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Hearing the Danger of an Armed Felon- Allowing for a Detention Hearing Under the Bail Reform Act for Those Who Unlawfully Possess Firearms

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HEARING THE DANGER OF AN ARMED FELON—ALLOWING FOR A DETENTION HEARING UNDER THE BAIL REFORM ACT FOR THOSE WHO UNLAWFULLY POSSESS FIREARMS

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This Article advocates an interpretation of the Bail Reform Act that affords courts the ability to hold detention hearings in gun crime cases to evaluate defendants' potential danger to the community. According to an interpretation advanced by some courts, gun possession offenses do not constitute "crimes of violence" within the meaning of the Act and therefore those charged with such crimes, even if they have a prior felony conviction, are not subject to pre-trial detention. Arguing against this approach, the Article looks to the Bail Reform Act, the relevant federal case law, and the alarming statistics concerning the growing use of firearms in violent crimes to demonstrate that a more expansive interpretation that includes these crimes is not only appropriate, but more consistent with the plain language and original intent of the Act.

The Article divides the current case law into two camps: the so-called "Slim Majority Rule," favoring the treatment of unlawful firearms possession as a "crime of violence; and the "Minority View" of case law, denying a detention hearing in these cases. Recognizing that there is a significant split among federal district and circuit courts about whether the Bail Reform Act permits a such a hearing, the Article carefully dissects the case law, the use of the term "crime of violence" in other statutory contexts and the reasoning underlying both approaches and concludes that the "Minority View" undermines the most basic purpose of the Bail Reform Act—to enhance public safety. As such, the Article advocates an approach that would allow courts, at a minimum, to hold detention hearings in gun cases to ensure that release of the accused would not pose a danger to the community.

Imagine a domestic relations incident in which a man holds his girlfriend captive at gunpoint.[1] After a brief standoff with police, the man is arrested on a state charge relating to the domestic relations incident and federal charges based on the fact that he possessed a firearm after being convicted of a felony offense and

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1. The factual scenario described herein is intended to be illustrative and hypothetical. Nevertheless, situations like the one described above are replete in the federal case law regarding detention and unlawful possession of firearms. *See, e.g.*, United States v. Kyle, 49 F. Supp. 2d 526, 527–28 (W.D. Tex. 1999) (addressing the issue of detention in a case where the defendant, who was subject to a domestic protection order, unlawfully possessed a firearm, threatened his ex-wife and child, and had a brief standoff with police).

made subject to a domestic restraining order.[2] Further imagine the very real possibility that the state law charges are dropped based on a lack of cooperation on the part of the victim, who has reconciled with the offender.[3] The federal charges are all that remain. Now imagine that, under the law, the federal prosecutor handling the case may not even be able to seek a detention hearing[4]—much less actually detain the violent offender—because some courts have held that the Bail Reform Act does not allow for a detention hearing in cases involving unlawful firearms possession by a prohibited person.[5] Under this flawed approach to the Bail Reform Act, the outcome would be the same whether the defendant's prior felony conviction was for murder, rape, child molestation, domestic terrorism, or any other manner of violent offense. Indeed, the result would be the same even if the defendant had just ended his term of supervision for the prior felony offense. It would be the same even if the ink on the domestic restraining order had not yet dried.

To address the foregoing gap in the law, this Article endeavors to dissect the Bail Reform Act, the relevant body of federal case law, and key facts and findings relating to violent firearms offenses to establish that, at a minimum, courts should be able to hold a hearing to decide whether it is appropriate to detain those who unlawfully possess firearms. The thesis of this Article mirrors the concerns described with an overtone of dismay by Senator Michael DeWine (R-Ohio) on January 21, 1997, on the floor of the United States Senate:

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2. *See* 18 U.S.C. §§ 922(g)(1),(8) (2003). These statutory provisions make it a federal crime for certain convicted felons and persons subject to domestic restraining orders to possess a firearm in or affecting interstate commerce.

3. "It is well documented that victims of domestic violence sometimes recant or refuse to cooperate after filing complaints against their assailants." Tom Lininger, *A Better Way to Disarm Batterers*, 54 HASTINGS L.J. 525, 527 n.2 (2003)(citing Angela Corsilles, *No Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 FORDHAM L. REV. 853, 857 (1994). If the victim's lack of cooperation was caused by the offender's threats against the victim, detention would be possible under 18 U.S.C. § 3142(f)(2)(B) (2003), which provides for a detention hearing, irrespective of the nature of the offense charged, where there is a serious risk that the defendant will threaten or intimidate a witness.

4. A "detention hearing" is a "judicial or quasi judicial proceeding used to determine the propriety of detaining a person on bail . . . ." BLACK'S LAW DICTIONARY 450 (6th ed. 1990). In the federal system, a detention hearing is an evidentiary hearing at which a judge determines whether any conditions exist that would reasonably assure the appearance of the defendant or the safety of the community if the defendant is released pending trial. *See* 18 U.S.C. §§ 3142(f),(g) (2003) (setting forth the federal Bail Reform Act's provisions for a detention hearing, as well as the "factors to be considered" at such a hearing).

5. *See, e.g.*, United States v. Twine, 344 F.3d 987, 988 (9th Cir. 2003) ("[W]e hold that 18 U.S.C. § 922(g)—felon in possession of a firearm—is not a crime of violence for purposes of the Bail Reform Act.").

> Under current law—the Bail Reform Act—certain dangerous accused criminals can be denied bail . . . if they have been charged with crimes of violence. But it's unclear under current law whether [the unlawful] possession of firearms should be considered a crime of violence.
>
> Mr. President, let us do a reality check on this. If someone who is a known convicted felon is walking around with a gun, what's the likelihood that person is carrying the gun for law-abiding purposes?[6]

The answer to Senator DeWine's rhetorical question can be answered in only one way if the concerns underlying federal firearms laws are brought to the fore and considered in earnest. As expressed by Congress in the prefatory comments to its landmark Gun Control Act of 1968, those concerns included, among other things, the "increasing rate of crime and lawlessness and the growing use of firearms in violent crime."[7] Clearly, Congressional concern was not with the peaceful use of firearms, but with the sorts of violent crimes that would occur if firearms were possessed by certain classes of individuals.[8] Accordingly, the Bail Reform Act should be construed in a way that acknowledges the reality that violence is a likely byproduct of the combination of firearms with felons, fugitives, drug addicts, domestic abusers, and others prohibited by law from possessing guns.[9]

This issue should not be overlooked. The number of federal gun prosecutions is sharply on the rise.[10] Under the Department of

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6. 143 CONG. REC. 912 (1997).

7. H.R. REP. NO. 90-1577, at 4412 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4410, 4412.

8. *See, e.g.*, 131 CONG. REC. S9169 (daily ed. July 9, 1985) (statement of Sen. Hatch) ("[W]hen Congress enacted the Gun Control Act of 1968, its intent was to reduce violent crime . . . .").

9. The danger inherent in a "criminally-inclined" person's possession of a gun was explained well by the court in *United States v. Aiken*:

> This Court is also concerned that there is an increased risk that a criminally-inclined individual will be more likely to use a firearm already in his possession to commit another crime. Possession of a firearm is an ongoing crime; it is a status offense. A felon who has access to a firearm during a period of time may be more inclined to use it and, when he does, the consequences are greater than they would be if he did not have access to such a weapon.

775 F. Supp. 855, 856–57 (D. Md. 1991).

10. Press Release, U.S. Dep't of Justice, Project Safe Neighborhoods: America's Network Against Gun Violence (Fact Sheet) (Jan. 30, 2003) (on file with the University of Michigan Journal of Law Reform) [hereinafter Project Safe Neighborhoods Fact Sheet]

Justice's "Project Safe Neighborhoods" initiative, gun crimes have become a national priority.[11] Indeed, in January 2003, the Department of Justice labeled gun crime reduction "the top domestic criminal justice initiative of President Bush."[12] Under that initiative, hundreds of millions of dollars has been or will be allocated to support what President George W. Bush has called "a focused and vigorous effort to cut gun crime."[13] Over two hundred federal prosecutors have been hired to address the increased caseload.[14] With more gun criminals coming into federal court, it is increasingly important to have a uniform policy under the Bail Reform Act to empower judges with the discretion to consider potential danger to the community. To that end, this Article advocates an interpretation of the Bail Reform Act that affords courts the much-needed ability to hold detention hearings in gun crime cases to evaluate the risk of danger to the community.

I. THE BAIL REFORM ACT OF 1984 AND SAFETY-BASED PRETRIAL DETENTION

Congress passed the Bail Reform Act of 1984 to give courts the flexibility to detain potentially dangerous defendants.[15] The Act was intended to ameliorate some of the deficiencies in the Bail Reform Act of 1966.[16] The 1966 Act attempted to reduce the number of

(describing the "[l]argest recorded increase in federal firearms prosecutions" in fiscal year 2002).

11. *See, e.g.*, News Release, U.S. Dep't of Justice, Attorney General Statement, No. DOJ 01-296, 2001 WL 729763, at *1 (D.O.J. June 28, 2001) (discussing the launch of Project Safe Neighborhoods, and explaining that "[a] top priority of this administration and this Department of Justice is reducing gun crime by the vigorous enforcement of the nation's gun laws").

12. Project Safe Neighborhoods Fact Sheet, *supra* note 10.

13. President George W. Bush, Remarks to U.S. Attorneys Conference, 2001 WL 1516904, at *1 (Nov. 29, 2001).

14. Project Safe Neighborhoods Fact Sheet, *supra* note 10.

15. *See* Kenneth Frederick Berg, *The Bail Reform Act of 1984*, 34 EMORY L.J. 685, 686 (1985) (explaining that Congress, in passing the Bail Reform Act of 1984, intended to give courts the ability to "detain individuals who present a risk to 'the safety of any other person and the community'" (quoting the Bail Reform Act of 1984, Pub. L. No. 98-473, Title II §§ 3142(b),(c),(e),(f))).

16. COMPREHENSIVE CRIME CONTROL ACT OF 1984, S. REP. NO. 98-225, at 5, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3188 (stating in the report authorizing the passage of the 1984 amendments to the Bail Reform Act: "The constraints of the Bail Reform Act [of 1966] fail to grant the courts the authority to impose conditions of release geared toward assuring community safety, or the authority to deny release to those defendants who pose an especially grave risk to the safety of the community.").

individuals who were unnecessarily detained before trial based on a lack of means to post bail.[17] In doing so, however, the Act had the side-effect of reducing the ability of prosecutors and courts to ensure pretrial detention for violent offenders.[18] Prior to the passage of the Bail Reform Act of 1984, courts were given the discretion to detain individuals without bond only where such individuals posed a risk of flight.[19] This limit on judicial and prosecutorial discretion gave rise to what Congress termed "the alarming problem of crimes committed by persons on release."[20] The thrust of the 1984 amendment to the Bail Reform Act was to "give courts adequate authority to make release decisions that give appropriate recognition to the danger a person may pose to others if released."[21]

Subsequent to the passage of the 1984 amendments to the Bail Reform Act, courts have much broader discretion in evaluating the issue of pretrial detention.[22] That discretion, however, is constrained by judicial interpretations of the terms and categories that allow for a detention hearing.[23] Under the Bail Reform Act, a

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17. The Attorney General's Task Force on Violent Crime explained the fundamental flaws in the 1966 Bail Reform Act in the following manner:

> The primary purpose of the [Bail Reform] Act [of 1966] was to deemphasize the use of money bonds in the Federal courts, a practice which was perceived as resulting in disproportionate and unnecessary pretrial incarceration of poor defendants, and to provide a range of alternative forms of release. These goals of the Act—cutting back on the excessive use of money bonds and providing for flexibility in setting conditions of release appropriate to the characteristics of individual defendants—are ones which are worthy of support. However, 15 years of experience with the Act have demonstrated that, in some respects, it does not provide for appropriate release decisions. Increasingly, the Act has come under criticism as too liberally allowing release and as providing too little flexibility to judges in making appropriate release decisions regarding defendants who pose serious risks of flight or danger to the community.

ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIME, FINAL REPORT 50–51 (Aug. 7, 1981).

18. *See id.*

19. According to the Conference Committee that drafted the Bail Reform Act of 1984, the predecessor statute, the Bail Reform Act of 1966, "adopted the concept that in noncapital cases a person is to be ordered released pretrial under those minimal conditions reasonably required to assure his presence at trial. Danger to the community and the protection of society are not to be considered as release factors under the current law." COMPREHENSIVE CRIME CONTROL ACT OF 1984, S. REP. NO. 98-225, at 4–5, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3187.

20. *Id.* at 3, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3185.

21. *Id.*; *see also* Berg, *supra* note 15, at 686.

22. *See* United States v. Dillard, 214 F.3d 88, 102 (2d Cir. 2000) ("A comparison of the Bail Reform Act of 1984 with the pre-existing law shows that the principal intended 'reform' was to expand enormously the circumstances in which defendants were to be detained prior to trial.").

23. *Cf.* United States v. Connolly, No. CRIM. 3:98CR223(RNC), 1999 WL 1995186, at *3 (D. Conn. Dec. 23, 1999) (discussing how a "court must first determine by a

detention hearing may be held in six types of cases: (1) crimes of violence;[24] (2) offenses for which the maximum penalty is life imprisonment or death;[25] (3) drug offenses with a maximum penalty of ten years or more;[26] (4) crimes committed after an individual has already been convicted of two state or federal crimes that would fall into any of the categories listed above;[27] (5) instances where there is a serious risk of flight;[28] and (6) cases

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preponderance of the evidence whether the defendant is eligible for pretrial detention" by looking to the six statutory categories eligible for a detention hearing; absent such a determination and a judicial finding that at least one of the statutory categories applies, "the court does not have the authority to hold a detention hearing").

24. Title 18, United States Code, Section 3142(f)(1) (2003) provides, in relevant part:

> The judicial officer shall hold a hearing to determine whether any condition or combination of conditions set forth in subsection (c) of this section will reasonably assure the appearance of such person as required and the safety of any other person and the community—
>
> (1) upon motion of the attorney for the Government, in a case that involves—
>
> (A) a crime of violence;
>
> (B) an offense for which the maximum sentence is life imprisonment or death;
>
> (C) an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.); or
>
> (D) any felony if such person has been convicted of two or more offenses described in subparagraphs (A) through (C) of this paragraph, or two or more State or local offenses that would have been offenses described in subparagraphs (A) through (C) of this paragraph if a circumstance giving rise to Federal jurisdiction had existed, or a combination of such offenses . . . .

118 U.S.C. § 3142(f)(1)(B) (2003).

25. 18 U.S.C. § 3142(f)(1)(B) (2003).

26. 18 U.S.C. § 3142(f)(1)(C) (2003).

27. 18 U.S.C. § 3142(f)(1)(D) (2003).

28. Section 3142(f)(2) provides two additional types of cases for which a court may order a detention hearing:

> Upon motion of the attorney for the Government or upon the judicial officer's own motion, in a case that involves—
>
> (A) a serious risk that such person will flee; or
>
> (B) a serious risk that such person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror.

18 U.S.C. § 3142(f)(2)(B) (2003).

where there is a serious risk of obstruction of justice or tampering with a prospective witness or juror.[29] Absent one of the six foregoing statutory circumstances, courts and prosecutors are powerless to even consider the issue of pretrial detention.[30] Accordingly, a court's interpretation of the applicability of those categories is critical to whether pretrial detention can even be considered.

