
**THE ROAD TO AND FROM *POWELL*:
JUDGE ALEXANDER’S DETERMINATION
THAT THE CHARGE OF BEING A FELON
IN POSSESSION OF A FIREARM DOES NOT
CONSTITUTE A “CRIME OF VIOLENCE”
UNDER THE BAIL REFORM ACT
PREVAILS**

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I. INTRODUCTION

Under the Bail Reform Act of 1984,¹ United States Magistrate Judges must balance the liberty interests of federally-charged criminal defendants – constitutionally entitled to a presumption of innocence – with concerns over maintaining the safety of specific individuals and/or the general public. The task, obviously, is not an easy one, and the release or detention decision a United States Magistrate Judge makes under the Bail Reform Act will likely have important ramifications, including whether the defendant is ultimately convicted and, if so, the sentence she receives.²

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1. 18 U.S.C. §§ 3141-3156 (2000).

2. See Douglas L. Colbert, *Thirty-Five Years After Gideon: The Illusory Right to Counsel at Bail Proceedings*, 1998 U. ILL. L. REV. 1, 6 n.27.

The American Bar Association Standards Relating to Pretrial Release and studies conducted in Philadelphia, New York, and Washington, D.C., demonstrated the “strong relationship between detention and unfavorable disposition.” State v. Fann, 571 A.2d 1023, 1026 (N.J. Super. Ct. Law Div. 1990) (quoting STANDARDS RELATING TO PRETRIAL RELEASE *Introduction* at 3 (1968)). Earlier studies revealed

The Bail Reform Act was designed to allow for pretrial detention of certain defendants in six limited circumstances.³ Despite congressional design for limited pretrial detention⁴ and the Supreme Court's recognition

that incarcerated defendants were much more likely to be convicted and to receive sentences two or three times greater than individuals who were released pending trial. *Id.* at 1026; *see also* RONALD GOLDFARB, RANSOM: A CRITIQUE OF THE AMERICAN BAIL SYSTEM 36-40 (1965); Charles E. Ares et al., *The Manhattan Bail Project: An Interim Report on the Use of Pretrial Parole*, 38 N.Y.U. L. REV. 67 (1963); Caleb Foote, *The Coming Constitutional Crisis in Bail* (part 1), 113 U. PA. L. REV. 959, 960 (1965); Caleb Foote, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. PA. L. REV. 1031, 1052 (1954) (comparing defendants charged with violent crimes; 67% of released defendants, and 25% of jailed defendants, were acquitted); Anne Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U. L. REV. 641 (1964) (stating that 64% of defendants jailed received prison sentences compared to 17% who were released). *But cf.* Gerald R. Wheeler & Carol L. Wheeler, *Bail Reform in the 1980s: A Response to the Critics*, 18 CRIM. L. BULL. 228 (stating that a causal relationship between detention and conviction may be statistically insignificant). In general, jailed defendants will find it more difficult to prepare a successful defense and are more likely to plead guilty the longer they await trial in jail. *See* JOHN S. GOLDKAMP, TWO CLASSES OF ACCUSED: A STUDY OF BAIL AND DETENTION IN AMERICAN JUSTICE 84-85 (1979) (reporting on a Washington, D.C. study by David McCarthy and Jeanne Wahl).

Id.

3. *See* 18 U.S.C. § 3142(f) (2000).

The judicial officer shall hold a hearing to determine whether any condition or combination of conditions ... 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 a maximum sentence is life imprisonment or death; (C) an offense for which the 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; or (2) 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.

Id.

4. *See* United States v. Phillips, 732 F. Supp. 255, 260 (D. Mass. 1990) (quoting from S. REP. NO. 225, 98th Cong., 2d Sess. 6-7, reprinted in 1984 U.S. CODE CONG. &

that “[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception,”⁵ 2001 Bureau of Justice Statistics reveal that detention hearings were held for fifty-two percent of federal criminal defendants; of those defendants, three-quarters were ordered detained.⁶

Of the enumerated circumstances in which the government may, by motion, seek detention, perhaps the most ambiguous is where the case “involves a crime of violence. . . .”⁷ While the Bail Reform Act defines “crime of violence,”⁸ it does not specifically identify those federal crimes that fit within the statutory definition. Therefore, United States Magistrate Judges (and further reviewing courts) must look at certain offenses and determine whether they, in fact, meet the statutory definition.

United States Magistrate Judge Alexander’s (Judge Alexander’s) decision in *United States v. Powell*⁹ is one of the earliest decisions concerning whether the government could seek detention of a defendant charged with being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1).¹⁰ The government’s justification for detention in

ADMIN. NEWS 3182, 3189). The text stated:

As the legislative history demonstrates, Congress limited pretrial preventive detention to these six circumstances because Congress was especially concerned with “a small but identifiable group of particularly dangerous defendants as to whom neither the impos[i]tion of stringent release conditions nor the prospect of revocation of release can reasonably assure the safety of the community or other persons. It is with respect to this limited group of offenders that the courts must be given the power to deny release pending trial.”

