SJC-13182

JORGE L. VEGA vs. COMMONWEALTH (and a consolidated case[1]).

Suffolk. February 4, 2022. - July 11, 2022.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

Pretrial Detention. Constitutional Law, Preventive detention. Due Process of Law, Pretrial detainees. Firearms. Practice, Criminal, Hearsay. Evidence, Hearsay, Relevancy and materiality.

Civil actions commenced in the Supreme Judicial Court for the county of Suffolk on May 26, 2021, and June 15, 2021.

Following transfer to the Appeals Court, the cases were heard by Sydney Hanlon, J.

The Supreme Judicial Court granted applications for direct appellate review.

Jeffrey A. Garland, Committee for Public Counsel Services (Patrick Levin, Committee for Public Counsel Services, also present) for Jorge L. Vega.

Mackenzie Slyman & Abigail H. Salois, Assistant District Attorneys, for the Commonwealth.

Darren T. Griffis, for Bob Nuah, was present but did not argue.

[1] Bob Nuah vs. Commonwealth.

Joshua M. Daniels & Lisa J. Steele, for Massachusetts Association of Criminal Defense Lawyers, amicus curiae, submitted a brief.

Katharine Naples-Mitchell, for Charles Hamilton Houston Institute for Race and Justice, amicus curiae, submitted a brief.

LOWY, J. These cases concern whether a person charged with unlawful possession of a firearm may be held without bail under G. L. c. 276, § 58A, which provides for the pretrial detention of defendants deemed a danger to an individual or the community. The statute applies only to defendants accused of the criminal activity specified in G. L. c. 276, § 58A (1), including unlicensed possession of a firearm, G. L. c. 269, § 10 (a). A defendant accused of a listed criminal activity may be held before trial if a judge finds by clear and convincing evidence, after a hearing, that "no conditions of release will reasonably assure the safety of any other person or the community." G. L. c. 276, § 58A (3).

The defendants here were charged with unlicensed firearm possession pursuant to G. L. c. 269, § 10 (a), and held before trial on the ground of dangerousness.[2] They argue that including unlicensed firearm possession as a predicate offense violates substantive and procedural due process. They also assert that

[2] Although Jorge L. Vega and Bob Nuah commenced these actions by filing petitions in the county court, for convenience, we refer to them as the defendants.

there was insufficient evidence of their dangerousness. We disagree with both arguments and therefore affirm.[3]

Background. The following facts are taken from the evidence that the Commonwealth presented in support of its motions to detain the defendants on the ground of dangerousness.

1. Jorge Vega. On May 8, 2021, at approximately 3 A.M., Boston police officers were positioned at a barricade to block nonresidents from entering a housing development in response to complaints about all-terrain vehicles driving loudly in the area when Jorge Vega approached the barricade in a car. An officer signaled with his hands and verbally commanded Vega to stop. Vega looked at the officer but drove through the barricade toward the end of the dead-end street. He stopped when officers followed. Vega told officers in response to their inquiry that he did not have his driver's license with him. The officers ordered a tow truck for the car and, during an inventory search of the vehicle, found a loaded firearm in the glove compartment.

A criminal complaint issued against Vega out of the Boston Municipal Court. The complaint charged Vega with possessing a firearm without a license, G. L. c. 269, § 10 (a), among other

[3] We acknowledge the amicus briefs submitted by the Massachusetts Association of Criminal Defense Lawyers and the Charles Hamilton Houston Institute for Race and Justice.

crimes.[4] The Commonwealth moved for pretrial detention based on dangerousness pursuant to G. L. c. 276, § 58A. At a hearing on the motion, the judge considered the testimony of a police officer involved in the seizure of the firearm and the arrest of the defendant, a police report describing the incident, other documentation related to Vega's arrest, the dockets of other judicial proceedings against Vega, and police reports regarding two of the other proceedings.[5]

These other proceedings against Vega involved firearm and ammunition possession. According to the police report about the incident leading to one of the pending cases, police recovered nine rounds of ammunition from one of Vega's pockets after he went to an emergency room with a gunshot wound.[6] According to the police report about the incident leading to the other pending matter, officers learned that Vega was in possession of a firearm while he was wearing a global positioning system (GPS)

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[4] The defendant also was charged with possessing a loaded firearm without a license, G. L. c. 269, § 10 (n); possessing ammunition without a firearm identification card, G. L. c. 269, § 10 (h) (1); resisting arrest, G. L. c. 268, § 32B; failing to stop for police, G. L. c. 90, § 25; failing to have a driver's license in his possession while operating a motor vehicle, G. L. c. 90, § 11; and driving with a suspended license, G. L. c. 90, § 23.

[5] The judge also considered body camera footage from the arrest and a paystub showing Vega's employment.

[6] Vega later pleaded guilty in that case and was sentenced to thirty days in a house of correction.

monitoring bracelet. The officers found Vega in a car's rear passenger's seat; after Vega got out of the car, they saw a firearm on the floor beneath the car's rear passenger's seat.[7] The defendant was out on bail in that case on the condition that he maintain a curfew of 8 P.M. to 7 A.M when he was arrested in the current case at around 3 A.M.

After reviewing the evidence, a Boston Municipal Court judge granted the Commonwealth's motion and ordered that Vega be detained on the ground of dangerousness. Vega filed a petition for review in the Superior Court. See G. L. c. 276, § 58A (7). A Superior Court judge denied the petition after a hearing at which the parties presented substantially the same evidence as they had in the Boston Municipal Court. Vega then filed a petition for relief in the county court pursuant to G. L. c. 211, § 3. A single justice of the Supreme Judicial Court, exercising the power provided by that statute, permitted the defendant to obtain appellate review and transferred the matter for consideration of the merits to a single justice of the Appeals Court, who denied Vega's petition.[8]

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[7] Vega later pleaded guilty in that case. He was sentenced to eighteen months in a house of correction and three years of probation.

[8] The single justice of the Supreme Judicial Court transferred the matter to a single justice of the Appeals Court pursuant to our Order Regarding Transfer of Certain Single

Vega appealed from the single justice's decision, and we granted his application for direct appellate review.

2. Bob Nuah. Worcester police officers responded to a call of a possible gunshot shortly after midnight on May 2, 2021. They found four people, including Bob Nuah, sitting in a parked car. There was a bag containing a firearm underneath the front passenger's seat and one round of ammunition in the glove compartment. The firearm had been reported stolen.

A criminal complaint issued against Nuah out of the District Court. The complaint charged Nuah with, among other things, possessing a firearm without a license, G. L. c. 269, § 10 (a).[9] The Commonwealth moved to detain Nuah pursuant to G. L. c. 276, § 58A.

Justice Matters During the COVID-19 Pandemic, first par., No. OE-144 (June 8, 2020), citing G. L. c. 211, § 4A, and G. L. c. 211A, § 12. See Fadden v. Commonwealth, 376 Mass. 604, 608 (1978), cert. denied, 440 U.S. 961 (1979) (although Supreme Judicial Court may not delegate general superintendence power to Appeals Court or single justice of Appeals Court, "the single justice of [the Supreme Judicial Court] may in a proper case exercise the power of general superintendence by allowing interlocutory review . . . and then transfer the case to a single justice of the Appeals Court for decision on the merits").

[9] Nuah also was charged with possessing a loaded firearm without a license, G. L. c. 269, § 10 (n); possessing ammunition without a firearm identification card, G. L. c. 269, § 10 (h) (1); and receiving stolen property of a value not exceeding $1,200, G. L. c. 266, § 60.

In support of its motion, the Commonwealth presented Nuah's criminal record, police reports and other documentation about the arrest in the current case, and police reports about other incidents involving Nuah. Several of the reports about the other incidents listed Nuah as being a member of the "Family Over Everything" gang. In one of the incidents described in the reports, police officers in North Carolina found multiple firearms, including one that had been reported stolen, in a car that Nuah was driving.

For his part, Nuah submitted during the dangerousness hearing several letters of support from friends and community members.

A District Court judge allowed the Commonwealth's motion and ordered that Nuah be detained as a danger to the community. The judge based this decision on, among other reasons, "[t]he defendant's reputation" of being "[g]ang affiliated." Nuah petitioned for Superior Court review of the District Court order pursuant to G. L. c. 276, § 58A (7). A Superior Court judge denied the petition after the parties presented the same evidence as they had in the District Court. In a memorandum of decision and order, the judge relied on, among other things, Nuah's numerous encounters with police and Nuah being "a known gang member in the city of Worcester."

Nuah then filed a petition for relief in the county court pursuant to G. L. c. 211, § 3. A single justice of the Supreme Judicial Court permitted the defendant to obtain appellate review and transferred the matter for consideration of the merits to a single justice of the Appeals Court, who denied the petition.[10]

Nuah appealed from the single justice's decision, and we granted his application for direct appellate review.

Discussion. 1. Standard of review. We review the decisions of the single justice of the Appeals Court for clear error of law or abuse of discretion. See Boisvert v. Commonwealth, 487 Mass. 1027, 1028 (2021) (addressing appeals from single justice of Supreme Judicial Court); Rule 1.0 of the Rules of the Appeals Court, as appearing in 97 Mass. App. Ct. 1001 (2020) (petitions transferred from single justice of Supreme Judicial Court to single justice of Appeals Court proceed as do petitions before single justice of Supreme Judicial Court). Where an appeal "concerns a request for bail relief, we also consider the propriety of the underlying bail order." Boisvert, supra, citing Brangan v. Commonwealth, 477 Mass. 691, 697, S.C., 478 Mass. 361 (2017). "In reviewing both the single justice's judgment and the bail judge's order, we

[10] The same single justice of the Appeals Court denied the petitions in Vega's and Nuah's cases.

. . . consider the legal rights at issue and independently determine and apply the law, without deference to their respective legal rulings." Boisvert, supra, quoting Brangan, supra.

2. Constitutionality of including unlicensed firearm possession as a predicate offense. General Laws c. 276, § 58A, provides for the pretrial detention based on dangerousness of defendants accused of certain criminal activity. Mendonza v. Commonwealth, 423 Mass. 771, 772 (1996). Subsection (1) lists the relevant criminal activity. See Commonwealth v. Young, 453 Mass. 707, 711 (2009). According to that subsection, and as relevant here, the Commonwealth may move for detention based on dangerousness if a defendant is "arrested and charged with a violation of paragraph (a) . . . of section 10 of chapter 269," which penalizes possession without a license of a firearm not in one's residence or place of business. G. L. c. 276, § 58A (1). The issue presented is whether including that crime as a predicate offense violates substantive or procedural due process.[11]

a. Substantive due process. Substantive due process "prevents the government from engaging in conduct that 'shocks

[11] Two other firearm possession crimes also are included in G. L. c. 276, § 58A (1). Those crimes are not at issue here.

the conscience' or interferes with rights 'implicit in the concept of ordered liberty'" (citations omitted). Aime v. Commonwealth, 414 Mass. 667, 673 (1993), quoting United States v. Salerno, 481 U.S. 739, 746 (1987). "[T]he nature of the individual interest at stake determines the standard of review that courts apply when deciding whether a challenged statute meets the requirements of the due process clause." Aime, supra. Where, as here, freedom from physical restraint before trial is involved, we apply strict scrutiny, and a statute will be upheld only if it furthers a legitimate and compelling government interest and is "narrowly tailored" to further that interest. Paquette v. Commonwealth, 440 Mass. 121, 125 (2003), cert. denied, 540 U.S. 1150 (2004), quoting Aime, supra, and citing Commonwealth v. Querubin, 440 Mass. 108 (2003). See LeSage, petitioner, 488 Mass. 175, 181 (2021) ("To comply with the requirements of substantive due process and satisfy strict scrutiny, government conduct that infringes on a fundamental right must be narrowly tailored to further a compelling and legitimate government interest").

The government has a legitimate and compelling interest in preventing extremely serious crime by arrestees. See Salerno, 481 U.S. at 749-750. This does not mean that all statutes allowing for pretrial detention on the ground of dangerousness are constitutional. Indeed, in Aime, 414 Mass. at 668, 682, we

held that a predecessor to the current dangerousness statute was unconstitutional because, among other reasons, it applied to "any arrestee" rather than "only to individuals who have been arrested for a specific category of serious offenses." The Legislature then enacted a dangerousness statute that applied only to defendants accused of certain criminal activity, and we concluded that that statute satisfied substantive due process. See Mendonza, 423 Mass. at 773, 778, 786-787.

The version of the statute at issue in the Mendonza case did not list unlicensed firearm possession as a predicate offense. See Mendonza, 423 Mass. at 786-787. See also St. 1994, c. 68, § 6, inserting G. L. c. 276, § 58A. Our reasoning there is, nevertheless, helpful here because we observed that for a predicate offense to satisfy substantive due process it must present a "menace of dangerousness." Mendonza, supra at 787. This means that if unlicensed firearm possession presents a menace of dangerousness, then including it as a predicate offense furthers the legitimate and compelling government interest of preventing extremely serious crime by arrestees. We conclude that unlicensed firearm possession is a dangerous menace.

A then Justice of this court explained in 2009 why unlicensed firearm possession is dangerous to the community:

> "When a handgun or automatic weapon is involved, the purpose of the firearm is to injure or kill; there is no other reason for that weapon's existence. . . . The risks associated with the possession of any firearm quite clearly are increased when those firearms are unlicensed. It is generally understood in the Commonwealth that there are licensing requirements applicable to firearms, and that it is unlawful to violate them. That the owner or user of an inherently dangerous instrumentality subject to licensure chooses not to abide by licensing requirements suggests powerfully that that person has obtained the weapon for an unlawful purpose that involves violence or the threat thereof. This is nothing more than common sense. . . . The fact that some otherwise law-abiding individuals may possess unlicensed firearms due to neglect or mistake does not alter the basic nature of the act in most situations or reduce the danger of death or serious personal injury that accompanies the use of the great majority of firearms that have not satisfied licensing requirements. . . . [A] fair reading of the statute would reject the pretense that a firearm is some neutral piece of equipment that is harmless in and of itself, and would recognize at a minimum the deadly sequence that so often follows on the possession of an unlicensed firearm."

Young, 453 Mass. at 718-721 (Cowin, J., dissenting).

The menace of dangerousness posed to individuals and communities by the possession of illegal firearms has only worsened over the past thirteen years.[12] The daily onslaught of

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[12] See, e.g., Gramlich, Pew Research Center, What the Data Says About Gun Deaths in the U.S. (Feb. 3, 2022), https://www.pewresearch.org/fact-tank/2022/02/03/what-the-data-says-about-gun-deaths-in-the-u-s/ [https://perma.cc/N8UJ-TJLF] ("The 45,222 total gun deaths in 2020 were by far the most on record, representing a 14% increase from the year before, a 25% increase from five years earlier and a 43% increase from a decade prior. . . . On a per capita basis, there were 13.6 gun deaths per 100,000 people in 2020 -- the highest rate since the mid-1990s . . ."); Thebault, Fox, & Ba Tran, 2020 Was the Deadliest Gun Violence Year in Decades. So Far, 2021 Is Worse, Wash. Post (June 14, 2021), https://www.washingtonpost.com/nation/2021/06/14/2021-gun-violence/ [https://perma.cc/5ZLQ-AFGL].

young people being shot, and the prospect of mass shootings, including in schools, has become too familiar a part of the modern news cycle. To be sure, these shootings are not all committed by individuals who illegally possess firearms. But certainly the fact that a firearm is illegally possessed increases the likelihood that it will be used illegally.

This is why the Legislature consistently has penalized illegal firearm possession. See Commonwealth v. Lindsey, 396 Mass. 840, 842 (1986) ("The history of Massachusetts gun control legislation in this century shows an unwavering legislative intent that one may lawfully carry a firearm only if he [or she] has a license or qualifies for a specific statutory authorization"); Commonwealth v. Jackson, 369 Mass. 904, 919 (1976) (upholding constitutionality of G. L. c. 269, § 10 [a], as amended by St. 1975, c. 113, § 2, because, among other reasons, "the Legislature could conclude . . . that harsh, inflexible penalties are needed to serve as a deterrent and that the need for deterrence, in light of the potential danger created by the unlawful carrying of a firearm, should be the primary, if not the sole, objective of the statute"); Commonwealth v. Bartholomew, 326 Mass. 218, 219 (1950) ("The intent of [G. L. c. 269, § 10, as amended by St. 1937, c. 250, § 1,] . . . is to protect the public from the potential danger incident to the unlawful possession of [dangerous] weapons").

See also United States v. Dillard, 214 F.3d 88, 93 (2d Cir. 2000), cert. denied, 532 U.S. 907 (2001) ("While it is possible to commit violent crimes without possession or use of a gun . . . , guns are without doubt the most potent and efficient instrument for violent crime. . . . Possession of a gun greatly increases one's ability to inflict harm on others and therefore involves some risk of violence").

Adding unlicensed firearm possession to the dangerousness statute was a further way to address the threat of this crime. See State House News Service (House Sess.), May 26, 2010 (statement of Rep. Eugene L. O'Flaherty) ("The city is impacted every year by homicides, carnage on our streets attributable to gangs, drugs and people in possession of illegal guns. This provides a tool long overdue to . . . tackle the issue of illegal handguns and the carnage they are causing across the state"); State House News Service (Sen. Sess.), Nov. 18. 2009 (statement of Sen. Mark C. Montigny) ("I think we should simply say that when there's an unlawful possession of a firearm, you may very well do something dangerous with it").

In sum, common sense and legislative intent demonstrate that unlicensed firearm possession is a dangerous menace.

Our decision in Young does not militate against this conclusion. In that case, we stated that unlicensed firearm possession "lacks" a "menace of dangerousness." Young, 453

Mass. at 716. However, we did so in the context of a statutory, not constitutional, analysis.

When we decided the Young case, the dangerousness statute did not list unlicensed firearm possession as a predicate offense. Id. at 710. But it did contain a residual clause (recently held unconstitutionally vague, see Scione v. Commonwealth, 481 Mass. 225, 232 [2019]) for felonies that "by [their] nature involve[] a substantial risk that physical force against the person of another may result." Young, 453 Mass. at 710, quoting G. L. c. 276, § 58A (1), as amended through St. 1996, c. 393, § 5. The issue presented was whether unlicensed possession of a firearm fell within that residual categorical clause. Young, supra at 711-712. We concluded that it did not, reasoning that unlicensed firearm possession was "by its nature" a "passive and victimless" "regulatory crime." Id. at 714. We observed that "inquiry into the 'nature' of the felony examines the legal elements comprising the felony, not the factual predicate giving rise to a complaint or indictment." Id. at 715. To support our conclusion, we stated that unlicensed possession of a firearm "lacks the 'menace of dangerousness' inherent in the crimes specifically included in [G. L. c. 276,] § 58A (1)." Id. at 716, quoting Mendonza, 423 Mass. at 787.

Despite holding that unlicensed firearm possession did not fall within the residual clause, we suggested that the Legislature could include the offense as a predicate if it wished to do so. Young, 453 Mass. at 715 n.11 ("Where the elements of a felony do not require proof that the defendant actually disregarded the safety and well-being of others, any determination concerning the substantiality of the connection between the felony and the risk of physical force against another properly lies with the Legislature" [emphasis added]); id. at 716-717 ("In holding that unlicensed possession of a firearm is not a predicate offense for purposes of [G. L. c. 276,] § 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]). It presumably was in response to this language in the Young case, which was released in 2009, that the Legislature decided in 2010 to add unlicensed firearm possession as a predicate offense. See St. 2010, c. 256, § 125.

We did not intend in the Young case to invite the Legislature to enact an unconstitutional statute. Indeed, we were not confronted in Young with a constitutional issue at all; we were confined to examining the "nature," or elements, of unlicensed firearm possession in applying the categorical

approach to the residual clause of the dangerousness statute, rather than considering the crime's practical consequences. See Young, 453 Mass. at 715. Now that we are presented with the constitutional issue, we may look beyond the crime's elements to its impact on society. See Salerno, 481 U.S. at 750 (upholding constitutionality of Federal dangerousness statute because, among other reasons, it "operates only on individuals who have been arrested for a specific category of extremely serious offenses," and "Congress specifically found that these individuals are far more likely to be responsible for dangerous acts in the community after arrest"). As discussed above, from a practical perspective unlicensed firearm possession does present a menace of dangerousness. Including it as a predicate offense, therefore, furthers the legitimate and compelling government interest of preventing extremely serious crime by arrestees.

The inclusion of unlicensed firearm possession as a predicate offense is also narrowly tailored to that interest. The Legislature did not list as a predicate offense every weapon crime included in G. L. c. 269, § 10. Other provisions in that section criminalize, for example, carrying certain knives, G. L. c. 269, § 10 (b); and unlicensed possession of ammunition, G. L. c. 269, § 10 (h) (1). The Legislature appears to have made a

reasoned decision that these crimes are not sufficiently dangerous to be included as predicates.

Moreover, certainly not every defendant charged with unlicensed firearm possession should be held pretrial. Such a charge allows the Commonwealth to move for a dangerousness hearing at which a judge will determine whether the defendant should be held. G. L. c. 276, § 58A (1)-(3). The ultimate determination as to whether conditions of release will reasonably assure the safety of any other person or the community, as well as all subsidiary findings, must be based on clear and convincing evidence. G. L. c. 276, § 58A (3), (4), second par. That means that not only must there be clear and convincing evidence that the defendant is dangerous, but also there must be clear and convincing evidence that no conditions of release will reasonably assure the safety of society. "The hearing shall be held immediately upon the person's first appearance before the court." G. L. c. 276, § 58A (4), second par. Although the Commonwealth may move for a continuance, id., any such motion may be granted only upon good cause shown, and "[t]he judge should . . . make a specific finding that such cause has been shown and what such cause is."[13] Mendonza, 423

[13] The showing of good cause is constitutionally required before a defendant can be held upon the Commonwealth's motion for up to three business days without an adjudication of

Mass. at 792. And a defendant held pretrial on the ground of dangerousness "shall be brought to a trial as soon as reasonably possible." G. L. c. 276, § 58A (3). The statute's framework, therefore, provides several safeguards to protect against pretrial detention of individuals who may be released safely.

For all these reasons, we conclude that unlicensed firearm possession as described in G. L. c. 269, § 10 (a), presents a menace of dangerousness and that its inclusion as a predicate offense is narrowly tailored to the Commonwealth's legitimate and compelling interest in preventing extremely serious crime by arrestees. See Mendonza, 423 Mass. at 787.[14]

b. Procedural due process. The Commonwealth violates the Federal and State Constitutions' guarantees of procedural due process when it "tak[es] away someone's life, liberty, or property under a criminal law so vague that it fails to give

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dangerousness. Mendonza, 423 Mass. at 773; G. L. c. 276, § 58A (4), second par. Good cause not only means that there is good reason for the Commonwealth not to be prepared at arraignment to go forward with its motion to detain; the Commonwealth must at least present a proffer to the judge that indicates a likelihood of satisfying the significant burden necessary to preventatively detain an individual presumed innocent of the crime charged.

[14] We do not intend this holding to affect our jurisprudence in other areas of the law that address the nature of unlicensed firearm possession. See, e.g., Commonwealth v. Holley, 478 Mass. 508, 528 (2017) (in felony-murder context, "possession of an unlicensed firearm is not inherently dangerous" "[a]s a matter of law"). These other areas are not before us.

ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." Johnson v. United States, 576 U.S. 591, 595 (2015). See Scione, 481 Mass. at 232. The defendants assert that G. L. c. 276, § 58A, is unconstitutionally vague if unlicensed firearm possession is included as a predicate offense because the factors that the statute provides for deciding whether an individual is a danger to the community, see G. L. c. 276, § 58A (5), are difficult to apply to "regulatory" crimes that do not involve danger. As discussed above, however, we do not see unlicensed firearm possession as simply a regulatory crime, but rather as a dangerous crime like the others listed in G. L. c. 276, § 58A (1). With respect to these other crimes, we have observed that the dangerousness statute "directs the courts to the factors that bear on the rational determination" of dangerousness. Mendonza, 423 Mass. at 788. We are not convinced that these factors are so difficult to apply to the dangerousness inquiry when unlicensed firearm possession is the predicate offense as to be unconstitutionally vague.[15]

[15] The factors are as follows: "the nature and seriousness of the danger posed to any person or the community that would result by the person's release, the nature and circumstances of the offense charged, the potential penalty the person faces, the person's family ties, employment record and history of mental illness, his reputation, the risk that the person will obstruct or attempt to obstruct justice or threaten, injure or intimidate

3. Dangerousness inquiry. As discussed above, if a defendant is charged with criminal activity listed in G. L. c. 276, § 58A (1), then "[a] judge may order pretrial detention if he or she finds[, after a hearing,] that the Commonwealth has established by clear and convincing evidence that 'no conditions of release will reasonably assure the safety of any other person or the community.'" Scione, 481 Mass. at 227, quoting G. L. c. 276, § 58A (3). A judge must consider a number of enumerated factors in addressing this question. See note 15, supra. The judge's subsidiary factual findings, as well as the judge's ultimate determination as to whether conditions of release will reasonably assure the safety of any other person or the community, must be supported by clear and convincing evidence. G. L. c. 276, § 58A (3), (4), second par.

Additionally, "[t]he rules concerning admissibility of evidence in criminal trials shall not apply to the presentation

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or attempt to threaten, injure or intimidate a prospective witness or juror, his record of convictions, if any, any illegal drug distribution or present drug dependency, whether the person is on bail pending adjudication of a prior charge, whether the acts alleged involve abuse as defined in [G. L. c. 209A, § 1], or violation of a temporary or permanent order issued pursuant to [G. L. c. 208, §§ 18, 34B; G. L. c. 209, § 32; G. L. c. 209A, §§ 3, 4, 5; or G. L. c. 209C, §§ 15, 20], whether the person has any history of orders issued against him pursuant to the aforesaid sections, whether he is on probation, parole or other release pending completion of sentence for any conviction and whether he is on release pending sentence or appeal for any conviction." G. L. c. 276, § 58A (5).

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. c. 276, § 58A (4), second par. Any hearsay evidence must be "reliable," and "when hearsay is offered as the only evidence of the alleged violation, the indicia of reliability must be substantial." Abbott A. v. Commonwealth, 458 Mass. 24, 34-35 (2010), quoting Commonwealth v. Durling, 407 Mass. 108, 118 (1990). Cf. Commonwealth v. Nick N., 486 Mass. 696, 706 (2021) ("as in Durling, if hearsay is admitted at Wallace W. proceedings, it must be reliable, and 'the indicia of reliability must be substantial' when hearsay is the only evidence offered").[16]

Here, there was both live witness testimony and documentary evidence regarding dangerousness in Vega's case, and the Commonwealth relied in Nuah's case exclusively on hearsay evidence. We conclude that the District Court, Boston Municipal Court, and Superior Court judges did not err in relying on this evidence, and especially the detailed police reports, in deciding by clear and convincing evidence that no conditions of release would reasonably assure the community's safety. See

[16] At a Wallace W. hearing, the Commonwealth attempts to prove that a juvenile potentially excluded from the Juvenile Court's jurisdiction pursuant to G. L. c. 119, § 52, has committed a prior offense and is, therefore, properly before the court. See Nick N., 486 Mass. at 699-700; Wallace W. v. Commonwealth, 482 Mass. 789 (2019).

Garcia v. Commonwealth, 481 Mass. 1005, 1005-1006 (2018). See also Abbot A., 458 Mass. at 36, quoting Commonwealth v. Maggio, 414 Mass. 193, 199 n.3 (1993) ("'detailed police reports' constitute '[r]eliable, factually detailed hearsay . . .'").

In Vega's case, the live witness testified from personal knowledge that police had found a firearm in Vega's car, and a police report about the incident stated that the firearm was loaded. The documentary evidence also showed that Vega had two other firearm and ammunition possession cases pending, one of which arose from Vega presenting to a hospital emergency room with a gunshot wound and ammunition in his pocket and the other of which arose out of an incident that occurred while he was subject to GPS monitoring. All of the relevant police reports were detailed and based on officers' personal observations as well as, in the emergency room case, an interview with a nurse. See Durling, 407 Mass. at 121-122 (police reports had substantial level of reliability where they were "factually detailed" and "relate[d] primary facts [that the officers observed personally], not mere conclusions or opinions"). The documentary evidence, including a case docket, also showed that Vega had been arrested in the current case while in violation of a curfew imposed as a condition of his pretrial release in one of his pending matters.

In Nuah's case, there was documentary evidence with a substantial level of reliability that Nuah was in a car with a firearm that had been reported stolen and a round of ammunition in the current case, and that he had a pending case involving possession of multiple firearms, including a firearm that had been reported stolen. The police reports about the arrests in the current case and the other pending case were detailed and based on officers' first-hand observations.

In sum, the live testimony and reliable hearsay evidence in Vega's case, and the hearsay evidence with a substantial level of reliability in Nuah's case, was sufficient to support the District Court, Boston Municipal Court, and Superior Court judges' conclusions that Vega and Nuah should be held on grounds of dangerousness. See G. L. c. 276, § 58A (5) (in analyzing dangerousness, judge must consider, among other factors, "the nature and seriousness of the danger posed to . . . the community that would result by the person's release," "the nature and circumstances of the offense charged," and "whether the person is on bail pending adjudication of a prior charge").

Nevertheless, the judges in Nuah's case should not have relied on the minimal evidence that Nuah was a gang member. The only evidence presented that Nuah was affiliated with a gang appears to have been brief mentions of that purported fact in various police reports without any factual support or indication

as to the source of the information.[17] This was insufficient evidence to prove Nuah's gang membership by clear and convincing evidence. See G. L. c. 276, § 58A (4), second par. Cf. Diaz Ortiz v. Garland, 23 F.4th 1, 15-22 (1st Cir. 2022) (addressing unreliability of Boston police department's gang database); Commonwealth v. Wardsworth, 482 Mass. 454, 469-470 (2019) (witness "lacked a basis in personal knowledge for concluding that the defendant was a member of the Walnut Park gang"). The judges should not, therefore, have considered Nuah's purported gang membership as a factor in favor of a dangerousness finding.

The Superior Court judge in Nuah's case also referenced that the defendant had "had numerous encounters with law enforcement." Mere interaction with police does not weigh in favor of finding a defendant dangerous. That a police report is generated about an encounter with an individual does not mean that the individual did anything wrong. For instance, one of the police reports about Nuah that the Commonwealth presented as evidence of his dangerousness described Nuah as a passenger in a car that was stopped, resulting in a verbal warning to the

[17] Three police reports referencing Nuah's purported gang membership stated merely, "Gang affiliation: FOE (Family over everything," "Gang affiliation: FOE," and "ACTIVE GANG MEMBER: Family Over Everything (FOE)." A fourth police report stated that police "received information from patrons enjoying [a festival] that several young gang affiliated males loitering in [the area] were carrying guns in their backpack and believed to be gang members." One of the young men was Nuah.

driver. This interaction with police says nothing about whether Nuah violated the law, let alone whether he did so in a dangerous manner. The mere existence of a police report is especially unhelpful in the dangerousness calculus for people of color, such as Nuah, who are disproportionately searched by police. See Commonwealth v. Sweeting-Bailey, 488 Mass. 741, 769-770 (2021) (Budd, C.J., dissenting) ("'[A]nyone's dignity can be violated' by an unconstitutional search; however, 'it is no secret that people of color are disproportionate victims of this type of scrutiny'" [citation omitted]).

Despite these errors, and for the reasons described above, the District Court, Boston Municipal Court, and Superior Court judges ultimately did not err in concluding that no conditions of release in Nuah's case would reasonably assure the community's safety, and the single justice did not abuse her discretion in denying the defendants' petitions.

Conclusion. Because unlicensed possession of a firearm is a constitutional predicate offense under G. L. c. 276, § 58A (1), and because there was no abuse of discretion in the determinations that Vega and Nuah should be held on the ground of dangerousness, the orders of the single justice of the Appeals Court denying their petitions are affirmed.

So ordered.

WENDLANDT, J. (concurring, with whom Gaziano, J., joins). I agree with the court that the inclusion of unlicensed possession of a firearm outside the home or place of business, G. L. c. 269, § 10 (a), as a predicate offense to the determination whether to detain an arrestee as a danger to an individual or the community under G. L. c. 276, § 58A, does not violate due process. I write separately because I would decide the constitutional question exclusively on the basis of the Legislature's determination that inclusion of this offense as a predicate to the dangerousness determination serves the legitimate and compelling State interest in preventing crime by arrestees insofar as the Legislature specifically has found that these arrestees are far more likely to be responsible for dangerous acts in the community after arrest, ante at . See Commonwealth v. Young, 453 Mass. 707, 715 n.11 (2009) ("any determination concerning the substantiality of the connection between the felony and the risk of physical force against another properly lies with the Legislature").

In view of the limited appellate record, I am disinclined to rely on so-called judicial "common sense," see ante at , quoting Young, 453 Mass. at 719 (Cowin, J., dissenting), which is hampered by our inability to conduct the type of broad-based and extensive fact finding through means available to the Legislature; it can lead to the awkward result that today's

court finds it is common sense that unlicensed firearm possession is a dangerous menace while yesterday's did not. See Young, supra at 716.

In my view, the Legislature's learned determination is sufficient to add the offense as a predicate to the dangerousness determination. Together with the required procedures, findings, burdens, and time constraints set forth in the dangerousness statute, as described by the court, ante at , I agree with the court that the statute is narrowly tailored to the compelling State interest.