In the context of evaluating safety-based detention in unlawful possession of firearms cases, courts have focused on just one of the six statutory categories, namely whether the unlawful firearms possession offense falls within the Bail Reform Act's definition of a "crime of violence."[31] The Act's definition for "crime of violence" includes three different types of offenses:

- Any "offense that has as an element of the offense the use, attempted use, or threatened use of physical force against the person or property of another;"[32]
- "[A]ny other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense;"[33] or
- Any sexual exploitation felony falling within three chapters of Title 18, United States Code, namely chapters 109A, 110, or 117.[34]

Because a defendant's unlawful possession of a firearm involves only the risk of violence, courts considering detention of such defendants generally discuss only the second statutory definition listed above, relating to the "substantial risk" of physical force.[35]

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29. *Id.*

30. *See, e.g.*, United States v. Singleton, 182 F.3d 7, 9 (D.C. Cir. 1999) ("Detention until trial is relatively difficult to impose. First, a judicial officer must find one of six circumstances triggering a detention hearing. . . . Absent one of these circumstances, detention is not an option." (internal citations omitted)).

31. *See, e.g.*, United States v. Plakio, No. 01-40084-01-RDR, 2001 WL 1167305, at *2 (D. Kan. Sept. 5, 2001) (addressing the detention of a person charged with a violation of Section 922(g)(1), and focusing on "the issue of whether the crime of felon in possession of a firearm is a crime of violence under the Bail Reform Act").

32. 18 U.S.C. § 3156(a)(4)(A) (2003).

33. 18 U.S.C. § 3156(a)(4)(B) (2003).

34. 18 U.S.C. § 3156(a)(4)(C) (2003).

35. *See, e.g.*, United States v. Say, 233 F. Supp. 2d 221, 225–26 (D. Mass. 2002) (finding that simple possession of stolen firearms and conspiracy to possess such stolen firearms were not crimes of violence because there was not "a substantial risk of violence inherent in the very nature of the crimes themselves"); United States v. Campbell, 28 F. Supp. 2d 805, 808 (W.D.N.Y. 1998) (finding that the felon-in-possession offense is a crime of violence under

Federal courts have adopted a categorical approach to determine whether an offense, such as a felon's unlawful possession of a firearm, falls into a detention eligible class under the Bail Reform Act.[36] Thus, courts typically look only to the charged statutory violations and the objective risk of harm from such a violation in determining if a statutory offense is a "crime of violence" as a matter of law under the Bail Reform Act. Courts do not consider the particulars of a crime.[37] Indeed, although the underlying circumstances and facts of a particular crime can be considered—and, indeed, are crucial—in determining whether detention is appropriate at a detention hearing, such facts are generally not considered in assessing whether the charged crime qualifies as a "crime of violence" for the purpose of triggering a hearing.[38]

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the Bail Reform Act). The Court stated that "[t]he statute does not require actual violence in the commonly understood sense of that word. Instead, it requires only that the offense be a felony that, 'by its nature, involves a *substantial risk* that physical force' may be used." *Id.* (quoting 18 U.S.C. § 3156(a)(4)(B)) (emphasis in original)).

36. *See, e.g.*, United States v. Goba, 240 F. Supp. 2d 242, 249 (W.D.N.Y. 2003) ("In this Circuit, a categorical analysis is employed to determine whether an offense constitutes a 'crime of violence.'").

37. *See* United States v. Connolly, No. CRIM. 3:98CR223(RNC), 1999 WL 1995186, at *5 (D. Conn. Dec. 23, 1999) (utilizing the categorical approach to evaluate whether the felon-in-possession offense is a crime of violence, and explaining that "[u]nder the 'categorical approach,' a court looks only to the intrinsic nature of the offense as it is defined by statute and does not consider any of the facts surrounding the particular alleged offense"). *But see* United States v. Byrd, 969 F.2d 106, 110 (5th Cir. 1992) (looking beyond the charged offense to determine if the case involved a crime of violence, and stating that "it is not necessary that the *charged offense* be a crime of violence; only that the *case involve* a crime of violence or any one or more of the § 3142(f) factors. But the proof of a nexus between the non-violent offense charged and one or more of the six § 3142(f) factors is crucial.").

38. *See* United States v. Chappelle, 51 F. Supp. 2d 703, 704–05 (E.D. Va. 1999) ("And since '[t]reating all defendants charged with a certain offense in the same manner avoids the risk of ad hoc justice or arbitrary distinctions' . . . the Court also favors the categorical approach that makes every such charge a 'crime of violence,' as opposed to a case by case approach that examines the individual facts underlying each charge." (quoting United States v. Campbell, 28 F. Supp. 2d 805, 807 (W.D.N.Y. 1998))). *But see Byrd*, 969 F.2d at 110 (expanding the categorical approach to include analysis of uncharged crimes that had a nexus to the charged offense).

II. FINDING THE ORIGINS OF THE JUDICIAL DISAGREEMENT OVER WHETHER THE BAIL REFORM ACT PERMITS A DETENTION HEARING IN CASES INVOLVING FELONS WHO ILLEGALLY POSSESS FIREARMS

There is a significant split among federal district and circuit courts about whether the Bail Reform Act permits a detention hearing in cases charging the unlawful possession of a firearm by a convicted felon.[39] The decisions of these courts break into two camps: those that find that "a substantial risk that physical force . . . may" result from a felon's unlawful possession of a gun,[40] and those that feel that no such "substantial risk" can objectively be tied to a felon's unlawful firearms possession.[41] The split in the views of these courts arises not only from the language of the Bail Reform Act, but also the decisions of courts in two other contexts. In *Stinson v. United States*,[42] the United States Supreme Court addressed whether the federal offense of being a felon in possession of a firearm constitutes a "crime of violence" for the purpose of triggering the armed career offender sentencing enhancement under the United States Sentencing Guidelines.[43] Various courts of appeals have also addressed whether the offense of being a felon in possession of a firearm qualifies as a "crime of violence" for the

39. *Compare* United States v. Dillard, 214 F.3d 88, 97, 104 (2d Cir. 2000) (holding that the crime of possessing a firearm subsequent to a felony conviction fell within the Bail Reform Act's definition of a "crime of violence," thereby allowing for a pretrial detention hearing), *with* United States v. Singleton, 182 F.3d 7, 16–17 (D.C. Cir. 1999) (finding that offense of felon in possession of a firearm was not a "crime of violence" under the provisions of the Bail Reform Act that would allow for a detention hearing).

40. *See, e.g., Dillard*, 214 F.3d at 95 ("We think that among the convicted felons who illegally possess guns, the number who do so by reason of the utility of guns in threatening or causing violence is significant. We find it difficult to accept the proposition that the risk of violent use of guns by convicted felons who possess them illegally is not 'substantial.'"); United States v. Floyd, 1998 WL 700158, at *1 (D.C. Cir. Aug. 10, 1998) ("The court properly determined that possession of a firearm by a felon in violation of 18 U.S.C. § 922(g)(1), is a crime of violence as that term is used in the Bail Reform Act, 18 U.S.C. § 3156(a)(4)(B).").

41. *See, e.g., Singleton*, 182 F.3d at 15 ("While felons with guns may as a class be more likely than non-felons with guns or felons without guns to commit violent acts, nothing inherent in a § 922(g) offense creates a 'substantial risk' of violence warranting pretrial detention."); United States v. Hardon, 1998 WL 320945, at *1 (6th Cir. June 4, 1998) ("Possession of a firearm and ammunition by a felon in violation of 18 U.S.C. § 922(g)(1), by their nature, do not involve such a [substantial] risk [of physical force under the Bail Reform Act].").

42. 508 U.S. 36 (1993).

43. *Id.* at 37 (finding, based upon the binding nature of commentary to the United States Sentencing Guidelines, that "[f]ederal courts may not use the felon-in-possession offense as the predicate crime of violence for purposes of imposing the career offender provision of USSG § 4B1.1").

purpose of serving as a predicate offense under 18 U.S.C. 924(c), which outlaws using, carrying, or possessing a firearm in connection with a "crime of violence."[44] Opinions addressing the "crime of violence" definition under the Bail Reform Act have discussed these two classes of decisions in varying degrees.[45]

III. TRACING THE SOURCE AND MEANING OF THE *STINSON* DECISION

The dispute in *Stinson* arose at a sentencing hearing in the Middle District of Florida where a district court followed the recommendation contained in the presentence report prepared by the United States Probation Office and sentenced the defendant, Stinson, under the harsher career offender sentencing provisions of the United States Sentencing Guidelines.[46] The court did so based on the defendant's conviction for being a felon in possession of a firearm, which occurred after two prior convictions for crimes of violence.[47] Specifically, the district court construed the unlawful firearms possession conviction as a "crime of violence" under the guidelines and applied the longer sentence provided for under the career offender enhancement.[48]

Not surprisingly, Stinson appealed the district court's decision to the United States Court of Appeals for the Eleventh Circuit.[49] On

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44. *See, e.g.*, United States v. Canon, 993 F.2d 1439, 1441 (9th Cir. 1993) (holding that "possession of a firearm by a felon is not a 'crime of violence' under § 924(c)"); *see also* United States v. Flennory, 145 F.3d 1264, 1268 (11th Cir. 1998) (dictum) (stating that "possession of a firearm is not a 'crime of violence' as that term is used in § 924(c)(3)"), *abrogation recognized by* United States v. Brown, 332 F.3d 1341, 1345 n.6 (11th Cir. 2003). *But see also* United States v. Jennings, 195 F.3d 795, 798–99 (5th Cir. 1999) (holding that possession of an unregistered pipe bomb constituted a "crime of violence" under 18 U.S.C. § 924(c)(3) because "there is a 'substantial risk' that possession of this inherently dangerous weapon would produce violence or property damage").

45. *See, e.g.*, United States v. Twine, 344 F.3d 987, 988 (9th Cir. 2003) (holding that a Section 922(g) offense was not a "crime of violence" because "we are bound by our holding in . . . *Canon*"); *Singleton*, 182 F.3d at 16 (citing both *Stinson* and *Canon* and applying the same "crime of violence" definition used in the sentencing context and in Section 924(c)(3) to the Bail Reform Act); United States v. Stratton, 2001 WL 527442, at *2 (D. Ariz. 2001) (distinguishing the context in which the Ninth Circuit issued its decision in *Canon*, and finding that a Section 922(g)(1) offense did qualify as a "crime of violence" under the Bail Reform Act).

46. *Stinson*, 508 U.S. at 38.

47. *Id.*

48. *Id.* at 38–39.

49. United States v. Stinson, 943 F.2d 1268 (11th Cir. 1991), *reh'g denied*, 957 F.2d 813 (11th Cir. 1992), *rev'd*, 508 U.S. 36 (1993).

appeal, Stinson argued that mere possession of a firearm, even by a prohibited person, does not constitute a "crime of violence."[50] The Eleventh Circuit, however, clearly thought little of Stinson's argument and wrote a strongly-worded opinion rejecting the defendant's view.[51] In doing so, the court looked to the language of the sentencing guidelines,[52] case law from similar contexts, including the Bail Reform Act,[53] as well as the legislative history of federal firearms laws.[54] In particular, the court focused on two pieces of persuasive authority: (1) the decision of the United States District Court for the Eastern District of Michigan in *United States v. Jones*;[55] and (2) the legislative history behind the federal firearms offense codified at Title 18, United States Code, Section 924(e).[56]

In discussing the *Jones* decision—a case in which a district court found that illegal firearm possession by a prior felon was a "crime of violence" under the Bail Reform Act—the court focused on the four specific reasons given by the *Jones* court for its conclusion:

> The court in *Jones* offered four independent justifications for its conclusion that the offense of weapons possession by a felon "by its nature" involves a "substantial risk of physical force": (1) felons are more likely to use firearms in an irresponsible manner; (2) felons are acutely aware that such activity is illegal, making the act of weapons possession a knowing disregard for [sic] legal obligations imposed upon them; (3) felons are more likely to commit crimes, enhancing the likelihood the weapon will be used in a violent manner; and (4) illegal weapons possession is an ongoing offense that is often not ended voluntarily, but only through law enforcement intervention, thus "[t]he character of the crime cannot be measured solely as of the moment of discovery and arrest."[57]

On the heels of its consideration of the foregoing factors in *Jones*, the *Stinson* court turned its attention to the legislative history justifying the criminal punishment of the unlawful possession of

50. *Id.* at 1270.
51. *See generally id.*
52. *Id.* at 1270.
53. *Id.* at 1271–72.
54. *Id.* at 1272.
55. 651 F. Supp. 1309 (E.D. Mich. 1987).
56. *Stinson*, 943 F.2d at 1272.
57. *Id.* (quoting *Jones*, 651 F. Supp. at 1310).

firearms by prohibited persons.[58] Specifically, the court focused on the Congressional commentary surrounding the passage of the Federal Firearms Owners Protection Act of 1986:

> We find further support for the conclusion that the offense of weapons possession by a felon "by its nature" imposes a "serious potential risk of injury" in the legislative history behind 18 U.S.C. § 924(e), which streamlined the categories of persons unqualified to receive or possess firearms and established a stiff mandatory minimum punishment. Section 924(e) was included as part of the Federal Firearms Owners Protection Act of 1986, which relaxed federal rules regarding private sales of firearms among sportsmen and collectors while simultaneously "enhanc[ing] the ability of law enforcement to fight *violent crime* and narcotics trafficking." . . . Introducing the measure on the floor of the Senate, its sponsor Senator McClure outlined what he considered unduly aggressive federal enforcement of private weapons sales among collectors and sportsmen, and concluded, "We need to redirect law enforcement efforts away from what amounts to paperwork errors and *toward willful firearms law violations that will lead to violent crime; for example,* selling stolen guns, or *selling firearms to prohibited persons.*"[59]

In light of the court's selection of the foregoing authorities as support, the Eleventh Circuit's ultimate finding—that possession of a firearm by a felon should be deemed a "crime of violence"—is hardly surprising. What may be surprising, however, to those to those who disagree with the court's ultimate conclusion, is the strong wording of the court's ultimate conclusion:

> Like the legislative body that criminalized weapons possession by convicted felons, we conclude that defendant's offense of conviction 'by its nature' imposed a 'serious risk of physical injury,' whether or not injury results at the exact moment of arrest or anytime during defendant's ongoing possession of the firearm. Because this offense always constitutes a 'crime of violence,' a convicted felon found guilty of firearms possession is automatically subject to sentencing enhancement

58. *Id.*
59. *Id.* (citations omitted).

under the career offender provisions of the Sentencing Guidelines.[60]

Less than a month after the Eleventh Circuit's decision, the United States Sentencing Commission amended its commentary to the guidelines section that was at issue in *Stinson*.[61] The new commentary, which became effective November 1, 1991,[62] was directly contrary to the result in *Stinson*, as well as the results of decisions by four other circuit courts that had addressed the same issue.[63] Specifically, the Sentencing Commission added language to the relevant section's commentary stating that "'crime of violence' does not include the offense of unlawful possession of a firearm by a felon."[64]

Following the Sentencing Commission's amendment of its guidelines, Stinson petitioned for a rehearing of his appeal.[65] The Eleventh Circuit, however, was unswayed by the Sentencing Commission's action.[66] The court reasoned that case law overwhelmingly supported the findings expressed in its earlier opinion, and explained that agency commentary that has not been passed upon by Congress, does nothing to bind federal courts or overrule established case authority.[67] Accordingly, the Eleventh Circuit denied the petition for rehearing.[68]

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60. *Id.* at 1272–73.

61. U.S. SENTENCING GUIDELINES MANUAL app. C, ¶ 433, at 836 (1991). The Guidelines amend the commentary to section 4B1.2 of the Federal Sentencing Guidelines, and state, in relevant part:

> The term 'crime of violence' does not include the offense of unlawful possession of a firearm by a felon. Where the instant offense is the unlawful possession of a firearm by a felon, the specific offense characteristics of § 2K2.1 (Unlawful Receipt, Possession, and Transportation of Firearms or Ammunition) provide an increase in offense level if the defendant has one or more prior felony convictions for a crime of violence or controlled substances offense; and, if the defendant is sentenced under the provisions of 18 U.S.C. § 924(e), § 4B1.4 (Armed Career Criminal) will apply. (amendment effective November 1, 1991).

