

**POSSESSION OF A (FIREARM) (RIFLE) (SHOTGUN)  
AT HOME OR BUSINESS<sup>1</sup>**

G.L. c. 269, § 10(h)

**The defendant is charged with unlawfully possessing a (firearm) (rifle) (shotgun). To prove the defendant guilty of this offense, the Commonwealth must prove (four) (five) things beyond a reasonable doubt:**

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

***Second:* That the item meets the legal definition of a (firearm) (rifle) (shotgun);**

***Third:* That the defendant knew that they possessed that (firearm) (rifle) (shotgun); and**

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

*If there is evidence that the defendant was exempt.*

**and *Fifth:* That the defendant did not qualify for one of the**

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<sup>1</sup> 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”. In cases with such fact patterns, the model instruction may be adapted accordingly.

**statutory exemptions.**

The issuance of firearm identification cards is governed by G.L. c. 140, §§ 129B - D. Section 129C also lists a number of exemptions from the requirement of a license to carry or a firearms identification card.

**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.**

*If defendant does not have physical control and/or the Commonwealth alleges constructive possession:*

**However, the law does not require that someone necessarily have actual physical custody of an object to possess it. An object is in a person's possession 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 end note 10.

**Instruction on 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 a (firearm) (rifle) (shotgun) is found is not sufficient by itself to permit an inference that the person knew about the presence of the (firearm) (rifle) (shotgun) without other indications of knowledge. Further, being present where a (firearm) (rifle)**

**(shotgun) is found, even with evidence that the defendant knew about the firearm, is not sufficient to prove possession, without evidence of intent to control that (firearm) (rifle) (shotgun).**

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 of defendant who was driving car where car was reported stolen and two firearms were found under passenger seat).

**To prove the second element, the Commonwealth must prove beyond a reasonable doubt that the item meets the legal definition of a (firearm) (rifle) (shotgun).**

#### **Firearm**

**A “firearm” is defined in our law as: “a pistol, revolver or other weapon... from which a shot or bullet can be discharged and... the length of [its] 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.”**

*Commonwealth v. Tuitt*, 393 Mass. 801, 810 (1985) (jury can determine from inspection that item is “firearm”; no need for expert testimony); *Commonwealth v. Fancy*, 349 Mass. 196, 204 (1965) (same); *Commonwealth v. Sperrazza*, 372 Mass. 667, 670 (1977) (testimony about “revolver” or “handgun” will support inference that barrel was under 16 inches).

**Rifle**

**A “rifle” is a weapon 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.**

**Shotgun**

**A “shotgun” is a weapon 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.**

**Stun Gun**

**A “stun gun” is a firearm under the law. It is a**

**portable device or weapon, from which an electrical current, impulse, wave or beam that is designed to incapacitate temporarily, injure or kill may be directed. It does not matter whether the stun gun passes an electrical shock by means of a dart or projectile via a wire lead.**

**To prove the third element, the Commonwealth must prove beyond a reasonable doubt that the defendant knew that they possessed this item and also knew that the item was a (firearm) (rifle) (shotgun), within the common meaning of that term. 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, and all of the surrounding circumstances, to help you determine the extent of the defendant’s knowledge at the time. If it was a conventional (firearm) (rifle) (shotgun), 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) (rifle) (shotgun).**

See Instruction 3.140 (Knowledge). *Commonwealth v. Marrero*, 484 Mass. 341, 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, 916-917 (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 that the firearm met the legal definition).

**To prove the fourth element, the Commonwealth must prove beyond a reasonable doubt that the defendant had neither a valid license to carry nor a firearm identification card at the time they possessed the (firearm) (rifle) (shotgun).**

Because a rifle or shotgun may be lawfully possessed with either a License to Carry or a Firearm Identification Card, the Commonwealth must prove that the defendant had neither the license nor the card. See G.L. c. 140 § 129B-C, § 131.

*If there is evidence that the defendant was exempt.*

**To prove the fifth element, the Commonwealth must prove beyond a reasonable doubt that the defendant did not qualify for the statutory exemption of \_\_\_\_\_.**

See G. L. c. 140, § 129C for the list of statutory exemptions. See Supplemental Instructions 3 and 4 below.

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

SUPPLEMENTAL INSTRUCTIONS

1. Non-firing firearm, rifle or shotgun. **When a weapon that was originally a (firearm) (rifle) (shotgun) becomes so defective or damaged that it will no longer fire a projectile, the law no longer considers it to be a (firearm) (rifle) (shotgun). But a weapon remains a (firearm) (rifle) (shotgun) within the meaning of the law when a slight repair, replacement or adjustment will again make it capable of firing a projectile.**

*Commonwealth v. Jefferson*, 461 Mass. 821, 828 (2012) (evidence sufficient where, with a “relatively slight repair with a pair of small pliers” gun could be fired); *Commonwealth v. Colton*, 333 Mass. 607, 608 (1956) (insertion of ammunition clip); *Commonwealth v. Bartholomew*, 326 Mass. 218, 220 (1950) (insertion of firing pin); *Commonwealth v. Raedy*, 24 Mass. App. Ct. 648, 652-656 (1987) (jury question whether gun that could be fired if inverted was “firearm”; judge who distinguishes between “major” and “minor” repairs need not instruct that Commonwealth must prove that this particular defendant had ability and knowledge to repair gun); *Commonwealth v. Rhodes*, 21 Mass. App. Ct. 968, 969- 970 (1986) (not a firearm where bent part rendered inoperable until repaired).

