

**POSSESSION OF A FIREARM WITHOUT A LICENSE OUTSIDE OF
HOME OR BUSINESS**

G.L. c. 269, § 10(a)

While the offense under G.L. c. 269, § 10(a) is often referred to as “carrying a firearm,” the 1990 amendment removed “carrying” (i.e. moving) the firearm as an element of the offense, replacing it with possession. See St. 1990, c. 511, § 2. Section 10(a) also criminalizes knowingly possessing a firearm or having a firearm under one’s control in a vehicle. Because the theory of constructive possession in a vehicle is a theory of possession, the instruction does not use the words “under one’s control in a vehicle,” but instead uses “possession” throughout. See Note 10, infra.

The 2024 legislative amendment inserted a new unitary definition of “firearm” that includes any “stun gun, pistol, rifle, shotgun, sawed-off shotgun, large capacity firearm, assault-style firearm, or machine gun that is designed to or readily able to be converted to expel a shot or bullet.” See St. 2024, c. 135, § 20. This definition of “firearm” also includes the finished or unfinished frame or receiver of a firearm, terms that are now defined in G.L. c. 140, § 121. Id.

The defendant is charged with knowingly possessing a firearm unlawfully.

To prove the defendant guilty of this offense, the Commonwealth must prove the following (four) (five) things beyond a reasonable doubt:

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

***Second:* That the item the defendant possessed met the legal definition of a firearm;**

***Third:* That the defendant *knew* that they possessed a firearm;**
and

***Fourth:* That the defendant did not have a valid license to possess a firearm; (and)**

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If there is evidence of one of the statutory licensing exemptions, the Commonwealth bears the burden to prove that the exemption does not apply. In such a case, use one of the following explanations to instruct the jury on that potential fifth element of the offense.

(Fifth: That the defendant possessed the firearm outside of their residence or place of business.)

See Commonwealth v. Guardado, 491 Mass. 666, 682-685 (2023); Commonwealth v. Coren, 437 Mass. 723, 734 (2002); Commonwealth v. Seay, 376 Mass. 735, 743 (1978).

In *Guardado*, the Supreme Judicial Court found “no compelling reason” to “upend our established precedent” that the residence or place of business exemption is an affirmative defense. *Guardado*, 491 Mass. at 683. A judge must instruct on the exemption only if there is “sufficient evidence” that the defendant was in their home or business when the firearm was discovered. *Id.* Because being outside the home or business is what distinguishes section 10(a) from 10(h), there would certainly be no error by including this element in 10(a). *See Commonwealth v. Powell, 459 Mass. 572, 587-88 (2011).* If a defendant’s firearm is stored within their vehicle, the residence exemption applies only if the vehicle is located within or on the defendant’s residence. *See Commonwealth v. Harris, 481 Mass. 767, 780 (2019).*

(Fifth: That the defendant did not qualify for one of the legal exemptions that allow the defendant to possess a firearm outside their home or business without a license.)

There are numerous statutory exemptions to the licensing requirement. See *infra*, and Supplemental Instructions on Licensing Exemptions, for discussion of those exemptions.

To prove the first element, the Commonwealth must prove beyond a reasonable doubt that the defendant possessed an item.

What does it mean to possess something? A person obviously possesses something if they have direct physical control of it at a given time.

Constructive possession.

However, the law does not require that someone have

actual physical custody of an object to possess it. An object is in a person's possession even without physical custody if they have:

- **knowledge of the object,**
- **the ability to exercise control over that object,**

either directly or through another person, and

- **the intent to exercise control over the object.**

For example, the law considers you to be in possession of things which you know are (in your bureau drawer at home) (in a safe deposit box at your bank).

Whether the defendant possessed an item is something that you must determine from all the evidence and any reasonable inferences that you may draw from the evidence. I caution you to remember that merely being present in the vicinity of an item, even if one knows that it is there, does not amount to possession.

Where the issue is constructive possession rather than actual physical possession, the Commonwealth must prove that "in addition to knowledge and the ability to exercise control over the firearm, the defendant must have the intention to do so." *Commonwealth v. Costa*, 65 Mass. App. Ct. 227, 234 (2005), citing *Commonwealth v. Sann Than*, 442 Mass. 748, 755 (2004); see also Note 11, *infra*.

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Guilt by association.

Possession is not proved simply because the defendant was associated with a person who controlled the item or the property where it was found.

Mere presence is not enough.

Merely being present where an item is found is not sufficient by itself to permit an inference that the person knew about the presence of the item without other indications of knowledge. Further, being present where an item is found, even with evidence that the defendant knew about the item, is not sufficient to prove possession, without evidence of intent to control that item.

See also Commonwealth v. Romero, 464 Mass. 648, 654 (2013) (presence alone is not sufficient to establish knowledge, ability and intent to control; instead, presence must be augmented by additional inculpatory evidence); *Commonwealth v. Brown*, 401 Mass. 745, 747 (1988) (insufficient evidence to prove personal knowledge where car reported stolen and two firearms found under passenger seat).