Id.

62. *Id.*

63. *See* United States v. Goodman, 914 F.2d 696 (5th Cir. 1990); United States v. Alvarez, 914 F.2d 915 (7th Cir. 1990); United States v. O'Neal, 937 F.2d 1369 (9th Cir. 1990); United States v. Williams, 892 F.2d 296 (3d Cir. 1989).

64. U.S. SENTENCING GUIDELINES MANUAL § 4B1.2, cmt. n.1 (1991).

65. United States v. Stinson, 957 F.2d 813, 814 (11th Cir. 1992), *rev'd*, 508 U.S. 36 (1993).

66. *Id.* at 815.

67. *Id.*

68. *Id.*

Stinson appealed his case to the United States Supreme Court, which granted *certiorari* for the limited purpose of determining whether the Eleventh Circuit erred when it did not accord binding effect to the commentary of the United States Sentencing Guidelines.[69] In examining the case, the Court reversed the Eleventh Circuit and held that the guidelines commentary was binding on the federal courts.[70] Accordingly, the Supreme Court did not specifically address the question of whether, as a matter of law, the illegal possession of a firearm constitutes a "crime of violence."[71] Indeed, the Court made clear that it was not addressing that issue when it qualified its opinion by stating that "[w]e recognize that the exclusion of the felon-in-possession offense from the definition of 'crime of violence' may not be compelled by the guideline text."[72] Nevertheless, the Supreme Court's decision in *Stinson* is often discussed as if it actually spoke to that issue, i.e., as if the Supreme Court had reviewed the Eleventh Circuit's first decision prior to the Sentencing Guidelines amendment of its commentary.[73] More often, however, the *Stinson* decision is discussed in an effort either to distinguish or draw parallels between the application of the term "crime of violence" in the sentencing and pretrial detention contexts.[74]

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69. United States v. Stinson, 508 U.S. 36, 40 (1993) ("The various Courts of Appeals have taken conflicting positions on the authoritative weight to be accorded to the commentary to the Sentencing Guidelines, so we granted *certiorari*.").

70. *Id.* at 47–48.

71. According to the opening language of the Court's opinion, the specific issue before the Court was whether the Eleventh Circuit erred when it held that "the commentary to the Sentencing Guidelines is not binding on the federal courts." *Id.* at 37–38. The answer to that issue was summarized when the Court decided that "commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." *Id.* at 38.

72. *Id.* at 47.

73. *Cf.* United States v. Newman, 1997 WL 603740, at *1 n.1 (10th Cir. Oct. 1, 1997) (rejecting a defendant's reliance on *Stinson* in the Bail Reform Act context, explaining that "*Stinson* provides little or no guidance concerning application of the § 3156(a)(4) definition at issue here"). Moreover, the author has confronted this type of argument a number of times in addressing the prospective detention of defendants charged with violating 18 U.S.C. § 922(g)(1).

74. *See, e.g., Newman*, 1997 WL 603740, at *1 n.1 (rejecting the appeal of two defendants who claimed that the *Stinson* decision should control the question of whether their unlawful possession of ten pipe bombs, which are considered "firearms" under the law, constituted a "crime of violence" under the Bail Reform Act). The Tenth Circuit expressly found that the defendants' argument was unpersuasive and noted that "the Court acknowledged that the gloss placed by the commentary might 'not be compelled by the guideline text.'" *Id.* (quoting *Stinson*, 508 U.S. at 47).

IV. COURTS' INTERPRETATION OF "CRIME OF VIOLENCE" IN THE CONTEXT OF 18 U.S.C. § 924(c)(3)

Some of the opinions that have addressed the Bail Reform Act's "crime of violence" definition in firearms prosecution cases have discussed how other courts have handled the same definition under Title 18, United States Code, Section 924(c).[75] Section 924(c) makes it unlawful for anyone to use or carry a firearm during or in relation to a "crime of violence."[76] It also makes it unlawful for anyone to possess a firearm in the furtherance of a "crime of violence."[77] The definition set forth for "crime of violence" under Section 924(c) is identical in all material respects to the definition set forth in the Bail Reform Act.[78]

Only three courts of appeals have examined whether unlawful possession of a firearm can constitute a "crime of violence" for the purpose of Section 924(c).[79] Two cases have discussed whether the federal felon-in-possession offense qualifies as a "crime of violence" under Section 924(c), albeit one of those cases did so in *dictum*.[80] Another case has looked at whether the unlawful possession of an unregistered firearm meets the "crime of violence" definition.[81]

Of the two cases that have looked at the felon-in-possession offense, both have concluded that the offense cannot be used as a

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75. *See, e.g.*, United States v. Lane, 252 F.3d 905, 907 (7th Cir. 2001) (citing the treatment of the felon-in-possession offense under the "crime of violence" definition in a pair of cases addressing 18 U.S.C. § 924(c) offenses) (citing United States v. Flennory, 145 F.3d 1264, 1268 (11th Cir. 1998) and United States v. Canon, 993 F.2d 1439, 1441 (9th Cir. 1993)); *see also, e.g.*, United States v. Moncrief, 289 F. Supp. 2d 1311 (M.D. Ala. 2003) (examining the Bail Reform Act's "crime of violence" definition against the meanings given to the same definition in the context of 18 U.S.C. § 924(c)(3)).

76. 18 U.S.C. § 924(c)(1)(A) (2003).

77. *Id.*

78. *Compare* 18 U.S.C. § 924(c)(3) (2003) (setting forth a two-pronged "crime of violence" definition identical to the first two prongs of the definition set forth at 18 U.S.C. § 3156(a)(4)(B)), *with* 18 U.S.C. § 3156(a)(4)(B) (2003) (setting forth a three-pronged "crime of violence" definition for that term as used in the Bail Reform Act).

79. *See* United States v. Jennings, 195 F.3d 795, 797–98 (5th Cir. 1999) (holding that possession of an unregistered firearm, specifically a pipe bomb, constituted a "crime of violence" under 18 U.S.C. § 924(c)(3) because "there is a 'substantial risk' that possession of this inherently dangerous weapon would produce violence or property damage"); United States v. Flennory, 145 F.3d 1264, 1268 (11th Cir. 1998) (dictum) (stating that "possession of a firearm is not a 'crime of violence' as that term is used in § 924(c)(3)"), *abrogation recognized by* United States v. Brown, 332 F.3d 1341, 1345 n.6 (11th Cir. 2003); United States v. Canon, 993 F.2d 1439, 1441 (9th Cir. 1993) (holding that "possession of a firearm by a felon is not a 'crime of violence' under § 924(c)").

80. *See infra* note 83.

81. *See Jennings*, 195 F.3d at 797–98.

predicate "crime of violence" under Section 924(c).[82] Because one of the these cases reached that conclusion in *dictum* and was later overruled on other grounds,[83] only one of the two decisions merits any discussion. That decision, however, does not provide much to support meaningful discussion, either. In *United States v. Canon*,[84] the United States Court of Appeals for the Ninth Circuit concluded that "possession of a firearm by a felon is not a 'crime of violence' under § 924(c)."[85] The court provided almost no analysis or discussion in reaching this conclusion, aside from relying on the amendment to the UNITED STATES SENTENCING GUIDELINES MANUAL, discussed *supra* in *Stinson*, that expressly excluded the felon-in-possession offense from the "crime of violence" definition applicable to so-called "career offenders."[86]

The Fifth Circuit came to a somewhat different conclusion in *United States v. Jennings*[87] when it concluded that a defendant's possession of unregistered firearms in violation of Title 26, United States Code, Section 5861(d) constituted a "crime of violence" under Title 18, United States Code, Section 924(c).[88] The firearms at issue were, however, not traditional firearms, but pipe bombs that fell within the National Firearms Act's definition of "firearm" by virtue of being "destructive device[s]."[89] The defendant had a traditional firearm, a handgun, with him when he possessed the pipe bombs.[90] He was charged with possessing that handgun during and in relation to the "crime of violence" of possessing the pipe bombs.[91] Because the court easily concluded that the possession of an unregistered weapon like a pipe bomb fell within the "crime of

82. *See Flennory*, 145 F.3d at 1268; *Canon*, 993 F.2d at 1441.

83. *See Flennory*, 145 F.3d at 1268. Although the *Flennory* case dealt with both a felon-in-possession charge and a charge under Section 924(c), the court expressly noted that a drug trafficking felony was the predicate crime under the Section 924(c) count. *Id.* at 1267–68. The court further stated that "[t]he plea agreement gave no indication that the violation for being a felon in possession of a firearm was the predicate offense for the violation of § 924(c)(1)." *Id.* at 1268. Accordingly, the court's comment that "[w]e note also that possession of a firearm by felon is not a 'crime of violence' as that term is used in § 924(c)(3)" constitutes *dictum*. *Id.*

84. 993 F.2d 1439 (9th Cir. 1993).

85. *Id.* at 1441.

86. *Id.* (citing U.S. SENTENCING GUIDELINES MANUAL § 4B1.2, cmt n.2 (1991)).

87. 195 F.3d 795 (5th Cir. 1999).

88. *Id.* at 797–98.

89. *See id.* at 796; 26 U.S.C. § 5845(a),(f) (2003) (defining the terms "firearm" and "destructive device" under the National Firearms Act).

90. *Jennings*, 195 F.3d at 796.

91. *Id.*

violence" definition, it saw no problem with the manner in which the defendant was charged.[92]

The different treatment of unlawful firearms possession in *Canon* and *Jennings* appears to relate less to the statutes involved than the facts of each case. In *Canon,* the government charged a felon who possessed a firearm both under the felon-in-possession statute and under Section 924(c) for using or carrying that same firearm during and in relation to the felon-in-possession offense.[93] Essentially, the defendant faced multiple charges and additional punishment for the same gun possession incident, albeit with different legal elements for each of the charged crimes.[94] In *Jennings,* the facts are markedly different, perhaps explaining the different result. The defendant possessed a number of pipe bombs and kept a handgun in his car where some of the pipe bombs were.[95] Accordingly, he was charged with using or carrying his handgun during and in relation to the "crime of violence" of pipe bomb possession.[96] The act of carrying a gun was distinct from, albeit in relation to, the act of possessing unlawful destructive devices.

Both *Canon* and *Jennings* have been cited or discussed by courts that have grappled with whether the Bail Reform Act's "crime of violence" definition encompasses unlawful firearms possession.[97] Although the context and rationale for those two courts' decisions are sometimes distinguished in discussing the Bail Reform Act,[98] some courts simply accept the findings, at least those in *Canon,* as completely dispositive of the issue, regardless of the changed

92. *Id.* at 798–99.

93. United States v. Canon, 993 F.2d 1439, 1440–41 (9th Cir. 1993).

94. Accordingly, there may not have been a double jeopardy issue under the Fifth Amendment to the United States Constitution. *See* Blockburger v. United States, 284 U.S. 299, 304 (1932) (setting forth the test for a multiplicitous indictment in violation of the Fifth Amendment's Double Jeopardy Clause); *see also* U.S. CONST. amend. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . .").

95. *Jennings,* 195 F.3d at 796–97.

96. *Id.* at 797.

97. *See* United States v. Twine, 344 F.3d 987, 988 (9th Cir. 2003), *petition for reh'g en banc pending,* 353 F.3d 690 (9th Cir. 2003); United States v. Lane, 252 F.3d 905, 907 (7th Cir. 2001); United States v. Moncrief, 289 F. Supp. 2d 1311, 1315 (M.D. Ala. 2003).

98. *See, e.g.,* United States v. Dillard, 214 F.3d 88, 103 n.17 (2d Cir. 2000). The court rejects the defendant-appellant's argument that "by construing the felon-in-possession offense to be a 'crime of violence' for the purpose of the Bail Reform Act, we illogically compel the same reading of another statute, 18 U.S.C. § 924." The court further explains that "[g]iven the different contexts and purposes of the statutes, courts retain ample latitude to interpret them differently if Congress intended them to have different meanings."

context.[99] The latter courts simply find, based on *Canon*, that the federal felon-in-possession offense should not be viewed as a "crime of violence" in any context, including the Bail Reform Act context.[100] In so doing, those courts are merely following *Canon*'s lead of bootstrapping a conclusion regarding statutory construction from an amendment to the United States Sentencing Guidelines Manual. In essence, those courts do exactly what the United States Supreme Court in *Stinson*[101] expressly "recognized" should not be done with respect to the Guidelines' text at issue, namely "that the exclusion of the felon-in-possession offense from the definition of 'crime of violence' may not be compelled by the guideline text."[102]

V. THE JUDICIAL DIVIDE REGARDING THE BAIL REFORM ACT'S CRIME OF VIOLENCE DEFINITION AFTER *STINSON* AND *CANON*

Following the Supreme Court's decision in *Stinson* and the Ninth Circuit's decision in *Canon*, courts have split over whether unlawful firearms possession should be treated as a "crime of violence" in pretrial detention decisions under the Bail Reform Act.[103] The split appears to have resulted from two things: (1) a perception among courts that the Bail Reform Act's definition of "crimes of violence" is ambiguous; and (2) differing views of the significance, if any, of judicial and administrative interpretations of "crime of violence" in other contexts.

The split among courts has created two primary groups of opinions. The first and slightly larger number of opinions focuses on the purpose of the Bail Reform Act and the inherent danger in

99. *See, e.g.*, *Twine*, 344 F.3d at 988 (finding that "felon in possession of a firearm . . . is not a crime of violence for purposes of the Bail Reform Act" because "we are bound by our holding in *United States v. Canon*, 993 F.2d 1439, 1441 (9th Cir. 1993)").

100. *Id.*

101. Stinson v. United States, 508 U.S. 36 (1993).

102. *Id.* at 47.

103. *Compare, e.g.*, United States v. Singleton, 182 F.3d 7 (D.C. Cir. 1999) (citing *Stinson* and finding that the federal felon-in-possession offense does not constitute a crime of violence under the Bail Reform Act), *with, e.g.*, *Dillard*, 214 F.3d at 97 ("'[B]y its nature,' the offense of illegal gun possession by a person previously convicted of a felony offense (not including business-regulating offenses), 'involves a substantial risk that physical force . . . may be used in the course of committing the offense.'"), *and* United States v. Floyd, 1998 WL 700158 (D.C. Cir. Aug. 10, 1998) ("The court properly determined that possession of a firearm by a felon in violation of 18 U.S.C. § 922(g)(1), is a crime of violence as that term is used in the Bail Reform Act, 18 U.S.C. § 3156(a)(4)(B).").

unlawful firearms possession.[104] These opinions find, notwithstanding the different interpretation of the same term in the sentencing context, that unlawful firearms possession should be viewed categorically as a "crime of violence," thus allowing for consideration of the detention issue.[105] The second group of opinions takes the contrary view, finding that while unlawful firearms possession may, as a class of offenses, create a risk of violence, that risk does not constitute the "substantial risk [of] physical force" during the commission of the offense that is required to constitute a "crime of violence."[106] This second class of opinions looks to the interpretation of "crime of violence" in the sentencing context as a source of persuasive authority for its views.[107]

A. The So-Called "Slim Majority Rule"[108] Favoring the Treatment of Unlawful Firearms Possession as a "Crime of Violence"

Throughout the case law addressing unlawful firearms possession as a "crime of violence" under the Bail Reform Act, references are made to the so-called majority rule favoring inclusion of such firearms possession crimes as crimes of

104. *See, e.g.*, United States v. Shirley, 189 F. Supp. 2d 966, 968 (W.D. Mo. 2002) ("A majority of other courts to consider the issue have also found that being a felon in possession of a firearm constitutes a crime of violence under the Bail Reform Act.").