Id.

5. *United States v. Salerno*, 481 U.S. 739, 755 (1987).

6. *See* 2001 Bureau of Justice Statistics, Federal Justice Statistics, *available at* <http://www.ojp.usdoj.gov/bjs/fed.htm> (last visited Mar. 9, 2004).

7. 18 U.S.C. § 3142(f)(1)(A) (2000).

8. *Id.* § 3156(a)(4) (2000). The Act defines “crime of violence” as:

(A) an 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;

(B) 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; or

(C) any felony under chapter 109A, 110, or 117. . . .

Id.

9. 813 F. Supp. 903 (D. Mass. 1992).

10. 18 U.S.C. § 922(g)(1) states:

It shall be unlawful for any person who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any

Powell was because the charged offense presented a “crime of violence” under the Bail Reform Act.¹¹ Despite the dearth of published decisions on the issue, and further, despite a contrary decision in the District of Massachusetts,¹² Judge Alexander held in *Powell* that the charge of being a felon in possession of a firearm did not constitute a “crime of violence” under the Bail Reform Act.¹³ In 2001, in *United States v. Silva*,¹⁴ Judge Alexander had the opportunity to revisit and reconsider her well-reasoned decision in *Powell*, but she declined.¹⁵ As shown below, Judge Alexander’s analyses in the *Powell* and *Silva* decisions rightfully have prevailed, and likely will continue to do so.

II. THE ROAD TO *POWELL*

The Bail Reform Act of 1984 engendered much controversy because it presented a marked departure from traditional bail decisions that focused on whether a charged defendant would return to court for trial.¹⁶ The Bail Reform Act was subject to, but ultimately survived, attacks on its constitutionality in *United States v. Salerno*.¹⁷ Despite surviving these attacks, courts have recognized that the Bail Reform Act must be construed narrowly to preserve the Supreme Court’s acknowledgement in *Salerno* that detention prior to trial should be a “carefully limited exception” to the

firearm or ammunition; or to receive any firearm or ammunition which has been shipped in interstate or foreign commerce.

Id. 18 U.S.C. § 921(a)(20)(A) exempts a felon who has been convicted of “any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices” from a charge under 18 U.S.C. § 922(g)(1).

11. See *Powell*, 813 F. Supp. at 906. Judge Alexander had previously decided, in an unpublished decision, that the felon in possession charge did not constitute a “crime of violence” for purposes of the Bail Reform Act. See *United States v. Whitford*, No. 92-73-J, 1992 WL 188815, at *4 (D. Mass. July 27, 1992).

12. See *United States v. Phillips*, 732 F. Supp. 255, 265-66 (D. Mass. 1990).

13. See *Powell*, 813 F. Supp. at 907.

14. 133 F. Supp. 2d 104 (D. Mass. 2001).

15. See *id.* at 110.

16. See Craig Ethan Allen, *Pretrial Detention and the Loss of Innocence*, *United States v. Salerno*, 107 S. Ct. 2092 (1987), 11 *HAMLIN L. REV.* 331, 331-32 (1988). Allen explained this controversy by stating:

The Bail Reform Act of 1984 marked a significant departure from traditional notions of the purpose of bail in the criminal justice system. Under the previous Bail Reform Act, neither danger to the community nor protection of society could be considered as factors in setting bail or denying pretrial release. Prior to 1984, the sole purpose of bail was to assure the appearance of the defendant at trial.

Id. (citations omitted).

17. 481 U.S. 739, 755 (1987).

“norm” of liberty.¹⁸

At the time of Judge Alexander’s 1992 *Powell* decision, she could look to very little case precedent concerning whether the offense of being a felon in possession of a firearm constituted a “crime of violence” such that the government could seek pretrial detention under the Bail Reform Act. At that time, *United States v. Phillips* was the only published decision in the District of Massachusetts or First Circuit directly on point.¹⁹

In *Phillips*, the United States District Court for the District of Massachusetts acknowledged that the phrase “crime of violence” needed to be interpreted narrowly. The *Phillips* court found that an offense could only be a “crime of violence” if the risk of violence was “inherent in the nature of the crime, regardless of whether there was a risk of violence, or any actual violence, during the commission of the offense under the facts of the particular case.”²⁰ The court found that the defendant could be detained only if “possession of a firearm by a felon . . . ‘by its nature involves a substantial risk that physical force may be used in the course of’ the possession.”²¹ The court found that being a felon in possession fit within the “crime of violence” definition under the Bail Reform Act:

A felon is more likely to know that such possession is illegal and is more likely to be possessing a firearm with willful disregard for the legal obligations imposed upon him as a convicted felon. This also makes it more likely that he will commit another crime, and that he will do so with a firearm in his possession. Also, possession of a firearm is an on-going offense, and may lead to the use of the firearm.²²

Shortly after the *Phillips* decision, the First Circuit was presented with a similar issue in *United States v. Doe*.²³ In *Doe*, the court was asked whether

18. *Id.* at 755; *see, e.g.*, *United States v. Gloster*, 969 F. Supp. 92, 96-97 (D. D.C. 1997). The opinion stated:

Finally, it should be noted that this entire inquiry takes place against the backdrop of a strong presumption against detention. “In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.” Despite this presumption of liberty, individuals accused of crimes for which they have not been convicted may be detained in some cases, in large part because “[t]he Bail Reform Act carefully limits the circumstances under which detention may be sought to the most serious of crimes.” This careful tailoring ensures not only the Act’s fairness but its constitutionality.

Gloster, 969 F. Supp. at 96-97 (citations omitted).

19. 732 F. Supp. 255, 262-63 (D. Mass. 1990).

20. *Id.* at 261 (citations omitted).

21. *Id.* at 262 (quoting 18 U.S.C. § 3156(a)(4)(B) (2000)) (citations omitted).

22. *Id.* at 263 (citations omitted).

23. 960 F.2d 221 (1st Cir. 1992).

the crime of being a felon in possession of a firearm was a “violent felony” subjecting the defendant to a fifteen-year minimum mandatory prison term under 18 U.S.C. § 924(e). That statute’s definition of “violent felony” includes any felony that “involves conduct that presents a serious potential risk of physical injury to another.”²⁴ To answer this question, the First Circuit applied “a formal categorical approach, looking only to the statutory definition of the prior offenses and not to the particular facts underlying those convictions,” and held that being a felon in possession of a firearm was not itself a “violent felony.”²⁵

First, the *Doe* court said simple possession of a firearm did not

fit easily within the literal language of the statute It is much harder . . . to imagine such a risk of physical harm often accompanying the conduct that normally constitutes firearm possession, for simple possession, even by a felon, takes place in a variety of ways (e.g., in a closet, in a storeroom, in a car, in a pocket) many, perhaps most, of which do not involve likely accompanying violence.²⁶

Second, “[t]o include possession, one would have to focus upon the risk of direct *future* harm that present conduct poses.”²⁷ Such an analysis would include clearly excludable offenses such as drunken driving.²⁸ Third, states with analogous statutes had never defined being a felon in possession as a “violent” crime.²⁹ Fourth, the court noted that under the United States Sentencing Guidelines, enhancements existed for violent offenders with two prior convictions for “crimes of violence” that were defined, like “violent felonies” under Section 924(e), to include “conduct that presents a serious potential risk of physical injury to another.”³⁰ In its commentary, the United States Sentencing Commission specifically excluded from the definition of violent crime the felon in possession charge.³¹ The First Circuit decided that the Sentencing Commission “is better able than any individual court to make an informed judgment about the relation between simple unlawful gun possession and the likelihood of accompanying violence.”³² For this reason, and because uniform interpretation of similar

24. 18 U.S.C. § 924(e)(2)(B)(ii) (2000).

25. *Doe*, 960 F.2d at 223-24 (citations omitted).

26. *Id.* at 224-25.

27. *Id.* at 225.

28. *See id.*

29. *See id.*

30. U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a)(2) (2002); *see also Doe*, 960 F.2d at 225.

31. *See id.* § 4B1.2, cmt. n.1 (2000).

32. *Doe*, 960 F.2d at 225.

language is itself desirable,³³ the court gave weight to the Commission's determination.³⁴ The *Doe* court acknowledged the "strong arguments" for the opposite conclusion, including those raised in the *Phillips* decision, but found that Congress had addressed those concerns by criminalizing the conduct itself, without focusing on whether the conduct itself was "violent."³⁵

In *United States v. Bell*,³⁶ the First Circuit, in a slightly different context than *Doe*—deciding whether a felon in possession charge triggered the career offender portions of the United States Sentencing Guidelines³⁷—reaffirmed *Doe*'s application of the categorical approach and held that the felon in possession crime was not a "crime of violence" under the Sentencing Guidelines.³⁸

33. The preference that "crime of violence" be consistently interpreted finds much support in Judge DeMoss' special concurrence in *United States v. Charles*, 301 F.3d 309, 316 (5th Cir. 2002):