To prove the second element, the Commonwealth must prove beyond a reasonable doubt that the defendant possessed an item that qualifies as a firearm under the law.

There are two requirements for an item to be a “firearm” under our law.

First, the item must be a (pistol) (revolver) (rifle) (shotgun).

Second, the item must be designed to expel a shot or bullet, or the item must be able to readily be converted to expel a shot or bullet.

G.L. c. 140, § 121, as amended effective October 2, 2024, defines “firearm” as:

a stun gun, pistol, revolver, rifle, shotgun, sawed-off shotgun, large capacity firearm, assault-style firearm and machine gun, loaded or unloaded, which is designed to or may readily be converted to expel a shot or bullet; the frame or receiver of any such firearm or the unfinished frame or receiver of any such firearm; provided, however, that “firearm” shall not include any antique firearm or permanently inoperable firearm.

For cases involving stun guns, see note 12. For cases involving an alleged frame or receiver, or an unfinished frame or receiver, see note 13. For antique firearms, see Note 19.

The 2024 revision—requiring proof that the item was designed to expel a shot or bullet—is a significant departure from the prior language, which required proof of operability. Permanently inoperable firearms, however, even if designed to expel a shot or bullet, are excluded from the definition of firearm. G.L. c. 140, § 121, *supra*. Therefore, operability will still be relevant. See Note 4, for further discussion.

Definition of “stun gun”

A “stun gun” is a portable device or weapon designed to incapacitate temporarily, injure, or kill by electrical shock, whether the shock passes by means of a dart or projectile with a wire lead or from an electrical current, impulse, wave, or beam.

G.L. c. 140, § 121 (defining “stun gun”). See also Note 12, *infra*.

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Definition of “pistol”

A “pistol” is a handgun with a chamber that is part of the barrel.

Merriam-Webster.com Dictionary (2024).

Definition of “revolver”

A “revolver” is a handgun with a cylinder of several chambers brought successively into line with the barrel and discharged with that barrel’s hammer.

Merriam-Webster.com Dictionary (2024).

Definition of “rifle”

A “rifle” is a firearm having a rifled bore with a barrel length equal to or greater than 16 inches and capable of discharging a shot or bullet for each pull of the trigger. The term “barrel length” refers to the portion of a firearm through which a shot or bullet is driven, guided, or stabilized, and includes the chamber.

G.L. c. 140, § 121 (defining “length of barrel” or “barrel length” and “rifle”).

Definition of “shotgun”

A “shotgun” is a firearm having a smooth bore with a barrel length equal to or greater than 18 inches with an overall length equal to or greater than 26 inches and capable of discharging a shot or bullet for each pull of the trigger. The term “barrel length” refers to the portion of a firearm through which a shot or bullet is driven, guided, or stabilized, and includes the chamber.

G.L. c. 140, § 121 (defining “length of barrel” or “barrel length” and “shotgun”).

To prove the third element, the Commonwealth must prove beyond a reasonable doubt that the defendant knew that the item they possessed was a firearm as that term is commonly understood; the Commonwealth is not required to prove that the defendant have knowledge of the legal definition of a firearm. This requires you to make a decision about the defendant’s state of mind at that time. You may examine the defendant’s actions and words, all of the surrounding circumstances, and any reasonable inferences, to help you determine the extent of the defendant’s knowledge at the time.

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Proof that the item was a conventional firearm, with its obvious dangers, may be sufficient to establish this element.

See Instruction 3.140 (Knowledge). *Commonwealth v. Marrero*, 484 Mass. 341, 345, 346-347 (2020), quoting *Commonwealth v. Sampson*, 383 Mass. 750, 762 (1981) (Commonwealth only required to prove that defendant had knowledge that the “instrument is a firearm within the generally accepted meaning of that term”); *Commonwealth v. Bacon*, 374 Mass. 358, 359 (1978) (knowledge need not be alleged in complaint); *Commonwealth v. Jackson*, 369 Mass. 904, 917 (1976) (knowledge must be proved); *Commonwealth v. Boone*, 356 Mass. 85, 87 (1969) (“control” in vehicle requires knowledge); *Commonwealth v. Papa*, 17 Mass. App. Ct. 987, 987-988 (1984) (defendant need not know the “exact capabilities or characteristics of the gun which make it subject to regulation”).

To prove the fourth element, the Commonwealth must prove beyond a reasonable doubt that the defendant did not have a valid (license to carry firearms) (firearm identification card).

Firearm identification card and license to carry firearms.

A “firearm identification card” is not the same thing as a “license to carry firearms.” A person with a valid firearm identification card may possess rifles and shotguns. A person with a valid license to carry firearms may possess firearms.

G.L. c. 140, § 129B(c) (firearm identification card); G.L. c. 140, § 131(a) (license to carry firearms). A valid firearm identification card does not permit a person to possess large capacity or semi-automatic rifles and shotguns. G.L. c. 140, § 129B(c). A valid license to carry firearms permits a person to possess large capacity firearms. G.L. c. 140, § 131(a).

Expired but valid license to carry firearms or firearm identification card under G.L. c. 140, § 121F(s).