105. *See, e.g.*, United States v. Connolly, No. CRIM. 3:98CR223(RNC), 1999 WL 1995186, at *7 (D. Conn. Dec. 23, 1999) ("[B]y its nature, the offense [of being a felon in possession of a firearm] poses a substantial risk that physical force may be used. The court is persuaded that a substantial risk of physical force exists when a felon unlawfully possesses a firearm because it is likely that he will use the firearm.").

106. *See, e.g.*, *Singleton*, 182 F.3d at 15 (finding that a detention hearing was not warranted in a felon-in-possession of a firearm case, explaining that "[w]hile felons with guns may as a class be more likely than non-felons with guns or felons without guns to commit violent acts, nothing inherent in a § 922(g) offense creates a 'substantial risk' of violence warranting pretrial detention"); United States v. Hardon, 1998 WL 320945, at *1 (6th Cir. June 4, 1998) (holding that possession of a firearm and ammunition by a felon does not involve such a substantial risk that physical force may be used in the course of committing the offense).

107. *See Singleton*, 182 F.3d at 15–16 (finding its rejection of the government's detention argument to be "consistent with the treatment of crimes of violence at sentencing" and explaining that "[i]f § 922(g) violations are not a predicate for lengthening the sentence of convicted armed recidivists, it would be incongruous to hold that the offense nevertheless warrants detention of merely accused armed recidivists").

108. United States v. Stratton, No. CR 00-0431 PHX SMM, 2001 WL 527442, at *3 (D. Ariz. Apr. 24, 2001) (adopting "the rationale as the better-reasoned decision and *slim majority rule* that the crime of Possession of a Firearm by a Convicted Felon for the purposes of the Bail Reform Act is a 'crime of violence'" (emphasis added)).

violence.[109] Due to the impracticality of quantifying the full body of opinions, published and unpublished, that have made such so-called majority findings, this Article does not seek to establish a numerical majority one way or the other. Nevertheless, it does appear that the greater number of opinions on the subject, including district court opinions, skew in favor of finding that unlawful firearms possession should be deemed a "crime of violence."[110] When looking only at court of appeals decisions, however, the numbers turn the other way, with more courts choosing to exclude unlawful firearms possession from the Bail Reform Act's "crime of violence" definition.[111] Accordingly, the term "majority rule" may be a misnomer.

Although the so-called majority rule is expressed in a number of cases, it was best expressed by the United States Court of Appeals for the Second Circuit in *United States v. Dillard*.[112] In *Dillard*, the Second Circuit was confronted with an appeal from a district court's detention of a defendant charged with being a felon in possession of a firearm under Title 18, United States Code, Section 922(g)(1).[113] The lower court had ordered a detention hearing based upon a finding that a violation of Section 922(g)(1) qualified as a "crime of violence" under the Bail Reform Act.[114] Based upon evidence adduced at the detention hearing, the lower court determined that Dillard was a danger to the community to the degree that "no conditions of release would adequately protect the community."[115] Dillard was alleged to have answered his door on

109. *See, e.g., id.*

110. *See id.*; *see also* United States v. Dillard, 214 F.3d 88, 97 (2d Cir. 2000) (stating that "[t]he vast majority of courts that have considered the question have agreed" that the felon in possession offense falls within the Bail Reform Act's definition of "crime of violence"); United States v. Shirley, 189 F. Supp. 2d 966, 968 (W.D. Mo. 2002) (recognizing that a majority of courts addressing the issue have found that unlawful gun possession by a felon constitutes a crime of violence).

111. *Compare Dillard*, 214 F.3d 88, *and* United States v. Floyd, 1998 WL 700158 (D.C. Cir. Aug. 10, 1998), *with* United States v. Twine, 344 F.3d 987 (9th Cir. 2003), United States v. Lane, 252 F.3d 905 (7th Cir. 2001), United States v. Singleton, 182 F.3d 7 (D.C. Cir. 1999), *and* United States v. Hardon, 1998 WL 320945 (6th Cir. June 4, 1998). *See also* United States v. Newman, 1997 WL 603740, at *1 (10th Cir. Oct. 1, 1997) (finding that defendants' unlawful possession of unregistered "firearms" under 26 U.S.C. § 5861 constituted a crime of violence under the Bail Reform Act, where the firearms were "ten fully functional pipe bombs").

112. 214 F.3d 88 (2d Cir. 2000).

113. *Id.* at 90.

114. *Id.*

115. *Id.*

March 24, 1999, and fired "three gun shots" at the unknown individuals who were calling on him.[116]

In reviewing the lower court's decision, the Second Circuit first looked to the felon-in-possession law contained in Section 922(g)(1).[117] In doing so, the court looked not only at the language of the statute, but also at a related statutory provision that excludes many types of nonviolent felony crimes from the coverage of the felon-in-possession statute.[118] The related provision, which is found at Title 18, United States Code, Section 921(a)(20)(A), removes all "Federal [and] State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices" from the coverage of Section 922(g)(1)'s prohibition against felons possessing firearms.[119] The *Dillard* court noted that "[b]y this definition, Congress excluded many non-violent felonies from the scope of the prohibition" against felons possessing firearms.[120]

After reviewing the statute under which Dillard was charged, the court proceeded to analyze the detention provisions of the Bail Reform Act, focusing on the Act's definition of and application to "crime[s] of violence."[121] In examining the Act's use of the term "crime of violence," the court explained that "the conventional meaning of that term does not govern the question."[122] Rather, the court explained that "[t]he statute uses that phrase as a term of art and provides . . . a special definition that extends substantially beyond the conventional meaning of 'crime of violence.'"[123] In particular, the court noted that Section 3156(a)(4) of the Bail Reform Act contains both a conventional definition of "crime of violence," e.g., crimes involving actual or threatened use of force, and a definition that "is clearly intended to cast a wider net."[124] This "wider net" is found at Section 3156(a)(4)(B), which addresses felony crimes that "by [their] nature, involve[] a substantial risk that physical force . . . may be used in the course of committing the offense."[125] According to the *Dillard* court, this "wider net" clause "speaks to offenses that give rise to a possibility, rather than a

116. *Id.*
117. *Id.*; *see also* 18 U.S.C. § 922(g)(1) (2003).
118. *Id.*; *see also* 18 U.S.C. § 921(a)(20)(A) (2003).
119. 18 U.S.C. § 921(a)(20)(A) (2003).
120. *Dillard*, 214 F.3d at 90.
121. *Id.* at 91 (citing 18 U.S.C. § 3142(f)(1)(A) (2003)).
122. *Id.*
123. *Id.* (citing 18 U.S.C. § 3156(a)(4) (2003)).
124. *Id.* at 92.
125. 18 U.S.C. § 3156(a)(4)(B) (2003).

certainty, that force may be used. . . . Force need not be a necessary concomitant to the offense."[126]

Although Dillard's use of force—i.e., his discharging his gun—during the commission of his crime made it unnecessary for the court to decide whether the "crime of violence" determination needed to be made on a case-by-case basis or a categorical basis due to the nature of the offense, the court in *dictum* endorsed the categorical approach. Specifically, the court "assume[d], without deciding, . . . that the use or risk of violence must result from the categorical nature of the offense and that the statute would not be satisfied where a defendant used violence in the commission of an offense whose nature ordinarily does not give rise to a substantial risk of violence."[127]

In seeking to apply the Bail Reform Act to the felon-in-possession charge in *Dillard*, the court looked to the language of the Act,[128] common-sense conclusions about felons who possess guns,[129] and the legislative history behind both the Bail Reform Act[130] and the Gun Control Act of 1968.[131] In doing so, the court easily concluded that: "if the words of the [Bail Reform] Act carry their normal meanings, possession of a gun by its nature gives rise to a risk of its use in violence; if that violent use occurs, it will occur in the course of the possession; if the possession is a criminal offense, the violent use will occur in the course of the offense of possession."[132] Accordingly, the court focused its attention on the more narrow and difficult question of "whether the risk of violent use [of an unlawfully possessed] firearm by a convicted felon is 'substantial.'"[133] With the question narrowly focused, the *Dillard* court proceeded to explain that it felt that "the most logical interpretation" of the Bail Reform Act "leads to the conclusion that the risk" of violence stemming from a felon's unlawful firearm possession "is substantial."[134] The court then detailed the basis for its conclusion, starting first with certain inferences it drew from the nature of the felon-in-possession offense:

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126. *Dillard*, 214 F.3d at 92.

127. *Id.*

128. *Id.* at 90–95.

129. *Id.* at 95 ("We think that among the convicted felons who illegally possess guns, the number who do so by reason of the utility of guns in threatening or causing violence is significant.").

130. *Id.* at 95–99.

131. *Id.* at 95–96.

132. *Id.* at 94.

133. *Id.*

134. *Id.*

> The risk of violent use posed by a convicted felon's possession of firearms is significant. The category of persons under consideration is limited to those who (a) have already been convicted of one felony (not including crimes of business regulation) and (b) have been charged with a second. Given the further fact that the issue arises only with respect to persons possessing a gun notwithstanding the fact the illegality of doing so, we think the risk of violent use arising from the nature of the offense cannot be regarded as insubstantial. For the risk to be "substantial," it is certainly not necessary that all or even most such illegal possessions create the risk of violence. It is sufficient that the risk be material, important, or significant. We think that among the convicted felons who illegally possess guns, the number who do so by reason of the utility of guns in threatening or causing violence is significant. We find it difficult to accept the proposition that the risk of violent use of guns by convicted felons who possess them illegally is not "substantial."[135]

The *Dillard* court did not, however, stop with its conclusion. The court went further to consider the possibility that the Bail Reform Act of 1984 was "open to dispute" with respect to the scope of the "crime of violence" definition.[136] Accordingly, the court proceeded to look to the primary purpose expressed in the legislative history of the Act.[137] That purpose, as explained by the court and discussed *supra*, was the creation of a mechanism by which courts could consider pretrial detention of defendants based on danger to the community.[138] As the court explained: "Prior to the 1984 Act the law previously in effect (the Bail Reform Act of 1966) made no provision for detention by reason of the defendant's dangerousness to protect the community."[139] By contrast, "[o]ne of the major reforms of the new statute was the provision for pretrial detention of numerous categories of dangerous defendants."[140] The court then proceeded to cite the Senate Report that accompanied passage of the Act, which detailed serious concerns regarding the prior law's failure to

135. *Id.* at 94–95.
136. *Id.* at 95.
137. *Id.*
138. *Id.*
139. *Id.* at 95.
140. *Id.*

account for danger to the community in detention decisions.[141] In sum, the court stated that the Senate Report "suggested that the Act arose from a 'broad base of support for giving judges the authority to weigh risks to community safety in pretrial release decisions.' "[142]

The court did not limit its legislative history analysis to the legislative intent behind the Bail Reform Act, but also looked to the "[t]he legislative history of the felon-in-possession provision" which, according to the court, "confirms that Congress regarded convicted felons as persons 'who pose serious risks of . . . danger to the community."[143] The court quoted the sponsor of the felon-in-possession prohibition, Senator Russell Long (D) of Louisiana,[144] who stated that the classes of prohibited persons under his proposed statute "[s]tated simply, . . . may not be trusted to possess a firearm without becoming a threat to society."[145]

After its tour of legislative history, the court stood by its initial conclusion.[146] The court reasoned that including felon-in-possession violations within the meaning of "crime of violence" would be in accord with the language and intent of the Bail Reform Act, whereas a contrary conclusion "would do serious harm to the Act's objectives."[147] The court's reasoning was that including unlawful firearms possession within the Act's definition of "crime of violence" did nothing more than allow for a detention hearing at which a judge would be able to evaluate evidence of a defendant's dangerousness.[148] This reasoning resembled the primary purpose behind the Bail Reform Act of 1984, which was to give judges greater flexibility to consider dangerousness in detention determinations.[149]

Finally, the *Dillard* court bolstered its position by pointing to the fact that the "vast majority of courts that have considered the question have agreed with th[e] interpretation" expressed in the *Dillard*

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141. *Id.* (citing S. REP. No. 98-225, at 5 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3188).

142. *Id.* (quoting S. REP. No. 98-225, at 5 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3188).

143. *Id.* (citation to internal quotation omitted in original).

144. *See* Official Senate Biographical Information for Senator Russell B. Long (on file with the University of Michigan Journal of Law Reform).

145. 114 CONG. REC. 14,773 (1968).

146. *Dillard*, 214 F.3d at 97.

147. *Id.* at 96.

148. *Id.* at 96–97.

149. *Id.*

decision.[150] In doing so, the court cited a contrary panel opinion issued by the United States Court of Appeals for the District of Columbia Circuit, and went to great pains—including six pages of analysis—to challenge and reject the reasoning of that opinion.[151]

B. The So-Called "Minority View"[152] of Case Law Denying a Detention Hearing in Unlawful Firearms Possession Cases

Standing in stark contrast to the opinions in *Dillard* and the other, so-called "majority view" cases are opinions that have denied a detention hearing based on the view that a convicted felon's possession of a firearm does not qualify as a "crime of violence" under the Bail Reform Act.[153] As with the "majority view" case law, the so-called "minority view" is anchored by a federal appellate panel decision, albeit one from a divided Court of Appeals.[154]

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150. *Id.* at 97 (citing, with approval, United States v. Spry, 76 F. Supp. 2d 719, 720–22 (S.D. W.Va. 1999); United States v. Kirkland, No. CRIM. A. 99-143, 1999 WL 329702, at *2–*3 (E.D. La. May 21, 1999); United States v. Campbell, 28 F. Supp. 2d 805, 808–10 (W.D.N.Y. 1998); United States v. Floyd, 11 F. Supp. 2d 39, 40 (D.D.C. 1998), *aff'd*, 1998 WL 700158 (D.C. Cir. Aug. 10, 1998); United States v. Hardon, 6 F. Supp. 2d 673, 676 (W.D. Mich. 1998), *rev'd*, 1998 WL 320945 (6th Cir. (Mich.) June 4, 1998); United States v. Butler, 165 F.R.D. 68, 71–72 (N.D. Ohio 1996); United States v. Washington, 907 F. Supp. 476, 485 (D.D.C. 1995); United States v. Trammel, 922 F. Supp. 527, 530–31 (N.D. Okla. 1995); United States v. Sloan, 820 F. Supp. 1133, 1138–41 (S.D. Ind. 1993); United States v. Aiken, 775 F. Supp. 855, 856–57 (D. Md. 1991); United States v. Phillips, 732 F. Supp. 255, 262–63 (D. Mass. 1990); United States v. Johnson, 704 F. Supp. 1398, 1399–1401 (E.D. Mich. 1988); and citing, with disapproval, United States v. Singleton, 182 F.3d at 7 (D.C. Cir. 1999); United States v. Robinson, 27 F. Supp. 2d 1116, 1118–19 (S.D. Ind. 1998); United States v. Gloster, 969 F. Supp. 92, 98 (D.D.C. 1997); United States v. Powell, 813 F. Supp. 903, 909 (D. Mass. 1992); United States v. Whitford, No. 92-73-J, 1992 WL 188815, at *3–*4 (D. Mass. July 27, 1992)).

151. *Id.* at 97–104 (distinguishing United States v. Singleton, 182 F.3d 7 (D.C. Cir. 1999)).

152. United States v. Stratton, No. CR 00-0431 PHX SMM, 2001 WL 527442, at *3 (D. Ariz. Apr. 24, 2001) (characterizing as the "minority view" the view held in *Singleton*, as well as in other cases, that unlawful firearms possession is not a 'crime of violence' under the Bail Reform Act).

