

**Commonwealth of Massachusetts**

**Appeals Court**

**SUFFOLK, SS.**

**2018 Sitting**

**No. 2018-P-1052**

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**Commonwealth**

**v.**

**Michael Kelly**

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**On Appeal From A Judgment Of The  
Natick District Court Of Middlesex County**

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**Brief And Record Appendix  
For The Defendant/Appellant**

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**Issues Presented**

- I. Whether the trial court erred in failing to grant the Defendant's motion for required finding of not guilty as to the charge of discharging a firearm within 500 feet of a building where there was no evidence from which the jury could reasonably conclude that said discharge was done knowingly
- II. Whether the trial court erred in refusing to instruct the jury on the elements of an exempted person or use pursuant to G.L. c. 140, s. 129C(m)

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**Statement of the Case**

On January 22, 2013, complaint number 1387CR0052 issued in the Natick District Court charging Defendant with witness intimidation as to Officer Ronald Richardson of the Natick Police Department and discharging a firearm within 500 feet of a building. RA 1; 3.<sup>2</sup> A further criminal complaint, number 1387CR0132, later issued on February 19, 2013, charging Defendant with unlicensed carrying of a firearm, assault and battery with a dangerous weapon, unlicensed possession of a large capacity firearm, and witness intimidation as to Gregory Fennelly. RA 2; 3. Both complaints related to conduct in the same course of events on the same day.

On July 12, 2013, the Commonwealth filed a *nolle prosequi* as to count three of docket 1387CR0132, charging the unlicensed possession of a high capacity firearm. RA 5. On August 5, 2015, the Commonwealth moved to amend count one of docket 1387CR0132 to G.L. c. 269, s. 10(a), which was later corrected on the first day of trial to G.L. c. 269, s. 10(h). RA 6; Tr. 1-5-6. Prior to trial, Defendant filed motions to dismiss and suppress evidence, both of which were

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<sup>2</sup> Citations to the record appendix will be referred to as "RA", followed by the page number on which the cited material appears. Citations to the trial transcript will be referred to as "Tr.", followed by the volume and page number(s) referenced. The volume relating to sentencing on August 11, 2015 is denoted as "1-" in its pages, but will be referred to as "4-."

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denied. R.A. 6.

The case proceeded to trial before Hon. David Cunis on Wednesday, August 5, 2015. The Court heard evidence and testimony on the 5th, 6th, and 7th of August. On August 7th the Commonwealth rested. Tr. 3-36. Defendant moved at that time for a required finding of not guilty. Tr. 3-36. Defendant took the stand and the defense rested on August 7, 2015. Tr. 3-130.

The jury returned verdicts of not guilty as to witness intimidation regarding Greg Fennelly; guilty as to discharging a firearm within 500 feet of a building; guilty as to unlicensed possession of a firearm; not guilty as to assault and battery with a dangerous weapon; and guilty as to the charge of witness intimidation relating to the Natick Police Department. Tr. 3-202-04. Defense counsel renewed her motion for a required finding of not guilty on August 11, 2015, following the jury verdict, prior to sentencing. Tr. 4-5. Defendant was then sentenced to a \$100 fine and \$25 surfine on the charge of discharging a firearm within 500 feet of a building; one year in the House of Correction, suspended for two years on the charge of unlicensed possession of a firearm and two years probation on the charge of witness intimidation. Tr. 4-12-13.



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Defendant's notice of appeal as to docket 1387CR0132 was timely filed on August 12, 2015. RA. 12. On or about October 6, 2017, Defendant filed a post-conviction motion for required finding of not guilty, pursuant to M. R. Cr. P. 25(b)(2) with regard to the charges of witness intimidation and discharging a firearm within 500 feet of a building. The trial court held a hearing on that motion, at which the Commonwealth conceded that the District Court lacked jurisdiction as to the witness intimidation charge, and that charge was dismissed. RA 12. The trial court later issued an order dated April 6, 2018 denying Defendant's motion for a required finding of not guilty as to the charge of discharging a firearm within 500 feet of a building. RA 13. Defendant filed a notice of appeal as to the trial court's order, and the trial court granted Defendant's motion to enlarge the time for filing same. RA 15, 16. The appeal of the denial of Defendant's post-conviction motion was entered on the docket of this Court on July 23, 2018, and consolidated with Defendant's direct appeal under docket 18-P-1052.