Under the circumstances enumerated in G.L. c. 140, § 121F(s), a license to carry firearms or firearm identification card remains valid after it has expired. If there is

evidence that a license or card was expired at the time of the offense, then the judge should read the following instruction. Refer to Supplemental Instruction on Licensing Exemptions, infra, when a defendant whose expired license or card does not meet the circumstances enumerated in § 121F(s).

In certain circumstances, an expired (license to carry firearms) (firearm identification card) is still valid. The Commonwealth has the burden to prove beyond a reasonable doubt that the expired (license) (card) was not valid.

The judge may read any of the following three paragraphs, consistent with the evidence.

An expired (license to carry firearms) (firearm identification card) is valid if the defendant applied to renew their (license) (card) before the expiration date, in which case the (license) (card) remains valid until the application for renewal is approved or denied. To prove the (license) (card) was not valid, the Commonwealth must prove beyond a reasonable doubt either: (i) that the defendant did not apply for renewal before the expiration date; or (ii) that the defendant applied for renewal before the expiration date and their application was denied before [date of offense] .

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An expired (license to carry firearms) (firearm identification card) is valid if it has been expired for 90 days or less and it has not been revoked or suspended. To prove that the (license) (card) was not valid, the Commonwealth must prove beyond a reasonable doubt either: (i) that the (license) (card) had been expired for more than 90 days; or (ii) that the (license) (card) had been revoked or suspended within that 90-day period.

G.L. c. 140, § 121F(s)(iii).

An expired (license to carry firearms) (firearm identification card) is valid if the defendant was on active duty with the armed forces of the United States on the expiration date, in which case the (license) (card) is valid for 180 days after the defendant's release from active duty. If the defendant applied to renew their (license) (card) during that 180-day period, the (license) (card) remains valid until the application for renewal is approved or denied. To prove that the (license) (card) was not valid, the Commonwealth must prove beyond a reasonable doubt either: (i) that the defendant was not on active duty on the

expiration date; or (ii) if the defendant was on active duty on the expiration date, that more than 180 days had passed after the defendant had been released from active duty or that the defendant had applied for renewal during that 180-day period and their application had been denied before [date of offense] .

G.L. c. 140, § 121F(s)(ii).

Knowledge of licensing requirement.

This instruction is recommended only when it is necessary to correct the misimpression that the Commonwealth must prove that the defendant knew that the law requires a license to carry a firearm.

You have heard some mention that the defendant did not know that they were required to have a (firearm identification card) (license to carry firearms) before possessing a firearm under these circumstances. The Commonwealth is not required to prove that the defendant knew that the law required them to have a (firearm identification card) (license to carry firearms). For that reason, the issue of knowledge of this requirement is not relevant to your deliberations in this case, and therefore

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**you should put it out of your mind and do not discuss it at
all during your deliberations.**

Use the following instruction when there is evidence that the defendant possessed the firearm in their home or place of business.

(To prove the fifth element, the Commonwealth must prove beyond a reasonable doubt that the defendant possessed the firearm outside of their residence or place of business. A person's residence does not include common areas of a building, but only areas that are under that person's exclusive control. A person's place of business only includes areas that are within the exclusive control of the business and does not include areas that are outside of the business's exclusive control.)

For further discussion of possession outside of a residence or place of business, see Note 8, *infra*.

For discussion of possession of a firearm under G.L. c. 269, § 10(h) as a lesser included offense of possession of a firearm under G.L. c. 269, § 10(a), see Note 9, *infra*.

Use the following instruction when there is evidence of one of the statutory exemptions other than the exemption for possession in the home or place of business.

(To prove the fifth element, the Commonwealth must prove beyond a reasonable doubt that the defendant did not qualify for the statutory exemption of _____.)

There are numerous statutory exemptions to the licensing requirement. The Supplemental Instructions on Licensing Exemptions, *infra*, cover the exemptions most likely to arise. Additional exemptions are found in G.L. c. 140, § 129C.

If the Commonwealth has proved all (four) (five) elements beyond a reasonable doubt, you should return a verdict of guilty. If the Commonwealth has failed to prove one or more of the elements beyond a reasonable doubt, you must find the defendant not guilty.

SUPPLEMENTAL INSTRUCTIONS ON LICENSING EXEMPTIONS

Exemption for new or returning resident under G.L. c. 140, § 129C(a)(ii) (60 day grace period).

A (new resident of Massachusetts) (Massachusetts resident returning to the Commonwealth) may be exempt from the requirement to have a (license to carry firearms) (firearm identification card). The Commonwealth must prove beyond a reasonable doubt that the exemption does not apply.

A (new resident moving to Massachusetts) (returning resident who has been away from Massachusetts for more than 180 days) is exempt from the requirement to have a (license to carry firearms) (firearm identification card) for 60 days after (entering) (returning to) Massachusetts. This

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exemption only applies to a firearm or ammunition that was in the (new) (returning) resident's possession before they (moved) (returned) to Massachusetts.

You must find the defendant not guilty unless the Commonwealth proves beyond a reasonable doubt that this exemption does not apply.