153. *See, e.g.*, United States v. Twine, 344 F.3d 987 (9th Cir. 2003); *Singleton*, 182 F.3d at 7; United States v. Hardon, 1998 WL 320945 (6th Cir. June 4, 1998); United States v. Collins, No. CRIM. A. 02-10152-RWZ, 2002 WL 31027433 (D. Mass. Sept. 11, 2002); United States v. Silva, 133 F. Supp. 2d 104 (D. Mass. 2001); United States v. Plakio, No. 01-40084-01-RDR, 2001 WL 1167305 (D. Kan. Sept. 5, 2001).

154. *Compare Singleton*, 182 F.3d at 7, 14–17 (finding that a detention hearing was not appropriate based upon danger to the community in a case involving a charge of a felon's unlawful possession of a firearm, basing its decision upon the view that the felon-in-possession offense is not a "crime of violence" within the meaning of the Bail Reform Act), *with* United States v. Floyd, 1998 WL 700158, at *1 (D.C. Cir. Aug. 10, 1998) (finding that

In 1999, in *United States v. Singleton*, a panel of the United States Court of Appeals for the District of Columbia Circuit addressed the question of whether a safety-based detention hearing could be held for a felon charged with unlawfully possessing a firearm.[155] Despite a contrary opinion by another panel of the District of Columbia Circuit less than one year earlier,[156] the panel found as a matter of law that a detention hearing could not be conducted because the felon-in-possession statute did not, in its view, constitute a "crime of violence" under the Bail Reform Act.[157] In making its decision, the *Singleton* court focused upon three chief arguments: (1) the perceived plain meaning of the Bail Reform Act and its "crime of violence" definition;[158] (2) the narrow meaning assigned to the term "crime of violence" by the United States Sentencing Commission and as passed upon by the Supreme Court in *Stinson*;[159] and (3) an implied injustice in considering safety-based detention of a felon-in-possession of a firearm due to the constitutional presumption of innocence.[160]

Looking first to the *Singleton* court's analysis of the perceived plain meaning of the Bail Reform Act, the court's announced analysis of the "plain meaning of the statute" does not start with the statute itself, as a plain meaning analysis would suggest, but with a series of excerpted quotes from the legislative history of the statute.[161] Indeed, before the court even began to probe the statutory language, the court made references to "[i]nterpretive uncertainty,"[162] "Congressional intent,"[163] ambiguity,[164] and "the rule of lenity."[165] Accordingly, the *Singleton* court appears to have begun

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"the [lower] court properly determined that possession of a firearm by a felon in violation of 18 U.S.C. § 922(g)(1), is a crime of violence as that term is used in the Bail Reform Act, 18 U.S.C. § 3156(a)(4)(B)").

155. *Singleton*, 182 F.3d at 7.

156. *See Floyd*, 1998 WL 700158.

157. *Singleton*, 182 F.3d at 16–17.

158. *Id.* at 13, 15.

159. *Id.* at 15–16.

160. *Id.* at 13, 15, 16 (referring to the presumption of innocence on at least four occasions).

161. *Id.* at 13 (quoting, in part, S. REP. No. 98-225, at 6 (1984)).

162. *Id.*

163. *Id.*

164. *Id.* at 13 n.12.

165. *Id.* The "rule of lenity" is a rule of statutory construction concerning ambiguous penal statutes. Under that rule, "where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant." United States v. Bass, 404 U.S. 336, 348 (1971). The rule "applies only when, after consulting traditional canons of statutory construction, we are left with an ambiguous statute." United States v. Shabani, 513 U.S. 10, 17 (1994). The Supreme Court has explained that "[t]he rule of lenity is not invoked by a grammatical possibility. It

its purported plain meaning analysis with a discussion of legislative history and textual uncertainty. With such a start, a decision premised upon a statute's plain meaning appears to be of dubious merit.[166]

When the *Singleton* court reached the plain meaning question in earnest, it focused upon a portion of the statutory language at issue, namely the latter portion of the alternative "crime of violence" definition that includes any offense that, "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."[167] In doing so, the court focused on what it called "the nexus requirement," which mandates that the prospect of force arise in the course of committing the charged offense.[168] The court then rejected the government's assertion that "in the course of committing the offense" simply meant during the offense.[169] The court explained its rejection of the government's assertion by stating, without support, that "the phrase 'in the course of committing' indicates that some aspect of the charged offense must create the risk of violence in order to itself qualify as a crime of violence."[170] In support of its view, the court then asserted a claim that both lacks support and conflicts with the statutory language under analysis: "Absent a direct relationship between the offense and a risk of violence, the possibility of violence is not a basis for pretrial detention on a charge that on its face does not involve violence as an element."[171] The court claimed that such a direct relationship could be seen in a crime such as burglary, which the court asserted would have such a "direct relationship," based upon the "actions of the burglar in committing the crime itself,

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does not apply if the ambiguous reading relied on is an implausible reading of the congressional purpose." Caron v. United States, 524 U.S. 308, 316 (1998).

166. After all, even court decisions utilizing intent-based and holistic approaches to statutory interpretation first begin their analyses by looking to the language of the statute. *See, e.g.*, Dole v. United Steelworkers of Am., 494 U.S. 26, 35 (1990) (addressing a "pure question of statutory construction" and, in doing so, explaining that "[t]he 'starting point is the language of the statute'" (quoting Schreiber v. Burlington Northern, Inc., 472 U.S. 1, 5 (1985))).

167. *Singleton*, 182 F.3d at 14; 18 U.S.C. § 3156(a)(4)(B) (2003).

168. *Id.* (citing 18 U.S.C. § 3156(a)(4)(B) (2003)).

169. *Id.* The court explains that "the government construes 'in the course of' as purely a temporal restraint." *Id.* Then, the court rejects the government's construction: "While nimble, this construction fails to respect the words and context of § 3156." *Id.*

170. *Id.*

171. *Id.*

and the likely consequences that would ensue upon intervention of another person."[172]

Notwithstanding the unequivocal certainty of the court's nexus analysis, described above, the analysis is wrong. As for the court's suggestion that the prospect of physical force must bear a "direct relationship" and "arise[] from" the charged offense, the court cited no authority aside from a general and unexplained reference to "the words and context of § 3156."[173] The reality, however, is that the words of Section 3156 belie the court's claim, including its use of the crime of burglary as a purported prime example of its reasoning. As noted *supra*, Section 3156(a)(4) contains three alternative definitions for "crime of violence" under the Bail Reform Act.[174] Although the *Singleton* court was ostensibly analyzing the coverage of the second of the definitions contained in Section 3156(a)(4)(B), the court's discussion revealed an understanding of the law that was more akin to the statute's first definition, contained in Section 3156(a)(4)(A).[175] It is the first definition that addresses crimes with a "direct relationship" to the use of force, insofar as it covers any "offense that has an element of the offense the use, attempted use, or threatened use of physical force against the person or property of another."[176] It is this first definition that appears to be in accord with the *Singleton* court's concerns about a direct nexus between the use of force and the charged offense. After all, this first definition clearly covers the court's example of the crime of burglary, which, at least at common law, requires a physical exertion of force, i.e., a breaking, prior to unlawful entry into the dwelling of another.[177] Accordingly, burglary constitutes an

172. *Id.*

173. *Id.*

174. *See supra* text accompanying notes 31–35.

175. *Compare* 18 U.S.C. § 3156(a)(4)(A) (2003) (defining the term "crime of violence" to apply to any "offense that has an element of the offense the use, attempted use, or threatened use of physical force against the person or property of another"), *with* 18 U.S.C. § 3156(a)(4)(B) (2003) (including within the same "crime of violence" definition "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense").

176. 18 U.S.C. § 3156(a)(4)(A) (2003).

177. *See, e.g.*, 13 AM. JUR. 2D Burglary § 1 (WESTLAW through May 2003) ("Observation: Burglary consists of unlawful breaking and entering, with the intent to commit a crime once entry has been gained."); *see also* State v. Berkey, 630 A.2d 855, 856 (N.J. Sup. Ct. Law Div. 1993) ("The core of the common law concept of burglary was the breaking and entry into a dwelling at night with the intent to commit a felony therein."); CHARLES E. TORCIA, WHARTON'S CRIMINAL EVIDENCE § 326, at 186 (14th ed. 1980) ("At common law, burglary is the breaking and entering of the dwelling house of another, at night, with the intent to commit a felony therein.").

offense bearing an element of "the use . . . of physical force against the . . . property of another."[178]

The statute's second definition, which is intended to be broader than the narrow, offense element-based definition contained at Section 3156(a)(4)(A), does not contain any of the words or concepts, such as "direct relationship"[179] or "arises from,"[180] that the *Singleton* court attributes to the definition.[181] Similarly, the second definition does not contain any reference to force being a necessary element of the charged offense.[182] Rather, the second definition, by its own terms, is intended to go beyond the element-based definition to cover "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."[183] Although the *Singleton* court dismissed out of hand the government's assertion that the phrase "in the course of" merely references a temporal relationship between the commission of the charged offense and the prospect of violence,[184] it did so without explaining why the phrase could not assume the temporal meaning that is generally assigned to it in dictionaries and elsewhere.[185]

To bolster its conclusion that felons in possession of firearms do not create a substantial risk of force or violence, the *Singleton* court concluded that "the relationship between possession and use of a firearm is sufficiently attenuated that possession alone does not create a 'substantial risk' of use[,]" even if the possession is by a convicted felon.[186] The court supported its conclusion by explaining that "not all felons are potentially more violent than non-felons," citing examples of felonies involving "economic

178. 18 U.S.C. § 3156(a)(4)(A) (2003).

179. United States v. Singleton, 182 F.3d 7, 14 (D.C. Cir. 1999).

180. *Id.*

181. 18 U.S.C. § 3156(a)(4)(B) (2003) (defining "crime of violence" to include, in addition to crimes with force as an element, "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense").

182. *Id.*

183. *Id.*

184. *Singleton*, 182 F.3d at 14.

185. *See, e.g.*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 305 (New college ed. 1976) (defining the word "course" as: "Movement in time; duration: *in the course of a year.*" (emphasis added)); WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 326 (2d college ed. 1972) ("—*in the course of*, in the progress or process of; *during*" (emphasis added)); *see also* United States v. Dillard, 214 F.3d 88, 93–94 (2d Cir. 2000) (explaining the Bail Reform Act's requirement that the risk of force occur "in the course of" the charged offense by using the term "during").

186. *Singleton*, 182 F.3d at 14–15.

crimes [and] regulatory offenses."[187] Indeed, in supporting its claim, the *Singleton* court went so far as to suggest that the distinction between "violent and non-violent felonies . . . is irrelevant in § 922(g) [felon-in-possession] cases[,]"[188] a statement that is overstated in light of the federal statutory exception for certain nonviolent felonies, including "antitrust violations, unfair trade practices, restraints of trade, [and] other similar offenses relating to the regulation of business practices."[189]

In addition to misstating the scope of Section 922(g)(1)'s applicability, the *Singleton* court stated, without any support, that the policy considerations behind the federal prohibition on felons' possession of guns "differ substantially from those in favor of pretrial detention of people who are presumed innocent."[190] In making this statement, the court failed to explain how Congressional concern about felons committing violent acts with firearms differs from Congressional concerns about violent acts committed by individuals awaiting trial on pretrial release. The court also failed to explain how concerns about a defendant's criminal history, parole status, and experience with the penal system are relevant under the Bail Reform Act for detention purposes, yet are of minimal significance, at least according to the *Singleton* court, when that same criminal history is factored into the underlying charge as a predicate element.[191]

Whereas the *Singleton* court failed to account for key aspects of the Bail Reform and Gun Control Acts, the court went out of its way to demonstrate the consistency of its approach with the United States Sentencing Guidelines and the United States Supreme Court's decision in *Stinson v. United States*.[192] As demonstrated above, however, the decision in *Stinson* does not

187. *Id.* at 15.

188. *Id.*

189. 18 U.S.C. § 921(a)(20) (2003) (excluding the offenses listed above from the statutory definition of "crime punishable by imprisonment for a term exceeding one year," as that term is used in 18 U.S.C. § 922(g)(1), and also excluding "any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less").

190. *Singleton*, 182 F.3d at 15.

191. *Cf.* 18 U.S.C. § 3142(g)(3),(4) (2003) (listing, among the factors to be considered by the court "in determining whether there are conditions of release that will reasonably assure . . . the safety of any other person and the community" such factors as "past conduct," "criminal history," and "whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of a sentence for an offense under Federal, State, or local law").

192. *Singleton*, 182 F.3d at 15–16 (citing U.S. SENTENCING GUIDELINES MANUAL § 4B1.2 cmt. 1 (1998); Stinson v. United States, 508 U.S. 36, 47 (1993)).

speak to the underlying issue of whether 18 U.S.C. § 922(g)(1) is a "crime of violence."[193] That decision addresses only an agency law question regarding the binding effect of a regulation by the United States Sentencing Commission in the sentencing context.[194] In the specific context under consideration in *Stinson*, the Sentencing Commission determined that the federal felon-in-possession offense should not be regarded as a "crime of violence" sufficient to trigger mandatory sentencing enhancements under the Guidelines.[195] The *Singleton* court regarded the Sentencing Commission's decision as significant insofar as "the overlap between bail and sentencing is striking, at least in the present context."[196] The court then pointed to the nature of information known at sentencing rather than at the stage where pretrial detention is being considered.[197] What the court did not address, however, was the nature and effect of classifying the felon-in-possession offense as a "crime of violence" in the sentencing as opposed to the pretrial detention context.

In the sentencing context, classification of an offense as a "crime of violence" often means the imposition of a significantly higher imprisonment sentence, with limited discretion for the court to depart downward.[198] In Title 28, United States Code, Section 994(h), Congress mandated that the United States Sentencing Guidelines "specify a sentence to a term of imprisonment at or near the maximum term" in cases where repeat offenders are convicted of a "crime of violence."[199] Such stiff sentences are provided for at Section 4B1.1 of the U.S. SENTENCING GUIDELINES MANUAL, which sets forth enhanced sentences for so-called "Career Offender[s]."[200] Consequently, the classification of an offense as a "crime of violence" can generate a severe sentence.

The consequences of a similar classification in the pretrial detention context are very different. Such a classification at the

193. *See also* supra text accompanying notes 71–75.

194. *Stinson*, 508 U.S. at 38 ("We decide that commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of that guideline.").

195. *Id.*; *see also supra* note 61.

196. *Singleton*, 182 F.3d at 16.

197. *Id.*

198. *See* U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 (setting forth enhanced penalties for "Career Offender[s]" who have committed "a crime of violence" or "a controlled substance offense").

199. 28 U.S.C. § 994(h) (2003).

200. U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 (2002).

detention stage would mean nothing more than that a detention hearing would need to be held.[201] The issue of detention would then be left to the court's discretion, subject to the Government proving by clear and convincing evidence that defendant poses a danger to the community.[202] Consequently, the so-called "overlap" between the two contexts is "striking" only for the entirely different nature of the two contexts.

