

DISCHARGE OF A FIREARM WITHIN 500 FEET OF A BUILDING

G.L. c. 269, § 12E

The defendant is charged with discharging a firearm within 500 feet of a dwelling or other building in use. To prove the defendant guilty of this offense, the Commonwealth must prove three things beyond a reasonable doubt:

- First:* That the defendant discharged a weapon;**
- Second:* That the weapon met the legal definition of a firearm [rifle] [shotgun]; and**
- Third:* That the discharge occurred within 500 feet of a (dwelling) (building) in use.**

To prove the first element, the Commonwealth must prove beyond a reasonable doubt that the defendant, whether intentionally or unintentionally, caused the firearm [rifle] [shotgun] to discharge when it was capable of firing or shooting a shot or bullet. The Commonwealth is not required to prove that a shot or bullet was actually released as a result of the discharge.

To prove the second element, the Commonwealth must prove beyond a reasonable doubt that the weapon which the defendant discharged met the legal definition of a firearm [rifle] [shotgun].

Firearm

A firearm is a stun gun or a pistol, revolver or other weapon of any description, loaded or unloaded, from which a shot or bullet can be discharged and of which the length of the barrel or barrels is less than 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.

To prove the third element, the Commonwealth must prove beyond a reasonable doubt that a (dwelling) (building) was within 500

feet as measured in a straight line from the defendant’s location at the time of the discharge. The Commonwealth must also prove that, at the time of the discharge, the (dwelling) (building) was “in use” in that it was an active (dwelling) (building) which was being used by one or more persons. However, the Commonwealth is not required to prove that the (dwelling) (building) was occupied at the moment when the weapon was discharged.

If the Commonwealth has proven all three elements beyond a reasonable doubt, you should return a verdict of guilty. If the Commonwealth has failed to prove one or more of these elements beyond a reasonable doubt, you must return a verdict of not guilty.

SUPPLEMENTAL INSTRUCTIONS

Consent

If there is evidence that the owner or legal occupant of the (dwelling) (building) consented in advance to the defendant’s discharge of a firearm within 500 feet of the (dwelling) (building), then the Commonwealth must prove beyond a reasonable doubt that (the neither the owner nor a legal occupant had consented to the discharge.

NOTES:

1. **Affirmative defenses:** The provisions of G. L. c. 269, § 12E do not apply to “(a) the lawful defense of life and property; (b) any law enforcement officer acting in the discharge of his duties; (c) persons using underground or indoor target or test ranges with the consent of the owner or legal occupant thereof; (d) persons using outdoor skeet, trap, target or test ranges with the consent of the owner or legal occupant of the land on which the range is established; (e) persons using shooting galleries, licensed and defined under the provisions of [G. L. c. 140, § 56A]; and (f) the discharge of blank cartridges for theatrical, athletic, ceremonial, firing squad, or other purposes in accordance with [G. L. c. 148, § 39].” See *Commonwealth v. Kelly*, 484 Mass. 53, 67 (2020) (the existence of a statutory exemption is treated “as equivalent to an affirmative defense”).
2. **Measuring 500 foot Distance:** See *Commonwealth v. Mendes*, 75 Mass. App. Ct. 390, 394, rev. denied, 457 Mass. 1106 (2009) (distance measure as a 500 radius from the point of discharge). See also *Commonwealth v. Forish*, 56 Mass. App. Ct. 1114 (2002) (unpublished), reversed on other grounds, 540 U.S. 1216, (2002), 61 Mass. App. Ct. 554 (2004) (jury may infer from photographs and stipulation that area was “thickly settled” with houses within 100 feet of each other that firearm was discharged within 500 feet of a building).
3. **Dwelling or building use:** The building may be “in use” at any time of the day and not necessarily occupied at the precise moment of the discharge. *Commonwealth v. Mendes*, 75 Mass. App. Ct. 390, 395, rev. denied, 457 Mass. 1106 (2009). The statute protects the “potential occupants of active buildings throughout the whole day and not simply within their formal business hours”. See *id.*
4. **Strict liability; no mens rea:** This statute is a strict liability public welfare statute. *Commonwealth v. Kelly*, 484 Mass. 53, 62 (2020). Thus, there is no *mens rea* element for the offense. See *id.*
5. **Firearm:** A starting pistol that fires blanks is a firearm under this statute if the barrel plug has been removed making the weapon capable of discharging a bullet or shot. *Commonwealth v. Stephens*, 67 Mass. App. Ct. 906, 907, rev. denied., 448 Mass. 1104 (2006). For purposes of this statute, the term “firearm” excludes a weapon that is: “(i) constructed in a shape that does not resemble a handgun, short-barreled rifle or short-barreled shotgun including, but not limited to, covert weapons that resemble key-chains, pens, cigarette-lighters or cigarette-packages; or (ii) not detectable as a weapon or potential weapon by x-ray machines commonly used at airports or walk-through metal detectors.” G.L. c. 140, § 121.
6. **Blanks.** The firing of blanks is prohibited by the statute. *Commonwealth v. Stephens*, 67 Mass. App. Ct. 906 (2006).