

## POSSESSION OF A FIREARM

The defendant is charged with unlawfully possessing a firearm.

Section 10(h) of chapter 269 of our General Laws provides as follows:

“Whoever . . . possesses . . . a firearm . . .  
without complying with the requirements [of law]  
relating to [a] firearm identification card . . .  
shall be punished . . . .”

In order to prove the defendant guilty of this offense, the Commonwealth must prove (three) (four) things beyond a reasonable doubt:

**First:** That the defendant possessed an item;

**Second:** That the item meets the legal definition of a “firearm”; (and)

**Third:** That the defendant knew that he (she) possessed that firearm.

*If there is evidence of one of the statutory exceptions, use one of the following:*

A. *If there is evidence that the defendant had a firearm ID card.* **And Fourth:**

**that the defendant did *not* have a valid firearm ID card.**

**B. If there is evidence that the defendant was exempt. And *Fourth*: that the**

**defendant did *not* qualify for one of the exemptions in the law that are a substitute for having a valid firearm ID card.**

*See Instruction 3.160 (License or Authority).*

G.L. c. 278, § 7; *Commonwealth v. Jones*, 372 Mass. 403, 406-407, 361 N.E.2d 1308, 1310-1311 (1977). The issuance of firearm identification cards is governed by G.L. c. 140, §§ 129B-129D. Section 129B also lists a number of exemptions from the requirement of a firearms identification card. See also Op. A.G. No. 86/87-4 (October 31, 1986) (18 U.S.C. § 926A provides a defense to a charge under §10[h] for a non-resident traveling through the Commonwealth with an unloaded and inaccessible handgun who is in compliance with the firearms laws of the states of origin and destination).

*Here define "possession" (Instruction 3.220).*

**A “firearm” is defined in our law as:**

**“a pistol, revolver or other weapon . . .**

**loaded or unloaded,**

**from which a shot or bullet can be discharged**

**and . . . the length of [whose] barrel is less than sixteen inches.”**

**That definition can be broken down into three requirements: *First*, it must be a weapon; *Second*, it must be capable of discharging a shot or bullet; and *Third*, it must have a barrel length of less than 16 inches. The term “barrel length” refers to “that portion of a firearm . . . through which a**

**shot or bullet is driven, guided or stabilized, and [includes] the chamber.”**

G.L. c. 140, § 121. *Commonwealth v. Tuitt*, 393 Mass. 801, 810, 473 N.E.2d 1103, 1110 (1985) (jury can determine from inspection that “firearm”); *Commonwealth v. Fancy*, 349 Mass. 196, 204, 207 N.E.2d 276, 282 (1965) (same); *Commonwealth v. Sampson*, 383 Mass. 750, 753, 422 N.E.2d 450, 452 (1981); *Commonwealth v. Sperrazza*, 372 Mass. 667, 670, 363 N.E.2d 673, 675 (1977) (testimony about “revolver” or “handgun” will support inference that barrel was under 16 inches); *Commonwealth v. Bartholomew*, 326 Mass. 218, 219, 93 N.E.2d 551, 552 (1950) (not necessary that firearm be loaded).

**As I mentioned before, the Commonwealth must prove beyond a reasonable doubt that the defendant knew that he (she) (possessed this item) (or) (had this item under his [her] control in a vehicle), *and* also knew that the item was a “firearm,” within the common meaning of that term. If it was a conventional firearm, with its obvious dangers, the Commonwealth is not required to prove that the defendant knew that the item met the *legal* definition of a firearm.**

*See Instruction 3.140 (Knowledge).*

General Laws c. 269, § 10(h) punishes “own[ing]” or “transfer[ring] possession” as well as possession, and is applicable to a “rifle, shotgun or ammunition” as well as a firearm. In cases with such fact patterns, the model instruction may be adapted accordingly. See G.L. c. 140, § 121 for definitions of “rifle,” “shotgun” and “ammunition.”

*Commonwealth v. Sampson*, 383 Mass. 750, 762, 422 N.E.2d 450, 457 (1981); *Commonwealth v. Bacon*, 374 Mass. 358, 359, 372 N.E.2d 780, 781 (1978) (knowledge need not be alleged in complaint); *Commonwealth v. Jackson*, 369 Mass. 904, 916-917, 344 N.E.2d 166, 174 (1976); *Commonwealth v. Boone*, 356 Mass. 85, 87, 248 N.E.2d 279, 280 (1969); *Commonwealth v. Papa*, 17 Mass. App. Ct. 987, 987-988, 459 N.E.2d 128, 128-129 (1984).

SUPPLEMENTAL INSTRUCTIONS

1. *Absence of evidence of firearm ID card.*

**You have heard some reference to (a firearm ID card) (a legal exemption from the requirement of a firearm ID card). There was no evidence in this case that the defendant had a firearm ID, and no evidence that the defendant qualified for one of the legal exemptions that are a substitute for having a firearm ID card. For that reason, the issue of a firearm ID card or exemption is not relevant to your deliberations in this case, and therefore you should put it out of your mind.**

This instruction is recommended only when, in the jury's presence, there has been some reference to, but not evidence of, a firearm ID card or exemption.

2. *Knowledge of firearm ID card requirement.*

**You have heard some mention that the defendant did not know that he (she) was required to have a firearm ID card before possessing a firearm. The Commonwealth is *not* required to prove that the defendant knew that the law required him (her) to have a firearm ID card before (possessing a firearm) (or) (having a firearm under his [her] control in a vehicle).**

This instruction is recommended only when it is necessary to correct such a misimpression.

NOTES:

1. **Possession of a firearm (§ 10[h]) as a lesser included offense of carrying a firearm (§ 10[a]).** Prior to 1991, possession of a firearm (§ 10[h]) was a lesser included offense of carrying a firearm (§ 10[a]). See *Commonwealth v. Nesselini*, 19 Mass. App. Ct. 1016, 1016, 476 N.E.2d 976, 977 (1985). Statute 1990, c. 511 (effective January 2, 1991) amended § 10(h) to provide that “[a] violation of this subsection shall not be considered a lesser included offense to a violation of subsection (a) . . . .” and that no one shall “prosecute as a violation of [§ 10(h)] the mere possession of a firearm, rifle, or shotgun by an unlicensed person not being present in or on his residence or place of business, nor shall the court allow an attempt to so prosecute.” However, both 1991 amendments were repealed by St. 1998, c. 180, § 69 (effective October 21, 1998).
2. **Non-firing firearm.** See the first supplemental instruction to Instruction 7.600 (Carrying a Firearm).
3. **Passenger in vehicle.** See the third supplemental instruction to Instruction 7.600 (Carrying a Firearm).