The *Singleton* court's discussion is, however, "striking" for another reason: a gap in its analysis. When the court evaluated the Sentencing Commission's exclusion of firearms possession offenses from the "crime of violence" definition under the "Career Offender" guidelines, the court failed to mention that there is now very little significance to the classification of such possession as a "crime of violence" under Section 4B1.1. Indeed, at the time of both the *Stinson* and *Singleton* decisions, there was little significance to such a classification, except as to crimes committed before November 1, 1991. On that date, the sentencing guidelines were amended to specify enhanced sentencing levels for unlawful firearms possession by certain recidivist offenders.[203] Through that amendment, the guideline penalties for unlawful firearms possession for recidivist criminals were rendered the same as those for "Career Offender[s]" under the guidelines.[204]

201. *See* United States v. Dillard, 214 F.3d 88, 96 (2d Cir. 2000) ("The conclusion that the felon-in-possession offense is within the definition of crime of violence does not cause the defendant's detention. It does no more than cause a hearing to consider whether the defendant is in fact dangerous (or likely to flee)."); *see also* United States v. Cruickshank, 150 F. Supp. 2d 1112, 1115 (D. Colo. 2001) ("[A] violation of § 922(g)(1) is a crime of violence and, therefore, under 18 U.S.C. § 3142(f)(1)(A), a detention hearing is mandated.").

202. United States v. Stratton, No. CR 00-0431 PHX SMM CR 01-0152 PHX SSM, 2001 WL 527442, at *3 (D. Ariz. Apr. 24, 2001) (explaining that, if the term "crime of violence" is construed to include unlawful firearms possession, "the Court can then proceed with a detention hearing, requiring the Government to prove on a case-by-case basis by a clear and convincing standard whether the particular person before it is a danger to the community or a particular individual"); *see also* 18 U.S.C. § 3142(f) (2003) ("The facts the judicial officer uses to support a finding under subsection (e) that no condition or combination of conditions will reasonably assure the safety of any other person and the community shall be supported by clear and convincing evidence.").

203. U.S. SENTENCING GUIDELINES MANUAL app. C, amendment 374 (2002) (deleting the prior version of Section 2K2.1, which set forth penalties for unlawful firearms possession, and adding a new version of that section that "revise[d] the offense levels and characteristics to more adequately reflect the seriousness of such offenses, including enhancements for defendants previously convicted of felony crimes of violence or controlled substances offenses. . . . The effective date of this amendment is November 1, 1991.").

204. *Compare* U.S. SENTENCING GUIDELINES MANUAL § 2K2.1(a)(2) (2002) (providing for an offense level of "24, if defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense"), *with* U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 (2002) (assigning an offense level of "24" for crimes carrying a ten-year maximum sentence and for cases in which a person is

Consequently, the *Singleton* court was incorrect when it stated that Section "922(g) violation[s] are not a predicate for lengthening the sentence of convicted armed recidivists. . . ."[205] To the contrary, the sentencing guidelines expressly provide for lengthening the sentence of convicted armed recidivists who unlawfully possess guns in violation of Section 922(g).[206] The guidelines have provided for such longer sentences since November 1991, nearly eight years before the *Singleton* decision.

Despite the foregoing analytical flaws, it is clear from the *Singleton* court's reference to the United States Sentencing Guidelines that the court was seeking validation of its views by analogy. It is telling, however, that the court did not seek validation by looking to the Bureau of Prison's treatment and classification of felons who possess firearms. Like the United States Sentencing Commission, the federal Bureau of Prisons is an agency charged with the duty of promulgating interpretive regulations that affect federal criminal defendants.[207] Whereas the Sentencing Commission promulgates regulations affecting how a defendant should be sentenced, the Bureau of Prisons promulgates regulations affecting how a defendant is to be classified for the execution of his or her sentence.[208] In contrast to the United States Sentencing Commission, however, the Bureau of Prisons has concluded that the federal felon in possession offense should be regarded as a "crime of violence" for prisoner classification purposes.[209] The

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sentenced for a "crime of violence" committed after his eighteenth birthday and "has at least two prior felony convictions of either a crime of violence or a controlled substance offense"). *See also* 18 U.S.C. § 924(a)(2) (2003) (setting forth a ten-year maximum sentence for unlawful firearms possession by a prohibited person in violation of 18 U.S.C. § 922(g)).

205. United States v. Singleton, 182 F.3d 7, 16 (D.C. Cir. 1999).

206. *See* FEDERAL SENTENCING GUIDELINES MANUAL § 2K2.1(a)(2) (2002).

207. *See* 18 U.S.C. §§ 4041–42 (2003) (providing statutory authority for Bureau of Prisons); *see also* 5 U.S.C. § 301 (2003) (establishing the authority for heads of executive departments to "prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property").

208. *See, e.g.*, 18 U.S.C. § 3261(b) (2003) (entrusting the Bureau of Prisons with the authority to designate the placement of individual prisoners to facilities "that the Bureau determines to be appropriate and suitable").

209. *See generally* Cook v. Wiley, 208 F.3d 1314 (11th Cir. 2000) (finding that the Bureau of Prisons reasonably interpreted a statute allowing for the early release of defendants who complete residential drug treatment following conviction for a "nonviolent offense," although Bureau-promulgated regulation concluded that unlawful possession of a firearm, including such possession by a convicted felon in violation of 18 U.S.C. § 922(g)(1), constituted a "crime of violence" so as to exclude such offenses from eligibility for early release); Sutherland v. Flemming, 2000 WL 1174566 (10th Cir. Aug. 18, 2000). *See also* 28 C.F.R. § 550.58(a)(1)(vi)(B) (2002) (excluding any inmate "whose current offense is a felony . . . [t]hat involved the carrying, possession, or use of a firearm or other dangerous weapon or explosives" from the coverage of a

Bureau of Prisons' classification decision is not mentioned in the *Singleton* decision.[210]

Finally, the *Singleton* court's repeated references to the presumption of innocence in its decision reveal a degree of discomfort with the concept of pretrial detention.[211] After all, why would a court find it necessary to mention the presumption of innocence numerous times in a purely legal analysis of the Bail Reform Act, when the Act makes clear in its language that none of its pretrial detention provisions "shall be construed as modifying or limiting the presumption of innocence."[212] Under the Bail Reform Act, the question of pretrial detention is considered independent of, and without prejudice to, a defendant's constitutional presumption of innocence, whether the defendant is a terrorist, an armed bank robber, a kidnapper, or a felon-in-possession of a gun.[213] Surely the *Singleton* panel would not have opposed holding a detention hearing for an accused terrorist, armed robber, or kidnapper based upon generic, implied concerns about treading on the presumption of innocence? In the final analysis, it appears that the panel included references to the presumption of innocence to buoy its conclusion, which, as shown above, as well as in *Dillard* and elsewhere,[214] stands on a shaky foundation.

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pretrial release program for those convicted of a "nonviolent offense"); *cf.* 18 U.S.C. § 3621(e)(2)(B) (2003) (setting forth statutory authority for a release program for those convicted of a "nonviolent offense"); *Lopez v. Davis*, 531 U.S. 230, 244 (2001) (approving the Bureau of Prisons's exclusion under 18 U.S.C. § 3621(e)(2)(B) (2003) of those who possessed a firearm in connection with a nonviolent offense, finding that it was reasonable to conclude "that an inmate's prior involvement with firearms, in connection with the commission of a felony, suggests his readiness to resort to life-endangering violence").

210. *See generally Singleton*, 182 F.3d at 7 (failing to mention the Bureau of Prisons's classification decision).

211. The *Singleton* opinion mentions the presumption of innocence in at least four locations in the opinion. *Id.* at 13, 15, 16.

212. 18 U.S.C. § 3142(j) (2003).

213. *See* 18 U.S.C. § 3142 (2003).

214. *See, e.g.*, United States v. Shirley, 189 F. Supp. 2d 966, 969 (W.D. Mo. 2002) (stating that "the *Singleton* reasoning is flawed," and finding "that the offense of being a felon in possession of a firearm is a crime of violence for purposes of the Bail Reform Act").

VI. POSNER WEIGHS IN ON THE ISSUE[215]

The most interesting, albeit somewhat flawed, opinion on this topic is the panel decision authored by Judge Richard Posner of the Seventh Circuit Court of Appeals in *United States v. Lane*.[216] *Lane* did not deal with issue of pretrial detention under the Bail Reform Act, but rather the issue of detention following conviction and pending sentencing, which is also influenced by whether an offense is classified as a "crime of violence." In particular, detention is presumed following a conviction for a "crime of violence" under the Bail Reform Act absent a showing of exceptional circumstances.[217] Where an offense is not a "crime of violence" or a certain type of narcotics crime, the standard for release is much more forgiving, allowing for release if the defendant can show by clear and convincing evidence that some set of conditions of release exist that will assure both his appearance as required and the safety of the community.[218]

In *Lane*, Judge Posner sided with the view that a felon's possession of a firearm does not pose a substantial risk that physical force may result from the unlawful gun possession.[219] He did so by dissecting the language of the statute, as was done in both *Dillard* and *Singleton*, but he went out of his way to criticize the logic of the *Dillard* court, while overlooking significant portions of the language and intent of the Bail Reform Act.[220]

Posner's first criticism went to the *Dillard* court's discussion of whether a felon's possession of a firearm created a "substantial risk that physical force against the person or property of another may be used in the course of committing the offense," under the Bail

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215. In mentioning Judge Posner by name, the author does not intend to single him out for criticism. As with many of the opinions authored by Judge Posner, the panel opinion discussed in this section, *United States v. Lane*, 252 F.3d 905 (7th Cir. 2001), has already been linked by courts and other commentators to Judge Posner. *See, e.g.*, United States v. Plakio, No. 01-40084-01 RDR, 2001 WL 1167305, at *2 (D. Kan. Sept. 5, 2001); Nicole J. Bredefeld, Note, *The Bail Reform Act of 1984 and Felons Who Possess Weapons: Discrepancy Among the Federal Courts*, 26 SETON HALL LEGIS. J. 215, 248 (2001). To the extent that this Article is critical of the *Lane* decision, the criticism is motivated by what Judge Roger Miner of the United States Court of Appeals for the Second Circuit labeled "a duty on the part of lawyers to identify and discuss incorrect actions by the courts, subject only to the requirement that the criticism be impelled by a good-faith desire for the improvement in the law and the legal system." Roger J. Miner, *Criticizing the Courts: A Lawyer's Duty*, 29-APR COLO. LAW. 31, 31 (Apr. 2000).

216. 252 F.3d 905 (7th Cir. 2001).

217. *See* 18 U.S.C. § 3143(a)(2) (2003).

218. *See* 18 U.S.C. § 3143(a)(1) (2003).

219. *Lane*, 252 F.3d at 906.

220. *Id.* at 907–08.

Reform Act.[221] In analyzing the *Dillard* court's approach to the issue, Posner focused on the distinction between the possession of tools of a crime and the actual commission of that crime:

> The Second Circuit in *Dillard* asked whether felons do a lot of violence with the weapons they possess illegally, and answered "yes," leading to the conclusion that the risk of violence created by being a felon in possession is substantial. But the statute asks whether there is a "substantial risk that physical force against the person or property of another may be used *in the course of committing the offense*," and the offense is possession of a firearm. People who commit that offense may end up committing another, and violent, offense, such as robbing a bank at gunpoint, but that doesn't make the possession offense violent. Otherwise we would have to say that the offense of driving a car without a license is a crime of violence because people who commit that offense are likely to drive when drunk, or to speed, or to drive recklessly, or attempt to evade arrest. . . . A crime that increases the likelihood of a crime of violence need not itself be a crime of violence. *Bailey v. United States*, 516 U.S. 137, 116 S. Ct. 501, 133 L.Ed.2d 472 (1995), is suggestive. The Supreme Court distinguished simple possession of a weapon from use in the sense of active use, limiting the statutory term "use" to the active variety. The active use of a gun is a crime of violence in a way that mere possession of it, even if criminal, is not. *Dillard* bespeaks a type of pre-*Bailey* understanding of possession and use as being essentially identical crimes.[222]

Although the *Lane* court's analysis may be compelling, it is compelling only when viewed outside of the context of the Bail Reform Act's full definition of "crime of violence." When viewed in the context of the Act's full definition, it becomes clear that Judge Posner failed to consider or even mention the fact that the Bail Reform Act expressly distinguishes between crimes that are inherently violent and those that merely possess the substantial likelihood that violence may result during their commission.[223] Accordingly, comparing a crime like a felon's possession of a handgun with the active use of that handgun, is like comparing

221. *Id.* at 907.
222. *Id.* at 907–08.
223. *See supra* notes 32–36 and accompanying text.

apples with oranges. The active use of a firearm, as would be contemplated under a *Bailey* definition of use, would clearly fall into the Bail Reform Act's first category of violent crimes, namely that applicable to offenses "that ha[ve] [as] an element . . . the use, attempted use, or threatened use of physical force against the person or property of another."[224] If Congress had intended to limit the Bail Reform Act's "crime of violence" definition to only those crimes that inherently involve violence, attempted violence, or the threat of violence, the Act's definition would have stopped after only one paragraph. Instead, Congress elected to incorporate into the definition crimes for which the link to violence is less direct.[225]

Moreover, the *Lane* court's criticism of *Dillard*'s reliance on firearm possession as a predicate for detention, as opposed to the actual use of such a firearm, ignores the very language Congress used in passing the Bail Reform Act of 1984. In the Conference Report accompanying the passage of the Act, Congress expressly listed possession of a weapon as a factor that "tend[s] to indicate that the defendant will pose a danger to the safety of the community if released."[226] Posner's criticisms of *Dillard* were also misplaced insofar as the "crime of violence" provisions of the Bail Reform Act do not generally bear on whether a detention hearing is appropriate for the type of offense at issue in *Bailey*, the using or carrying of a firearm during and in relation to a crime of violence or a drug trafficking offense.[227] Such offenses, which are charged under Title 18, United States Code, Section 924(c), are accounted for in the Bail Reform Act at Section 3142(e), wherein Congress provided that such a crime should trigger a rebuttable presumption of detention.[228] Indeed, Congress spoke to this particular issue in the

224. 18 U.S.C. § 3156(a)(4)(A) (2003).

225. *See* 18 U.S.C. § 3156(a)(4)(B) (2003).

226. COMPREHENSIVE CRIME CONTROL ACT OF 1984, S. REP. NO. 98-225, at 22, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3205.

227. *See generally* Bailey v. United States, 516 U.S. 137 (1995) (addressing the meaning of the term "use" in 18 U.S.C. § 924(c)(1)(A)'s prohibition against the use or carrying of a firearm during or in relation to a drug trafficking offense or a crime of violence), *superseded, in part, by statute* in the Act to Throttle Criminal Use of Guns, Pub. L. No. 105-386, 112 Stat. 3469 (codified at 18 U.S.C. § 924(c)(1) (2003)). *See also* 144 CONG. REC. S12670–02 (daily ed. Oct. 16, 1998) (statement of Sen. DeWine) (discussing how the "Bailey Fix Act" was meant to embrace not only instances of brandishing, firing or displaying a firearm during a crime of violence or drug trafficking offense, but also to those situations where a defendant kept a firearm available to provide security for the transaction, its fruit or proceeds, or was otherwise emboldened by its presence in the commission of the offense).

228. 18 U.S.C. § 3142(e) (2003). The statute reads:

> Subject to rebuttal by the person, it shall be presumed that no condition or combination of conditions will reasonably assure the appearance of the person as required

Senate Report accompanying the Act, wherein it stated that "obvious considerations based upon the inherent dangers in committing a felony using a firearm support a rebuttable presumption for detention."[229] In light of these clear faults in the *Lane* decision, Judge Posner's assault on the *Dillard* decision should be rejected as poorly reasoned and wide of the mark.