G.L. c. 140, § 129C(a)(ii).

Exemption for nonresidents under G.L. c. 140, § 129C(i), & (j) (possession in certain circumstances).

A nonresident may be exempt from the requirement to have a (license to carry firearms) (firearm identification card) in Massachusetts. A “nonresident” is a person who is temporarily in Massachusetts but legally resides in another state (or United States territory). The Commonwealth must prove beyond a reasonable doubt that the exemption does not apply.

G.L. c. 140, § 121 (defining “nonresident”).

The judge may read any of the following three paragraphs, consistent with the evidence.

A nonresident who is 18 or older may possess rifles and shotguns and the ammunition for those rifles and

shotguns if the nonresident has a permit, card, or license issued from their state of residence.

G.L. c. 140, § 129C(i). Under this exemption, the requirements to obtain a permit, card, or license in the state of residence must be “substantially similar” to those for obtaining a firearm identification card in Massachusetts, as determined by the Massachusetts State Police. G.L. c. 140, § 129C(i), (l). This exemption does not permit the nonresident to possess large capacity or semi-automatic rifles and shotguns. G.L. c. 140, § 129C(i).

A nonresident who is 18 or older may possess rifles and shotguns and the ammunition for those rifles and shotguns:

The following exemptions do not permit the nonresident to possess large capacity or semi-automatic rifles and shotguns. G.L. c. 140, § 129C(i).

- **to hunt during hunting season with a nonresident hunting license or a hunting license or permit lawfully issued from their state of residence.**

G.L. c. 140, § 129C(j)(i). Under this exemption, the requirements to obtain a hunting license or permit in the state of residence must be “substantially similar” to those in G.L. c. 131, § 11, as determined by the Massachusetts State Police. G.L. c. 140, § 129C(j)(i), (l).

- **while on a firing or shooting range.**

G.L. c. 140, § 129C(j)(ii).

- **while at a firearm showing or display organized by a regularly existing gun collectors’ club or association.**

G.L. c. 140, § 129C(j)(iv).

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You must find the defendant not guilty unless the Commonwealth proves beyond a reasonable doubt that this exemption does not apply.

Exemption for nonresidents traveling through Massachusetts under G.L. c. 140, § 129C(j) (iii) & (k) (transport).

A nonresident may carry a firearm on their person while in a vehicle lawfully traveling through Massachusetts so long as the firearm remains in the vehicle and, if the firearm is outside its owner's direct control, the firearm is stored in accordance with Massachusetts law.

G.L. c. 140, § 129C(k). For Massachusetts law regarding storage of a firearm in a vehicle, see G.L. c. 140, § 131C.

A nonresident who is 18 or older may possess rifles and shotguns and the ammunition for those rifles and shotguns while traveling in or through Massachusetts so long as the rifles and firearms are unloaded and in a locked container in accordance with Massachusetts law.

G.L. c. 140, § 129C(j)(iii). The above exemptions do not permit the nonresident to possess large capacity or semi-automatic rifles and shotguns. G.L. c. 140, § 129C(i). The statute defines "secured in a locked container" as "secured in a container that is capable of being unlocked only by means of a key, combination or similar means, including in an unoccupied motor vehicle, a locked trunk not accessible from the passenger compartment, [or] a locked console or locked glovebox" G.L. c. 140, § 121. For Massachusetts law regarding storage of a firearm, see G.L. c. 140, §§ 131C & 131L.

Exemption for expired and invalid license to carry firearms or firearm identification card under G.L. c. 140, § 121F(t).

When a defendant's expired license or card is not valid under § 121F(s), the person may only be subject to a civil fine instead of criminal prosecution under G.L. c. 269, § 10(a), in the circumstances enumerated in G.L. c. 140, § 121F(t). This is an affirmative defense and a defendant who satisfies their burden of production is entitled to an instruction that the Commonwealth bears the burden of disproving the defense beyond a reasonable doubt. Refer to instruction on "Expired but valid license. . . ", supra, when a defendant's expired license or card may still be valid under G.L. c. 140, § 121F(s).

In certain circumstances, a person with an expired and invalid (license to carry firearms) (firearm identification card) may be exempt from criminal punishment for possessing a (firearm) (rifle or shotgun). The Commonwealth must prove beyond a reasonable doubt that the exemption does not apply.

The defendant is entitled to this exemption if their (license) (card) was invalid for the sole reason that the (license) (card) was expired and they would not otherwise have been disqualified from renewing their (license) (card) had they applied to do so. To prove that the defendant is not entitled to this exemption, the Commonwealth must prove beyond a reasonable doubt at least one of the following things:

One, the defendant never had a valid (license) (card).

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Two, the defendant's (license) (card) was invalid for a reason other than it was expired.

Three, the defendant would have been disqualified from renewing their (license) (card) had they applied for renewal.

See Note 18, *infra*, for the conditions that disqualify a person from renewing a license to carry firearms or firearm identification card under G.L. c. 140, § 121F(j).

Four, the defendant had been notified that their (license) (card) was revoked or suspended or that a revocation or suspension was pending, and the revocation or suspension was due to something other than failing to provide a change of address.

Five, the defendant had been notified of the denial of their application to renew their (license) (card).

G.L. c. 140, § 121F(t). The language of G.L. c. 140, § 121F(t) was inserted by St. 2024, c. 135, § 32, and mirrors that previously found in the former versions of G.L. c. 140, § 129B(12) (applicable to firearm identification cards) and G.L. c. 140, § 131(m) (applicable to licenses to carry firearms).

The mere production of an expired license is insufficient to warrant this instruction "without some evidence that the defendant had never been denied a new license." *Commonwealth v. Indrisano*, 87 Mass. App. Ct. 709, 714 (2015) (analyzing former statutory language). However, a defendant was entitled to the instruction where there was testimony that they had never applied to renew their license, had never received notice of denial, and had never received notice of revocation or suspension. *Id.*

You must find the defendant not guilty unless the Commonwealth proves beyond a reasonable doubt that this exemption does not apply.

NOTES:

1. Commonwealth must prove defendant not licensed. The Commonwealth must prove that the defendant was not licensed to carry a firearm as an element of unlawful possession of a firearm under G.L. c. 269, § 10(a). *Commonwealth v. Guardado*, 491 Mass. 666, 668 (2023). This new rule applies prospectively and to those cases that were active or pending on direct review as of June 23, 2022, the date of the issuance of *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2122 (2022), in which the Supreme Court held that the Second Amendment to the United States Constitution protects an individual's right to carry a firearm in public. As a result of this ruling, in *Guardado*, the Supreme Judicial Court overturned Massachusetts precedent that licensure is an affirmative defense and instead, placed the burden on the Commonwealth to prove that the defendant did not have a license at the time of the offense. See *id.* at 668, 690.

2. Proof of absence of license. The Commonwealth may seek to admit statements by the defendant about the absence of a license or card. See G. L. c. 140, § 129C, paragraph 9 (obligation to produce firearm license upon request of a police officer). The Commonwealth may also seek to introduce properly certified or attested official government records from a local police department or the Firearms Records Bureau (or both). G L. c. 233, §§ 76, 78 and 79J; Mass. R. Crim. P. 40 (a). While such agency certificates or affidavits stating that there is no record of a firearm license issued to a defendant may not run afoul of hearsay or evidentiary rules, the Confrontation Clause would likely prohibit their admission without a testifying witness from the agency responsible for keeping such records, and who is familiar with how the records are kept, made, and stored. *Guardado, supra* at 695 (Lowy, J., concurring). Whether a witness other than the one who undertook the search was qualified to testify about the search would be a preliminary question for the trial judge to decide. *Id.* at 702-703. "For a witness 'to be competent to testify that a search of the database returned no result ... [i]t suffices that the witness be familiar with the process of searching the database and with the public record-keeping practices with respect to the database.'" *Commonwealth v. Jones*, 106 Mass. App. Ct. 613, 617 (2026), quoting *Commonwealth v. Smith*, 496 Mass. 304, 312 (2025). A diligent search to determine the absence of a record is met where the search efforts utilized would have found the record if it existed; the fact that it does not take a long time to search a database does not nullify the diligence of the search. *Jones*, 106 Mass. App. Ct. 613.

3. Ballistics certificate. Despite the provision in G.L. c. 140, § 121A that a sworn certificate shall constitute prima facie evidence of the findings of a ballistics expert, the admission of a ballistics certificate without the opportunity to cross-examine the certifying ballistics expert is constitutional error. See *Commonwealth v. Brown*, 75 Mass. App. Ct. 361, 363 (2009), citing *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009). See also *Commonwealth v. Muniz*, 456 Mass. 166, 168 (2010).

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4. Intended design v. operability. The 2024 revision—requiring proof that the item was designed to expel a shot or bullet—is a significant departure from the prior language, which required proof of operability. Under the prior definition of “firearm,” expert testimony was not required to establish operability. *Commonwealth v. Marrero*, 484 Mass. 341, 347-48 (2020), citing *Commonwealth v. Tuitt*, 393 Mass. 801, 810 (1985), and *Commonwealth v. Fancy*, 349 Mass. 196, 204 (1965); see *id.* at 347-48 (expert testimony not required where no weapon was recovered but witness testified about seeing and hearing weapon fire); *Fancy*, 349 Mass. at 205 (expert testimony not required where jury could inspect the item in evidence to determine whether it met the statutory definition). However, operability will still be relevant where the statute’s definition of firearms excludes firearms that are “permanently inoperable”. G.L. 140, § 121. While not defined by case law or statutorily, the Massachusetts State Police, in their Firearms Identification Section policies and procedures, define permanently inoperable as “a firearm . . . that is incapable of expelling a shot or bullet and incapable of being readily restored to a firing condition.” See also 27 CFR § 478.11.

5. Necessity defense. The Supreme Judicial Court has assumed that a threat of death or serious injury, if it is direct and immediate, may excuse momentary possession of a firearm. *Commonwealth v. Lindsey*, 396 Mass. 840, 843-845 (1986). See *Commonwealth v. Iglesia*, 403 Mass. 132, 135-136 (1988); *Commonwealth v. Franklin*, 376 Mass. 885, 888 n.2 (1978). See Instruction 9.240 (Necessity or Duress).

6. Notice of affirmative defenses. The issuance of firearm identification cards and licenses to carry are governed by G.L. c. 140, §§ 129B and 131, respectively. Section 129C lists a number of statutory exemptions. Generally, these exemptions cover nonresidents in various circumstances, federally licensed firearms manufacturers or wholesale dealers and persons employed by them, persons in the military, police officers and other peace officers of any jurisdiction either in performance of their duties or who are duly authorized to possess, members of a veteran’s organization when on official parade duty or ceremonial occasions, to list a few. G.L. c. 140, § 129C, ¶ 4 (a) - (u).

Under Mass. R. Crim. P. 14.3(b), a defendant who intends to rely upon an affirmative defense of exemption must file advance notice of such a defense with the prosecutor and the clerk-magistrate. If the defendant fails to comply with the requirement, the defendant may not rely upon such a defense. The judge may allow late filing of the notice, order a continuance, or make other appropriate orders.

7. Notice of license revocation. The Commonwealth may prove that the defendant was given notice of the denial **either** orally or in writing. *Commonwealth v. Farley*, 64 Mass. App. Ct. 854, 865-67 (2005). See *Police Comm’r of Boston v. Robinson*, 47 Mass. App. Ct. 767, 773, 774 (1999) (proving notice of license revocation by certified mail requires proof of receipt); *Commonwealth v. Hampton*, 26 Mass. App. Ct. 938, 940 (1988) (defendant who purposefully or willfully evaded notice of license revocation sent by certified mail had constructive notice of license revocation).

8. “Residence or place of business.” While declining to address the scope of the place of business exemption, and whether it is limited to “an owner or proprietor of [a] business”, *Commonwealth v. Guardado*, 491 Mass. 666, 686 & n.9 (2023), the Court did hold that “a firearm located within a parking lot falls within the place of business exemption only if the parking lot is within the exclusive control of the business” *id.* at 684 (“An individual has an interest in protecting his or her place of business, but that interest is attenuated when the individual enters an area that is not within the exclusive control of that business”). See *Commonwealth v. Coren*, 437 Mass. 723, 734 (2002) (defining “residence” to include “all areas in and around a defendant’s property, including outside areas, over which defendant retains exclusive control,” but not including “public streets, sidewalks, and common areas to which occupants of multiple dwellings have access”); *Commonwealth v. Dunphy*, 377 Mass. 453, 458-460 (1979) (jury issue whether backyard was common area); *Commonwealth v. Domingue*, 18 Mass. App. Ct. 987, 990 (1984) (defendant privileged to carry at place of business); *Commonwealth v. Morales*, 14 Mass. App. Ct. 1034,

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1035 (1982) (jury issue whether area was a common area to which other occupants or owner had access); *Commonwealth v. Samaras*, 10 Mass. App. Ct. 910, 910 (1980) (no privilege to carry on sidewalk in front of defendant's house).

9. Lesser included offense of possession of a firearm under G.L. c. 269, § 10(h). 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 (1985). In 1991, the Legislature 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) nor shall anyone 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." St. 1990, c. 511 (eff. Jan. 2, 1991). This provision was deleted when the statute was rewritten in 1998. St. 1998, c. 180, § 69 (eff. Oct. 21, 1998). Where the place of possession is at issue in a case, the court may consider, with input from the parties, whether to give an instruction on 10(h) as a lesser included offense of 10(a), where being outside the home or business is often what distinguishes the two offenses.

10. Constructive possession requires knowledge, ability, and intention to control. In order to prove constructive possession of an item, the Commonwealth must show "knowledge coupled with the ability and intention to exercise dominion and control." *Commonwealth v. Romero*, 464 Mass. 648, 653 (2013), quoting *Commonwealth v. Brzezinski*, 405 Mass. 401, 409 (1989). Proof of constructive possession may be established by circumstantial evidence and the reasonable inferences drawn from the evidence. See *id.* "Presence alone cannot show the requisite knowledge, power, or intention to exercise control over [contraband], but presence, supplemented by other incriminating evidence, 'will serve to tip the scale in favor of sufficiency.'" *Commonwealth v. Albano*, 373 Mass. 132, 134 (1977), quoting *United States v. Birmley*, 529 F.2d 103, 108 (6th Cir. 1976). Even with evidence of knowledge of a firearm and the ability to control it, the Commonwealth must prove that the defendant had the intent to control the firearm. *Romero*, 464 Mass. at 654. Presence in a vehicle with a firearm must be "augmented by additional inculpatory evidence." *Id.*

For further discussion of constructive possession in firearms cases, see *Commonwealth v. Santos*, 95 Mass. App. Ct. 791, 800 (2019) (sufficient evidence of knowledge, ability and intent to control firearm where car was registered to defendant's mother and controlled by him, shotgun was partially in plain view and within his reach, defendant concealed shotgun, gave false information to police, and engaged in repair of shotgun); *Commonwealth v. Albano*, 373 Mass. 132, 134-36 (1977) (sufficient evidence where gun in plain view; defendant acted suspiciously); *Commonwealth v. Bailey*, 29 Mass. App. Ct. 1007, 1008 (1990) (gun in plain view near defendant's feet; car had been broken into; attempted escape); *Commonwealth v. Montgomery*, 23 Mass. App. Ct. 909, 910 (1986) (gun on defendant's side of auto and defendant had appropriate ammunition clip); *Commonwealth v. Lucido*, 18 Mass. App. Ct. 941, 943 (1984) (gun in glove compartment with defendant's personal letters); *Commonwealth v. Donovan*, 17 Mass. App. Ct. 83, 85-86 (1983) (gun under seat of borrowed car surrounded by defendant's acknowledged property); *Diaz, supra* (gun in plain view on floor in front of defendant). Compare *Commonwealth v. Brown*, 401 Mass. 745, 747 (1988) (insufficient evidence to prove defendant had knowledge of firearm, where defendant drove stolen car, guns were found under passenger seat, both occupants bent forward in unison when stopped and no admissions); *Commonwealth v. Almeida*, 381 Mass. 420, 422-423 (1980) (insufficient proof of knowledge of defendant where gun was inside covered console of borrowed auto); *Commonwealth v. Boone*, 356 Mass. 85, 87 (1969) (insufficient proof of knowledge where defendant was passenger in a car with gun under driver's seat); *Commonwealth v. Hill*, 15 Mass. App. Ct. 93, 94-97 (1983) (insufficient to prove gun inside woman's purse at male passenger's feet).

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11. Flare guns. A flare gun is not a “firearm” for purposes of G.L. c. 269, § 10(a). *Commonwealth v. Sampson*, 383 Mass. 750, 753-761 (1981).

12. Stun guns. In 2018, the Legislature amended G.L. c. 140, § 121 to include a stun gun in the definition of a firearm. See St. 2018, c. 123, § 4. As amended by St. 2024, c. 135, §§15-31, c. 140, § 121 now states that, “A stun gun is a firearm under our law. A stun gun is a portable device or weapon designed to incapacitate temporarily, injure, or kill by electrical shock, whether the shock passes by means of a dart or projectile with a wire lead or from an electrical current, impulse, wave, or beam.” Although the legislature has included a stun gun in the definition of a firearm, as laid out above, a firearm is an item that is “designed to or may readily be converted to expel a shot or bullet.” As they are manufactured, stun guns are not designed or converted to do so. Should the case involve illegal possession of a stun gun, the judge should instruct the jury accordingly, using these definitions.

13. “Frame or receiver” and “unfinished frame or receiver.” Chapter 269, § 10(a) also references in its definition of “firearm” both a “frame or receiver of such firearm,” or an “unfinished frame or receiver.”

A “frame” is defined as “the part of a pistol or revolver that provides housing or a structure for the component designed to hold back the hammer, striker, bolt or similar primary energized component prior to initiation of the firing sequence, even if pins or other attachments are required to connect such component to the housing or structure.”

A “receiver” is defined as “the part of a rifle or shotgun that provides housing or a structure for the primary component designed to block or seal the breech prior to initiation of the firing sequence, even if pins or other attachments are required to connect such component to the housing or structure.” As to a frame or receiver, “Any such part that is identified with an importer or manufacturer serial number shall be presumed, absent an official determination by the Bureau of Alcohol, Tobacco, Firearms and Explosives in the United States Department of Justice or other reliable evidence to the contrary, to be the frame of the firearm.”

An “unfinished frame or receiver” is defined as a forging, casting, printing, extrusion, machined body, or similar item that:

- (i) has reached a stage in manufacture when it may readily be completed or assembled to function as a frame or receiver; or
- (ii) is marketed or sold to the public to become or be used as the frame or receiver of a functional firearm once completed or assembled.

An “unfinished frame or receiver” does not include a component designed and intended for use in an “antique firearm.” G.L. c. 140, § 121 (defining “unfinished frame or receiver”).

Although the legislature has included finished and unfinished frames and receivers in the definition of a firearm, as stated above, a firearm is an item that is “designed to or may readily be converted to expel a shot or bullet.” Frames and receivers, finished or unfinished, are not designed or converted to do so. Should the case involve illegal possession of a finished or unfinished frame or receiver, the judge should instruct the jury accordingly, using the above definitions.

14. BB or pellet guns. BB or pellet guns are only considered a firearm under G.L. c. 269, § 10(j), where, specifically for the purposes of the offense of carrying a firearm at a school, college, or university or in transport for such an institution, the definition includes “any pistol, revolver, rifle or smoothbore arm from which a shot, bullet or pellet can be discharged.”

15. Other firearms. The definition of “firearm” specifically enumerates additional weapons as firearms: sawed-off shotguns, large capacity firearms, assault-style firearms, and machine guns. G.L. c. 140, § 121. The District Court lacks jurisdiction over the possession of these specific firearms. G.L. c.

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140, § 131M (assault-style firearm); G.L. c. 269, § 10(c) (machine gun and sawed-off shotgun), 10(m) (large capacity firearm).

16. Antique firearms. Antique firearms are exempted from G.L. c. 269, § 10, and are defined by G.L. c. 140, § 121" as any firearm or replica manufactured in or before 1899 if the firearm:

- (i) is not designed or redesigned for using rimfire or conventional centerfire fixed ammunition; or
- (ii) uses rimfire or conventional centerfire fixed ammunition that is no longer manufactured in the United States and which is not readily available in the ordinary channels of commercial trade.

That definition includes any muzzle-loading rifle, shotgun, or pistol that is designed to use black powder, or a black powder substitute, and that cannot use fixed ammunition, unless the firearm:

- (a) incorporates a firearm frame or receiver;
- (b) is converted into a muzzle-loading firearm; or
- (c) is a muzzle-loading firearm that can be readily converted to fire fixed ammunition by replacing the barrel, bolt, breechblock, or any combination of those parts.

To the extent that this issue is a jury question, the jury should be instructed in accordance with this definition.

17. Disqualifying conditions. As stated in several supplemental instructions *infra.*, a defendant may seek to assert an affirmative defense that their license is expired but valid under G.L. c. 140, § 121F(s), or they are exempt from punishment if they hold an expired but invalid license and that they would not be disqualified from renewing their license, under G.L. c. 140, § 121F(t). As such, the issue of whether or not the defendant would be disqualified from holding a license may be germane to the case on trial. See *Commonwealth v. Farley*, 64 Mass. App. Ct. 854, 861 n.12 (2005). As laid out in G.L. c. 140, § 121F(j), the following conditions may make the defendant a "prohibited person," to whom the licensing authority must deny an application for a license or renewal:

- Certain prior convictions and delinquency and youthful offender adjudications in the Commonwealth or any other state or federal jurisdiction. G.L. c. 140, § 121F(j)(i).
- Prior commitment for mental illness, pursuant to G.L. c. 123, §§ 7, 8, 12(e), 15(b), 16(b), 16(c), & 18, or for alcohol or substance use disorder, pursuant to G.L. c. 123, § 35, unless one of the enumerated exceptions is met. G.L. c. 140, § 121F(ii).
- Alien without lawful permanent residency. G.L. c. 140, § 121F(v).
- Currently subject to an order under G.L. c. 209A (abuse prevention) or c. 258E (harassment prevention), an extreme risk protection order under G.L. c. 140, §§ 131R-131Y, or any other similar order issued by another jurisdiction. G.L. c. 140, § 121F(iii).
- Subject to an outstanding arrest warrant from any state or federal jurisdiction. G.L. c. 140, § 121F(iv).
- Dishonorable discharge from the United States armed forces. G.L. c. 140, § 121F(vi).
- A fugitive from justice. G.L. c. 140, § 121F(vii).

Additionally, for any LTC issued on or after August 10, 2022, a licensing authority must deny or revoke an LTC if the applicant is unsuitable, and the unsuitability determination must "be based on reliable, articulable and credible information that the applicant or licensee has exhibited or engaged in behavior that suggests that, if issued a license, the applicant or licensee may create a risk to public safety or a risk of danger to self or others." G.L. c. 140, § 121F(k).

18. Exemption for interstate transport of firearms. Both Federal and Massachusetts law permit the interstate transport of firearms as long as certain conditions are met. See G.L. c. 140, s. 129C(j)(iii) & (k), and 18 U.S.C. s. 926A. See supplemental instruction, *infra.*

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19. Constitutional challenge. The Supreme Judicial Court has held that the nonresident firearm licensing scheme in effect after August 10, 2022, which mirrored the same substantive requirements as the resident licensing scheme in effect at that same time, was not facially unconstitutional. *Commonwealth v. Marquis*, 495 Mass. 434, 458, 469-70 (2025) (criminal defendant may bring facial challenge to licensing scheme when charged with violating a licensing statute which is unconstitutional on its face). The Court also held that the pre-2022 version of the resident licensing scheme was not unconstitutional on its face where at least some of its applications – exclusion of felons and violent criminal from firearm possession – are constitutionally valid. *Commonwealth v. Rodriguez*, 496 Mass. 627, 642 & n.8 (2025), abrogating *Commonwealth v. Donnell*, 495 Mass. 471, 484 (2025). A defendant who has not applied for a license does not have standing to bring an as-applied challenge. *Marquis*, 495 Mass. at 436.

20. Proof of coventurer's lack of license required for firearm possession under joint venture liability. In *Commonwealth v. Severino*, 106 Mass. App. Ct. 170 (2025), the Appeals Court held that in light of *Commonwealth v. Guardado*, 491 Mass. 666 (2023) (*Guardado I*), and 493 Mass. 1 (2023) (*Guardado II*), proof of a coventurer's lack of license is an essential element of joint venture liability for a firearms possession offense, where the coventurer is the person seen in possession of the firearm.