### **Statement of Facts**

#### **A. The Commonwealth's Evidence**

On January 20, 2013, Gregory Fennelly went to

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Defendant's home to watch a Patriots game with some mutual friends, including Daniel Lynch, Jeffrey Nickinello, Kelly Bowers, and Tyler Sullivan. Mr. Fennelly had known Defendant since kindergarten and stayed close friends through high school. Tr. 1-179, 1-131-35. Mr. Fennelly had obtained a license to carry a firearm a few weeks prior to the incident, but did not yet own a gun. Tr. 1-141, 2-14, 2-38. Mr. Fennelly testified that Defendant greeted him, and invited him into a bedroom where Defendant showed Mr. Fennelly a pistol he was offering to sell to Mr. Fennelly. Tr. 1-139-40. Defendant had also shown a gun to Mr. Lynch earlier that day (Tr. 2-38), and to Mr. Sullivan "a couple weeks prior to the incident." Tr. 2-69, 2-79.

While Mr. Fennelly and Defendant were alone in the bedroom, Defendant removed the magazine, placed it on the bed, looked into the chamber, and handed Mr. Fennelly the gun. Tr. 1-144-45. Defendant began showing Mr. Fennelly how to clean the gun. He showed Mr. Fennelly an additional magazine and a "speed loader," that he removed from a backpack. Tr. 1-150. Mr. Fennelly attempted to insert the magazine and speed loader, and handed the gun back to Defendant. Tr. 1-151. Mr. Fennelly claimed that he never held the gun when it was fully assembled with a clip

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inside. Tr. 1-205. Defendant offered to sell Mr. Fennelly the gun, and Mr. Fennelly said he would think about it. Tr. 1-153.

Defendant's girlfriend then entered the room and began speaking with Defendant. Mr. Fennelly's attention was drawn to his phone at that time, and according to his testimony, the next thing Mr. Fennelly recalled was hearing a "noise go off," and realizing that there was a hole in his hand. Tr. 1-157-58. Defendant would later tell Mr. Sullivan that he was going to sell the gun to Mr. Fennelly, that he had disarmed it, and that it "went off" after Mr. Fennelly handed the gun back to Defendant. Tr. 2-90; 92. Mr. Fennelly testified that the gunshot did not arise in the context of an argument or any other circumstances to indicate to him that it was anything other than a "mistake" (which is the term Mr. Fennelly used to describe the incident). Tr. 1-187. Mr. Fennelly then ran out of the room yelling "Mike f-ing shot me," and was driven to the hospital by his friend, Daniel Lynch, in Mr. Fennelly's vehicle with Defendant in the back seat. Tr. 158.

As Mr. Fennelly, Mr. Lynch, and Defendant left for the hospital Defendant's father, Michael Kelly Sr., who was upstairs, "came running down the stairs" and told everyone to leave. Tr. 2-36, Tr. 2-60. He had

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not heard the gunshot, but was alerted to it when his nephew came up the stairs saying "[u]ncle, [u]ncle, there's been an accident." Tr. 133. After the three men left for the hospital, Ms. Bowers entered the bedroom. She observed white matter and blood on the wall in the bedroom, and observed Defendant's girlfriend cleaning blood in the kitchen. Tr. 2-55-59.

On the way to the hospital, Defendant told Mr. Fennelly "[s]ay you did it. Don't say I did it. Everything will be fine. Tell 'em we were at the farm . . . ." Tr. 1-160. Mr. Fennelly testified that he responded by saying "I'm not gonna lie. I can't lie." Id. Mr. Fennelly also testified that at the hospital Defendant told a nurse that Mr. Fennelly had shot himself. Tr. 1-161. Mr. Fennelly was treated at the Leonard Morse Hospital in Natick and then transferred to Mass. General in Boston, where he had five reconstructive surgeries. Tr. 1-164-65. Mr. Fennelly also testified about lasting disabilities caused by the gunshot. Tr. 1-168.