VII. A STUDY IN CONTRAST: THE RELATIVE UNIFORMITY OF CASE LAW ADDRESSING WHETHER POSSESSION OF RESTRICTED FIREARMS (E.G., SHORT BARRELED SHOTGUNS) CONSTITUTES A "CRIME OF VIOLENCE"

Most cases addressing unlawful firearms possession under the Bail Reform Act have looked at felon-in-possession offenses.[230] A smaller number, however, have addressed whether the possession of restricted firearms constitutes a "crime of violence" under the Bail Reform Act.[231] Restricted firearms cases generally deal with violations of Title 26, United States Code, Section 5861, which forbids the possession of certain classes of unregistered firearms.[232] Section 5861 sets forth a variety of criminal tax violations that relate to a person's failure to register certain types of weapons or to pay the requisite tax for registration.[233] The types of weapons covered by

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and the safety of the community if the judicial officer finds that there is probable cause to believe that the person committed . . . an offense under section 924(c) . . . of title 18 of the United States Code.

Id.

229. COMPREHENSIVE CRIME CONTROL ACT OF 1984, S. REP. NO. 98-225, at 20, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3203.

230. *See supra* notes 111, 150, and 153.

231. *See* United States v. Newman, No. 97-1294, 1997 WL 603740 (10th Cir. Oct. 1, 1997); United States v. Stratton, No. CR. 00-0431 PHX SMM, CR 01-0152 PHX SMM, 2001 WL 527442 (D. Ariz. Apr. 24, 2001); United States v. Butler, 165 F.R.D. 68 (N.D. Ohio 1996); United States v. Crawford, No. 95-CR-169, 1995 WL 311345 (N.D.N.Y. May 16, 1995); United States v. Dodge, 842 F. Supp. 643 (D. Conn. 1994), *aff'd*, 846 F. Supp. 181 (D. Conn. 1994), *aff'd*, 61 F.3d 142 (2d Cir. 1995); United States v. Sloan, 820 F. Supp. 1133 (S.D. Ind. 1993); United States v. Kruszewski, No. 91-0031P, 1991 WL 268684 (N.D. Ind. Dec. 10, 1991); United States v. Aiken, 775 F. Supp. 855 (D. Md. 1991); United States v. Spires, 755 F. Supp. 890 (C.D. Cal. 1991).

232. *See, e.g., Aiken*, 775 F. Supp. at 855 (discussing the application of the Bail Reform Act to a defendant charged with, *inter alia*, possessing an unregistered sawed-off shotgun in violation of 26 U.S.C. § 5861(d)).

233. *See* 26 U.S.C. § 5861(a)–(l) (2003). Section 5861 is part of the National Firearms Act, which is codified at 26 U.S.C. § 5801 *et seq.* When Congress passed that Act, it "estab-

Section 5861 include short-barreled shotguns, firearm silencers, machine guns, and "destructive devices."[234] Under the law, these weapons are all classified as "firearms."[235]

Courts addressing the unlawful possession of restricted "firearms" have uniformly held that such possession is a "crime of violence" for the purposes of triggering a detention hearing under the Bail Reform Act.[236] In so holding, courts have reasoned that restricted classes of firearms are inherently dangerous and have no legitimate, peaceful purpose.[237] Based on this reasoning, these courts have concluded that the unlawful possession of such weapons constitutes a "substantial risk" of physical force so as to qualify

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lished a regulatory structure for the taxation of certain classes of firearms." United States v. Dodge, 61 F.3d 142, 145 (2d Cir. 1995).

234. As explained by the magistrate judge in *Dodge*:

> Not every firearm need be registered with the Department of the Treasury's National Firearms Registration and Transfer Record. The only firearms which must be registered are "firearms" within the meaning of 26 U.S.C. § 5845. As used in that section, the term "firearm" includes machineguns, sawed-off shotguns, sawed-off rifles, silencers, and "destructive devices." 26 U.S.C. § 5845(a)(7) & (8).

842 F. Supp. at 644.

235. *See* 26 U.S.C. § 5845(a) (2003) (including in the definition of "firearm" such weapons as short-barreled rifles and shotguns, machineguns, firearm silencers, and destructive devices). Section 5845(a) was explained by the magistrate judge in the *Dodge* opinion:

> The term "firearm" is narrowly defined in 26 U.S.C. § 5845(a) to include only those weapons and devices which Congress believed to be either so inherently dangerous and lacking in legitimate utilitarian purpose, or so susceptible to misuse in criminal activities that they should not be possessed by private citizens freely and without federal regulation.

842 F. Supp. at 644.

236. *See, e.g., Newman*, 1997 WL 603740, at *1 (finding that possession of unregistered pipe bombs in violation of 26 U.S.C. § 5861 constitutes a "crime of violence" under the Bail Reform Act so as to require a detention hearing); *Stratton*, 2001 WL 527442, at *3 (concluding that the possession of an unregistered short-barreled shotgun constitutes a "crime of violence" under the Bail Reform Act); *Dodge*, 846 F. Supp. at 183–84 (finding that possession of an unregistered silencer and an unregistered pipe bomb constitutes "crime of violence" under Bail Reform Act).

237. *See, e.g., Dodge*, 846 F. Supp. at 184 ("[B]oth a silencer and a pipe bomb are inherently dangerous weapons for which no peaceful purpose can be seriously suggested, regardless of whether the weapons actually are used."); *cf.* United States v. Lane, 252 F.3d 905, 907 (7th Cir. 2001) ("Some firearms, it is true—for example, sawed-off shotguns—have no significant lawful use, and so their possession by felons may well constitute a crime of violence . . . .").

as a "crime of violence" under the definition listed at Title 18, United States Code, Section 3156(a)(4)(B).[238]

The case authorities discussed above are not in dispute. For example, Judge Posner expressed agreement with the rationale of those cases in his opinion in *Lane*.[239] Despite this lack of dispute, there seems to be little reason to justify one view of persons who possess prohibited firearms and a contrasting view of persons who are prohibited from possessing firearms. Although some judges—like Judge Posner in *Lane*—argue that felons who possess firearms are not *always* more likely to use violence,[240] the same argument can be made for those who possess unregistered "firearms" under the National Firearms Act. Absent empirical data or case-specific information,[241] it is not possible to say whether an otherwise law-abiding person with an unregistered machinegun is more or less likely to engage in violence than a felon or domestic abuser who unlawfully possesses a handgun. A machinegun may be a more potent weapon

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238. *See, e.g.*, *Newman*, 1997 WL 603740, at *1 (concluding that the possession of an unregistered "firearm" in violation of the National Firearms Act constitutes a "crime of violence" under the Bail Reform Act).

239. *Lane*, 252 F.3d at 907 ("Some firearms, it is true—for example, sawed-off shotguns—have no significant lawful use, and so their possession by felons may well constitute a crime of violence . . . .").

240. *See, e.g.*, United States v. Singleton, 182 F.3d 7, 15 (D.C. Cir. 1999) ("[N]ot all felons are potentially more violent than non-felons."). In *Lane*, the court questions:

> A person who has been convicted of committing a felony (and has not been pardoned) is no doubt more likely to make an illegal use of a firearm than a nonfelon, and the illegal use is likely to involve violence. Otherwise it would be a little difficult to see why being a felon in possession of a firearm is a crime. But is the risk *substantial*? And for *all* felonies other than those . . . excepted from the reach of section 922(g)(1) . . .?

252 F.3d at 906.

241. It is telling that the *Singleton* court faulted the prosecution and the so-called "majority view" opinions for presuming that armed felons pose a substantial risk of violence because such a theory is "laden with factual assumptions for which the government offers no empirical support." *Singleton*, 182 F.3d at 14. Notwithstanding the *Singleton* court's criticism, there is ample empirical evidence of recidivism among felons, including violent felons. According to a June 2002 special report from the Bureau of Justice Statistics, 67.5% of prisoners who were released from prison were rearrested for a new felony or serious misdemeanor offense within three years. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SPECIAL REPORT: RECIDIVISM OF PRISONERS RELEASED IN 1994 1 (June 2002) (on file with the University of Michigan Journal of Law Reform). Among prisoners with the highest rearrest rates were those who were in prison for "possessing, using, or selling illegal weapons (70.2%)." *Id.* Violent offenders were 61.7% more likely to be rearrested for a new offense within three years. *Id.* at 2. Of the 272,111 prior inmates who were tracked after being released in 1994, 67.8% had a record of violence. *Id.* at 5. Accordingly, the *Singleton* court's reliance on the lack of empirical evidence for links to recidivism and violent tendencies among ex-felons appears to be misplaced. Such evidence does exist.

than a handgun, but its potential will not be unleashed sitting on a gun collector's shelf. Conversely, a small caliber derringer could wreak havoc in the hands of a violent criminal. Without an evidentiary hearing, the relative difference in the risk of violence cannot accurately be known.[242] Accordingly, the judicial distinction between crimes involving restricted weapons and crimes involving people restricted from possessing weapons seems artificial and ignores the reality that a gun, whatever its type, is more likely to cause violence when left in the wrong hands.[243] This is especially true under the Bail Reform Act, where the defendant, not the weapon, is being evaluated for potential danger to the community.[244]

VIII. GUIDANCE PROVIDED BY THE GUN CONTROL ACT OF 1968

A. The Gun Control Act

To determine whether firearms crimes fall within the "crime of violence" definition contained in the Bail Reform Act, one can look to the legislative history of that Act, which is only partially instructive, or one can look more broadly at Congress' perception of the risks inherent in the sorts of firearms possession offenses at issue. If one endeavors to do the latter, it becomes clear that, in prohibiting firearms possession by certain individuals and restricting

242. In *United States v. Silva*, 133 F. Supp. 2d 104 (D. Mass. 2001), a magistrate judge reasoned that the felon-in-possession offense is not a crime of violence because not every felon is dangerous: "To be sure, many felons have committed violent offenses. Perhaps there is something in their nature, whether innate or acquired, biological or social, that has led them down the path of violence and mayhem. But it is the individuality of that person that is key to that dangerousness. . . ." *Id.* at 112. The same logic can be applied to possessors of unregistered firearms, especially those without criminal histories. Yet under the Bail Reform Act's categorical approach to "crimes of violence," possession of unregistered firearms is always considered violent. The felon-in-possession offense may not be so regarded. Both crimes, however, are premised on a risk of potential violence. *See* discussion of Gun Control Act, *infra* notes 246–64 and accompanying text. Accordingly, defendants in both classes of cases should qualify for a detention hearing to determine whether their "individuality" reveals "something in their nature" that makes them dangerous.

243. United States v. Aiken, 775 F. Supp. 855, 856–57 (D. Md. 1991) ("This Court is also concerned that there is an increased risk that a criminally-inclined individual will be more likely to use a firearm already in his possession to commit another crime.").

244. *See* 18 U.S.C. § 3142(e),(g) (2003) (discussing the factors that courts should consider in determining whether detention is appropriate).

the possession of certain classes of firearms, Congress was concerned with preventing gun violence.[245]

Congress made its first earnest strides into federal gun control with the passage of the Gun Control Act of 1968.[246] Although federal firearms legislation was passed prior to that Act, such legislation dealt narrowly with the organized crime and gang problems of Prohibition and the 1930s[247] and, thereafter, the war surplus importation boom following the Second World War.[248] Those pieces of legislation dealt more with the risks inherent in the possession of certain types of firearms, e.g. dangerous firearms like machine guns, rather than placing prohibitions on gun ownership by classes of individuals.[249] Until 1968, nothing was enacted at the federal level to address the general risks of violence inherent in gun possession by troublesome individuals, as distinguished from prior federal regulation and restriction of certain types of firearms and firearm transactions.[250] The Gun Control Act of 1968 did, however, focus on preventing gun violence, and the history of the Act demonstrates the origins and significance of the Act's prohibitions.[251]

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245. *See* GUN CONTROL ACT OF 1968, H.R. CONF. REP. NO. 90-1577, at 4412 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4410, 4412 ("This increasing rate of crime and lawlessness and the growing use of firearms in violent crime clearly attest to a need to strengthen Federal regulation of interstate firearms traffic."); *see also* 131 CONG. REC. S9169 (daily ed. July 9, 1985) (statement of Sen. Hatch) ("[W]hen Congress enacted the Gun Control Act of 1968, its intent was to reduce violent crime.").

246. *See* William J. Vizzard, *The Gun Control Act of 1968*, 18 ST. LOUIS U. PUB. L. REV. 79, 84 (Symposium 1999) (explaining that "[a]t no time before or since [passage of the Gun Control Act] has Congress addressed gun control policy with as much breadth or depth," and that "[t]itle VII [of the Act] addressed simple firearm possession for the first time at the federal level").

247. *See* Sen. Richard J. Durbin, *Taking Guns Seriously: Common Sense Gun Control to Keep Guns out of the Hands of Kids and Criminals*, 18 ST. LOUIS U. PUB. L. REV. 1, 3 (Symposium 1999) ("Support for the first national gun law, the National Firearms Act of 1934, grew during the 1920's and the era of Prohibition as a way to stop widespread mobster shootings and turf wars. The law imposed a tax of $200 on the transfer of any machine gun or sawed off shotgun.").

248. *See* Vizzard, *supra* note 246, at 79 ("Clearly protectionist, the legislation targeted the increase in imported firearms, the great majority of which were military surplus.").

249. H.R. CONF. REP. NO. 90-1956, at 4412 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4426, 4434 (referring to the 1934 legislation and its coverage and stating "[t]he present National Firearms Act covers gangster-type weapons such as machineguns, sawed-off shotguns, short-barreled shotguns, mufflers, and silencers").

250. *See* Vizzard, *supra* note 246, at 84 (explaining that the Gun Control Act of 1968 "addressed simple firearm possession for the first time at the federal level").

251. GUN CONTROL ACT OF 1968, H.R. CONF. REP. NO. 90-1577, at 4412 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4410, 4412 (beginning the "general statement" of the Conference Report with a discussion of how the "increasing rate of crime and lawlessness and the grow-

B. Background to the Gun Control Act

The legislative history of the Gun Control Act demonstrates that is was motivated by public concerns about the misuse of firearms and the growing rate of violent crime.[252] Aside from the actual comments of the proponents of the Act, which will be detailed below, the historical backdrop of the Act shows many of the events and concerns motivating the desire for heightened gun control. Although this Article will not retrace the full history of growing crime and violence during the 1960s, it is worth noting that during the years leading up to the passage of the Act, a sitting President and numerous civil rights leaders were assassinated.[253] Just weeks before the passage of the Act, and during its discussion and consideration in Congress, guns were used to kill Dr. Martin Luther King and presidential candidate and United States Senator Robert Kennedy.[254] As explained by one commentator: "After the 1968 assassinations of Robert Kennedy and Martin Luther King a groundswell of visible support for more decisive federal action temporarily materialized."[255]

The impact of these assassinations can be seen in the comments of those initiating the legislation. For example, Senator Russell Long, who proposed that portion of the Act that gave rise to the current felon-in-possession statute, explained the purpose and motivation of his proposed statute in a prepared statement he read into the record on the floor of the Senate:

> Of all of the gun bills that have been suggested, debated, discussed and considered, none except this Title VII attempts to bar possession of a firearm from persons whose prior behaviors have established their violent tendencies. . . .
>
> Under Title VII, every citizen could possess a gun until the commission of his first felony. Upon his conviction, however,

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ing use of firearms in violent crime clearly attest to a need to strengthen Federal regulation of interstate firearms traffic").

252. *See id.*

253. *See, e.g.*, Jim F. Couch & William F. Shugart, Jr., *Crime, Gun Control, and the BATF: The Political Economy of Law Enforcement*, 30 FORDHAM URB. L.J. 617, 620 (2003) (discussing how the Gun Control Act of 1968 was "[p]assed in the wake of the assassinations of President John F. Kennedy and Dr. Martin Luther King, Jr.").

254. *See* Vizzard, *supra* note 246, at 83.

255. *Id.* at 85.

