for Antiowane Hawkins-Davis by Atty. Robert Tobin, Jr.
06/09/2021	#2	Exhibits A-E filed by Atty. Robert Tobin, Jr.
06/09/2021	#3	Certificate of Service filed by Atty. Robert Tobin, Jr.
06/09/2021	#4	ORDER: "This matter came before the Court, Georges, Jr., J., on the defendant's petition seeking review of the order of the trial court denying bail based on a finding of dangerousness pursuant to G.L. c. 276, § 58A. Upon consideration thereof, and in accordance with the Court's June 3, 2020, "Standing Order Regarding Transfer of Certain Single Justice Matters During The COVID-19 Pandemic" (effective June 8, 2020), IT IS ORDERED that the matter be transferred forthwith to the Appeals Court for review of the trial court's order. The matter will then proceed before a single justice of the Appeals Court just as it would proceed before me. See Appeals Court Rule 2:01." (Georges, Jr., J.)
06/09/2021	#5	(Partially IMPOUNDED) Supplemental Exhibit B with attachments to petition filed by Atty. Robert Tobin, Jr.
06/09/2021	#6	Copy of Docket Sheets, received from Suffolk Superior Court.
06/11/2021		ORDER: The defendant is to file a copy of his CORI forthwith. A response from the Commonwealth is requested and due, on or before 06/21/2021. (Hanlon, J.) *Notice
06/21/2021	#7	Response to paper #1 filed for Commonwealth by Attorney Benjamin Shorey.
06/28/2021	#8	Notice of appearance filed for Commonwealth by Attorney Benjamin Shorey.

06/29/2021 #9	<p>ORDER: This matter came before the Court on the defendant/petitioner, Antoiwane Hawkins-Davis's, petition, pursuant to G. L. c. 211, § 3, which the Supreme Judicial Court referred to the Single Justice of the Appeals Court, in accordance with the Supreme Judicial Court's June 3, 2020 "Standing Order regarding Transfer of Certain Single Justice Matters during the COVID-19 Pandemic." The defendant seeks review of a May 12, 2021 order of the Suffolk County Superior Court (Doolin, J.), denying the defendant's motion to reconsider an order of pretrial detention under G. L. c. 276, § 58A. After review, the defendant's petition is denied.</p> <p><u>Background.</u> On November 14, 2020, police officers arrested the defendant on a warrant from the West Roxbury Division of the Boston Municipal Court, docket 2006 CR 1030, charging him with assault by means of a dangerous weapon and strangulation/suffocation of an acquaintance. During the arrest and subsequent search of a "fanny pack" the defendant was carrying, the officers found a "Black and Silver Smith and Wesson SW9VE . . . with 16 rounds in the magazine along with one in the chamber of 9MM Jag Luger Ammunition." The defendant did not have a license to carry a firearm.</p> <p>On March 26, 2021, the defendant was indicted for unlawful possession of a firearm, second offense, in violation of G. L. c. 269, § 10 (a) and (d); unlawful possession of a loaded firearm in violation of G. L. c. 269, § 10 (n); unlawful possession of ammunition in violation of G. L. c. 269, § 10 (h) (1); and unlawful possession of a large capacity firearm in violation of G. L. c. 269, § 10 (m).</p> <p>On April 7, 2021, a judge of the Suffolk Superior Court (Doolin, J.) allowed the Commonwealth's motion for pretrial detention pursuant to G. L. c. 269, § 58A. On May 11, 2021, the defendant moved for reconsideration of that order, claiming that pretrial detention based on possessory, regulatory offenses violated his due process rights. On May 12, 2021, the judge denied the motion for reconsideration. On June 2, the defendant filed a petition for relief from the denial of the motion for reconsideration pursuant to G. L. c. 211, § 3.</p> <p><u>Discussion.</u> The defendant argues that his detention based on firearm possession offenses violates his due process rights. Specifically, he relies on <u>Commonwealth v. Vieira</u>, 483 Mass. 417 (2019), and <u>Commonwealth v. Young</u>, 453 Mass. 707 (2009). In <u>Vieira</u>, the Supreme Judicial Court explained why pretrial detention under G. L. c. 276, § 58A comports with due process:</p> <p>"Where the Commonwealth seeks pretrial detention on account of an individual's dangerousness, [t]he threshold question in every case is whether the defendant has [been charged with committing] a predicate offense under [G. L. c. 276,] § 58A (1). If no predicate offense has been charged, a defendant may not be placed in pretrial detention under G. L. c. 276, § 58A.</p> <p>The charges for which an individual may be detained prior to trial, due to dangerousness, are limited. The practice of pretrial detention on the basis of dangerousness has been upheld as constitutional in part because the Legislature carefully limit[ed] the circumstances under which detention may be sought to the most serious of crimes, e.g., a specific category of extremely serious offenses" (internal citations and quotations omitted; alterations in original).</p> <p><u>Vieira</u>, 483 Mass. at 421.</p> <p>In <u>Young</u>, the court held that unlawful possession of a firearm under G. L. c. 269, § 10 (a) is a "regulatory crime" and could not serve as a predicate offense for pretrial detention pursuant to § 58A because that crime was not listed as a predicate offense in § 58A and is not an offense which "by its nature involves a substantial risk that physical force against the person of another may result." <u>Young</u>, 453 Mass. at 713-714, 717; G. L. c. 276, § 58A (1996). In response to the court's ruling in <u>Young</u>, the Legislature amended § 58A to include unlawful possession of a firearm under G. L. c. 269, § 10 (a) as a predicate offense. See G. L. c. 276, § 58A (2010).</p> <p>The defendant now argues that it is unconstitutional under the principles explained in <u>Young</u> for the unlawful possession of a firearm to be considered a predicate offense for purposes of pretrial detention pursuant to § 58A. This argument ignores the <u>Young</u> court's qualification that "[i]n holding that unlicensed possession of a firearm is not a predicate offense for purposes of § 58A, we are not unmindful of the dangers relating to unlicensed possession of firearms. Nevertheless, <u>in the absence of clear legislative intent to the contrary</u>, we cannot rewrite or torture the statute's language to include this offense" (emphasis added). <u>Young</u>, 453 Mass. at 716-717. The Legislature subsequently made its intent clear when it amended § 58A to include unlicensed possession of a firearm as a predicate offense.</p> <p>For that reason, I see no abuse of discretion or error of law in the judge's conclusion that the defendant's due process rights have not been violated. Accordingly, the order of the Superior Court is affirmed. <u>So ordered.</u> (Hanlon, J.) *Notice/Attest/Doolin, J.</p>
07/06/2021 #10	Notice of appeal filed for Antoiwane Hawkins-Davis by Attorney Benjamin Keehn.
07/07/2021	Copy of paper #10 to counsel.
07/07/2021 #11	Notice of Assembly of the Record to counsel.