While Mr. Fennelly was being treated, Officer Ronald Richardson was performing a property check at Leonard Morse Hospital when he observed a parked car with an open door. Officer Richardson encountered Defendant, who was the operator of the vehicle, and

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who told the officer he was "there for a friend who was having a hand problem." Tr. 1-84. Officer Richardson followed Defendant inside the hospital where he found Gregory Fennelly being treated for a gunshot injury. Tr. 1-85. Defendant told Officer Richardson that Mr. Fennelly had been shot in the hand while Defendant had been showing him a gun he was trying to sell to Mr. Fennelly. Tr. 1-87-88. Defendant told the officer that the gun was being transported to Maine by someone named Ryan Nile because Defendant was afraid that the police would take it. Id. The officer had brief conversations with several other witnesses and then notified the station, which dispatched a detective. Tr. 90-91.

Detective Vitale arrived and interviewed Defendant at the hospital where Defendant told him that Mr. Fennelly had shot himself and the gun was on its way up to Maine. Tr. 2-183-89. Defendant also told the Detective that he lived in Maine. Tr. 2-191. The Detective put out a BOLO for the individual who Defendant said was transporting the gun to Maine. Tr. 2-192. The Detective was later advised that there was no living person by the name Defendant had given in the State of Maine. Tr. 2-192.

Meanwhile, Natick Police officers Michael Mabardy and Scott Lacerra responded to Defendant's residence

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where they met Defendant's father, Mr. Michael Kelly Sr. Tr. 1-100-03. The officers conducted a protective sweep and retrieved a firearm. Tr. 1-103-07. Mr. Kelly Sr. gave the officers consent to search the home, and waited with his dogs in a vehicle while the police conducted the search. Tr. 2-136. Officer Mabardy testified that in a bedroom he saw a firearm in an open case and a trail of blood drops leading out of the room, through the living room, out to the driveway, and to the front bumper of one of the vehicles in the driveway. Tr. 1-108. Officer Mabardy further testified that the firearm that was recovered was a semi-automatic that held 12 rounds in the magazine and one in the chamber. Tr. 1-118. Mr. Kelly Sr. testified that Defendant was living off-and-on at both the residence and another in Maine, and had (as of the time of trial) a Maine drivers license. Tr. 2-100; 122; 150. Mr. Lynch also testified that Defendant and his family had a place in Maine and liked to go hunting. Tr. 2-249.

Mr. Kelly Sr. testified that he had a license to carry (Tr. 2-110) and testified that he had given Defendant consent to show the firearm for sale (though, of course, not to shoot it in the home). Id.; 2-142. Mr. Kelly Sr. stated that Defendant had "consent to do with what he wants with [the gun], as

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long as he keeps it in the house and -- and under my -- my supervision . . . ." Tr. 2-101. He also stated that the gun was his son's (Id.) but that he (Mr. Kelly Sr.) kept a lock on it, the key to which he gave Defendant that day when Defendant told him he wanted to show it for sale. Tr. 2-105. Mr. Kelly Sr. explained that it was his son who had purchased the gun, but when it was in Massachusetts they treated it as his father's property. Tr. 2-107.

With regard to the firearm recovered in Defendant's home, Detective Vitale testified that the magazine was capable of holding 12 rounds, making it illegal in Massachusetts. Tr. 2-199. On cross examination the Detective was asked whether he was familiar with G.L. c. 140, s. 129C, and he said he was not. Tr. 2-209. The Detective was shown and confirmed that Defendant had a drivers license from Maine with an address in New Portland. Tr. 2-214.

Lieutenant Paul Thompson testified for the Commonwealth as a firearms expert. Tr. 3-1-9. The Lieutenant testified that the firearm at issue was operable (Tr. 3-10) and was not approved for civilian use in Massachusetts, though he did not know if it was legal to purchase in another state. Tr. 3-13; 31. He also testified about a particular feature of the gun that, in his opinion, made it a risky weapon to use

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because in order to disassemble it, the user must fully depress the trigger. Tr. 3-21. After the Lieutenant's testimony, and the introduction of medical records, the Commonwealth rested and Defendant's motion for required finding was made on the record and denied.<sup>3</sup> Tr. 3-35-36.

**B. The Defendant's Evidence**

Defendant was the only witness to testify for the defense. He testified that he lived in Maine, but on January 20, 2013, he was staying at his father's house. Tr. 3-40-42; 44. Defendant testified that when he learned that Mr. Fennelly had obtained his license to carry he asked his father if it would be okay to show Mr. Fennelly the gun. Tr. 3-49. He testified that he (Defendant) purchased and owned the gun, but did not buy it or use it in Massachusetts. Tr. 3-50.