> Title VII would deny every assassin, murderer, thief and burglar of the right to possess a firearm in the future. . . .
>
> Despite all that has been said about the need for controlling firearms in this Country, no other amendment heretofore offered would get at the Oswalds or the Galts. They are the types of people at which Title VII is aimed.[256]

Although rife with the hyperbole characteristic of hot button political debate, the motivation behind Senator Long's proposal is clear. References to the prevalence of firearm violence can be found throughout the legislative debate surrounding the Act's passage and elsewhere in the congressional reports accompanying the Act's passage. For example, the House Report, which was issued just sixteen days after the assassination of Robert Kennedy,[257] led off its "general statement" section with a statement about how the "increasing rate of crime and lawlessness and the growing use of firearms in violent crime clearly attest to a need to strengthen Federal regulation of interstate firearms traffic."[258] In support of that statement, the Report then proceeded to lay out the types of firearms violence that the Act was intended to address and hopefully prevent:

> Handguns, rifles, and shotguns have been the chosen means to execute three-quarters of a million people in the United States since 1900. The use of firearms in violent crimes continues to increase today. Statistics indicated that 50 lives are destroyed by firearms each day. In the 13 months ending in September 1967 guns were involved in more than 6,500 murders, 10,000 suicides, 2,600 accidental deaths, 43,500 aggravated assaults, and 50,000 robberies. No civilized society can ignore the malignancy which this senseless slaughter reflects.[259]

Even with all other indicators of legislative intent, the comments of Senator Long, as the primary drafter of the legislation, appear to be the most salient on the question of intent. Indeed,

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256. 114 CONG. REC. 14,773–74 (1968) (statement of Sen. Long).

257. The House Report was issued on June 21, 1968. *See* H.R. REP. No. 90-1577 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4410. Senator Kennedy was assassinated on June 5, 1968. *See, e.g.*, Vizzard, *supra* note 246, at 83.

258. H.R. REP. No. 90-1577, at 4412 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4410, 4412.

259. *Id.* at 4413.

just three years after the passage of the Act, the Supreme Court revisited the Act's passage and legislative history, and noted the comments of Senator Russell Long, who proposed that portion of the Act that gave rise to the current felon-in-possession statute. The Court summarized Senator Long's comments in the following way: "On the Senate floor, Senator Long, who introduced § 1202, described various evils that prompted his statute. These evils included assassinations of public figures and threats to the operation of businesses significant enough in the aggregate to affect commerce."[260] In his prepared statement promoting his bill, Senator Long gave a very clear picture of the concerns underlying his proposal to outlaw firearms possession by certain classes of people:

> This proposed title would make it a Federal crime for the following classes of persons to receive, possess, or transport any firearm in commerce, or affecting commerce:
>
> 1. Convicted felons.
> 2. Persons discharged from the Military under other than honorable conditions.
> 3. Mental incompetents.
> 4. Persons who have renounced their United States citizenships [sic].
> 5. Aliens illegally in this Country.
>
> . . . .
>
> Clauses 1–5 describe persons who, by their actions, have demonstrated that they are dangerous, or that they may become dangerous. Simply stated, they may not be trusted to possess a firearm without becoming a threat to society.[261]

Based upon the foregoing, it is clear that Senator Long's proposal, which was passed by Congress in substantially the same form as described above, was motivated by concerns about the danger to society inherent in the possession of firearms by the likes of prior felons, the mentally ill, and those who have

260. United States v. Bass, 404 U.S. 336, 345 (1971) (citing 114 CONG. REC. 13,868–71, 14,772–75 (1968)).

261. 114 CONG. REC. 14,773 (1968) (statement of Sen. Long).

renounced their United States citizenship.[262] In the words of Senator Long, "[t]heir very acts show that society must be protected from them."[263]

IX. TYING IT ALL TOGETHER

In light of the purposes underlying the Bail Reform Act, there should be little question about whether the Act *should* allow for a safety-based detention hearing in cases involving unlawful possession of firearms by prohibited persons. Failing Congressional intervention to change the Act's disputed language, however, the salient issue is somewhat different. At issue is whether the Act, in fact, allows for such a hearing. The answer to that question appears to be the same as the answer to the general policy question posed above, despite the acknowledged ambiguity in the Act's language. After all, the language of the Act's "crime of violence" definition appears to be expansive, expressed in a manner covering not only those crimes directly linked to the use of force (i.e., where force is an element), but also "any other offense" bearing a substantial risk that the use of force *may* be used in the course of that offense.[264] With this broad, albeit somewhat ambiguous, definition, it should be clear that the Bail Reform Act was not intended to preclude a detention hearing in those borderline cases where physical force, while not inevitable, "may be used."[265]

While this uncertainty in statutory language may suggest, but not compel, a broad "crime of violence" definition that encompasses firearms possession offenses, the legislative history resolves this uncertainty. The legislative commentary to the Act repeatedly makes clear that the Act's principal concern was with the prior law's failure to give judges the authority or flexibility to consider a defendant's dangerousness or the community's safety in evaluating detention. Indeed, in its commentary to the 1984 Act, Congress bluntly stated that "it is intolerable that the law denies judges the

262. Subsequent Congressional debate on amendments to the Gun Control Act further confirms that the Act was aimed at curbing violent acts by armed felons and other prohibited persons. As Senator Hatch of Utah stated in a 1985 debate on the Federal Firearms Owners Protection Act, "when Congress enacted the Gun Control Act of 1968, its intent was to reduce violent crime . . . ." 131 CONG. REC. S9169 (daily ed. July 9, 1985) (statement of Sen. Hatch).

263. 114 CONG. REC. 14,774 (1968) (statement of Sen. Long).

264. *See* 18 U.S.C. § 3156(a)(4)(B) (2003).

265. *Id.*

tools to make honest and appropriate decisions regarding the release of [dangerous] defendants."[266]

Aside from these general concepts favoring a broad construction of the Act's detention hearing qualifiers, the legislative history also specifically favors the eligibility of firearms possession offenses for a detention hearing. In the legislative commentary discussing the quantum of evidence required for detention on safety grounds, Congress expressly mentioned firearms possession. Specifically, the Committee authoring the report that accompanied passage of the Act stated that "if the dangerous nature of the current offense is to be a basis of detention, then there should be evidence of the specific elements or circumstances of the offense, *such as possession* or use *of a weapon* . . ., that tend to indicate that the defendant will pose a danger to the safety of the community if released."[267] In light of this specific language addressing offenses involving firearms possession, it is surprising that courts have disagreed about the Act's application to firearms possession offenses.

The disagreement among courts is even more surprising when the history of the Gun Control Act is considered in earnest. Indeed, it is remarkable that any court could seriously question whether a felon in possession of a firearm should be evaluated for potential danger to the community when the chief proponent of the felon-in-possession prohibition made clear that his proposal was aimed at "persons who, by their actions, have demonstrated that they are dangerous, or that they may become dangerous."[268] Such indecision is even more remarkable when the same legislator amplified his concerns by explaining that prior felons "[s]tated simply, . . . may not be trusted to possess a firearm without becoming a threat to society."[269]

Although some courts have signaled a distaste for the safety-based detention of unlawful firearms possessors, as evidenced by the *Singleton* court's use of the term "incapacitation" in describing pretrial detainees,[270] the core issue here does not deal with whether certain defendants should be detained pending trial. Rather, the issue is whether detention can even be considered with respect to those defendants. Even in those egregious cases of firearms possession by recidivist violent felons, be they rapists, murderers, or child

266. COMPREHENSIVE CRIME CONTROL ACT OF 1984, S. REP. NO. 98-225, at 5, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3188.

267. *Id.* at 22, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3205.

268. 114 CONG. REC. 14,773 (1968) (statement of Sen. Long).

269. *Id.*

270. United States v. Singleton, 182 F.3d 7, 16 (D.C. Cir. 1999).

molesters, the Bail Reform Act still puts the burden on the prosecution to prove danger to the community by clear and convincing evidence. Accordingly, where the prosecution cannot prove a danger to the community, there is no risk of detention. It is only where there is a demonstrable danger to the community that the so-called minority view of courts, led by *Singleton*, impacts the process by denying judges the ability to consider detention.

X. ONE LAST WRINKLE

Although the Bail Reform Act's pretrial detention provisions generally provide for a hearing, the Act's provisions for detention pending sentencing or appeal after a guilt finding do not.[271] In cases where a defendant has been found guilty of certain drug trafficking offenses or any "crime of violence," detention pending sentencing or appeal is mandatory, with very few exceptions.[272] Accordingly, a different and more serious consequence flows from the classification of a crime as a "crime of violence" for the purpose of detention post-trial or post-guilty plea. Thus, one of the chief safeguards supporting the classification of unlawful firearm possession as a "crime of violence" in the pretrial context—namely that a hearing and weighty burden of proof would still be required for detention—is not present at the presentencing and appeal stages of proceedings.

Dillard and its progeny generally ignore the foregoing concern when they rely upon the safeguard of a hearing to justify including unlawful firearms possession within the Bail Reform Act's "crime of violence" definition.[273] For example, the *Dillard* opinion incorrectly states that "[t]he conclusion that the felon-in-possession offense is within the definition of crime of violence does not cause the

271. *Compare* 18 U.S.C. § 3142(f) (2003) (setting forth the detention hearing procedure for pretrial detention determinations), *with* 18 U.S.C. § 3143(a)(2) (2003) (mandating that the judge order certain categories of defendants detained pending sentencing and appeal, unless an acquittal or new trial order is likely, or the defendant does not face a sentence of imprisonment and is unlikely to flee or pose a danger).

272. 18 U.S.C. § 3143(a)(2) (2003).

273. *See* United States v. Dillard, 214 F.3d 88, 96 (2d Cir. 2000); *see also* United States v. Stratton, No. CR. 00-0431 PHX SMM, CR. 01-0152 PHX SMM, 2001 WL 527442, at *3 (D. Ariz. Apr. 24, 2001) (failing to acknowledge the complications of the Bail Reform Act at the presentencing and appeal stages by stating that "[i]f a broader scope [of the "crime of violence" definition] is permitted, the Court can then proceed with a detention hearing, requiring the Government to prove on a case-by-case basis by a clear and convincing standard whether the particular person before it is a danger to the community").

defendant's detention. It does no more than cause a hearing to consider whether the defendant is in fact dangerous (or likely to flee)."[274] To the contrary, such a classification can, in fact, "cause the defendant's detention" for all post-trial and post-guilty plea proceedings.[275]

Section 3143(a)(2) of the Bail Reform Act mandates that, except a few limited circumstances, "[t]he judicial officer shall order that a person who has been found guilty of an offense in a case described in subparagraph (A), (B), or (C) of subsection (f)(1) of section 3142 and is awaiting imposition or execution of sentence be detained. . . ."[276] Subparagraph (A) of § 3142(f)(1) pertains to all offenses that fall within the definition of "a crime of violence."[277] Section 3143(b)(2) provides similar language requiring the detention of such defendants pending appeal.[278]

The rigid language of Section 3143 should not, however, foreclose a defendant's release pending sentencing or appeal in all firearms possession cases, even if such offenses are classified as crimes of violence under the Bail Reform Act. As with most other areas relating to detention and sentencing, the law provides a safety valve which allows a judge to release a defendant pending sentencing or appeal if "exceptional reasons" exist to support such a release.[279] Section 3145(c) of the Bail Reform Act provides that a defendant detained under the restrictive provisions can be released, if such release is otherwise proper, "if it is clearly shown that there are exceptional reasons why such person's detention would not be appropriate."[280] Thus, if a judge is confronted with an exceptionally nonviolent or nonthreatening firearms possession case, such as the simple possession of hunting rifles by a former felon—an offense that, by design, receives lenient treatment under the Sentencing Guidelines[281]—the judge would retain the discretion under the law to release the defendant on bond.

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274. *Dillard*, 214 F.3d at 96.

275. *See* 18 U.S.C. § 3143(a)(2) (2003).

276. *Id.*

277. 18 U.S.C. § 3142(f)(1)(A) (2003).

278. 18 U.S.C. § 3143(b)(2) (2003) ("The judicial officer shall order that a person who has been found guilty of an offense in a case described in subparagraph (A), (B), or (C) of subsection (f)(1) of section 3142 and sentenced to a term of imprisonment, and who has filed an appeal or petition for a writ of certiorari, be detained.").

279. 18 U.S.C. § 3145(c) (2003).

280. *Id.*

281. *See* U.S. SENTENCING GUIDELINES MANUAL § 2K2.1(b)(2) (2002) (lowering a defendant's offense level significantly if the defendant is found to have "possessed all ammunition and firearms solely for lawful sporting purposes or collection, and did not unlawfully discharge or otherwise unlawfully use such firearms or ammunition").

Although the aforementioned wrinkle in the law would reduce a judge's ability to release certain defendants pending sentencing or appeal if unlawful firearms possession crimes were classified as crimes of violence, the effect would be offset by a greater judicial discretion to address detention issues in the pretrial context. Additionally, while judicial discretion would be limited at the presentencing and appeal stages, judges would still retain the ability to avoid unjust detention in "exceptional" cases. This shifting of judicial discretion from the post-trial or post-guilty plea stages to the beginning of proceedings makes sense. At the outset of a case, much less is known about a particular defendant or the specifics of his crime. A judge, accordingly, needs to be given the leeway at this preliminary stage to make detention decisions after hearing evidence about the defendant and his crime. After a defendant's guilt has been established, the same degree of judicial discretion is not needed. This reality is reflected in the law, which shifts during the post-guilt phase away from the flexible procedures which effectively favor release in most cases. During post-guilt proceedings, detention is presumed in all cases where imprisonment is likely and the burden is placed on the defendant to prove why he or she should be detained.[282] Moreover, as mentioned above, detention is very nearly compelled by law in certain drug and all violent felony cases.[283] This reduction in the discretion afforded courts comports with Judge Posner's observation in *Lane* that "[o]nce the defendant has been convicted, the likelihood of a miscarriage of justice is much less and so the conditions of release are much tighter."[284] Thus, while the much-needed increase in judicial discretion at the outset of proceedings may lessen judicial discretion in the post-guilt phase, such a reduction is far from absolute and is fully consistent with the language and spirit of the Bail Reform Act. Accordingly, the one last wrinkle created by the inclusion of unlawful firearms crimes in the "crime of violence" definition should not stand in the way of giving judges the ability to hold pretrial detention hearings to gauge whether individual gun criminals pose a danger to the community.

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282. *See* 18 U.S.C. § 3143(a)(1) (2003) (mandating that the judge "shall order" the detention of any defendant "who has been found guilty and is awaiting imposition or execution of sentence" unless there is "clear and convincing evidence" that the defendant "is not likely to flee or pose a danger to the safety of any other person or the community if released").

283. *See* 18 U.S.C. § 3143(a)(2) (2003).

284. United States v. Lane, 252 F.3d 905, 908 (7th Cir. 2001).

XI. CONCLUSION

When making bail determinations, judges should be allowed to evaluate the danger posed by those accused of unlawful firearms possession. Where Congress has proscribed the possession of firearms, it has done so based on the perceived danger inherent in the types of firearms it has restricted and the categories of individuals it has barred from possessing them. This legislative perception of danger militates strongly in favor of classifying firearms possession offenses as "crime[s] of violence" under the Bail Reform Act of 1984. After all, the primary purpose behind the Bail Reform Act was to give judges the ability to consider a defendant's danger to the community in making bail determinations.

Accordingly, the restrictive interpretation given by some courts to the Act's "crime of violence" language should be rejected as inconsistent with both the Act's language and purpose. A better approach is to give courts the ability to hold detention hearings to evaluate the danger posed by those who unlawfully possess firearms. Such an approach not only better implements the Bail Reform Act's intended purpose, but it also acknowledges the reality that Congress recognized in outlawing various types of firearms possession, namely that certain individuals and weapons pose a threat to the safety of the community if left unregulated.