2. Knowledge of license 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 or firearms identification card.

**You have heard some mention that the defendant did not know that they were required to have a license to carry or firearms identification card before possessing a (firearm) (rifle) (shotgun). The Commonwealth is *not***



**required to prove that the defendant knew that the law required them to have a license to carry or firearm identification card before possessing a (firearm) (rifle) (shotgun).**

3. Expired license or firearm identification card. **One of the exemptions to the requirement of a valid (license to carry) (firearm identification card) provided by law is for certain persons with an expired (license to carry) (firearm identification card). This exemption is intended to exempt from criminal punishment persons whose (license to carry) (firearm identification card) became invalid inadvertently but who would otherwise not be disqualified from holding a valid (license) (firearm identification card).**

**The defendant is entitled to this exemption if their (license to carry) (firearm identification card) was expired and they had not been notified of any revocation or suspension of the (license) (card), or pending revocation or suspension of the (license) (card), or denial of a renewal application. The Commonwealth has the burden**

**to prove that the exemption does not apply. To do this, the Commonwealth must prove beyond a reasonable doubt one of the following things:**

**One, that the defendant never had a valid (license to carry) (firearm identification card); or**

**Two, that the defendant had been notified that the (license) (card) was revoked or suspended or that revocation or suspension was pending, and that the revocation or suspension was due to something other than a failure to provide a change of address; or**

**Three, that the defendant had been notified of the denial of an application to renew their (license to carry) (firearm identification card).**

**If the Commonwealth has not proven one of those three things beyond a reasonable doubt, you must find the defendant not guilty.**

G.L. c. 140, § 131(m); *Commonwealth v. Indrisano*, 87 Mass. App. Ct. 709, 716-17 (2015). The mere production of an expired license is insufficient to warrant this instruction, but testimony that the defendant had never applied to renew the license, had never received notice of denial, and had never received notice of revocation or suspension entitles a defendant to the instruction. *Indrisano*, 87 Mass. App. Ct. at 714.

4. If there was some evidence that the defendant was transporting a firearm through Massachusetts and the defendant was legally permitted

*to possess and carry under both the origin and destination state's laws.*

**A person may transport a firearm through the Commonwealth of Massachusetts, so long as they satisfy four conditions:**

- 1) They are in compliance with the gun laws in the state they are traveling from;**
- 2) They are in compliance with the gun laws in the state they are traveling to;**
- 3) The weapon is not loaded; and**
- 4) The weapon and any ammunition is not readily accessible while being transported.**

**If there is evidence of the above four conditions, you must find the defendant not guilty unless the Commonwealth proves beyond a reasonable doubt that at least one of those conditions has not been met.**

See *Commonwealth v. Harris*, 481 Mass. 767, 778 (2019) (finding no error in declining to give instruction regarding this exception; not warranted based on facts at trial). Pursuant to 18 U.S.C. § 926A, any person who is not prohibited under Federal law from transporting, shipping, or receiving a firearm, "shall be entitled to transport a firearm for any lawful purpose from any place where he may lawfully possess and carry such firearm to any other place where he may lawfully possess and carry such firearm if, during such transportation the firearm is unloaded, and neither the firearm nor any ammunition being transported is readily accessible or is directly accessible from the passenger compartment of such transporting vehicle."

## 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 (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.” Stat. 1990, c. 511 (effective January 2, 1991). This provision was deleted when the statute was rewritten by St. 1998, c. 180, § 69 (effective October 21, 1998).

**2. 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).

**3. 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).

**4. 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.

**5. Notice of affirmative defense.** 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(b)(3), 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.

**6. Notice of license revocation.** 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).

**7. 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. See *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.

**8. 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.

9. **“Residence or place of business”.** See *Guardado*, 491 Mass. 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”); *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. Morales*, 14 Mass. App. Ct. 1034, 1035 (1982) (jury issue whether area was a common area to which other occupants or owner had access); *Commonwealth v. Domingue*, 18 Mass. App. Ct. 987, 990 (1984) (defendant privileged to carry at place of business); *Commonwealth v. Samaras*, 10 Mass. App. Ct. 910, 910 (1980) (no privilege to carry on sidewalk in front of defendant’s house).

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, supra* at 654. Presence in a vehicle with a firearm must be “augmented by additional exculpatory evidence”. *Id.*

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, 134-136 (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 auto 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).