There are, in fact, eight different definitions of the term "crime of violence" in the United States Code and the United States Sentencing Guidelines. These different definitions can be located at the following citations: 18 U.S.C. § 16, 18 U.S.C. § 924(c)(D)(3), 18 U.S.C. § 3156(a)(4), [FED. R. CRIM. P. 32(f)(2)], 28 U.S.C. § 540A(c), 42 U.S.C. § 13726(a)(1), U.S.S.G. § 2L1.2, application notes (B)(ii) and U.S.S.G. § 4B1.2(a). There are a variety of common elements in each of these definitions, but they each have differing words and phrases. I can see no rational justification for a defined term such as "crime of violence," which is used as frequently as the term "crime of violence" is used, to have this many different meanings. I can see no rational justification for a prior conviction being categorized as a "crime of violence" under one of these definitions but not under another. Finally, I can see no rational justification for some of these definitions being closed-ended and self-contained; and others of these definitions have catch-all clauses which invite speculation and differing results depending upon who (prosecutor, defense counsel, probation officer, or judge) is making the interpretive call which these catch-all provisions require. In my view, the level of ambiguity generated by these varying definitions is totally unacceptable in a criminal justice system that claims to be based on due process. In my view, blame for this state of disarray falls squarely on the shoulders of the Congress (specifically the Judiciary Committees of the House and the Senate) and on the Sentencing Commission and its staff. It is not the task of the Judicial Branch to say which of these varying definitions the Congress intended to be controlling; nor is it the task of the Judicial Branch to make specific what Congress has failed to specify.

Id.

34. See *Doe*, 960 F.2d at 225.

35. See *id.*

36. 966 F.2d 703 (1st Cir. 1992).

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

38. See *Bell*, 966 F.2d at 707.

III. JUDGE ALEXANDER'S APPLICATION OF THE CATEGORICAL APPROACH
IN *POWELL*

Against the backdrop of *Phillips*, *Doe*, and *Bell*, Judge Alexander confronted in *Powell* the issue of whether being a felon in possession was a "crime of violence" authorizing the government to seek detention on that basis. In *Powell*, the defendant matched the description of a perpetrator of a shooting that killed one victim and injured two others.³⁹ After the shooting, the police found the defendant one block away. He had a gunshot wound to his leg and was carrying a .44 caliber Charter Arms revolver; ballistics revealed that this gun had discharged the bullet that killed the victim.⁴⁰ A search of an apartment believed to be the defendant's revealed additional guns and ammunition.⁴¹ The government charged the defendant with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) and moved to detain the defendant under four of the six circumstances enumerated in 18 U.S.C. § 3142(f).⁴² Ultimately, the government requested detention on the grounds that the charge against the defendant of being a felon in possession of a firearm was a "crime of violence" and that the defendant presented a serious risk of flight.⁴³

In her analysis whether the charge of being a felon in possession of a firearm constituted a "crime of violence" under the Bail Reform Act, Judge Alexander first recognized:

To qualify as a crime of violence, a crime must be either (1) a crime involving the use or attempted use of force against the person or property of another; or (2) a felony posing a substantial risk that physical force would be used against the person or property of another.⁴⁴

In determining whether the felon in possession charge constituted a "crime of violence," Judge Alexander was influenced by the First Circuit's *Doe* and *Bell* decisions, which rejected the notion that, for federal sentencing purposes, being a felon in possession either was a "violent felony" or a "crime of violence."⁴⁵ She noted that the "First Circuit stressed the Sentencing Commission's preference for a categorical approach to determining which types of offenses are crimes of violence and noted that

39. See *United States v. Powell*, 813 F. Supp. 903, 905 (D. Mass. 1992).

40. See *id.*

41. See *id.* at 906.

42. See *id.* at 905.

43. See *id.* at 906.

44. *Id.* at 906-07 (citations omitted).

45. *Powell*, 813 F. Supp. at 907 (citing *United States v. Doe*, 960 F.2d 221 (1st Cir. 1992) and *United States v. Bell*, 966 F.2d 703 (1st Cir. 1992)).

many instances of the felon in possession crime do not pose a substantial risk of physical injury to another.”⁴⁶ Judge Alexander also relied on *Doe*, noting that “by construing the definition of violent felony to cover the felon in possession crime, the violent felony definition would be triggered by any direct future harm of present conduct, necessitating inclusion of offenses such as drunken driving.”⁴⁷

Judge Alexander could not find a meaningful distinction to hold that the felon in possession charge was not a crime of violence for sentencing purposes, but was for detention purposes:

To hold otherwise would require a finding that the felon in possession crime is not indicative of the type of danger to society that would trigger sentencing provisions designed to prolong incarceration for dangerous individuals, but is indicative of the type of danger to society that would trigger the Bail Reform Act’s provisions for incarcerating dangerous individuals before trial, when the relevant language is nearly identical. Why are such individuals more dangerous before trial than after serving their sentence? Arguably, it is the other way around, given, *inter alia*, that a conviction increases the certainty of a person’s dangerousness and that a lengthy period of incarceration may harden criminal tendencies.⁴⁸