Defendant explained that on January 20, 2013, he had friends over to watch the Patriots game. He testified that it was 'not a drinking party.' Tr. 3-57. He met up with Mr. Fennelly, and led him into the bedroom to show him the gun and disassembled it. Tr. 3-58-59. The gun was unloaded when Defendant handed it to Mr. Fennelly, but he later handed Mr. Fennelly a

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<sup>3</sup> The hearing on Defendant's motion was not recorded, but there is no record of any favorable action taken by the trial court on that motion.



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loaded magazine, which was inserted into the gun. Tr. 3-62. Defendant testified that his girlfriend entered and exited the room, and that when Mr. Fennelly handed the gun back to him, it was in an "awkward position," where "the slide was back." Tr. 3-64. He testified that he could "see the bullet" and tried to remove the magazine. Tr. 3-68. The magazine came out, a bullet fell out, and the slider returned to the closed position. Tr. 3-69-70. Defendant testified that he then aimed the gun at a pile of laundry, and depressed the trigger in order to disassemble it -- as the Lieutenant explained was required for this gun. The gun then discharged. Tr. 3-74. Mr. Fennelly was shot in the hand and Defendant, Mr. Fennelly, and Mr. Lynch then rushed to the hospital.

In the car ride to the hospital, Defendant testified, he did say to Mr. Fennelly 'let's just tell 'em it happened somewhere else,' to which Mr. Fennelly said he would not lie. Tr. 3-78. Defendant also testified about his interaction with the police (Tr. 3-82; 85), his transportation to the police station (Tr. 3-92), and his arrest (Tr. 3-97).

Defendant testified that the whole incident was an accident, saying "I had no idea there was even a bullet in the chamber." Tr. 3-99. He testified that he was not the one who loaded the gun. Tr. 3-99-100.

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He also testified that his purpose in depressing the trigger was to disassemble the gun. Tr. 3-128.

On cross examination there was a great deal of discussion about Defendant's address. When asked about the gun, Defendant agreed that he had the gun for approximately four months before January 20, 2013. Tr. 3-117; 123. He testified that he possessed the firearm in Maine during the hunting season and that his father transported it to Massachusetts, "[r]ight after Thanksgiving." Tr. 3-125-26; 130.

During the charging conference, Defendant requested an instruction on exemption from the licensing requirements of G.L. c. 140, s. 129C, pursuant to subsection (m) which provides that the provisions of G.L. c. 140, s. 129C "shall not apply to . . . exempted persons and uses," including:

(m) The temporary holding, handling or firing of a firearm for examination, trial or instruction in the presence of a holder of a license to carry firearms, or the temporary holding, handling or firing of a rifle or shotgun for examination, trial or instruction in the presence of a holder of a firearm identification card, or where such holding, handling or firing is for a lawful purpose;

G.L. c. 140, s. 129C(m)

The court declined to give the instruction and noted Defendant's objection. Tr. 3-143; 3-190. Defense counsel nevertheless argued in her closing that "the possession of that gun was covered under the license

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to carry by the homeowner, who was Mr. Kelly [(Sr.)],” and that “for the short period of time that [Defendant] was holding that gun, he was in the room with Greg and Greg testified that he had a valid license to carry.” Tr. 3-170.

The defense then rested, and each side delivered closing arguments. The jury was instructed according to the charging conference. With regard to the discharge of a firearm within 500 feet of a building, the court essentially read the text of G.L. c. 140, s. 121 to the jury. 3-195-96. The jury deliberated and returned its verdict. Tr. 3-202-05. Sentencing was put off to the following week. Prior to sentencing, defense counsel renewed her motion for a required finding of not guilty following close of Defendant's evidence. Tr. 4-3.

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**Argument**

- I. **THE TRIAL COURT ERRED IN FAILING TO GRANT THE DEFENDANT'S MOTION FOR REQUIRED FINDING OF NOT GUILTY AS TO THE CHARGE OF DISCHARGING A FIREARM WITHIN 500 FEET OF A BUILDING WHERE THERE WAS NO EVIDENCE FROM WHICH THE JURY COULD REASONABLY CONCLUDE THAT SAID DISCHARGE WAS DONE KNOWINGLY**

Defendant was convicted of possession of the firearm, but acquitted of the charge of assault and battery with a dangerous weapon for the shooting injury to Greg Fennelly's hand. The jury therefore believed that he was responsible for the injury, but that it was an accident -- that he did not mean to shoot his friend in the hand. However, the jury was never instructed that the conduct had to be done knowingly, and was therefore effectively instructed that, with regard to the offense of discharging a firearm within 500 feet of a building, the jury should return a verdict of 'guilty' even if the discharge was an accident.

The jury was instructed on the elements that appear in the statute defining the offense, G.L. c. 269, s. 12E, as follows:

. . . the Commonwealth must prove. . . four elements beyond a reasonable doubt. First, the Commonwealth must prove beyond a reasonable doubt that the Defendant possessed a firearm as defined by statute . . . The second element the Commonwealth must prove beyond a reasonable doubt is that the firearm was discharged. The third element the Commonwealth must prove beyond a reasonable doubt is that the discharge occurred within

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500 feet of a dwelling or other building in use. And the fourth element the Commonwealth must prove is that the discharge occurred without the consent of the owner or legal occupant of that dwelling or other building in use.

Tr. 3-196.

There are no model jury instructions for the charge of discharging a firearm within 500 feet of a dwelling. It appears that when the jury was being instructed, the Court omitted any discussion of the degree of *mens rea* required to sustain a conviction because none is explicitly provide for in the text of the statute.

"[T]he 'existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American jurisprudence.'" Commonwealth v. Miller, 385 Mass. 521, 524 (1982) citing Dennis v. United States, 341 U.S. 494, 500 (1951). Certainly, the legislature "may 'create strict criminal liabilities by defining criminal offenses without any element of scienter,'" (Id.) but in the absence of evidence of such legislative intent that is not the default. See e.g. Commonwealth v. Corey, 351 Mass. 331 (1966) (Reading scienter into statute prohibiting sale of obscene material).

In Commonwealth v. Jones, the SJC observed that "where First Amendment rights are at issue, we presume 'that some form of *scienter* is to be implied in a

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criminal statute even if not expressed.'"

Commonwealth v. Jones, 471 Mass. 138, 143 (2015) (collecting cases). "Statutes, purporting to create criminal offences which may 'impinge upon the public's access to constitutionally protected matter,' have been construed to require knowledge by the accused of the facts giving rise to criminality." Commonwealth v. Buckley, 354 Mass. 508, 510 (1968). Although first amendment rights are not implicated in G.L. c. 269, s. 12E, the statute certainly implicates second amendment rights, and should therefore receive the same degree of scrutiny. District of Columbia v. Heller, 554 U.S. 570 (2008)

The SJC itself has implied, albeit in *dicta*, that s. 12E contains a knowledge requirement at least to the underlying act of discharging a firearm.

In this last feature [the school zone statute] resembles other criminal statutes which punish an underlying violation committed *with mens rea* and consider the offense aggravated by a fact of which the defendant may not have express knowledge. See G.L.c. 269, § 12E (1990 ed.) (discharge of a firearm within 500 feet of a dwelling; no requirement of knowledge of the distance);

Commonwealth v. Alvarez, 413 Mass. 224, 230 (1994) (emphasis added).

Alvarez therefore implies that a defendant may be punished under s. 12E without proof of his

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knowledge regarding his proximity to a building where the "underlying violation" (ie. discharging a firearm) is punished "*with mens rea*." Cf. Commonwealth v. Evans, 439 Mass. 184 (2003) (Motion for required finding of not guilty on the charge of discharging a firearm within 500 feet of a building would not be meritorious where the defendant "took a gun 'out of his pocket,' [and] shot it 'three to four times' at 'members of the Castlegate Gang,' then fled."); Commonwealth v. Stephens, 67 Mass. App. Ct. 906 (2006) (Conviction for discharging a firearm within 500 feet of a dwelling upheld where "defendant pointed the gun . . . and began to shoot at both [victims]" with a starter pistol loaded with blanks.)

The SJC has "concluded that other provisions of the firearms statute that do not explicitly contain a *mens rea* requirement, among them G. L. c. 269, § 10 (c) and (h), and previous versions of G. L. c. 269, § 10, implicitly require knowledge." Commonwealth v. Brown, 479 Mass. 600 (2018) and cases cited. In Brown, the Commonwealth argued with regard to the offense of carrying a loaded firearm that "G. L. c. 269, § 10 (n), '[was] not totally void of any *mens rea* requirement,' in that the Commonwealth must prove the intent of the underlying possessory offense." Id. at

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606. The SJC rejected this limiting principle, and held that the Commonwealth was required to prove that the defendant also knew the firearm was loaded. Id. There is even less reason in this case to do otherwise where 12E undeniably establishes an independent offense, and not, as the Commonwealth argued in Brown, merely a sentencing enhancement. It is also worth noting that s. 12E criminalizes the conduct of individuals discharging firearms without regard to whether that person is otherwise licensed to do so, and that Defendant was separately convicted of unlicensed possession of the firearm in this case.

A claim of sufficiency of the evidence is reviewed under the oft-repeated Latimore standard, viewing the evidence in the light most favorable to the Commonwealth. Commonwealth v. Adonsoto, 475 Mass. 497 (2016) citing Commonwealth v. Latimore, 378 Mass. 671, 676-677 (1979). "[T]he evidence and the inferences permitted to be drawn therefrom must be 'of sufficient force to bring minds of ordinary intelligence and sagacity to the persuasion of [guilt] beyond a reasonable doubt.'" Commonwealth v. Semedo, 456 Mass. 1, 8 (2010). "[I]t is not enough for the appellate court to find that there was some record evidence, however slight, to support each essential element of the offense; it must find that there was enough



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evidence that could have satisfied a rational trier of fact of each such element beyond a reasonable doubt."

Latimore, supra at 677-78.

It is clear that the statute implies that one must knowingly discharge a firearm before criminal liability may attach under 12E. The SJC in Alvarez assumed and implied as much. The jury was never instructed of that implicit requirement for the very understandable reason that the charge was not the centerpiece of the trial and in the absence of a standard jury instruction the trial court simply read the statute to the jury. The trial court thereafter denied Defendant's renewed motion for a directed verdict of not guilty, and issued an opinion finding that the statute did not include a *scienter* requirement. There was no record evidence to support the inference that Defendant knowingly discharged the firearm. Defendant, for his part, described the incident as an accident, and said that he did not know the gun was loaded. Mr. Fennelly also described the incident as an accident. The jury acquitted Defendant on assault and battery, showing that the jury did not find sufficient evidence that Defendant's conduct was reckless. Allowing a conviction to stand in the absence of sufficient evidence would be a violation of Defendant's Due Process rights. Jackson v. Virginia,

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443 U.S. 307, 316 (1979)

Accordingly, Defendant's conviction must be vacated, and an order entered directing an acquittal on the charge of discharging a firearm within 500 feet of a building.

**II. THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THE ELEMENTS OF AN EXEMPTED PERSON OR USE PURSUANT TO G.L. C. 140, S. 129C(M)**

G.L. c. 140, s. 129C provides that the firearms licensing requirements of that section shall not apply to, among others,

(m) The temporary holding, handling or firing of a firearm for examination, trial or instruction in the presence of a holder of a license to carry firearms, or the temporary holding, handling or firing of a rifle or shotgun for examination, trial or instruction in the presence of a holder of a firearm identification card, or where such holding, handling or firing is for a lawful purpose;

G.L. c. 140, s. 129C(m)

Defendant requested a license or authority instruction, referencing s. 129C. Tr. 3-139; 141; 1-6. The Commonwealth opposed the request, and in response cited Commonwealth v. Bachman in which the defendant had "relie[d] on the fact that [his companion] was issued a firearm identification card to support his claim of exemption under the firearms charges." Commonwealth v. Bachman, 41 Mass. App. Ct. 757, 760 (1996). In Bachman, the Court of Appeals

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held that the exemption provision of G.L. c. 140, s. 129C(m) was inapplicable to the defendant in that case because

The "use" exemption provided by the firearms portion of subparagraph (m), as amended by St. 1969, c. 799, § 8, states, "[t]he temporary holding, handling or firing of a firearm for examination, trial or instruction in the presence of a *holder of a license to carry firearms . . .*"

Id. (emphasis in original).

In Bachman, the licensed individual had only an FID card. Relying on the distinction between an FID card and a license to carry, the Court of Appeals found s. 129C(m) inapplicable on the facts of that case.

In this case, Defendant testified that he was the owner of the firearm at issue, and that he purchased it in New Hampshire. He and his father testified that while the firearm was being held in Massachusetts, that Defendant would only have access to it by permission of his father, who testified that he had a license to carry firearms. