

SJC-13182

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

COMMONWEALTH
vs.
JORGE VEGA

COMMONWEALTH
vs.
BOB NUAH

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

**BRIEF AMICUS CURIAE OF THE CHARLES HAMILTON HOUSTON INSTITUTE FOR
RACE & JUSTICE IN SUPPORT OF THE PETITIONER-APPELLANTS & REVERSAL**

Katharine Naples-Mitchell
BBO #704239
Charles Hamilton Houston Institute for
Race & Justice at Harvard Law School
Areeda Hall, Room 522
1545 Massachusetts Avenue
Cambridge, MA 02138
617-495-5121
knaplesmitchell@law.harvard.edu

January 31, 2022

TABLE OF CONTENTS

Table of Contents.....	2
Table of Authorities	3
Corporate Disclosure Statement	10
Preparation of Amicus Brief	10
Statement of Interest of Amicus Curiae.....	10
Introduction.....	12
Summary of Argument.....	13
Argument.....	14
I. The well-documented harms of pretrial detention vastly outweigh the abstract, speculative harm that might result from an administrative, possessory offense.....	14
II. Defendants of color, Black defendants in particular, are disproportionately charged with unlicensed firearm possession and disproportionately subjected to dangerousness hearings.....	22
III. Social science research demonstrates consistent biased associations between race and perceived danger, which are inextricably embedded in an approach to public safety justified by “common sense.”	36
Conclusion	43
Mass R. App. P. 16(K) Certification.....	45
Certificate of Service	45

TABLE OF AUTHORITIES

CASES

<i>Aime v. Commonwealth</i> , 414 Mass. 667 (1993).....	19, 21
<i>Bell v. Wolfish</i> , 441 U.S. 520 (1979)	20
<i>Buck v. Davis</i> , 137 S. Ct. 759 (2017).....	38
<i>Commonwealth v. Buckley</i> , 478 Mass. 861 (2018)	37
<i>Commonwealth v. Long</i> , 485 Mass. 711 (2020).....	37
<i>Commonwealth v. McCowen</i> , 458 Mass. 461 (2010).....	37
<i>Commonwealth v. Sweeting-Bailey</i> , 488 Mass. 741 (2021)	38
<i>Commonwealth v. Vieira</i> , 483 Mass. 417 (2019).....	12
<i>Commonwealth v. Young</i> , 453 Mass. 707 (2009)	passim
<i>Mendonza v. Commonwealth</i> , 423 Mass. 771 (1996)	12, 15, 20
<i>United States v. Salerno</i> , 481 U.S. 739 (1987).....	12, 21
<i>Walsh v. Commonwealth</i> , 485 Mass. 567 (2020)	17

Constitutional Provisions

Art. 12 of the Mass. Decl. of Rts.14

Statutes

G.L. c. 276, § 58A..... passim

G.L. c.269, § 10(a) 14, 24, 42

OTHER AUTHORITIES

C. Anderson, *The Second: Race and Guns in a Fatally Unequal America* (2021) ..41

Barabas, Dinakar & Doyle, *The Problems With Risk Assessment Tools*, N.Y. Times (July 17, 2019), <https://www.nytimes.com/2019/07/17/opinion/pretrial-ai.html>15, 17

Barabas et al., *Technical Flaws of Pretrial Risk Assessments Raise Grave Concern* (2019), https://dam-prod.media.mit.edu/x/2019/07/16/TechnicalFlawsOfPretrial_ML%20site.pdf16

Baughman, *Costs of Pretrial Detention*, 97 B.U. L. Rev. 1 (2017)..... 17

Betancourt, *Suffolk County Sheriff's Office reports fifth death in six months*, WGBH (Dec. 14, 2021), <https://www.wgbh.org/news/local-news/2021/12/14/suffolk-county-sheriffs-office-reports-fifth-death-in-six-months>19

Bishop et al., *Criminal Justice Policy Program, Racial Disparities in the Massachusetts Criminal System* (Sept. 2020), <https://hls.harvard.edu/content/uploads/2020/11/Massachusetts-Racial-Disparity-Report-FINAL.pdf>..... 22

Bogus, *Race, Riots, and Guns*, 66 S. Cal. L. Rev. 1365 (1993)41

Carbado & Richardson, *The Black Police: Policing Our Own*, 131 Harv. L. Rev. 1979 (2018)..... 38

Correll et al., *Across the thin blue line: police officers and racial bias in the decision to shoot*, 92 J. Personality & Soc. Psychol. 1006 (2007).....40

Correll et al., <i>The police officer’s dilemma: using ethnicity to disambiguate potentially threatening individuals</i> , 83 J. Personality & Soc. Psychol. 1314 (2002)	39
Cottrol & Diamond, “ <i>Never Intended to be Applied to the White Population</i> ”: <i>Firearms Regulation and Racial Disparity--The Redeemed South’s Legacy to a National Jurisprudence?</i> , 70 Chi.-Kent L. Rev. 1307 (1995).....	41
Cottrol & Diamond, <i>The Second Amendment: Toward an Afro-Americanist Reconsideration</i> , 80 Geo. L.J. 309 (1991)	41
Cramer, <i>The Racist Roots of Gun Control</i> , 4 Kan. J.L. & Pub. Pol’y 17 (1995).....	41
Digard & Swavola, Vera Inst. of Justice, <i>Justice Denied: The Harmful and Lasting Effects of Pretrial Detention</i> 7 (2019), https://www.vera.org/downloads/publications/Justice-Denied-Evidence-Brief.pdf	38
Dobbie et al., <i>The Effects of Pre-trial Detention on Conviction, Future Crime, and Employment</i> , 108 Am. Econ. Rev. 201 (2018).....	18
Dubber, <i>Policing Possession: The War on Crime and the End of Criminal Law</i> , 91 J. Crim. L. & Criminology 829 (2001).....	15
Eberhardt et al., <i>Seeing Black: Race, Crime, and Visual Processing</i> , 87 J. Personality & Soc. Psychol. 876 (2004)	38, 39
Fagan et al., <i>Stops and Stares: Street Stops, Surveillance, and Race in the New Policing</i> , 43 Fordham Urb. L.J. 539 (2016).....	34, 36
Fagan & Davies, <i>Policing Guns: Order Maintenance and Crime Control in New York, in Guns, Crime, and Punishment in America</i> 191 (Harcourt ed., 2003).....	35
Feathers, <i>Gunshot-Detecting Tech Is Summoning Armed Police to Black Neighborhoods</i> , VICE: Motherboard (July 19, 2021), https://www.vice.com/en/article/88nd3z/gunshot-detecting-tech-is-summoning-armed-police-to-black-neighborhoods	35
<i>Felons have high gun ownership rates despite prohibitions</i> , U.C. Davis Health: Violence Prevention Research Program (Mar. 10, 2020), https://health.ucdavis.edu/vprp/news/headlines/felons-have-high-gun-ownership-rates-despite-prohibitions/2020/03	35

Funk, <i>Gun Control in America: A History of Discrimination Against the Poor and Minorities</i> , in <i>Guns in America: A Reader</i> 390 (Dizard et al. eds., 1999)	41
Goel et al., <i>Precinct or Prejudice? Understanding Racial Disparities in New York City’s Stop-and-Frisk Policy</i> , 10 <i>Annals Applied Stats.</i> 365 (2016)	34
Holmes Didwania, <i>The immediate consequences of federal pretrial detention</i> , <i>Am. L. & Econ. Rev.</i> 1 (2020)	17
Honig, <i>Jail Suicides in Massachusetts Point to National Crisis: Challenging Legislatures to Say Not One More</i> , <i>Prison Legal News</i> (Apr. 1, 2021), https://www.prisonlegalnews.org/news/2021/apr/1/jail-suicides-massachusetts-point-national-crisis-challenging-legislatures-say-not-one-more	19
Human Impact Partners & Families for Justice as Healing, <i>Keeping Kids and Parents Together: A Healthier Approach to Sentencing in Massachusetts</i> (Sept. 2017)	18
Hureau, <i>Seeing Guns to See Urban Violence: Racial Inequality & Neighborhood Context</i> , <i>Daedalus: J. Am. Academy of Arts & Scis.</i> , Winter 2022, at 49.....	42
Johnson, <i>Ever-Increasing Levels of Parental Incarceration and the Consequences for Children</i> , in <i>Do Prisons Make Us Safer? The Benefits and Costs of the Prison Boom</i> 177 (Raphael & Stoll eds., 2009)	18
King, <i>Address Gun Violence by Going After the Root Causes</i> , <i>Brennan Ctr. for Justice</i> (Apr. 14, 2021), https://www.brennancenter.org/our-work/analysis-opinion/address-gun-violence-going-after-root-causes	42
Kleck et al., <i>The effect of perceived risk and victimization on plans to purchase a gun for self-protection</i> , 39 <i>J. Crim. Justice</i> 312 (2011)	44
Leslie & Pope, <i>The Unintended Impact of Pretrial Detention on Case Outcomes</i> , 60 <i>J.L. & Econ.</i> 529 (2017)	17
Levin, <i>Guns and Drugs</i> , 84 <i>Fordham L. Rev.</i> 2173 (2016).....	15, 34, 36
Levinson et al., <i>Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test</i> , 8 <i>Ohio St. J. Crim. L.</i> 187 (2010).....	40

Lowenkamp et al., Arnold Found., *Investigating the Impact of Pretrial Detention on Sentencing Outcomes* (Nov. 2013), https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_state-sentencing_FNL.pdf..... 17

Martin, *Hidden Consequences: The Impact of Incarceration on Dependent Children*, *Nat’l Inst. of Just. J.*, 278, March 2017, <https://www.ojp.gov/pdffiles1/nij/250349.pdf>.....18

Mass. Sentencing Comm’n, *Survey of Superior Court Sentencing Practices FY18* (Oct. 2019), <https://www.mass.gov/doc/survey-of-superior-court-sentencing-practices-fy-2018/download> 22

Mass. Trial Court, Dep’t of Research & Planning, *Massachusetts Trial Court, Charges Dashboard*, <https://public.tableau.com/app/profile/drap4687/viz/MassachusettsTrialCourtChargesDashboard/LeadCharges> (last updated Jan. 19, 2022)24, 30

Mass. Trial Court, Dep’t of Research & Planning, *Massachusetts Trial Court, Dangerousness Hearings*, <https://public.tableau.com/app/profile/drap4687/viz/MassachusettsTrialCourtDangerousnessHearings/MainDashboard> (last updated Jan. 18, 2022).....23, 25

Mass. Trial Court, Dep’t of Research & Planning, *Pre-Trial Release Decision Initial Release Outcome and Bail Amount By Race and Gender* (June 4, 2019), <https://www.mass.gov/doc/initial-release-outcome-and-bail-amount/download>. 31

Mass. Trial Court, *Survey of Pretrial Statistics in Criminal Cases FY2019* (May 2021), <https://www.mass.gov/doc/massachusetts-trial-court-survey-of-pretrial-statistics-in-criminal-cases-fy2019/download> 23, 26

Metzl, *What guns mean: the symbolic lives of firearms*, 5 *Palgrave Comms.* 35 (2019)..... 43

Morgan, *The NRA Supported Gun Control When the Black Panthers Had the Weapons*, *History* (Aug. 30, 2018), <https://www.history.com/news/black-panthers-gun-control-nra-support-mulford-act>.....41

K.G. Muhammad, <i>The Condemnation of Blackness: Race, Crime, and the Making of Modern Urban America</i> (2010).....	38
Parker et al., <i>America’s Complex Relationship with Guns</i> , Pew Res. Ctr. (June 22, 2017), https://www.pewresearch.org/social-trends/2017/06/22/the-demographics-of-gun-ownership	43
Payne, <i>Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon</i> , 81 <i>J. Personality & Soc. Psychol.</i> 181 (2001).....	40
Pear et al., <i>Armed and prohibited: characteristics of unlawful owners of legally purchased firearms</i> , 27 <i>Injury Prevention</i> 145 (2021).....	35
Pogrebin et al., <i>Collateral Costs of Short-Term Jail Incarceration: The Long-Term Social and Economic Disruptions</i> , 5 <i>Corrections Management Q.</i> 64 (2001)	17
Quillian & Pager, <i>Black Neighbors, Higher Crime? The Role of Racial Stereotypes in Evaluations of Neighborhood Crime</i> , 107 <i>Am. J. Soc.</i> 717 (2001)	38
Quillian & Pager, <i>Estimating risk: Stereotype amplification and the perceived risk of criminal victimization</i> , 73 <i>Soc. Psychol. Q.</i> 79 (2010)	38
Riley, <i>Indians and Guns</i> , 100 <i>Geo. L.J.</i> 1675 (2012).....	41
Sabino, <i>West Side Drivers Are Stopped By Cops The Most In Chicago. But 94% Of Stops Don’t Lead To Tickets</i> , <i>Block Club Chi.</i> (Nov. 18, 2021), https://blockclubchicago.org/2021/11/18/west-side-drivers-are-stopped-by-cops-the-most-in-chicago-but-94-of-stops-dont-lead-to-tickets	35
Sim, Correll & Sadler, <i>Understanding police and expert performance: when training attenuates (vs. exacerbates) stereotypic bias in the decision to shoot</i> , 39 <i>Personality & Soc. Psychol. Bull.</i> 291 (2013)	40
Smith & Levinson, <i>The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion</i> , 35 <i>Seattle U.L. Rev.</i> 795 (2012).....	38
Spencer et al., <i>Implicit Bias and Policing</i> , 10 <i>Soc. & Personality Psychol. Compass</i> 50 (2016).....	39

Stevenson & Mayson, *Pretrial Detention and the Value of Liberty*, Univ. of Va., Public Law & Legal Theory Paper Series 2021-14 (Feb. 2021)..... 20, 21

Stewart et al., *Neighborhood Racial Context and Perceptions of Police-Based Racial Discrimination Among Black Youth*, 47 *Criminology* 847 (2009)..... 38

Swaner et al., 'Gotta Make Your Own Heaven': Guns, Safety, and the Edge of Adulthood in New York City, Ctr. for Ct. Innovation (2020), https://www.courtinnovation.org/sites/default/files/media/document/2020/Report_GunControlStudy_08052020.pdf..... 44

Trawalter et al., *Attending to Threat: Race-Based Patterns of Selective Attention*, 44 *J. Exp'l Psychol.* 1322 (2008) 38

Vacha & McLaughlin, *The impact of poverty, fear of crime, and crime victimization on keeping firearms for protection and unsafe gun-storage practices: A review and analysis with policy recommendations*, 35 *Urb. Educ.* 496 (2000) 44

Wang, *Rise in jail deaths is especially troubling as jail populations become more rural and more female*, Prison Pol'y Initiative (June 23, 2021), https://www.prisonpolicy.org/blog/2021/06/23/jail_mortality.....19

Weir, *Policing in black & white*, *Am. Psychol. Ass'n: Monitor on Psychol.* (Dec. 2016), <https://www.apa.org/monitor/2016/12/cover-policing>37

Willmsen & Healy, *When Inmates Die Of Poor Medical Care, Jails Often Keep It Secret*, WBUR (Mar. 23, 2020), <https://www.wbur.org/news/2020/03/23/county-jail-deaths-sheriffs-watch>18

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Judicial Court Rule 1:21, the Charles Hamilton Houston Institute for Race and Justice at Harvard Law School represents that it is a subsidiary of Harvard University, a 501(c)(3) organization. The *amicus* does not issue any stock or have any parent corporation, and no publicly held corporation owns stock in *amicus*.

PREPARATION OF AMICUS BRIEF

Pursuant to Appellate Rule 17(c)(5), amici and their counsel declare that:

- (a) no party or party's counsel authored this brief in whole or in part;
- (b) no party or party's counsel contributed money to fund preparing or submitting the brief;
- (c) no person or entity other than the amici curiae contributed money that was intended to fund preparing or submitting a brief; and
- (d) counsel has not represented any party in this case or in proceedings involving similar issues, or any party in a case or legal transaction at issue in the present appeal.

STATEMENT OF INTEREST OF AMICUS CURIAE

The Charles Hamilton Houston Institute for Race and Justice (“Houston Institute”) at Harvard Law School was launched in 2005 by Charles J. Ogletree, Jr., Jesse Climenko Professor of Law. The Institute honors and continues the work of

Charles Hamilton Houston, who engineered the multi-year legal strategy that led to the unanimous 1954 Supreme Court decision, *Brown v. Board of Education*. The Houston Institute’s long-term goal is to ensure that every member of our society enjoys equal access to the opportunities, responsibilities, and privileges of membership in the United States. To further that goal and to advance racial justice, the Houston Institute seeks to eliminate practices or policies which compound the excessive policing and punishment that created mass incarceration while simultaneously promoting investments in the communities that have been most harmed.

Over the last few years, the Houston Institute has worked in partnership with local community-based organizations to promote public health solutions to avert the serious harms of gun violence in poor communities of color.¹ The alarming statistics on gun fatalities—including that young Black men and teens are killed by guns at a rate 20 times their white counterparts, and that Black women and girls are four times more likely to be killed than white women and girls—illuminate the need for an approach to violence prevention and

¹ See, e.g., Cannon-Grant & Harris, *Boston officials need to fund violence prevention*, Commonwealth Mag. (May 23, 2019), <https://commonwealthmagazine.org/opinion/boston-officials-need-to-fund-violence-prevention>; Harris & Naples-Mitchell, *We fail to view gun violence through a racial equity lens*, Bos. Globe (Apr. 1, 2021), <https://www.bostonglobe.com/2021/04/01/opinion/we-fail-view-gun-violence-through-racial-equity-lens>.

intervention directed at root causes. Instead of a carceral approach that has entrenched cycles of trauma, violence, unemployment, and housing instability in poor communities of color, the Houston Institute advances empirically-backed public health solutions to gun violence. Such solutions include community-led violence intervention and prevention, living-wage jobs and basic income payments, lead abatement, cleaning and greening neighborhoods, improving vacant lots and abandoned buildings, permanent community-based trauma services and mental health care, and direct investment in poor neighborhoods.

INTRODUCTION

Pretrial detention without the possibility of release for months at a time is only constitutionally sound if limited to the *most serious* crimes—those which threaten the “menace of dangerousness.” *Mendonza v. Commonwealth*, 423 Mass. 771, 787 (1996); see also *Commonwealth v. Vieira*, 483 Mass. 417, 421 (2019), quoting *United States v. Salerno*, 481 U.S. 739, 747, 750 (1987). The Appellants and other *amici* compellingly explain why licensure is an inapt and unjust proxy for dangerousness, and how, under the categorical approach required by G.L. c. 276, § 58A, the prospect of pretrial detention without the possibility of release for unlicensed firearm possession is not narrowly tailored to the compelling state interest of promoting community safety. This brief endeavors to further assist the Court to balance the speculative, abstract risk of potential harm that might flow

from a “passive and victimless” possessory offense, *Commonwealth v. Young*, 453 Mass. 707, 714 (2009), against the concrete, documented, and pronounced harm that ineluctably flows from pretrial incarceration. Further, this brief explores new Trial Court data concerning racial disparities in dangerousness hearings, as well as the risk of implicit bias clouding the decision to detain someone based on unlicensed firearm possession.

SUMMARY OF ARGUMENT

Pretrial detention is legally considered an administrative hold for a regulatory purpose, defined as “not punishment.” But there can be no dispute that the conditions of confinement where people are incarcerated pretrial are *punishing*. The Legislature justifies the immense harms and deprivations of pretrial detention by an asserted public safety purpose. However, there is little evidence that incarceration produces safety. Discounting the harms of incarceration in favor of preventing the abstract risk of future harm from an offense that offers little reliable predictive power offends substantive due process. *Infra* at 14-22. The Legislature’s contrary policy judgment is neither empirically supported nor constitutional.

One danger of inherently fallible predictive judgments is that assumptions tinged by bias naturally creep in; discretionary judgments of this nature are the most fertile terrain for racial biases to take hold. *Infra* at 36-37. Available data from

the Massachusetts Trial Court show that defendants of color are disproportionately charged with unlicensed firearm possession; that prosecutors seek dangerousness hearings in a greater proportion of lead weapons offense cases than cases with a lead offense against the person; and that Black and Hispanic people are disproportionately subjected to dangerousness hearings. *Infra* at 22-36. These data may illustrate how implicit bias and systemic racism overlap to label people of color dangerous, people of color in the presence of guns in particular—consistent with a long history of gun regulation targeting communities of color. The Commonwealth emphasizes that the Legislature may make policy judgments in the interest of public safety. But the asserted public safety link is so loosely defined, speculative, and broadly rooted in fear instead of evidence that it invites precisely the implicit biases this Court has cautioned us all to root out. *Infra* at 36-43. The inclusion of G.L. c.269, § 10(a) as a predicate offense violates art. 12 of the Massachusetts Declaration of Rights.

ARGUMENT

- I. **The well-documented harms of pretrial detention vastly outweigh the abstract, speculative harm that might result from an administrative, possessory offense.**

The logic of G.L. c. 276, § 58A is to avert the *possibility* of future harm to others or the community at large by imposing the *certainty* of harm on accused people and their families: incarcerating people labeled dangerous for 120 or 180

days, long before their guilt is proven beyond a reasonable doubt. *Mendoza*, 423 Mass. at 780. The Commonwealth’s detention statute presumes pretrial incarceration is both morally justifiable and socially beneficial by incapacitating people perceived to pose a pronounced risk of future serious harm because they have been accused of specific enumerated crimes, mostly violent felonies. Empirical research on pretrial incarceration and the lived experiences of people who have spent time in jail cast doubt on that balance—particularly for a regulatory, possessory offense with such limited predictive power of future violence.²

The § 58A statute gives trial judges a nearly impossible task: predicting future dangerousness among those merely accused of crimes. According to available data, it is quite rare for someone to be charged with a violent crime while released pretrial—and, conversely, it is exceedingly common that people who are flagged as potentially dangerous do not go on to commit a violent offense.³ Data from pretrial risk assessment tools are helpful comparators because algorithmic inputs for detention decisions largely track the factors judges consider under

² See Levin, *Guns and Drugs*, 84 Fordham L. Rev. 2173, 2177 n.10 (2016) (describing how, unlike crimes involving gun use, possession offenses do not reflect violence), citing Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. Crim. L. & Criminology 829, 832 (2001).

³ Barabas, Dinakar & Doyle, *The Problems With Risk Assessment Tools*, N.Y. Times (July 17, 2019), <https://www.nytimes.com/2019/07/17/opinion/pretrial-ai.html>.

§ 58A, and the algorithms attempt to quantify risk. As a group of scholars led by researchers from Harvard and MIT explained in a public statement in 2019,

[B]ecause pretrial violence is exceedingly rare, it is challenging to statistically predict. Risk assessments cannot identify people who are more likely than not to commit a violent crime. The fact is, the vast majority of even the highest risk individuals will not go on to be arrested for a violent crime while awaiting trial. Consider the dataset used to build the Public Safety Assessment (PSA): 92% of the people who were flagged for pretrial violence did not get arrested for a violent crime and 98% of the people who were not flagged did not get arrested for a violent crime.⁴

In other words, among only the limited population of people who were flagged as dangerous—flagged for the possibility that they might commit a violent crime if released—the overwhelming majority were not arrested for a violent crime. These researchers concluded that “If these tools were calibrated to be as accurate as possible, then they would predict that every person was unlikely to commit a violent crime while on pretrial release.” *Id.*

The Legislature’s decision to insert unlicensed firearm possession as a predicate for dangerousness even after this Court determined it did not “itself pose a substantial risk that physical force against another may result,” *Young*, 453 Mass. at 714, suffers from the same built-in flaws as these algorithmic risk assessment

⁴ Barabas et al., Technical Flaws of Pretrial Risk Assessments Raise Grave Concern at 2 (2019), https://dam-prod.media.mit.edu/x/2019/07/I6/TechnicalFlawsOfPretrial_ML%20site.pdf.

tools. It “sacrifices accuracy for the sake of making questionable distinctions among people who *all* have a low, indeterminate or incalculable likelihood of violence” and “lead[s] judges to overestimate the risk of pretrial violence and detain far more people than is justified.” Barabas, Dinakar & Doyle, *supra*.

There are serious costs of this balance to people accused of crimes, their families, their communities, and society as a whole. The Appellants’ brief delineates some of the consistent, empirically documented consequences of pretrial detention—loss of employment, loss of housing or greater housing instability, greater likelihood of conviction and a sentence to incarceration, inability to communicate with counsel and participate wholly in one’s own defense—all recognized by this Court, see *Walsh v. Commonwealth*, 485 Mass. 567, 579 (2020).⁵ A vast body of research suggests a host of further harms—interruption of parental rights, traumatic experiences for children of incarcerated parents,

⁵ See generally Baughman, *Costs of Pretrial Detention*, 97 B.U. L. Rev. 1, 5 (2017); Leslie & Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes*, 60 J.L. & Econ. 529 (2017); Pogrebin et al., *Collateral Costs of Short-Term Jail Incarceration: The Long-Term Social and Economic Disruptions*, 5 Corrections Management Q. 64, 64-65 (2001); Lowenkamp et al., Arnold Found., *Investigating the Impact of Pretrial Detention on Sentencing Outcomes*, at 10 (Nov. 2013), https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_state-sentencing_FNL.pdf; Holmes Didwania, *The immediate consequences of federal pretrial detention*, Am. L. & Econ. Rev. 1 (2020).

decreases in the economic stability of whole families, and increases in recidivism, indicating that incarceration itself is criminogenic.⁶

This Court’s consideration of the effects of pretrial detention in the substantive due process balancing must also take stock of the actual conditions of confinement in jail—the strip searches and public showers and open communal toilets and inadequate medical care;⁷ the inedible food and rodent infestations and limited access to hygiene products; the crowded dorms and two-person cells the size of a parking space; the sensory deprivation and sensory overload from constant noise, harsh lighting, and a lack of time outdoors; the lack of sleep, the enforced idleness; the exposure to physical and sexual violence, punitive sanctions like solitary confinement that may constitute torture, and a heightened risk of

⁶ Dobbie et al., *The Effects of Pre-trial Detention on Conviction, Future Crime, and Employment*, 108 Am. Econ. Rev. 201(2018); Johnson, *Ever-Increasing Levels of Parental Incarceration and the Consequences for Children*, in *Do Prisons Make Us Safer? The Benefits and Costs of the Prison Boom 177-206* (Raphael & Stoll eds., 2009); Martin, *Hidden Consequences: The Impact of Incarceration on Dependent Children*, Nat’l Inst. of Just. J., 278, March 2017, <https://www.ojp.gov/pdffiles1/nij/250349.pdf>; Human Impact Partners & Families for Justice as Healing, *Keeping Kids and Parents Together: A Healthier Approach to Sentencing in Massachusetts* (Sept. 2017).

⁷ See, e.g., Willmsen & Healy, *When Inmates Die Of Poor Medical Care, Jails Often Keep It Secret*, WBUR (Mar. 23, 2020), <https://www.wbur.org/news/2020/03/23/county-jail-deaths-sheriffs-watch> (“A WBUR investigation found that when people suffered from dire medical conditions in Massachusetts county jails, they were often ignored or mistrusted, with fatal consequences.”).

premature death.⁸ In the last six months, between July and December 2021, five people died in the custody of the Suffolk County Sheriff's Department—all held pretrial or temporarily detained pending a civil commitment placement.⁹ The consequences of pretrial detention are not limited to a temporary, albeit substantial, loss of liberty and the collateral consequences that flow from time pulled out of one's daily routine and work and family commitments; spending time in jail produces significant dignitary harms that can permanently shape a person's mental and physical health and wellbeing.

In determining whether the abstract risk of harm from a possessory offense meets the “menace of dangerousness” to justify detention without the possibility of release, this court must reckon with what is not collateral but central to pretrial detention: jail is a punishing environment. The distinction between the “regulatory restraint” of pretrial detention, *Aime v. Commonwealth*, 414 Mass. 667,

⁸ Wang, *Rise in jail deaths is especially troubling as jail populations become more rural and more female*, Prison Pol’y Initiative (June 23, 2021), https://www.prisonpolicy.org/blog/2021/06/23/jail_mortality/ (“The Bureau of Justice Statistics (BJS) recently came out with the 2018 mortality data for local jails. Nationwide, there were 1,120 deaths reported, or a rate of 154 deaths per 100,000 people in jail, the highest levels since BJS’ first report on this topic in 2000.”); Honig, *Jail Suicides in Massachusetts Point to National Crisis: Challenging Legislatures to Say Not One More*, Prison Legal News (Apr. 1, 2021), <https://www.prisonlegalnews.org/news/2021/apr/1/jail-suicides-massachusetts-point-national-crisis-challenging-legislatures-say-not-one-more>.

⁹ Betancourt, *Suffolk County Sheriff's Office reports fifth death in six months*, WGBH (Dec. 14, 2021), <https://www.wgbh.org/news/local-news/2021/12/14/suffolk-county-sheriffs-office-reports-fifth-death-in-six-months>.

677-678 (1993), quoting *Bell v. Wolfish*, 441 U.S. 520, 535-537 (1979), and incarceration as punishment is a legal fiction. Cf. *Mendonza*, 423 Mass. at 779. Indeed, in many counties in Massachusetts, people are sent to *the very same jail buildings*—subject to the same rigid rules, bars, locks, shackles, tight confines, threats of violence, unhygienic environments, and restrictions on contact with loved ones regardless of whether they are held pretrial or county sentenced.¹⁰

Empirical studies and personal testimonials do not support the efficacy of incarceration for public safety. A 2021 meta-analysis of 116 studies found that “custodial sanctions have no effect on reoffending or slightly increase it when compared with the effects of noncustodial sanctions such as probation.”¹¹ Much like custodial sentencing, pretrial detention does not promote community safety; empirical studies collected above, *see supra* notes 5-6, illustrate that by interrupting access to protective factors like income, housing, and social supports, and by inflicting harm, incarceration risks making communities less safe.

A 2021 survey study by Megan Stevenson and Sandra Mayson offers a useful framework to balance the harms of a victimless offense and the harms of time in

¹⁰ Further, for many years, women from multiple counties were incarcerated pretrial in MCI-Framingham’s Awaiting Trial Unit. Since October 2019, Middlesex is the only remaining county that sends women detained pretrial to state prison.

¹¹ Petrick et al., *Custodial Sanctions and Reoffending: A Meta-Analytic Review*, 50 *Crime & Justice* 353 (2021).

jail. Using a Rawlsian cost-benefit analysis, these scholars asked survey participants to compare the costs of detention and crime directly, “imagining themselves as both detainee and as crime victim.”¹² The authors found that virtually no one is dangerous enough to justify pretrial detention:

The survey results suggest that people view incarceration as an incredibly harmful experience. Most would choose crime-victimization over even short jail stints. The median respondent says that a single day in jail is as costly as a burglary, that three days are as costly as a robbery, and that a month in jail is as costly as an aggravated assault. The severity of the harm that incarceration inflicts means that preventive detention can only be justified on consequentialist grounds if there is a very high risk that the person would otherwise commit serious crime.¹³

In *Young*, this Court explicitly held, “unlicensed possession of a firearm does not manifest a disregard for the safety and well-being of others, and therefore lacks the ‘menace of dangerousness’” *Young*, 453 Mass. at 716. This offense—which is regulatory, possessory, and involves no threat or use of force—is not a reliable predictor of future harm or a proper basis for the Legislature to impose pretrial detention, which must be calculated to “prevent danger to society” *Aime*, 414 Mass. at 678, citing *Salerno*, 481 U.S. at 747. The Commonwealth argues that guns are dangerous—discounting that the statute punishing *unlicensed* possession of a

¹² Stevenson & Mayson, *Pretrial Detention and the Value of Liberty*, Univ. of Va., Public Law & Legal Theory Paper Series 2021-14 (Feb. 2021).

¹³ *Id.* at 6.

gun is not a reliable predictor of dangerousness and that detention itself endangers the community. That firearms may generally be regulated in the interest of public safety does not mean that anyone alleged (but not proven) to have overlooked or disregarded firearm licensing requirements should be eligible for the grave harms of detention.

II. Defendants of color, Black defendants in particular, are disproportionately charged with unlicensed firearm possession and subjected to dangerousness hearings.

Available data about prosecutors' use of § 58A for unlicensed firearm possession offenses are limited. But data do consistently show dramatic racial disparities in charging¹⁴ and sentencing¹⁵ of unlicensed firearm offenses and in prosecutorial requests for detention on the grounds of dangerousness, discussed *infra*. As the Appellants' brief explains, the legislative history of § 58A highlighted the issue of domestic violence and a focus on preventing the harm of assaultive crimes. But data on prosecutors' use of the dangerousness statute show that a greater percentage of cases with lead weapons offenses than cases with lead

¹⁴ See Bishop et al., Criminal Justice Policy Program, Racial Disparities in the Massachusetts Criminal System at 50-51 (Sept. 2020), <https://hls.harvard.edu/content/uploads/2020/11/Massachusetts-Racial-Disparity-Report-FINAL.pdf> (“[O]ver 70% of the people charged with both carrying a firearm without a license and leaving a firearm unattended are Black or Latinx.”).

¹⁵ See Mass. Sentencing Comm'n, Survey of Superior Court Sentencing Practices FY18, at 41-42 (Oct. 2019), <https://www.mass.gov/doc/survey-of-superior-court-sentencing-practices-fy-2018/download>.

person offenses involve a dangerousness hearing.¹⁶ According to a report by the Massachusetts Trial Court, of the 133,006 total defendants subject to an initial release decision in FY19 in the district and municipal courts, “[d]efendants facing a lead weapon (17.9%) or person (8.9%) charge had the highest rates of dangerousness hearings.”¹⁷ The data summary does not disaggregate by possessory weapons offenses and the analysis is limited to lead charges,¹⁸ but it is clear that prosecutors seek detention on dangerousness grounds more reflexively with respect to weapons offenses than person offenses—affecting nearly 1 in 5

¹⁶ However, cases with lead person offenses comprise the majority of dangerousness hearings (68.2% of FY19 dangerousness hearings). This likely results from caseload magnitude: far more cases with lead person offenses are filed annually, meaning they also account for a greater percentage of *dangerousness hearings*. 6.8% of FY19 dangerousness hearings involved a lead weapons offense. See Mass. Trial Court, Dep’t of Research & Planning, *Massachusetts Trial Court, Dangerousness Hearings*, <https://public.tableau.com/app/profile/drap4687/viz/MassachusettsTrialCourtDangerousnessHearings/MainDashboard> (last updated Jan. 18, 2022) [hereinafter *Dangerousness Dashboard*] (add the percentages within the “person” and “weapon” offense categories in the “Adult demographics (table)” tab, selecting Boston Municipal/District Court, All Counties, Offense Type, Race/Ethnicity).

¹⁷ Mass. Trial Court, Survey of Pretrial Statistics in Criminal Cases FY2019 at 45 (May 2021), <https://www.mass.gov/doc/massachusetts-trial-court-survey-of-pretrial-statistics-in-criminal-cases-fy2019/download>.

¹⁸ Lead charges are not always the most serious offense or the eligible § 58A predicate in the case. Available data do not show how many cases involve a lead weapons offense but other, more serious charges. The data also do not show the inverse: how many cases with a *different* lead offense category also involve a weapons offense.

defendants charged with a lead weapons offense in district or municipal court in FY19.

Additional Trial Court data show that unlicensed firearm possession offenses comprise the greatest plurality of lead weapons offenses prosecuted in the Commonwealth each year. For example, in FY19, there were 1,194 cases brought in district and municipal court involving a lead weapons offense.¹⁹ The top five charges—representing a combined two-thirds of lead weapons offenses—were all possessory in nature: carrying a firearm without a license, G.L. c. 269, §10(a) (368 cases, 19.2% of lead weapons offenses); possessing a firearm without FID card, G.L. c. 269, §10(h) (254 cases, 13.3%); carrying a dangerous weapon, G.L. c. 269, §10(b) (254 cases, 13.3%); carrying a loaded firearm without a license, G.L. c. 269, §10(n) (206 cases, 10.8%); and possessing ammunition without FID card, G.L. c. 269, §10(h)(1) (188 cases, 9.8%). *Id.* (click the “Weapon” category—the orange bar on the left—on the Charges Dashboard and review the Lead Charge Detail data in the right column). Weapons offenses involving categorically dangerous conduct—for example, discharging a weapon within 500 feet of a building—are significantly rarer (50 cases in FY19, or 2.6% of lead weapons offenses). *Id.*

¹⁹ Mass. Trial Court, Dep’t of Research & Planning, *Massachusetts Trial Court, Charges Dashboard*, “All Lead Charges Filed in District/Municipal Court, FY2019: 176,405,” <https://public.tableau.com/app/profile/drap4687/viz/MassachusettsTrialCourtChargesDashboard/LeadCharges> (last updated Jan. 19, 2022) (Select a Year, “FY 2019”) [hereinafter *Charges Dashboard*].

The Trial Court maintains an interactive dashboard tracking dangerousness hearings in the Commonwealth, with data available from FY18 through the first two quarters of FY22.²⁰ The dashboard was updated on January 18, 2022 and now includes racial demographic data about dangerousness requests and the option to view dangerousness requests disaggregated by both offense type²¹ and race or ethnicity simultaneously.²² The dashboard does not include the total number of cases prosecuted each year—only the total number of cases in which dangerousness hearings were held. Accordingly, from these data it is not possible to explore in what percentage of cases disaggregated by race/ethnicity and offense type prosecutors moved to have defendants labeled dangerous and jailed without the possibility of release. These data cannot show the percentage of white defendants charged with weapons offenses subjected to dangerousness hearings compared to the percentage of Black or Hispanic defendants charged with weapons offenses subjected to dangerousness hearings—and therefore cannot

²⁰ *Dangerousness Dashboard*, *supra* note 16.

²¹ The dashboard does not specify, but offense type likely correlates to lead charge.

²² View detailed data using the “Adult Demographics (table)” tab. This tab allows users to see cumulative data for Superior Court and Boston Municipal/District Court filings separately, as well as to further disaggregate by county. Set the drop-down menus in the two right columns to “Race/ethnicity” and “Offense type”.

account for how disparities in dangerousness hearings reflect or amplify existing racial disparities in the prosecution and charging of weapons offenses.²³

However, as an initial matter, across all charges in 2019, “White defendants had the lowest rate of dangerousness hearings (2.3%) and Black/African-American defendants had the highest rate (3.3%).”²⁴ Hispanic defendants had a similarly high rate (3.2%). *Id.* Further, the dashboard does show that as prosecutorial requests for dangerousness hearings have increased over the last few years post-*Brangan*, weapons cases have become a larger fraction of all cases with requests for dangerousness hearings—and racial disparities have increased, evidenced by particularly stark increases in dangerousness requests in weapons offense cases against defendants of color.

The tables are reproduced below in full, showing the breakdown of the overlay of each offense category and racial demographic as a percentage of the total dangerousness filings in that court’s jurisdiction. For example, in FY18, dangerousness hearings were held in 27 superior court cases charging lead weapons offenses against Black defendants,²⁵ 26 charging lead weapons offenses against Hispanic defendants, and 26 charging lead weapons offenses against white

²³ Further, the Dashboard shows only dangerousness filings, not dangerousness *findings*.

²⁴ Mass. Trial Court, *supra* note 17, at 45.

²⁵ The table lists cases, not unique defendants. A single person could have multiple cases with dangerousness hearings within a year.

defendants—respectively, 3.9%, 3.7%, and 3.7% of total superior court dangerousness hearings that year. By comparison, in FY21, the last full year of available data, dangerousness hearings were held in 87 superior court cases charging lead weapons offenses against Black defendants, 58 charging lead weapons offenses against Hispanic defendants, and 35 charging lead weapons offenses against white defendants—respectively, 8.6%, 5.7%, and 3.5% of total superior court dangerousness hearings that year.

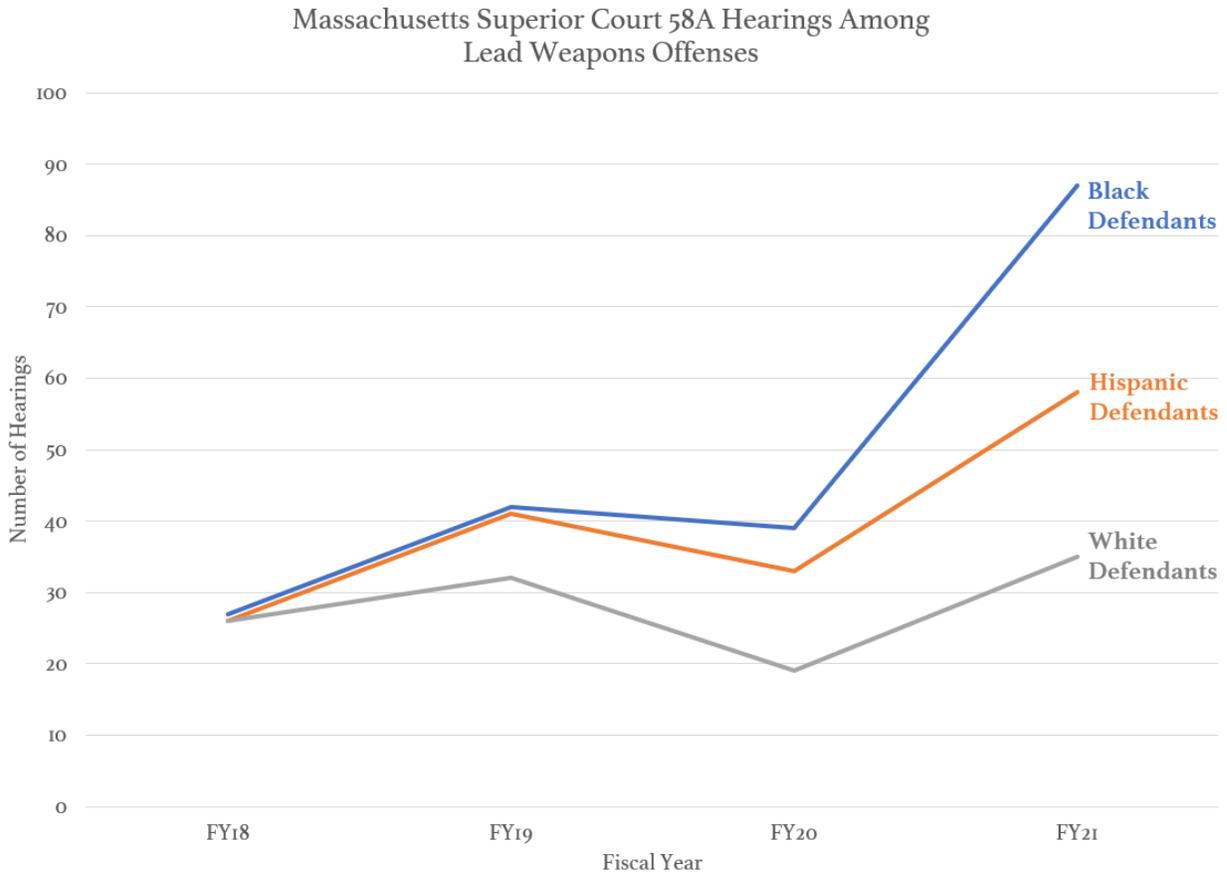
Superior Court 58A hearings, FY18-FY22, Q2²⁶ | Race/Ethnicity & Offense Type

Massachusetts Trial Court, Dangerousness Hearings by [Massachusetts Trial Court, Department of Research and Planning](#)



Massachusetts Trial Court										
Cases with One or More Dangerousness Hearings under MGL Chapter 276 §58A, Case Characteristics and Demographics										
Select a Jurisdiction	Select a County	Select a Demographic / Case Characteristic Category				Select a Second Demographic / Case Characteristic Category				
Superior Court	All	Race/Ethnicity				Offense Type				
	FY18		FY19		FY20		FY21		FY22	
Grand Total	697	100.0%	837	100.0%	831	100.0%	1,010	100.0%	519	100.0%
Black / African-American	12	1.7%	18	2.2%	21	2.5%	31	3.1%	10	1.9%
Drug	1	0.1%	4	0.5%	4	0.5%	4	0.4%	1	0.2%
Motor Vehic..	106	15.2%	138	16.5%	133	16.0%	170	16.8%	92	17.7%
Person	8	1.1%	2	0.2%	3	0.4%	9	0.9%	2	0.4%
Property	27	3.9%	42	5.0%	39	4.7%	87	8.6%	39	7.5%
Weapon	12	1.7%	15	1.8%	17	2.0%	28	2.8%	9	1.7%
Other	11	1.6%	21	2.5%	28	3.4%	30	3.0%	22	4.2%
Hispanic	3	0.4%	1	0.1%	1	0.1%	6	0.6%	3	0.6%
Drug	132	18.9%	159	19.0%	162	19.5%	177	17.5%	97	18.7%
Motor Vehic..	5	0.7%	8	1.0%	4	0.5%	12	1.2%	4	0.8%
Person	26	3.7%	41	4.9%	33	4.0%	58	5.7%	37	7.1%
Property	14	2.0%	10	1.2%	17	2.0%	23	2.3%	12	2.3%
Weapon										
Other										
Other Race	13	1.9%	14	1.7%	25	3.0%	8	0.8%	5	1.0%
Drug	2	0.3%	2	0.2%						
Motor Vehic..	3	0.4%	4	0.5%	4	0.5%	2	0.2%	4	0.8%
Person	3	0.4%	4	0.5%						
Property	3	0.4%	4	0.5%						
Weapon										
Other										
White	10	1.4%	21	2.5%	34	4.1%	27	2.7%	10	1.9%
Drug	18	2.6%	18	2.2%	13	1.6%	20	2.0%	10	1.9%
Motor Vehic..	208	29.8%	208	24.9%	202	24.3%	202	20.0%	95	18.3%
Person	17	2.4%	20	2.4%	15	1.8%	9	0.9%	9	1.7%
Property	26	3.7%	32	3.8%	19	2.3%	35	3.5%	18	3.5%
Weapon	27	3.9%	26	3.1%	31	3.7%	23	2.3%	18	3.5%
Other										
Not Known/Not Reported	1	0.1%	1	0.1%	1	0.1%	3	0.3%	1	0.2%
Drug	12	1.7%	19	2.3%	22	2.6%	35	3.5%	14	2.7%
Motor Vehic..	1	0.1%	1	0.1%						
Person	1	0.1%	1	0.1%						
Property	1	0.1%	1	0.1%	2	0.2%	4	0.4%	7	1.3%
Weapon	2	0.3%	1	0.1%	1	0.1%	3	0.3%	3	0.6%
Other										

²⁶ The FY22 data only include the first two quarters of the year (July-December, 2021). These data are omitted from discussion because they are incomplete.



Similar patterns appear in Boston Municipal and District Court data. In FY18, dangerousness hearings were held in 69 district and municipal court cases charging lead weapons offenses against Black defendants, 66 charging lead weapons offenses against Hispanic defendants, and 57 charging lead weapons offenses against white defendants—respectively, 2.2%, 2.1%, and 1.9% of total municipal and district court dangerousness hearings that year. By comparison, in FY21, dangerousness hearings were held in 219 district and municipal court cases charging lead weapons offenses against Black defendants, 163 charging lead weapons offenses against Hispanic defendants, and 93 charging lead weapons

offenses against white defendants—respectively, 5.3%, 4.0%, and 2.3% of total district and municipal court dangerousness hearings that year. While the practice of seeking dangerousness hearings for weapons offenses generally increased, the disparate rates of increase suggest prosecutors particularly targeted accused people of color.

Boston Municipal/District Court 58A hearings, FY18-FY22, Q2 | Race/Ethnicity & Offense Type

Massachusetts Trial Court, Dangerousness Hearings by [Massachusetts Trial Court, Department of Research and Planning](#)

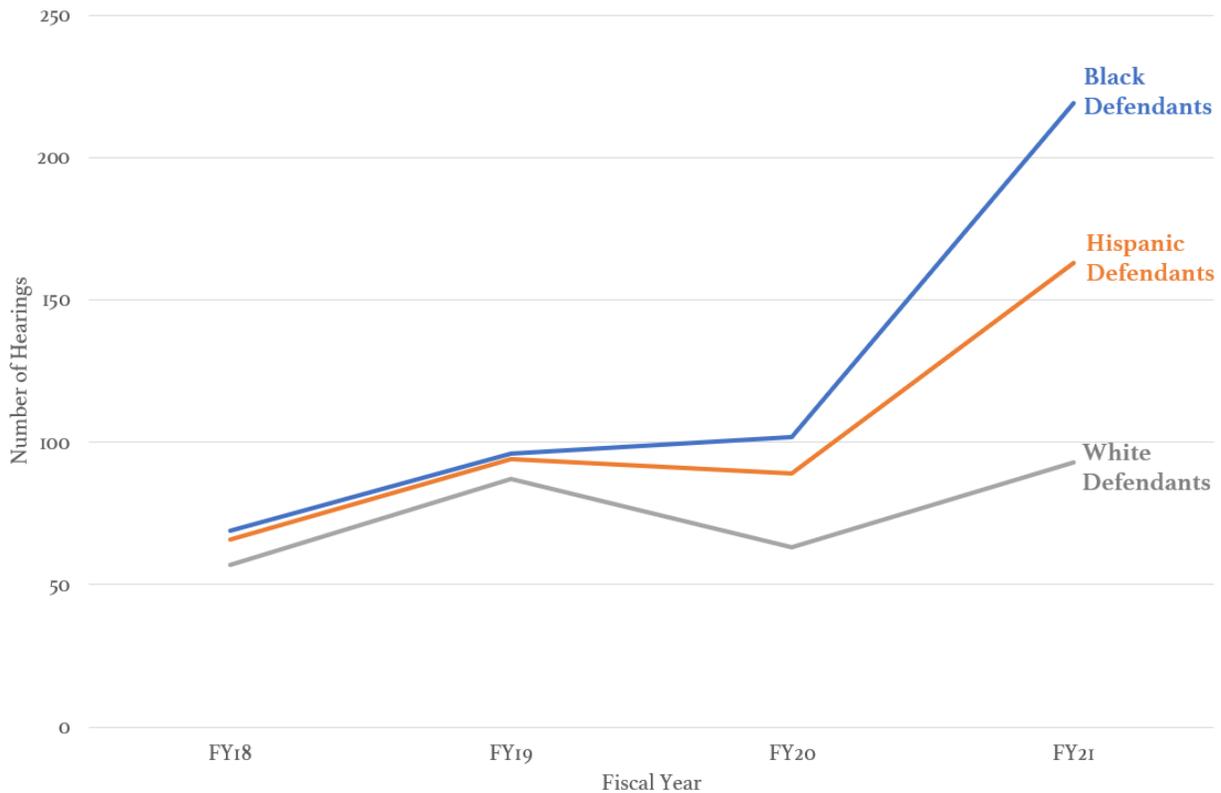
Main Dashboard | Trends | Adult Demographics (bar chart) | Adult Demographics (table) | Child/Youth Demographics

Massachusetts Trial Court
Cases with One or More Dangerousness Hearings under MGL Chapter 276 §58A, Case Characteristics and Demographics

Select a Jurisdiction: Boston Municipal / District Court | Select a County: All | Select a Demographic / Case Characteristic Category: Race/Ethnicity | Select a Second Demographic / Case Characteristic Category: Offense Type

	FY18		FY19		FY20		FY21		FY22	
	Cases	%								
Grand Total	3,075	100.0%	3,670	100.0%	3,518	100.0%	4,104	100.0%	2,082	100.0%
Black / African-American	28	0.9%	36	1.0%	39	1.1%	63	1.5%	19	0.9%
Drug	17	0.6%	15	0.4%	19	0.5%	34	0.8%	10	0.5%
Motor Vehicle	34	1.1%	28	0.8%	23	0.7%	33	0.8%	16	0.8%
Person	69	2.2%	96	2.6%	102	2.9%	219	5.3%	102	4.9%
Property	78	2.5%	66	1.8%	96	2.7%	139	3.4%	67	3.2%
Weapon	38	1.2%	70	1.9%	61	1.7%	95	2.3%	42	2.0%
Other	25	0.8%	23	0.6%	27	0.8%	32	0.8%	20	1.0%
Hispanic	538	17.5%	629	17.1%	624	17.7%	716	17.4%	374	18.0%
Drug	31	1.0%	34	0.9%	34	1.0%	54	1.3%	19	0.9%
Motor Vehicle	66	2.1%	94	2.6%	89	2.5%	163	4.0%	83	4.0%
Person	91	3.0%	103	2.8%	102	2.9%	145	3.5%	73	3.5%
Property	3	0.1%	10	0.3%	6	0.2%	12	0.3%	1	0.0%
Weapon	60	2.0%	54	1.5%	55	1.6%	56	1.4%	38	1.8%
Other	3	0.1%	2	0.1%	2	0.1%	2	0.0%	4	0.2%
Other Race	9	0.3%	13	0.4%	7	0.2%	11	0.3%	4	0.2%
Drug	4	0.1%	8	0.2%	3	0.1%	10	0.2%	8	0.4%
Motor Vehicle	48	1.6%	77	2.1%	71	2.0%	75	1.8%	36	1.7%
Person	89	2.9%	108	2.9%	76	2.2%	74	1.8%	40	1.9%
Property	1,022	33.2%	1,186	32.3%	1,127	32.0%	955	23.3%	511	24.5%
Weapon	73	2.4%	75	2.0%	71	2.0%	67	1.6%	49	2.4%
Other	57	1.9%	87	2.4%	63	1.8%	93	2.3%	53	2.5%
White	192	6.2%	220	6.0%	191	5.4%	221	5.4%	127	6.1%
Drug	3	0.1%	6	0.2%	6	0.2%	9	0.2%	3	0.1%
Motor Vehicle	3	0.1%	6	0.2%	4	0.1%	2	0.0%	1	0.0%
Person	55	1.8%	91	2.5%	92	2.6%	107	2.6%	44	2.1%
Property	2	0.1%	5	0.1%	2	0.1%			2	0.1%
Weapon	6	0.2%	3	0.1%	5	0.1%	11	0.3%	12	0.6%
Other	10	0.3%	15	0.4%	12	0.3%	25	0.6%	15	0.7%
Not Known / Not Reported										

Massachusetts BMC/District Court 58A Hearings Among Lead Weapons Offenses



This analysis does not account for existing disparities in the racial demographics of weapons charges compared to population representation. But looking at this evolution in dangerousness hearings, unless there has been a commensurate disparate increase in weapons offenses against defendants of color over the last few years,²⁷ it appears that, post-*Brangan*, the Commonwealth has

²⁷ Based on the Trial Court’s charges dashboard, see *supra* note 19, an overall increase in the lead weapons offense caseload does not explain this pattern. The total number of lead weapons offenses brought in district and municipal courts did increase from 1,856 in FY18 to 2,104 in FY21. This represents 248 additional lead weapons offenses from 2018 to 2021, a 13% increase. By contrast, the increase in dangerousness hearings against Black defendants with lead weapons offenses from 69 in FY18 to 219 in FY21 represents a 217% increase. More than three times

moved to detain defendants of color accused of weapons offenses without the possibility of release at increasingly higher rates as compared to white defendants.²⁸

The dashboard also shows that prosecutors file 58A holds for lead weapons charges as a greater proportion of their dangerousness requests against defendants of color than among those against white defendants. This could be explained by an association where prosecutors more readily label defendants of color as dangerous by virtue of a weapons offense than white defendants.²⁹ In FY18, a total of 647 Black people, 789 Hispanic people, and 1,481 white people were subjected to dangerousness hearings. The racial demographic breakdown of dangerousness hearings shows that 10.7% of Black people (69) subjected to dangerousness hearings were labeled dangerous by prosecutors for a weapons offense, compared to 8.4% of Hispanic people (66) and just 3.9% of white people (57). These numbers increased in FY21, where 18.8% of Black defendants labeled

as many Black defendants charged with weapons offenses were subjected to dangerousness hearings in FY21 as in FY18.

²⁸ An earlier Trial Court analysis found that, pre-*Brangan* and shortly thereafter, defendants of color charged with mandatory minimum weapons offenses were much more likely than white defendants to be held on very high bails, but white defendants were more likely to be held on dangerousness. See Mass. Trial Court, Dep't of Research and Planning, Pre-Trial Release Decision Initial Release Outcome and Bail Amount By Race and Gender at 21-22 (June 4, 2019), <https://www.mass.gov/doc/initial-release-outcome-and-bail-amount/download>.

²⁹ These data do not allow a more precise analysis that controls for underlying caseload demographics across charge categories.

dangerous by prosecutors were charged with a lead weapons offense (219 weapons offenses among 1165 Black defendants subjected to dangerousness hearings), 13.5% of Hispanic defendants labeled dangerous by prosecutors were charged with a lead weapons offense (163 weapons offenses among 1205 Hispanic defendants subjected to dangerousness hearings), but just 6.3% of white defendants labeled dangerous by prosecutors were charged with a lead weapons offense (93 weapons offenses among 1485 white defendants subjected to dangerousness hearings).

Recent § 58A hearings for weapons offenses in Suffolk County illustrate especially concerning racial demographic patterns—and how the availability of § 58A for a regulatory possession offense is vulnerable to arbitrariness and, potentially, implicit bias. In FY18, Trial Court data show that Suffolk County did not move for 58A detention on weapons offenses in district or municipal courts at all. But in FY21, the Suffolk County District Attorney’s Office labeled 90 Black people, 25 Hispanic people, and 4 white people dangerous by virtue of a weapons offense. Among dangerousness hearings for weapons offenses in Suffolk County district and municipal courts in FY21, 76% involved Black people, and 97% involved people of color.

Suffolk County Boston Municipal/District Court 58A hearings, FY18-FY22, Q2 | Race/Ethnicity & Offense Type

Massachusetts Trial Court, Dangerousness Hearings by Massachusetts Trial Court, Department of Research and Planning

Main Dashboard Trends Adult Demographics (bar chart) Adult Demographics (table) Child/Youth Demographics

Massachusetts Trial Court
Cases with One or More Dangerousness Hearings under MGL Chapter 276 §58A, Case Characteristics and Demographics

Select a Jurisdiction: Boston Municipal / District Court
 Select a County: Suffolk
 Select a Demographic / Case Characteristic Category: Race/Ethnicity
 Select a Second Demographic / Case Characteristic Category: Offense Type

	FY18		FY19		FY20		FY21		FY22	
	Cases	%	Cases	%	Cases	%	Cases	%	Cases	%
Grand Total	51.0	100.0%	55.0	100.0%	52.0	100.0%	348.0	100.0%	171.0	100.0%
Black / African-American										
Drug							3.0	0.9%		
Motor Vehicle	1.0	2.0%			1.0	1.9%	11.0	3.2%	3.0	1.8%
Person	14.0	27.5%	22.0	40.0%	15.0	28.8%	99.0	28.4%	44.0	25.7%
Property					2.0	3.8%	3.0	0.9%	2.0	1.2%
Weapon			4.0	7.3%	7.0	13.5%	90.0	25.9%	45.0	26.3%
Other	7.0	13.7%	4.0	7.3%	6.0	11.5%	32.0	9.2%	21.0	12.3%
Hispanic										
Drug							5.0	1.4%		
Motor Vehicle	3.0	5.9%			1.0	1.9%	1.0	0.3%	3.0	1.8%
Person	12.0	23.5%	11.0	20.0%	5.0	9.6%	32.0	9.2%	20.0	11.7%
Property			1.0	1.8%			4.0	1.1%		
Weapon			2.0	3.6%			25.0	7.2%	10.0	5.8%
Other	2.0	3.9%	1.0	1.8%			9.0	2.6%	7.0	4.1%
Other Race										
Person	1.0	2.0%			1.0	1.9%				
Weapon									1.0	0.6%
Other							2.0	0.6%		
White										
Drug									1.0	0.6%
Motor Vehicle	3.0	5.9%	1.0	1.8%			1.0	0.3%	1.0	0.6%
Person	5.0	9.8%	9.0	16.4%	7.0	13.5%	13.0	3.7%	6.0	3.5%
Weapon					1.0	1.9%	4.0	1.1%	2.0	1.2%
Other	3.0	5.9%			1.0	1.9%	4.0	1.1%	1.0	0.6%
Not Known / Not Reported										
Person					4.0	7.7%	7.0	2.0%	2.0	1.2%
Weapon					1.0	1.9%	3.0	0.9%		
Other									2.0	1.2%

Suffolk County’s 90 dangerousness hearings for Black people charged with weapons offenses accounted for 25.9% of all dangerousness hearings filed in Suffolk County district and municipal courts in FY21, nearly *five times* the figure for the Commonwealth as a whole (5.3% of dangerousness hearings in district and municipal courts in FY21 involved lead weapons offenses against Black people, see *supra*). These data also illustrate that for Black and Hispanic people, Suffolk County sought nearly as many dangerousness hearings for weapons offenses as for person offenses. Given Trial Court data, summarized above, on the predominance of possessory offenses among weapons charges throughout the Commonwealth, the Suffolk County District Attorney’s Office may be requesting

58A detention when people are merely accused of having a weapon nearly as often as when someone is accused of hurting or trying to hurt someone.

Again, without figures about the underlying racial demographics of weapons charges brought by Suffolk County, analysis of this disparity is incomplete. Further, charging disparities alone cannot end the inquiry, as the demographic breakdown of the number of arrests or prosecutions for weapons offenses, and for unlicensed firearm possession in particular, does not necessarily accurately reflect the demographics of those in the community who possess a firearm without a license or FID card.³⁰ Law enforcement efforts to discover firearms possessed without proper licensure particularly target communities of color.³¹ By contrast, empirical estimates of the demographics of people in the

³⁰ See Levin, *supra* note 2, at 2197 (“Without data about who owns, possesses, or carries guns illegally, we simply do not know . . . whether the numbers for arrests and convictions accurately reflect the demographics of illegal gun possession.”).

³¹ Gun-focused policing strategies like street stops and frisks, vehicle stops, and technological surveillance like ShotSpotter are concentrated in communities of color—despite concerns about efficacy, racial injustice, and civil rights. See, e.g., Fagan et al., *Stops and Stares: Street Stops, Surveillance, and Race in the New Policing*, 43 *Fordham Urb. L.J.* 539, 540 (2016) (“Minority neighborhoods [in Boston] experience higher levels of field interrogation and surveillance activity, controlling for crime and other social factors. Relative to [w]hite suspects, Black suspects are more likely to be observed, interrogated, and frisked or searched controlling for gang membership and prior arrest history.”); Goel et al., *Precinct or Prejudice? Understanding Racial Disparities in New York City’s Stop-and-Frisk Policy*, 10 *Annals Applied Stats.* 365, 374-375, 390 (2016) (among 300,000 stops in New York City from 2011-2012 where police suspected criminal possession of a weapon, Black and Hispanic individuals were stopped more often but considerably less likely to be found with a weapon than white people, were

community who possess firearms unlawfully are limited, but one recent study conducted in California by the U.C. Davis Health Violence Prevention Research Program offers some insight. The researchers found nearly 19,000 individuals in California who continued to own nearly 50,000 firearms after being legally prohibited from doing so—most due to a felony conviction.³² The study found that the majority of these prohibited firearm owners were white (52.5%), 27.5% were Hispanic, and just 10.8% were Black.³³ These data may not be generalizable nationally or regionally, but they raise the possibility that gun policing and prosecution reflect a skewed portrait of unlicensed gun possessors—where members of law enforcement target people not because of the inherent danger of their conduct (having a weapon without a license) but rather perhaps in part

stopped based on less evidence, and guns were by far *not* the weapon most commonly found); Sabino, *West Side Drivers Are Stopped By Cops The Most In Chicago. But 94% Of Stops Don't Lead To Tickets*, Block Club Chi. (Nov. 18, 2021), <https://blockclubchicago.org/2021/11/18/west-side-drivers-are-stopped-by-cops-the-most-in-chicago-but-94-of-stops-dont-lead-to-tickets>; Fagan & Davies, *Policing Guns: Order Maintenance and Crime Control in New York*, in *Guns, Crime, and Punishment in America 191-221* (Harcourt ed., 2003); Feathers, *Gunshot-Detecting Tech Is Summoning Armed Police to Black Neighborhoods*, VICE: Motherboard (July 19, 2021), <https://www.vice.com/en/article/88nd3z/gunshot-detecting-tech-is-summoning-armed-police-to-black-neighborhoods>.

³² See *Felons have high gun ownership rates despite prohibitions*, U.C. Davis Health: Violence Prevention Research Program (Mar. 10, 2020), <https://health.ucdavis.edu/vprp/news/headlines/felons-have-high-gun-ownership-rates-despite-prohibitions/2020/03>.

³³ Pear et al., *Armed and prohibited: characteristics of unlawful owners of legally purchased firearms*, 27 *Injury Prevention* 145 (2021). The authors did not study other people who may possess weapons unlawfully.

because of their race and place,³⁴ layering the selective enforcement of detention for alleged dangerousness atop selective enforcement of the criminal offense itself. Where 97% of dangerousness hearings for weapons offenses in Suffolk County district and municipal courts involved people of color in FY21, and 76% targeted Black people, concerns about the potential role of implicit bias in seeking dangerousness hearings for unlicensed possession are well-founded.

III. Social science research demonstrates consistent biased associations between race and perceived danger, which are inextricably embedded in an approach to public safety justified by “common sense.”

The Commonwealth argues that determining whether unlicensed firearm possession sufficiently compromises public safety to warrant eligibility for preventive pretrial detention is an unreviewable policy judgment left to the Legislature. But it is precisely this Court’s role to determine whether the remedy selected by the Legislature—detaining people for months at a time in conditions indistinguishable from punishment who lack a license but *possess* a gun—is narrowly tailored to the compelling interest in preventing gun *violence*. Both the legislative history cited by the Commonwealth and Justice Cowin’s dissent in *Young*

³⁴ See, e.g., Levin, *supra* note 2, at 2193-2198. *Id.* at 2206 (“Searching for guns—like searching for drugs—can easily become pretextual, a proxy for some general prediction of risk, danger, or lawlessness. . . . Many searches yield little evidence of wrongdoing but increase a system of hyper-policing for individuals (particularly men of color) who are deemed ‘suspicious.’”); Fagan et al., *supra* note 31.

illustrate the danger of uncritical deference to such a Legislative judgment. Justice Cowin appealed to “common sense” and “common knowledge” of “the obvious relationship between unlicensed firearms and their use in violent behavior” and lambasted what she saw as an unfounded distinction between *possession* and *use* of a firearm. 453 Mass. at 719-720 (Cowin, J., dissenting). Asserting that the relationship between unlicensed possession and violence is obvious, and that possession equates to use, is consistent with the rhetoric in the legislative history cited by the Commonwealth, but fails to satisfy the burden of narrow tailoring. Further, appealing to common sense and common knowledge, unmoored from evidence, invites employing society’s collective unconscious biases in pretrial liberty decisions.

Implicit biases—attitudes or stereotypes that influence beliefs, actions and decisions, even without conscious awareness—affect us all, including members of law enforcement. See *Commonwealth v. Long*, 485 Mass. 711, 734 (2020); *Commonwealth v. Buckley*, 478 Mass. 861, 878 (2018) (Budd, J., concurring); *Commonwealth v. McCowen*, 458 Mass. 461, 499 (2010) (Ireland, J., concurring). “One of the most well-demonstrated types of implicit bias is the unconscious association between [B]lack individuals and crime.”³⁵ See *Commonwealth v.*

³⁵ Weir, *Policing in black & white*, Am. Psychol. Ass’n: Monitor on Psychol. (Dec. 2016), <https://www.apa.org/monitor/2016/12/cover-policing>.

Sweeting-Bailey, 488 Mass. 741, 770, 770 n.9 (2021) (Budd, C.J., dissenting), quoting *Buck v. Davis*, 137 S. Ct. 759, 776 (2017) (describing the “powerful racial stereotype—that of [B]lack men as ‘violence prone’” (internal citation omitted)). This “particularly noxious strain of racial prejudice,” *Buck*, 137 S. Ct. at 776, is longstanding and pervasive in American society.³⁶ “The mere presence of a Black man . . . can trigger thoughts that he is violent and criminal.”³⁷

Social science research illustrates how pernicious, unconscious associations between race, crime, and violence might influence a prosecutorial or judicial decision to label someone “dangerous” for a regulatory, victimless unlicensed firearm possession offense.³⁸ Researchers have found that this stereotyping

³⁶ See generally K.G. Muhammad, *The Condemnation of Blackness: Race, Crime, and the Making of Modern Urban America* (2010); see also, e.g., Trawalter et al., *Attending to Threat: Race-Based Patterns of Selective Attention*, 44 *J. Exp'l Psychol.* 1322, 1322 (2008); Stewart et al., *Neighborhood Racial Context and Perceptions of Police-Based Racial Discrimination Among Black Youth*, 47 *Criminology* 847, 854 (2009); Quillian & Pager, *Black Neighbors, Higher Crime? The Role of Racial Stereotypes in Evaluations of Neighborhood Crime*, 107 *Am. J. Soc.* 717, 718 (2001); Quillian & Pager, *Estimating risk: Stereotype amplification and the perceived risk of criminal victimization*, 73 *Soc. Psychol. Q.* 79 (2010).

³⁷ Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 *J. Personality & Soc. Psychol.* 876, 876 (2004). Carbado & Richardson, *The Black Police: Policing Our Own*, 131 *Harv. L. Rev.* 1979, 1994 (2018) (“[A]s a result of implicit racial biases, officers are more likely to focus their attention on black, rather than white, individuals. This is true even when the officers are consciously egalitarian, reject racial profiling, or are black themselves.”).

³⁸ See generally Smith & Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 *Seattle U.L. Rev.* 795 (2012); Digard & Swavola, *Vera Inst. of Justice, Justice Denied: The Harmful and Lasting Effects of Pretrial Detention* 7 (2019), <https://www.vera.org/downloads/publications/Justice-Denied->

influences behavior in a wide range of situations and circumstances, particularly in discretionary decisions.³⁹

Studies show that perceiving someone's race as Black versus white influences "people's memory for who was holding a deadly razor in a subway scene, people's evaluation of ambiguously aggressive behavior, people's decision to categorize nonweapons as weapons, the speed at which people decide to shoot someone holding a weapon, and the probability that they will shoot at all."⁴⁰ For example, in a study using a first-person shooter video game, research subjects were instructed to shoot armed targets and not shoot unarmed targets when presented with images of young men, white and Black, holding either guns or objects like cellphones or soda cans.⁴¹ Study participants shot armed targets more often, and more quickly, if they were Black—and refrained from shooting unarmed targets more quickly if they were white. *Id.* A version of the study with police participants

Evidence-Brief.pdf ("Judicial officials have a great deal of discretion, minimal constraints, and often little information on which to base their decisions. In these conditions, they may employ racialized assumptions—for example, by considering people of color to pose a higher risk, be more culpable or less reliable, or be better able to bear the pains of incarceration than white people—in order to make up for missing case information and to guide their decisions." (citations omitted)).

³⁹ Spencer et al., *Implicit Bias and Policing*, 10 Soc. & Personality Psychol. Compass 50, 54-55 (2016).

⁴⁰ Eberhardt et al., *supra* note 37 (citations omitted).

⁴¹ Correll et al., *The police officer's dilemma: using ethnicity to disambiguate potentially threatening individuals*, 83 J. Personality & Soc. Psychol. 1314 (2002).

showed similar evidence of bias in reaction times.⁴² A third set of experiments considered how training could attenuate, or exacerbate, racial bias in the decision to shoot. In an experiment limited to special unit police officers who routinely dealt with gang members of color, officers were more likely to exhibit racial bias in the decision to shoot.⁴³ Their training and experience reinforced the association between people of color and danger, entrenching the role of bias in controlling behavior. Similar experiments have found that when participants viewed rapidly flashed photos of Black faces immediately before seeing degraded photos of guns, they were significantly faster at identifying the image as a gun than after being primed by white faces.⁴⁴

This body of research illustrates how people see *race* and think *danger*, particularly when stimuli (for example, guns) reinforce the notion of dangerousness. Researchers have also developed an implicit association test to find that people see *race* and think *guilty*.⁴⁵ The inclusion of unlicensed firearm possession as a predicate offense under § 58A risks reinforcing both relationships.

⁴² Correll et al., *Across the thin blue line: police officers and racial bias in the decision to shoot*, 92 J. Personality & Soc. Psychol. 1006 (2007).

⁴³ Sim, Correll & Sadler, *Understanding police and expert performance: when training attenuates (vs. exacerbates) stereotypic bias in the decision to shoot*, 39 Personality & Soc. Psychol. Bull. 291 (2013).

⁴⁴ Payne, *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J. Personality & Soc. Psychol. 181, 185-186 (2001).

⁴⁵ Levinson et al., *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 Ohio St. J. Crim. L. 187, 206 (2010).

But it also invites a more particular web of associations regarding *armed people of color*—stereotypes that assume involvement in gangs or drug sales, for example. Determining whether someone is dangerous due to conduct that does not involve violence may trigger this set of unconscious cultural stereotypes that specifically associate *armed people of color* with ruthlessness and other illicit activities. This country’s social history of gun regulation supports this web of more particular implicit associations.⁴⁶ Gun regulation through criminal punishment has had a discriminatory design and discriminatory impact—disrupting access to lawful self-defense for people and communities of color:⁴⁷

Alongside the regulation of militias, hunting laws, and carry laws, one of the most common categories of early American gun laws . . . were those that prohibited Native Americans, slaves, and Black free people from possessing guns. . . . [T]he historical record of Blacks’ access to guns and their rights to self-defense has been

⁴⁶ See, e.g., Morgan, *The NRA Supported Gun Control When the Black Panthers Had the Weapons*, History (Aug. 30, 2018), <https://www.history.com/news/black-panthers-gun-control-nra-support-mulford-act>. Cottrol & Diamond, “Never Intended to be Applied to the White Population”: Firearms Regulation and Racial Disparity--The Redeemed South’s Legacy to a National Jurisprudence?, 70 Chi.-Kent L. Rev. 1307 (1995); Bogus, *Race, Riots, and Guns*, 66 S. Cal. L. Rev. 1365 (1993); Cramer, *The Racist Roots of Gun Control*, 4 Kan. J.L. & Pub. Pol’y 17 (1995).

⁴⁷ See, e.g., Funk, *Gun Control in America: A History of Discrimination Against the Poor and Minorities*, in *Guns in America: A Reader* 390, 390 (Dizard et al. eds., 1999) (“One undeniable aspect of the history of gun control in the United States has been the conception that the poor, especially the non-white poor, cannot be trusted with firearms.”); C. Anderson, *The Second: Race and Guns in a Fatally Unequal America* (2021); Cottrol & Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 Geo. L.J. 309 (1991); Riley, *Indians and Guns*, 100 Geo. L.J. 1675, 1712 (2012).

marked by a profound current of doubt regarding African American humanity and citizenship. Over the last half-century, however, the racialized impacts of American gun regulation have been generated by ostensibly race-neutral policies. Yet race is inextricably woven into contemporary American gun policy's core fact: in a space of heated debate over the balance between collective security and individual gun rights, the achievement of gun policy has been reached by means of consensus that guns should be regulated through the criminal justice system. Of course, one of the main insights of sociological scholarship of the last two decades is that the criminal justice system—particularly through policing strategies and incarceration—has become a key source of social stratification that has uniquely disadvantaged African Americans.⁴⁸

Although this Court found that unlicensed firearm possession is categorically passive and victimless and does not manifest a disregard for others' safety and well-being, the Legislature has nonetheless instructed prosecutors and judges that the offense is inherently dangerous and can predict the likelihood of future harm. The inclusion of § 10(a) in the statute as a predicate offense acts as a priming exercise; prosecutors and trial judges are primed to see danger even where the individual's conduct is entirely passive. The cases at bar illustrate the

⁴⁸ Hureau, *Seeing Guns to See Urban Violence: Racial Inequality & Neighborhood Context*, Daedalus: J. Am. Academy of Arts & Scis., Winter 2022, at 49, 58. Accord King, *Address Gun Violence by Going After the Root Causes*, Brennan Ctr. for Justice (Apr. 14, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/address-gun-violence-going-after-root-causes> (“[A]ttempts to address daily gun violence erred by depending on a racist and otherwise biased criminal legal system to address a problem that is perpetuated by inequality.”).

passiveness of this offense and the reality that these men were labeled dangerous by virtue of who they were, not what they were alleged to have done or might reasonably be expected to do. Implicit bias casts the specter of violence even where the only observable conduct was sitting in a car in the presence of a gun without a license. In both cases, the firearms in question were not found on the person of the men who were arrested. In one case, the gun was locked in the glove compartment of his mother's car, which he was driving; in the other, the gun was found in a fanny pack with no direct connection to the defendant in a car with multiple occupants. Given social science research on implicit bias, the race of the accused compounds the social fear of guns, and of gun owners of color more particularly.⁴⁹ In other words, the "common sense" bias that assumes people found in possession of unlicensed guns must have a nefarious purpose risks amplifying racial biases that label people of color dangerous.

CONCLUSION

The vast majority of people who possess guns do so not because they intend to use them, but in order to feel safe.⁵⁰ The decision to obtain a firearm is largely

⁴⁹ Metzl, *What guns mean: the symbolic lives of firearms*, 5 Palgrave Comms. 35 (2019), ("[M]ainstream society reflexively codes white men carrying weapons in public as patriots, while marking armed black men as threats or criminals.").

⁵⁰ Parker et al., *America's Complex Relationship with Guns*, Pew Res. Ctr. (June 22, 2017), <https://www.pewresearch.org/social-trends/2017/06/22/the-demographics-of-gun-ownership> ("67% of gun owners say[] [protection] is a major reason they personally own a gun.").

motivated by past victimization and fear of future victimization—particularly salient in communities subject to overlapping forces of discrimination and deprivation. Unlicensed possession does not necessarily portend violent intentions so much as a yearning for safety.⁵¹ Detaining people in violent conditions in order to prevent the abstract risk that possession of a gun without a license forecasts future harm is not narrowly tailored to promote public safety—indeed, it may do just the opposite.

Respectfully submitted,

/s/ Katharine Naples-Mitchell

Katharine Naples-Mitchell
BBO #704239
Charles Hamilton Houston Institute
for Race and Justice at
Harvard Law School
Areeda Hall, Room 522
1545 Massachusetts Ave.
Cambridge, MA 02138
(617) 495-5121
knaplesmitchell@law.harvard.edu

January 31, 2022

⁵¹ Swaner et al., 'Gotta Make Your Own Heaven': Guns, Safety, and the Edge of Adulthood in New York City, Ctr. for Ct. Innovation (2020), https://www.courtinnovation.org/sites/default/files/media/document/2020/Report_GunControlStudy_08052020.pdf; Kleck et al., *The effect of perceived risk and victimization on plans to purchase a gun for self-protection*, 39 J. Crim. Justice 312 (2011); Vacha & McLaughlin, *The impact of poverty, fear of crime, and crime victimization on keeping firearms for protection and unsafe gun-storage practices: A review and analysis with policy recommendations*, 35 Urb. Educ. 496 (2000).

MASS R. APP. P. 16(K) CERTIFICATION

I hereby certify that this brief complies with the rules of the Court that pertain to the filing of briefs, including Mass. R. App. P. 16, 17, and 20. It is typewritten in 14-point, Athelas font, and complies with the length limit of 20(a)(2)(c) because it was produced with a proportionally spaced font and does not contain more than 7,500 non-excluded words. This document contains 7,478 non-excluded words as counted by the word-processing system used to prepare it.

CERTIFICATE OF SERVICE

On January 31, 2022, I served a copy of this brief on all parties through the e-file system and by electronic mail.

/s/ Katharine Naples-Mitchell

Katharine Naples-Mitchell (BBO #704239)
Charles Hamilton Houston Institute for
Race & Justice at Harvard Law School
Areeda Hall, Room 522
1545 Massachusetts Ave.
Cambridge, MA 02138
(617) 495-5121
knaplesmitchell@law.harvard.edu