Examining the mandates of the Bail Reform Act, Judge Alexander further found that she likewise was required to use the categorical approach in determining whether the defendant had been charged with a crime of violence.⁴⁹ She noted that not only had the First Circuit sentencing decisions utilized the categorical approach, but also that cases the government relied upon “employ[ed] a categorical, generic approach to defining crimes of violence *under the Bail Reform Act*, looking at the nature of the offense, instead of at the circumstances of the particular instance of the commission of the offense.”⁵⁰ As Judge Alexander eloquently wrote: “This categorical approach is in harmony with the overall legal landscape of detention jurisprudence, which construes the Bail Reform Act narrowly, mindful that its shores abut choppy constitutional waters.”⁵¹

Taking the categorical approach and bound by the First Circuit’s observation “that many instances of commission of the felon in possession

46. *Id.* (citing *Bell*, 966 F.2d at 704-06).

47. *Id.* at 908 (citing *Doe*, 960 F.2d at 225).

48. *Id.*

49. *Id.* at 909.

50. *See Powell*, 813 F. Supp. at 909.

51. *Id.*

offense pose no serious risk of physical harm,”⁵² Judge Alexander concluded that a felon in possession of a firearm charge is not a crime of violence under the Bail Reform Act. While it was true, as the government argued, that many instances of gun possession by a felon indicated “extraordinary danger” (as evidenced in the case before her), such an argument could be addressed only by the legislative branch.⁵³

IV. THE INFLUENCE OF *POWELL* AND ITS CATEGORICAL APPROACH

Following *Powell*, the first published circuit court opinion to address the issue whether being a felon in possession constituted a “crime of violence” for purposes of the Bail Reform Act was *United States v. Singleton*,⁵⁴ in which the D.C. Circuit determined that it did not.⁵⁵ In *Singleton*, the court found, as Judge Alexander did in *Powell*, that answering the question required employing a categorical approach.⁵⁶ The court noted that, almost without exception, published district court opinions had used the categorical approach, and that the plain meaning of Section 3156 required it.⁵⁷

The court recognized that “[f]ederal courts have divided over whether a felon-in-possession offense is a crime of violence warranting pretrial detention.”⁵⁸ The court noted that, as in the cases of *Powell* and *Phillips*, there were even intra-district splits on the issue.⁵⁹ The court acknowledged, however, that in making its determination, it did “not write on a clean slate because the Supreme Court has already recognized that Congress limited pretrial detention of persons who are presumed innocent to a subset of defendants charged with crimes that are ‘the most serious’ compared to

52. *Id.* (citing *Doe*, 960 F.2d at 224).

53. *See id.* Ultimately, Judge Alexander decided that the defendant could be detained because the government had demonstrated, under § 3142(f)(2)(A), that the defendant was a risk of flight because “no condition or combination of conditions will assure the defendant’s appearance.” *Id.*

54. 182 F.3d 7 (D.C. Cir. 1999).

55. *See id.* at 9. In 1998, the Sixth Circuit, in an unpublished decision, stated that the definition of “crime of violence” provided by Section 3156(a)(4)(B) required a “substantial risk that physical force against the person or property of another may be used in the course of committing the offense,” and found simply that: “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 risk.” *United States v. Hardon*, No. 98-1625, 1998 U.S. App. LEXIS 12180, at *2-3 (6th Cir. 1998) (citations omitted).

56. *See Singleton*, 182 F.3d at 10.

57. *See id.* at 10-11.

58. *Id.* at 12.

59. *See id.* at 13 n.8.

other federal offenses.”⁶⁰

Ultimately, in deciding that the felon in possession charge was not a “crime of violence” for purposes of the Bail Reform Act, the court engaged in essentially the same analysis that Judge Alexander utilized in *Powell*: (1) the Bail Reform Act’s definition of “crime of violence” required a showing that there was a “substantial risk” of violence “in the course of committing the offense,” and that there was an insufficient nexus between possessing a firearm and using a firearm in a violent manner;⁶¹ (2) nothing inherent in the felon in possession crime created a “substantial risk” of violence;⁶² (3) numerous felons such as those convicted of economic crimes and regulatory offenses did not seem more likely to use firearms in a violent manner;⁶³ (4) the government had other sufficient means under the law to detain armed felons when additional circumstances warranted it;⁶⁴ (5) nothing in the legislative history cited by the government supported the argument that Congress intended to sweep the felon in possession offense within the definition of “crime of violence”;⁶⁵ and (6) in light of the Sentencing Commission’s determination that the felon in possession charge was not a violent crime when, at sentencing, a court had a fuller record before it, “it would be odd to conclude that it is categorically a proxy for violence on a thin record when the presumption of innocence applies.”⁶⁶

The Second Circuit, however, was not swayed by Judge Alexander’s or the D.C. Circuit’s analysis and in 2000 decided (over dissent) in *United States v. Dillard*⁶⁷ that the felon in possession charge constituted a “crime of violence” authorizing the government to seek detention under the Bail Reform Act. In *Dillard*, the Second Circuit assumed, without deciding, that it would employ the categorical approach.⁶⁸ The court broke down the relevant § 3156(a)(4)(B) definition of “crime of violence” into five elements:

- (i) the offense must be a felony;
- (ii) the offense must involve a risk that physical force may be used against the person or property of another;
- (iii) that risk must result from the nature of the offense;
- (iv) the risk must be that the use of physical force would occur “in the course of the

60. *Id.* at 13 (citation omitted).

61. *See id.* at 14.

62. *See Singleton*, 182 F.3d at 15.

63. *See id.*

64. *See id.*

65. *See id.*

66. *Id.* at 15-16.

67. 214 F.3d 88 (2d Cir. 2000), *cert. denied*, 532 U.S. 907 (2001).

68. *See id.* at 92.

offense”; and (v) the risk must be “substantial.”⁶⁹

The first element is, of course, undisputed as the felon in possession charge is a felony.⁷⁰ As for the second element, the court found that “[p]ossession of a gun greatly increases one’s ability to inflict harm on others and therefore involves some risk of violence.”⁷¹ The third element concerns the risk resulting from the nature of the offense. The court found that by possessing guns in violation of the law, “previously convicted criminals increase the risk that they may engage in violent acts. The risk results from the nature of the offense.”⁷² For the fourth element, the court found that the risk of use of physical force necessarily follows from possession because the violent use of a gun could occur only while the felon was possessing it.⁷³

The court, while confident in its analysis of the first four elements, found that whether the risk was “substantial” was “not so clear.”⁷⁴ The court held that “substantial” did not mean inevitable, and that instead the risk could be “material, important, or significant.”⁷⁵ The court looked to legislative history and recognized that certain passages could be cited to support either side of the issue; nevertheless, the court established that “the most compelling indications drawn from the legislative history of the Bail Reform Act and the felon-in-possession statute support the conclusion that, had Congress focused on the very question, it would have intended felons illegally in possession to be eligible for detention under the Act.”⁷⁶ Therefore, the court rejected *Singleton*, finding “numerous flaws in its analysis and reasoning.”⁷⁷

The opinion in *Dillard* was met by a vigorous dissent.⁷⁸ The dissent agreed with the D.C. Circuit’s *Singleton* decision that “‘some aspect of the charged offense must create the risk of violence in order to itself qualify as a crime of violence.’ The act necessary to commit the felon in possession

69. *Id.* at 92-93.

70. *See id.*

71. *Id.* at 93.

72. *Id.*

73. *See Dillard*, 214 F.3d at 93-94.

74. *Id.* at 94.

75. *Id.* at 94-95.

76. *Id.* at 95

77. *Id.* at 97. Two of *Dillard*’s primary criticisms of *Singleton* were: (1) the *Singleton* court failed to acknowledge the substantial risk between possession of a firearm and its violent use and (2) the *Singleton* court’s narrow construction of the Bail Reform Act, specifically the “crime of violence” language based on a defendant’s “presumption of innocence” had no support in either the Supreme Court’s *Salerno* opinion or in the legislative history of the Bail Reform Act. *Id.* at 100, 102-03.

78. *See id.* at 104-06.

offense—obtaining or possessing a weapon while a felon—does not itself involve ‘a substantial risk’ of physical force.”⁷⁹ The dissent asserted that by separating the language of the “crime of violence” requirement into five elements, the majority created an ambiguity where none existed.⁸⁰ The dissent criticized “as pure sophistry” the majority’s argument that “a felon in possession of a weapon poses a substantial risk of physical force, and that, ipso facto, that risk occurs ‘in the course of’ committing the offense.”⁸¹ The dissent noted that the majority essentially eliminated the requirement that the substantial risk of physical force occur “‘in the course of’ committing the offense.”⁸² The dissent further acknowledged that it was “inappropriate” for the majority “to speculate as to whether a felon-in-possession defendant may commit a ‘crime of violence’ in the future.”⁸³

V. JUDGE ALEXANDER REVISITS THE ISSUE IN *UNITED STATES V. SILVA*

Relying on the *Dillard* majority opinion, in 2001, the government asked Judge Alexander to revisit her holding from *Powell* in *United States v. Silva*.⁸⁴ Forcefully, Judge Alexander declined.

Judge Alexander noted that the analysis in the *Dillard* opinion (as in the intra-district *Phillips* opinion) “rightfully turn[s] on the risk posed by the possession of a firearm.”⁸⁵ But Judge Alexander deconstructed the *Dillard* opinion to find that it:

[P]urports to seize upon the assumption that it is the nature of the offense . . . that poses the risk of violence in Section 922(g) cases. But a closer reading of the court’s analysis belies any such reliance on the stated assumption — for *Dillard* relies on truisms (e.g., “[f]irearms are instruments designed for the use of physical force, whether legal or illegal . . .”) to transform improperly the risk of danger from the particular person in possession of the firearm to the generic offense of illegally possessing the firearm.⁸⁶

Judge Alexander found that the Second Circuit could not have held that possession of a firearm, in and of itself, is a crime of violence, but that it relied solely on the fact that a felon possessed the firearm to find such a crime.⁸⁷ Judge Alexander disagreed with the Second Circuit’s analysis

79. *Dillard*, 214 F.3d at 105 (Meskill, C.J., dissenting) (citations omitted).

80. *See id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. 133 F. Supp. 2d 104 (D. Mass. 2001).

85. *Id.* at 111.

86. *Id.*

87. *See id.* at 112.

stating:

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, for there are other felons who have not committed violent offenses, or even offenses in which violence is implicated. Take, for one example, the father who fails repeatedly to pay child support in violation of 18 U.S.C. § 228(c)(2), or the person who willfully attempts to evade individual income taxes in violation of 26 U.S.C. § 7201. Neither offense is within the ambit of “white collar offenses” exempted from the statute by 18 U.S.C. § [922](a)(20)(A). Each has committed a felony, but neither is necessarily a violent offender because of their crime. Both would be proscribed from possessing a handgun as both have been convicted of a felony. And should they choose willfully to disobey the law, or inadvertently do so, and permit a firearm to be in their home, they would both be guilty of being a felon in possession of a handgun. Despite that culpability, however, neither has necessarily been magically transformed into a violent criminal, and this Court does not believe that they necessarily pose a risk of committing a violent felony merely because they now possess a firearm. As such, the *Dillard* analysis cannot hold, at least in its entirety.⁸⁸

Judge Alexander was fortified by the *Singleton* court’s rejection of the validity of the factual assumption underlying *Dillard* and *Phillips* —i.e., “a felon possessing a firearm is more likely to use it in a crime of violence.”⁸⁹ Without any empirical support for this assumption, Judge Alexander could not be swayed.⁹⁰ Judge Alexander further found that the First Circuit, which had rejected the rationale of *Phillips* in its *Bell*⁹¹ and *Doe*⁹² opinions and had supported consistent interpretations of “crime of violence” regardless of the source of the definition, had established a precedent inconsistent with *Dillard*.⁹³

VI. JUDGE ALEXANDER’S ANALYSIS CARRIES THE DAY

Similarly to Judge Alexander, in 2001, the Seventh Circuit in *United States v. Lane*⁹⁴ rejected the reasoning of *Dillard* and held that, for

88. *Id.*

89. *Id.* (discussing *United States v. Singleton*, 182 F.3d 7, 14 (D.C. Cir. 1999)).

90. *See Silva*, 133 F. Supp. 2d at 112.

91. *United States v. Bell*, 966 F.2d 703 (1st Cir. 1992).

92. *United States v. Doe*, 960 F.2d 221 (1st Cir. 1992).

93. *Silva*, 133 F. Supp. 2d at 113.

94. 252 F.3d 905 (7th Cir. 2001).

purposes of the Bail Reform Act, a felon in possession charge was not a crime of violence.⁹⁵ The court looked to contexts outside the Bail Reform Act where courts had to consider whether the felon in possession charge was a violent crime, and found that “courts have held, uniformly so far as our research has disclosed, that being a felon in possession is not a crime of violence, where ‘crime of violence’ is defined identically or similarly to the definition of the term in section 3156(a)(4)(B).”⁹⁶ The court found that the Second Circuit in *Dillard* simply had 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 of a firearm is substantial.”⁹⁷ But the Seventh Circuit found that the Second Circuit was asking the wrong question because the statute:

[A]sks 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.⁹⁸

Similar to Judge Alexander’s analysis in *Powell*, the Seventh Circuit noted that to hold otherwise would require saying that many non-violent offenses would qualify as crimes of violence:

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 to attempt to evade arrest. . . . A crime that increases the likelihood of a

95. *See id.* at 908.

96. *Id.* at 906-07. For this proposition the court referred to:

Royce v. Hahn, 151 F.3d 116, 123-24 (3d Cir. 1998) (identical definition in statute requiring Bureau of Prisons to notify local law enforcement authorities of imminent release of certain prisoners); *United States v. Flennory*, 145 F.3d 1264, 1268 (11th Cir. 1998) (identical definition, in statute punishing various firearm offenses); *United States v. Canon*, 993 F.2d 1439, 1441 (9th Cir. 1993) (ditto); *United States v. Oliver*, 20 F.3d 415, 418 (11th Cir. 1994) (per curiam) (“violent felony” defined, for purposes of the same firearms statute as in *Flennory* and *Canon*, as a felony that “involves conduct that presents a serious potential risk of physical injury to another”); *United States v. Garcia-Cruz*, 978 F.2d 537, 543 (9th Cir. 1992) (ditto); *United States v. Doe*, 960 F.2d 221, 226 (1st Cir. 1992) (ditto). [Cf.] U.S.S.G. § 4B1.2(a)(2) and Application Note 1; *Stinson v. United States*, 508 U.S. 36, 47, 113 S.Ct. 1913, 123 L.Ed.2d 598 (1993).

Id. at 907.

97. *Lane*, 252 F.3d at 907.

98. *Id.*

crime of violence need not itself be a crime of violence.⁹⁹

The Seventh Circuit also criticized *Dillard*'s very broad reading of the Bail Reform Act: “[h]ad Congress wanted all potentially dangerous defendants denied bail pending trial, it would have drafted the Bail Reform Act differently. To interpret ‘crime of violence’ broadly in order to enable more defendants to be detained pending trial is to alter the legislative design.”¹⁰⁰

The most recent court of appeals to weigh in (with a published decision) on the issue of whether being a felon in possession of a firearm constitutes a “crime of violence” under the Bail Reform Act is the Ninth Circuit in *United States v. Twine*.¹⁰¹ In *Twine*, the court — citing to *Singleton, Lane*, and *Dillard* — noted that there were arguments on both sides of the issue.¹⁰² Nevertheless, the court decided it was bound by its decision in *United States v. Canon*¹⁰³ that had held, for purposes of 18 U.S.C. § 924(c) (using a firearm during a crime of violence), the felon in possession charge was not a “crime of violence.”¹⁰⁴ Thus, the court held that to be consistent with *Canon*, the felon in possession charge also did not constitute a “crime of violence” under the Bail Reform Act.¹⁰⁵ The Ninth Circuit’s analysis here parallels Judge Alexander’s analysis in *Powell* in that it did not make sense to find that the felon in possession charge is not a “crime of violence” for certain purposes (e.g., sentencing), but that it is for purposes of the Bail Reform Act.¹⁰⁶

VII. CONCLUSION

In a society where “liberty is the norm,”¹⁰⁷ there can be no question of the propriety of Judge Alexander’s narrow reading of the Bail Reform Act

99. *Id.*

100. *Id.* at 908. Unlike the *Powell* and *Singleton* decisions, which relied on a combination of statutory and constitutional considerations, *Lane* relied solely on statutory and legislative intent grounds. *See id.*

101. 344 F.3d 987 (9th Cir. 2003).

102. *See id.* at 987-88.

103. 993 F.2d 1439, 1441 (9th Cir. 1993).

104. *Twine*, 344 F.3d at 988.

105. *Id.*

106. After issuing the *Twine* decision, the Ninth Circuit ordered both parties to submit letter briefs setting forth their respective positions concerning whether the case—including the issue of whether being a felon in possession of a firearm constituted a crime of violence under the Bail Reform Act—should be heard en banc. *See United States v. Twine*, 353 F.3d 690 (9th Cir. 2003). After the parties submitted supplemental briefing, rehearing en banc was denied. *See United States v. Twine*, No. 03-10393, 2004 WL 595084 (9th Cir. Mar. 26, 2004).

107. *United States v. Salerno*, 481 U.S. 739, 755 (1987).

to prevent the government from seeking detention of an individual solely because she is charged with being a felon in possession of a firearm. Although there is some surface appeal to the *Dillard* and *Phillips* opinions, Judge Alexander carefully deconstructed them in both *Powell* and *Silva* to show that they failed to adequately take into account the requirement that there be a nexus between the charged crime—possession of a firearm—and the substantial risk of physical force. Judge Alexander also forcefully asserted that the status of the possessor did not necessarily increase the risk of physical harm. Judge Alexander’s important decisions in *Powell* and *Silva* are intellectually honest, truest to the language of the Bail Reform Act, most consistent with legislative history, and perhaps most compellingly, eloquently cognizant of important constitutional concerns, including the defendant’s presumption of innocence. While some circuits—including the First Circuit—have not weighed in definitively on the precise issue, Judge Alexander’s analysis rightfully has prevailed, and likely will continue to do so.