APPEALS COURT

Single Justice

Case Docket

COMMONWEALTH vs. JORGE VEGA
THIS CASE CONTAINS IMPOUNDED MATERIAL OR PID
2021-J-0283

CASE HEADER

Case Status	Disposed: Case Closed
Status Date	06/30/2021
Nature	Transferred c 211, s 3
Entry Date	06/18/2021
Pet Role Below	Defendant
Single Justice	Hanlon, J.
Brief Status	
Brief Due	
Case Type	Criminal
Lower Ct Number	
Lower Court	Boston Municipal, Dorchester Div.
Lower Court Judge	Michael Doolin, J.

INVOLVED PARTY

Commonwealth
Plaintiff/Respondent

Jorge Vega
Defendant/Petitioner

ATTORNEY APPEARANCE

[Cailin M. Campbell, Assistant District Attorney](#)
[Kaitlin Tolbert, Assistant District Attorney](#)
[Mackenzie Slyman, Assistant District Attorney](#)

[Jeffrey Garland, Esquire](#)

DOCKET ENTRIES

Entry Date	Paper	Entry Text
06/18/2021		IMPOUNDMENT NOTE: PORTION OF PAPER #3 EXHIBIT A SECTION V (CARI) and INTERSTATE RECORD ARE TOTALLY IMPOUNDED Per G. L. c. 276, § 100
06/18/2021		Superintendence c. 211, s. 3 transfer from the Supreme Judicial Court.
06/18/2021	#1	(PARTIALLY IMPOUNDED) Emergency Petition for Relief from Detention Pursuant to G. L. c. 211, § 3 with Memorandum of Law in Support, Certificate of Service, Index of Exhibits and attached Exhibits filed for Jorge Vega by Atty. Jeffrey A. Garland.
06/18/2021	#2	Affidavit of Counsel in Support of Petition filed by Atty. Jeffrey A. Garland.
06/18/2021	#3	DVD-R containing two video exhibits filed by Atty. Jeffrey Garland.
06/16/2021	#4	ORDER: "This matter came before the Court, Georges, Jr., J., on a petition for review of a May 14, 2021 order issued by the Dorchester Division of the Boston Municipal Court allowing the Commonwealth's motion for an order of pretrial detention based on dangerousness and a May 21, 2021 order issued by the Suffolk Superior Court pursuant to G. L. c. 276, § 58A. Upon consideration thereof, and in accordance with the Court's June 3, 2020, "Standing Order Regarding Transfer of Certain Single Justice Matters During the COVID-19 Pandemic" (effective June 8, 2020), IT IS ORDERED that the matter be transferred forthwith to the Appeals Court for review of the trial court's order. The matter will then proceed before a single justice of the Appeals Court just as it would proceed before me. See Appeals Court Rule 2:01. (Georges, Jr., J.)
06/18/2021	#5	Copy of Docket Sheets, received from Boston Municipal, Dorchester Div..
06/18/2021	#6	Notice of appearance filed for Commonwealth by Attorney Mackenzie Slyman.
06/21/2021		RE #1: The defendant's petition has been filed as partially impounded. To the extent impounded information is included in the documents attached to the petition, the petition is to be refiled, on or before 06/25/2021, with any impounded materials filed in a separate document marked as impounded. A response to the petition from the Commonwealth, including a copy of the defendant's CORI, is requested and due on or before 06/28/2021. (Hanlon, J.) *Notice

06/24/2021 #7	REVISED Emergency Petition for Relief from Detention Pursuant to G. L. c. 211, § 3 filed for Jorge Vega by Attorney Jeffrey Garland.
06/24/2021 #8	List of Exhibits filed for Jorge Vega by Attorney Jeffrey Garland.
06/24/2021 #9	Appendix filed for Jorge Vega by Attorney Jeffrey Garland.
06/24/2021 #10	Appendix (IMPOUNDED) filed for Jorge Vega by Attorney Jeffrey Garland.
06/28/2021 #11	Motion to Extend the Time to File a Response to Petition filed for Commonwealth by Attorney Mackenzie Slyman.
06/28/2021	RE#11: Allowed to 06/29/2021. *Notice.
06/29/2021 #12	Response filed for Commonwealth by Attorney Mackenzie Slyman.
06/29/2021 #13	Appendix (IMPOUNDED) filed for Commonwealth by Attorney Mackenzie Slyman.

06/30/2021 #14

MEMORANDUM AND ORDER: This matter came before the Court, on the defendant/petitioner, Jorge Vega's, petition, pursuant G. L. c. 211, § 3, which the Supreme Judicial Court referred to the Single Justice of the Appeals Court, in accordance with the Supreme Judicial Court's June 3, 2020 "Standing Order regarding Transfer of Certain Single Justice Matters during the COVID-19 Pandemic." The defendant seeks review of a June 1, 2021 order from a judge of the Suffolk Superior Court (Doolin, J.) affirming an order from the Dorchester Division of the Boston Municipal Court (Kaplanes, J.) detaining the defendant pursuant G. L. c. 276, § 58A. After review, the defendant's petition is denied.

Background. During the early morning hours of May 8, 2021, Boston Police officers, with their blue cruiser lights activated, formed a barricade with their vehicles, blocking half of the street at the intersection of Westview Street and Westview Way. The barricade was established in response to civilian complaints about people recklessly operating off-road vehicles in the area. Around 3:10 A.M., the defendant drove past the barricade, ignoring an officer's hand signals and verbal commands to stop. The defendant then attempted to make a U-turn at the end of the street but stopped for police officers. A query showed that the defendant had a suspended driver's license, along with multiple firearms charges on his Board of Probation record, including two open firearm related cases.

The officers arrested the defendant and, eventually, called a tow truck, after allowing a reasonable amount of time for a licensed operator to claim the vehicle. During a subsequent inventory search prior to towing, the officers discovered a key on the floor of the vehicle used it to open the locked glovebox; inside, they discovered a loaded SCCY Industries firearm.

On May 10, 2021, the defendant was charged in the Dorchester Division of the Boston Municipal Court with carrying a firearm without a license, in violation of G. L. c. 269, § 10(a); carrying a loaded firearm without a license, in violation of G. L. c. 269, § 10(n); possession of ammunition without an identification card, in violation of G. L. c. 269, § 10(h)(1); operating a motor vehicle with a suspended license, in violation of G. L. c. 90, § 23; and resisting arrest, in violation of G. L. c. 268, § 32B. The Commonwealth moved, pursuant to G. L. c. 276, § 58A to hold the defendant as a danger and, on May 18, 2021, the judge (Kaplanes, J.) agreed and ordered the defendant detained for 120 days. The defendant filed a petition for review in the Suffolk Superior Court and on May 21, 2021 the judge (Doolin, J.) denied the defendant's petition and ordered his continued detention. This is the order now before me.

Discussion. The single justice normally reviews a request for reconsideration of bail for abuse of discretion or clear error of law. *Comnesso v. Commonwealth*, 369 Mass. 368, 374 (1975). The defendant argues, based on the Supreme Judicial Court's decision in *Commonwealth v. Young*, 453 Mass. 707 (2009), that considering the crime of unlawful possession of a firearm as a predicate offense for a finding of dangerousness - and resulting pretrial detention - pursuant to § 58A is unconstitutional. In *Young*, the court held that unlawful possession of a firearm under G. L. c. 269, § 10 (a) is a "regulatory crime," and could not serve as a predicate offense for pretrial detention pursuant to § 58A because that crime was not listed as a predicate offense in § 58A and is not an offense which "by its nature involves a substantial risk that physical force against the person of another may result." *Young*, 453 Mass. at 713-714, 717; G. L. c. 276, § 58A (1996). However, the *Young* court also invited the Legislature to amend § 58A by stating that "[i]n holding that unlicensed possession of a firearm is not a predicate offense for purposes of § 58A, we are not unmindful of the dangers relating to unlicensed possession of firearms. Nevertheless, in the absence of clear legislative intent to the contrary, we cannot rewrite or torture the statute's language to include this offense" (emphasis added). *Young*, 453 Mass. at 716-717. The Legislature subsequently amended § 58A to include unlawful possession of a firearm under G. L. c. 269, § 10(a) as a predicate offense. See G. L. c. 276, § 58A (2010). Since it appears that the statute was amended in direct response to the Supreme Judicial Court's invitation to do so, I see no abuse of discretion or error of law.

The defendant also argues that the Commonwealth did not prove by clear and convincing evidence that he is dangerous or that there are "no conditions of release [that] will reasonably assure the safety of any other person or the community." See G. L. c. 276, § 58A(3). In ordering the defendant's detention pursuant to § 58A, the District Court judge (Kaplanes, J.) considered the charged offense as designated in § 58A(1), the nature of the offense of possessing a loaded firearm, the potential mandatory minimum sentence the defendant faces, and the defendant's history of picking up similar charges while out on bail. *Com. App. 90*. The Superior Court judge affirmed that order.

The defendant has a significant prior record. His Court Activity Record Information (CARI) report is seven pages long. Apparently, two days ago, on June 28, 2021, the defendant pleaded guilty in the Leominster District Court to possession of ammunition without an Firearms Identification Card, in violation of G. L. c. 269, § 10(h); he was sentenced to thirty days in the house of corrections, deemed served, while the defendant was held on these charges. The police report in the record for that offense states that the defendant walked into Leominster Hospital and reported that he had a gunshot wound; his clothes were covered in blood and had to be cut off his body. The defendant refused to tell responding police officers any of the underlying circumstances, other than to say, "I was in the wrong place at the wrong time." The charge nurse gave the officer nine bullets she apparently had taken from the defendant.

The CARI also shows a pending case in the Suffolk Superior Court, from July 14, 2020, where the defendant is

charged with unlawful possession of a firearm; possession of ammunition; and possession of a large capacity feeding device. These charges arose in the Roxbury Division of the Boston Municipal Court. In that same court, there is also a pending case from 2019, in which the defendant is charged with leaving the scene of an accident after causing property damage. In 2014, when the defendant was a juvenile, he was committed to the Department of Youth Services (DYS) for assault and battery and being a disorderly person; in 2013, he also was committed to DYS for a probation violation on a domestic assault and battery charge.

I also note that the defendant's arrest on this case originated while the defendant was released on bail, and, when he was arrested on this matter, his conditions of release included a curfew from 8:00 P.M. until 7:00 A.M. and an order to stay out of the city of Boston.

After careful review of the entire record, I see no abuse of discretion in the judge's finding, by clear and convincing evidence, that the defendant poses a serious risk of danger and that there are no conditions of release that would mitigate sufficiently the risk he poses.

For the foregoing reasons, the defendant's petition is denied. So ordered. (Hanlon, J.). Notice/attest/Doolin, J./Kaplanes, J.

07/06/2021 #15	Notice of appeal filed for Jorge Vega by Attorney Jeffrey Garland.
07/07/2021	Copy of paper #15 to counsel.
07/07/2021 #16	Notice of Assembly of the Record to counsel.

As of 07/09/2021 5:15pm

APPEALS COURT

Single Justice
Case DocketCOMMONWEALTH vs. BOB NUAH
THIS CASE CONTAINS IMPOUNDED MATERIAL OR PID
2021-J-0242

CASE HEADER

Case Status	Disposed: Case Closed
Status Date	06/30/2021
Nature	Transferred c 211, s 3
Entry Date	05/27/2021
Pet Role Below	Defendant
Single Justice	Hanlon, J.
Brief Status	
Brief Due	
Case Type	Criminal
Lower Ct Number	
Lower Court	Worcester Superior Court
Lower Court Judge	Daniel M. Wrenn, J.

INVOLVED PARTY

Commonwealth
Plaintiff/RespondentBob Nuah
Defendant/Petitioner

ATTORNEY APPEARANCE

[Jane A. Sullivan, capp](#) - Inactive
[Ellyn H. Lazar, Assistant District Attorney](#)
[Susan M. Oftring, Assistant District Attorney](#)
[Darren T. Griffis, Esquire](#)

DOCKET ENTRIES

Entry Date	Paper	Entry Text
05/27/2021		IMPOUNDMENT NOTE: Exhibit 1: Defendant's CARL and Exhibit 2: Defendant's Criminal History are TOTALLY IMPOUNDED pursuant to Mass. Gen. Law. 276, § 100.
05/27/2021		Superintendence c. 211, s. 3 transfer from the Supreme Judicial Court.
05/27/2021	#1	Emergency Petition for Relief Pursuant to G. L. c. 211, § 3 with Certificate of Service and Atty. Darren T. Griffis.
05/27/2021	#2	(PARTIALLY IMPOUNDED) Record Appendix Submitted in Support of Emergency Petition for Relief Pursuant to G. L. c. 211, § 3 with Exhibits 1-13 filed by Atty. Darren T. Griffis.
05/27/2021	#3	ORDER: "This matter came before the Court, Wendlandt, J., on the defendant's petition seeking review of the order of the trial court denying bail based on a finding of dangerousness pursuant to G.L. c. 276, § 58A. Upon consideration thereof, and in accordance with the Court's June 3, 2020, "Standing Order Regarding Transfer of Certain Single Justice Matters During The COVID-19 Pandemic" (effective June 8, 2020), IT IS ORDERED that the matter be transferred forthwith to the Appeals Court for review of the trial court's order. The matter will then proceed before a single justice of the Appeals Court just as it would proceed before me. See Appeals Court Rule 2:01." (Wendlandt, J.)
05/27/2021	#4	Copy of Docket Sheets, received from Worcester Superior Court.
06/02/2021		ORDER: The defendant is to file a copy of his CORI forthwith. A response to the petition is requested and due from the Commonwealth, on or before 06/08/2021. (Hanlon, J.) Notice/attest/Wrenn, J.
06/02/2021	#5	Response to Appeals Court Order dated 6/2/21 (IMPOUNDED) filed for Bob Nuah by Attorney Darren Griffis.
06/08/2021	#6	Response to paper #1 filed for Commonwealth by Attorney Susan Oftring.

06/30/2021 #7

ORDER: This matter came before the Court on the defendant/petitioner, Bob Nuah's, petition, pursuant to G. L. c. 211, § 3, which the Supreme Judicial Court referred to the Single Justice of the Appeals Court, in accordance with the Supreme Judicial Court's June 3, 2020 "Standing Order regarding Transfer of Certain Single Justice Matters during the COVID-19 Pandemic." The defendant seeks review of a May 18, 2021 order of the Worcester Superior Court (Wrenn, J.) affirming a Worcester District Court order (Power, J.) holding the defendant without bail pursuant to G. L. c. 276, § 58A. After review, the defendant's petition is denied.

Background. The defendant is charged with illegal possession of a firearm, not at home or work, in violation of G. L. c. 269, 10(a); illegal possession of a loaded firearm, not home or work, in violation of G. L. c. 269, 10(n); possession of ammunition, in violation of G. L. c. 269, 10(h)(1); and receiving stolen property in violation of G.L. c. 266, § 60.

In the decision at issue, the judge described the Commonwealth's allegations as follows:

"The defendant is twenty-one years old. Presently, he has the pending charges that are the subject of this hearing arising out of allegations that he possessed a loaded firearm in a motor vehicle. In addition, the defendant also has pending charges in the state of North Carolina, also alleging he possessed firearms in a vehicle. The incident which gives rise to the present charges occurred on May 2, 2021. At that time, Officers responded to 1200 Main Street in Worcester at about 12:30 a.m. to reports of possible gunshots fired. An investigation revealed that there had been an altercation, which led to a motor vehicle parked in the vicinity of the shooting, which then led to the search of the defendant, at which time a bag found in close proximity to him contained a loaded firearm.

In addition, the Worcester Police reports contained within the Commonwealth's evidence show a disturbing pattern of the defendant involved in violent conduct and possessing weapons. In addition, the defendant has a history of not responding to lawful commands by police, and he is a known gang member in the City of Worcester. The totality of the evidence presented by the Commonwealth shows the defendant to be a dangerous individual to the community at large given his clear association with violence and handguns. In addition, even though the defendant is only twenty-one years old, he has had numerous encounters with law enforcement, has clear gang affiliations, and has a pattern of refusing to obey lawful commands from authority figures and/or law enforcement."

Discussion. Citing Commonwealth v. Young, 453 Mass. 707 (2009), the defendant argues that considering the crime of unlawful possession of a firearm as a predicate offense for a finding of dangerousness - and resulting pretrial detention - pursuant to G. L. c. 276, § 58A, is unconstitutional. Further, the defendant argues that the Commonwealth failed to establish his dangerousness by clear and convincing evidence.

The single justice normally reviews a request for reconsideration of bail for abuse of discretion or clear error of law. Comness v. Commonwealth, 369 Mass. 368, 374 (1975). See also Vasquez v. Commonwealth, 481 Mass. 747, 751 (2019). In Young, the court held that unlicensed possession of a firearm did not fall within the residual clause[1] of § 58A and therefore was not a predicate offense for pretrial detention under that statute. Young, 453 Mass. at 716-717. The court, however, invited the Legislature to amend § 58A to include unlicensed possession of a firearm as an enumerated offense. See id. ("In holding that unlicensed possession of a firearm is not a predicate offense for purposes of § 58A, we are not unmindful of the dangers relating to unlicensed possession of firearms. Nevertheless, in the absence of clear legislative intent to the contrary, we cannot rewrite or torture the statute's language to include this offense"). The Legislature subsequently made its intent clear when it amended § 58A specifically to include unlicensed possession of a firearm as a predicate offense under § 58A.

I also have considered the defendant's further arguments that the statutory amendment is unconstitutional. However, given that it appears that the statute was amended to include possession of a firearm in direct response to the Supreme Judicial Court's invitation to do so, I see no abuse of discretion or error of law in the judge's decision to reject that argument.

The defendant next argues that the Commonwealth did not prove by clear and convincing evidence, as the statute requires, that his release would pose a danger to the public. That argument also fails. I see no abuse of discretion or error of law in the motion judge's determination that the Commonwealth, in fact, has proven the defendant's dangerousness by clear and convincing evidence. The statute, G. L. c. 276, § 58A, makes it clear that "[t]he 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." Accordingly, the defendant's arguments that certain evidence "consists entirely of hearsay allegations introduced through police reports" are not persuasive at this stage of the proceedings.

Further, I agree that the evidence presented was sufficient to establish the defendant's dangerousness by clear and convincing evidence. As noted supra, the judge concluded that the Commonwealth's evidence showed "a disturbing pattern of the defendant involved in violent conduct and possessing weapons." Specifically, the Commonwealth alleges that, in the underlying incident, Worcester police officers responded to an area they knew to be one subject to high crime, including, but not limited to gun violence. There had been a report of a

possible gunshot in the parking lot of a nail salon, along with "multiple males fighting". When the officers arrived at the scene, the alleged victim said that he had been "jumped" by a group of "males".[2] Police then searched the area and, in the parking lot where the sound of the possible gunshot had originated, they found the defendant in a "silver sedan" with three other young men and a strong odor of burnt marijuana. One of the officers told the four to get out of the sedan, and the defendant "attempted to take a large backpack with him." The officer told him to leave the backpack. When another officer examined the car, he discovered a "black working firearm" in the black backpack or "fanny pack" the defendant had attempted to remove, along with a loose round of ammunition in the glove compartment. The serial number on the firearm indicated that it had been stolen in Colorado.

This is not the first time the defendant has been found in a vehicle with a stolen firearm. In September 2020, the defendant was stopped for traffic violations in North Carolina and five handguns were seized from the vehicle he was driving, three from the engine and two from the center console. One of the five firearms had been reported stolen. The officers also seized four boxes of ammunition, six magazines with live rounds and other ammunition. The Commonwealth also provided police reports that suggest that the defendant threatened employees of an Auto Body Shop with a firearm in July 2020 and had been part of an altercation involving two firearms at an apartment building in June 2020.[3]

After careful review of the entire record, I see no abuse of discretion in the judge's finding, by clear and convincing evidence, that the defendant poses a serious risk of danger and that there are no conditions of release that would mitigate sufficiently the risk he poses.[4]

For all of the foregoing reasons, the defendant's petition is denied. So ordered. (Hanlon, J.) *Notice/Attest /Wrenn, J.

Footnotes:

[1] The residual clause in § 58A permits a defendant to be detained based on dangerousness for an offense not listed in § 58A, but which, nonetheless, "by its nature, involves a substantial risk that physical force against the person of another may result."

[2] A woman accompanying the alleged victim confirmed that account; also, she had blood on her shirt that she said was the alleged victim's blood from her efforts to separate him from his attackers.

[3] In fact, the Commonwealth has submitted more than 80 pages of police reports involving this defendant. The substance of the reports includes those incidents described above, and also includes reports of at least two other armed robberies, at least one occurring in 2017 when the defendant was a juvenile. (The 2017 case appears on his Board of Probation Record as "attempt to commit larceny under \$250.00; apparently, the defendant admitted to sufficient facts on that charge, the case was continued without a finding for six months and then dismissed.) Other reports involved motor vehicle stops and at least one arrest for being a disorderly person.

[4] I do note that I also have read and considered carefully the many letters of support that the defendant submitted in support of his petition for review. It is clear that he has made significant personal contributions to his community and that a number of people think very highly of him with good reason. Unfortunately, these testimonials, as moving as they are, cannot outweigh the defendant's significant history with illegal firearms, at least at this stage of the proceedings.

07/07/2021 #8	Notice of appeal filed for Bob Nuah by Attorney Darren Griffis.
07/07/2021	Copy of paper #8 to counsel.
07/07/2021 #9	Notice of Assembly of the Record to counsel.

As of 07/07/2021 5:15pm

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

21-J-263

COMMONWEALTH

vs.

ANTOIWANE HAWKINS-DAVIS.

MEMORANDUM AND ORDER

This matter came before the Court on the defendant/petitioner, Antoiwane Hawkins-Davis's, petition, pursuant to G. L. c. 211, § 3, which the Supreme Judicial Court referred to the Single Justice of the Appeals Court, in accordance with the Supreme Judicial Court's June 3, 2020 "Standing Order regarding Transfer of Certain Single Justice Matters during the COVID-19 Pandemic." The defendant seeks review of a May 12, 2021 order of the Suffolk County Superior Court (Doolin, J.), denying the defendant's motion to reconsider an order of pretrial detention under G. L. c. 276, § 58A. After review, the defendant's petition is denied.

Background. On November 14, 2020, police officers arrested the defendant on a warrant from the West Roxbury Division of the Boston Municipal Court, docket 2006 CR 1030, charging him with assault by means of a dangerous weapon and strangulation/suffocation of an acquaintance. During the arrest and subsequent search of a "fanny pack" the defendant was

carrying, the officers found a "Black and Silver Smith and Wesson SW9VE . . . with 16 rounds in the magazine along with one in the chamber of 9MM Jag Luger Ammunition." The defendant did not have a license to carry a firearm.

On March 26, 2021, the defendant was indicted for unlawful possession of a firearm, second offense, in violation of G. L. c. 269, § 10 (a) and (d); unlawful possession of a loaded firearm in violation of G. L. c. 269, § 10 (n); unlawful possession of ammunition in violation of G. L. c. 269, § 10 (h) (1); and unlawful possession of a large capacity firearm in violation of G. L. c. 269, § 10 (m).

On April 7, 2021, a judge of the Suffolk Superior Court (Doolin, J.) allowed the Commonwealth's motion for pretrial detention pursuant to G. L. c. 269, § 58A. On May 11, 2021, the defendant moved for reconsideration of that order, claiming that pretrial detention based on possessory, regulatory offenses violated his due process rights. On May 12, 2021, the judge denied the motion for reconsideration. On June 2, the defendant filed a petition for relief from the denial of the motion for reconsideration pursuant to G. L. c. 211, § 3.

Discussion. The defendant argues that his detention based on firearm possession offenses violates his due process rights. Specifically, he relies on Commonwealth v. Vieira, 483 Mass. 417 (2019), and Commonwealth v. Young, 453 Mass. 707 (2009). In

Vieira, the Supreme Judicial Court explained why pretrial detention under G. L. c. 276, § 58A comports with due process:

"Where the Commonwealth seeks pretrial detention on account of an individual's dangerousness, [t]he threshold question in every case is whether the defendant has [been charged with committing] a predicate offense under [G. L. c. 276,] § 58A (1). If no predicate offense has been charged, a defendant may not be placed in pretrial detention under G. L. c. 276, § 58A.

The charges for which an individual may be detained prior to trial, due to dangerousness, are limited. The practice of pretrial detention on the basis of dangerousness has been upheld as constitutional in part because the Legislature carefully limit[ed] the circumstances under which detention may be sought to the most serious of crimes, e.g., a specific category of extremely serious offenses" (internal citations and quotations omitted; alterations in original).

Vieira, 483 Mass. at 421.

In Young, the court held that unlawful possession of a firearm under G. L. c. 269, § 10 (a) is a "regulatory crime" and could not serve as a predicate offense for pretrial detention pursuant to § 58A because that crime was not listed as a predicate offense in § 58A and is not an offense which "by its nature involves a substantial risk that physical force against the person of another may result." Young, 453 Mass. at 713-714, 717; G. L. c. 276, § 58A (1996). In response to the court's ruling in Young, the Legislature amended § 58A to include unlawful possession of a firearm under G. L. c. 269, § 10 (a) as a predicate offense. See G. L. c. 276, § 58A (2010).

The defendant now argues that it is unconstitutional under the principles explained in Young for the unlawful possession of a firearm to be considered a predicate offense for purposes of pretrial detention pursuant to § 58A. This argument ignores the Young court's qualification that "[i]n holding that unlicensed possession of a firearm is not a predicate offense for purposes of § 58A, we are not unmindful of the dangers relating to unlicensed possession of firearms. Nevertheless, in the absence of clear legislative intent to the contrary, we cannot rewrite or torture the statute's language to include this offense" (emphasis added). Young, 453 Mass. at 716-717. The Legislature subsequently made its intent clear when it amended § 58A to include unlicensed possession of a firearm as a predicate offense.

For that reason, I see no abuse of discretion or error of law in the judge's conclusion that the defendant's due process rights have not been violated. Accordingly, the order of the Superior Court is affirmed.

So ordered.

By the Court (Hanlon, J.)

A red ink signature, likely of the Assistant Clerk, written in a stylized, cursive manner.

Assistant Clerk

Entered: June 29, 2021.

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

21-J-283

COMMONWEALTH

vs.

JORGE VEGA

MEMORANDUM AND ORDER

This matter came before the Court, on the defendant/petitioner, Jorge Vega's, petition, pursuant G. L. c. 211, § 3, which the Supreme Judicial Court referred to the Single Justice of the Appeals Court, in accordance with the Supreme Judicial Court's June 3, 2020 "Standing Order regarding Transfer of Certain Single Justice Matters during the COVID-19 Pandemic." The defendant seeks review of a June 1, 2021 order from a judge of the Suffolk Superior Court (Doolin, J.) affirming an order from the Dorchester Division of the Boston Municipal Court (Kaplanes, J.) detaining the defendant pursuant G. L. c. 276, § 58A. After review, the defendant's petition is denied.

Background. During the early morning hours of May 8, 2021, Boston Police officers, with their blue cruiser lights activated, formed a barricade with their vehicles, blocking half of the street at the intersection of Westview Street and

Westview Way,. The barricade was established in response to civilian complaints about people recklessly operating off-road vehicles in the area. Around 3:10 A.M., the defendant drove past the barricade, ignoring an officer's hand signals and verbal commands to stop. The defendant then attempted to make a U-turn at the end of the street but stopped for police officers. A query showed that the defendant had a suspended driver's license, along with multiple firearms charges on his Board of Probation record, including two open firearm related cases.

The officers arrested the defendant and, eventually, called a tow truck, after allowing a reasonable amount of time for a licensed operator to claim the vehicle. During a subsequent inventory search prior to towing, the officers discovered a key on the floor of the vehicle used it to open the locked glovebox; inside, they discovered a loaded SCCY Industries firearm.

On May 10, 2021, the defendant was charged in the Dorchester Division of the Boston Municipal Court with carrying a firearm without a license, in violation of G. L. c. 269, § 10(a); carrying a loaded firearm without a license, in violation of G. L. c. 269, § 10(n); possession of ammunition without an identification card, in violation of G. L. c. 269, § 10(h)(1); operating a motor vehicle with a suspended license, in violation of G. L. c. 90, § 23; and resisting arrest, in

violation of G. L. c. 268, § 32B. The Commonwealth moved, pursuant to G. L. c. 276, § 58A to hold the defendant as a danger and, on May 18, 2021, the judge (Kaplanes, J.) agreed and ordered the defendant detained for 120 days. The defendant filed a petition for review in the Suffolk Superior Court and on May 21, 2021 the judge (Doolin, J.) denied the defendant's petition and ordered his continued detention. This is the order now before me.

Discussion. The single justice normally reviews a request for reconsideration of bail for abuse of discretion or clear error of law. Commesso v. Commonwealth, 369 Mass. 368, 374 (1975). The defendant argues, based on the Supreme Judicial Court's decision in Commonwealth v. Young, 453 Mass. 707 (2009), that considering the crime of unlawful possession of a firearm as a predicate offense for a finding of dangerousness - and resulting pretrial detention - pursuant to § 58A is unconstitutional. In Young, the court held that unlawful possession of a firearm under G. L. c. 269, § 10 (a) is a "regulatory crime," and could not serve as a predicate offense for pretrial detention pursuant to § 58A because that crime was not listed as a predicate offense in § 58A and is not an offense which "by its nature involves a substantial risk that physical force against the person of another may result." Young, 453 Mass. at 713-714, 717; G. L. c. 276, § 58A (1996). However, the

Young court also invited the Legislature to amend § 58A by stating that "[i]n holding that unlicensed possession of a firearm is not a predicate offense for purposes of § 58A, we are not unmindful of the dangers relating to unlicensed possession of firearms. Nevertheless, in the absence of clear legislative intent to the contrary, we cannot rewrite or torture the statute's language to include this offense" (emphasis added). Young, 453 Mass. at 716-717. The Legislature subsequently amended § 58A to include unlawful possession of a firearm under G. L. c. 269, § 10(a) as a predicate offense. See G. L. c. 276, § 58A (2010). Since it appears that the statute was amended in direct response to the Supreme Judicial Court's invitation to do so, I see no abuse of discretion or error of law.

The defendant also argues that the Commonwealth did not prove by clear and convincing evidence that he is dangerous or that there are "no conditions of release [that] will reasonably assure the safety of any other person or the community." See G. L. c. 276, § 58A(3). In ordering the defendant's detention pursuant to § 58A, the District Court judge (Kaplans, J.) considered the charged offense as designated in § 58A(1), the nature of the offense of possessing a loaded firearm, the potential mandatory minimum sentence the defendant faces, and the defendant's history of picking up similar charges while out

on bail. Com. App. 90. The Superior Court judge affirmed that order.

The defendant has a significant prior record. His Court Activity Record Information (CARI) report is seven pages long. Apparently, two days ago, on June 28, 2021, the defendant pleaded guilty in the Leominster District Court to possession of ammunition without an Firearms Identification Card, in violation of G. L. c. 269, § 10(h); he was sentenced to thirty days in the house of corrections, deemed served, while the defendant was held on these charges. The police report in the record for that offense states that the defendant walked into Leominster Hospital and reported that he had a gunshot wound; his clothes were covered in blood and had to be cut off his body. The defendant refused to tell responding police officers any of the underlying circumstances, other than to say, "I was in the wrong place at the wrong time." The charge nurse gave the officer nine bullets she apparently had taken from the defendant.

The CARI also shows a pending case in the Suffolk Superior Court, from July 14, 2020, where the defendant is charged with unlawful possession of a firearm; possession of ammunition; and possession of a large capacity feeding device. These charges arose in the Roxbury Division of the Boston Municipal Court. In that same court, there is also a pending case from 2019, in which the defendant is charged with leaving the scene of an

accident after causing property damage. In 2014, when the defendant was a juvenile, he was committed to the Department of Youth Services (DYS) for assault and battery and being a disorderly person; in 2013, he also was committed to DYS for a probation violation on a domestic assault and battery charge.

I also note that the defendant's arrest on this case originated while the defendant was released on bail, and, when he was arrested on this matter, his conditions of release included a curfew from 8:00 P.M. until 7:00 A.M. and an order to stay out of the city of Boston.

After careful review of the entire record, I see no abuse of discretion in the judge's finding, by clear and convincing evidence, that the defendant poses a serious risk of danger and that there are no conditions of release that would mitigate sufficiently the risk he poses.

For the foregoing reasons, the defendant's petition is denied.

So ordered.

By the Court (Hanlon, J.),



Assistant Clerk

Entered: June 30, 2021.

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

21-J-242

COMMONWEALTH

vs.

BOB NUAH.

MEMORANDUM AND ORDER

This matter came before the Court on the defendant/petitioner, Bob Nuah's, petition, pursuant to G. L. c. 211, § 3, which the Supreme Judicial Court referred to the Single Justice of the Appeals Court, in accordance with the Supreme Judicial Court's June 3, 2020 "Standing Order regarding Transfer of Certain Single Justice Matters during the COVID-19 Pandemic." The defendant seeks review of a May 18, 2021 order of the Worcester Superior Court (Wrenn, J.) affirming a Worcester District Court order (Power, J.) holding the defendant without bail pursuant to G. L. c. 276, § 58A. After review, the defendant's petition is denied.

Background. The defendant is charged with illegal possession of a firearm, not at home or work, in violation of G. L. c. 269, 10(a); illegal possession of a loaded firearm, not home or work, in violation of G. L. c. 269, 10(n); possession of

ammunition, in violation of G. L. c. 269, 10(h)(1); and receiving stolen property in violation of G.L. c. 266, § 60.

In the decision at issue, the judge described the Commonwealth's allegations as follows:

"The defendant is twenty-one years old. Presently, he has the pending charges that are the subject of this hearing arising out of allegations that he possessed a loaded firearm in a motor vehicle. In addition, the defendant also has pending charges in the state of North Carolina, also alleging he possessed firearms in a vehicle. The incident which gives rise to the present charges occurred on May 2, 2021. At that time, Officers responded to 1200 Main Street in Worcester at about 12:30 a.m. to reports of possible gunshots fired. An investigation revealed that there had been an altercation, which led to a motor vehicle parked in the vicinity of the shooting, which then led to the search of the defendant, at which time a bag found in close proximity to him contained a loaded firearm.

In addition, the Worcester Police reports contained within the Commonwealth's evidence show a disturbing pattern of the defendant involved in violent conduct and possessing weapons. In addition, the defendant has a history of not responding to lawful commands by police, and he is a known gang member in the City of Worcester. The totality of the evidence presented by the Commonwealth shows the defendant to be a dangerous individual to the community at large given his clear association with violence and handguns. In addition, even though the defendant is only twenty-one years old, he has had numerous encounters with law enforcement, has clear gang affiliations, and has a pattern of refusing to obey lawful commands from authority figures and/or law enforcement."

Discussion. Citing Commonwealth v. Young, 453 Mass. 707 (2009), the defendant argues that considering the crime of unlawful possession of a firearm as a predicate offense for a finding of dangerousness - and resulting pretrial detention - pursuant to G. L. c. 276, § 58A, is unconstitutional. Further,

the defendant argues that the Commonwealth failed to establish his dangerousness by clear and convincing evidence.

The single justice normally reviews a request for reconsideration of bail for abuse of discretion or clear error of law. Commesso v. Commonwealth, 369 Mass. 368, 374 (1975). See also Vasquez v. Commonwealth, 481 Mass. 747, 751 (2019). In Young, the court held that unlicensed possession of a firearm did not fall within the residual clause¹ of § 58A and therefore was not a predicate offense for pretrial detention under that statute. Young, 453 Mass. at 716-717. The court, however, invited the Legislature to amend § 58A to include unlicensed possession of a firearm as an enumerated offense. See id. ("In holding that unlicensed possession of a firearm is not a predicate offense for purposes of § 58A, we are not unmindful of the dangers relating to unlicensed possession of firearms. Nevertheless, in the absence of clear legislative intent to the contrary, we cannot rewrite or torture the statute's language to include this offense"). The Legislature subsequently made its intent clear when it amended § 58A specifically to include unlicensed possession of a firearm as a predicate offense under § 58A.

¹ The residual clause in § 58A permits a defendant to be detained based on dangerousness for an offense not listed in § 58A, but which, nonetheless, "by its nature, involves a substantial risk that physical force against the person of another may result."

I also have considered the defendant's further arguments that the statutory amendment is unconstitutional. However, given that it appears that the statute was amended to include possession of a firearm in direct response to the Supreme Judicial Court's invitation to do so, I see no abuse of discretion or error of law in the judge's decision to reject that argument.

The defendant next argues that the Commonwealth did not prove by clear and convincing evidence, as the statute requires, that his release would pose a danger to the public. That argument also fails. I see no abuse of discretion or error of law in the motion judge's determination that the Commonwealth, in fact, has proven the defendant's dangerousness by clear and convincing evidence. The statute, G. L. c. 276, § 58A, makes it clear that "[t]he 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." Accordingly, the defendant's arguments that certain evidence "consists entirely of hearsay allegations introduced through police reports" are not persuasive at this stage of the proceedings.

Further, I agree that the evidence presented was sufficient to establish the defendant's dangerousness by clear and

convincing evidence. As noted supra, the judge concluded that the Commonwealth's evidence showed "a disturbing pattern of the defendant involved in violent conduct and possessing weapons." Specifically, the Commonwealth alleges that, in the underlying incident, Worcester police officers responded to an area they knew to be one subject to high crime, including, but not limited to gun violence. There had been a report of a possible gunshot in the parking lot of a nail salon, along with "multiple males fighting". When the officers arrived at the scene, the alleged victim said that he had been "jumped" by a group of "males".² Police then searched the area and, in the parking lot where the sound of the possible gunshot had originated, they found the defendant in a "silver sedan" with three other young men and a strong odor of burnt marijuana. One of the officers told the four to get out of the sedan, and the defendant "attempted to take a large backpack with him." The officer told him to leave the backpack. When another officer examined the car, he discovered a "black working firearm" in the black backpack or "fanny pack" the defendant had attempted to remove, along with a loose round of ammunition in the glove compartment. The serial

² A woman accompanying the alleged victim confirmed that account; also, she had blood on her shirt that she said was the alleged victim's blood from her efforts to separate him from his attackers.

number on the firearm indicated that it had been stolen in Colorado.

This is not the first time the defendant has been found in a vehicle with a stolen firearm. In September 2020, the defendant was stopped for traffic violations in North Carolina and five handguns were seized from the vehicle he was driving, three from the engine and two from the center console. One of the five firearms had been reported stolen. The officers also seized four boxes of ammunition, six magazines with live rounds and other ammunition. The Commonwealth also provided police reports that suggest that the defendant threatened employees of an Auto Body Shop with a firearm in July 2020 and had been part of an altercation involving two firearms at an apartment building in June 2020.³

After careful review of the entire record, I see no abuse of discretion in the judge's finding, by clear and convincing evidence, that the defendant poses a serious risk of danger and

³ In fact, the Commonwealth has submitted more than 80 pages of police reports involving this defendant. The substance of the reports includes those incidents described above, and also includes reports of at least two other armed robberies, at least one occurring in 2017 when the defendant was a juvenile. (The 2017 case appears on his Board of Probation Record as "attempt to commit larceny under \$250.00; apparently, the defendant admitted to sufficient facts on that charge, the case was continued without a finding for six months and then dismissed.) Other reports involved motor vehicle stops and at least one arrest for being a disorderly person.

that there are no conditions of release that would mitigate sufficiently the risk he poses.⁴

For all of the foregoing reasons, the defendant's petition is denied.

So ordered.

By the Court (Hanlon, J.)

A handwritten signature in red ink, appearing to be 'J. Hanlon', written over the text 'By the Court (Hanlon, J.)'.

Assistant Clerk

Entered: June 30, 2021.

⁴ I do note that I also have read and considered carefully the many letters of support that the defendant submitted in support of his petition for review. It is clear that he has made significant personal contributions to his community and that a number of people think very highly of him with good reason. Unfortunately, these testimonials, as moving as they are, cannot outweigh the defendant's significant history with illegal firearms, at least at this stage of the proceedings.

Certificate of Compliance

I hereby certify that this application complies with rules 11 and 20 of the Massachusetts Rules of Appellate Procedure. The application is set in 14-point Athelas and the argument section contains 1,989 words, as determined through use of the “Word Count” feature in Microsoft Word for Office 365.

/s/ Jeff Garland
Jeffrey A. Garland

Certificate of Service

I hereby certify that I have today served the foregoing Application for Direct Appellate Review on the Commonwealth by directing copies through the electronic filing service provider to:

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July 21, 2021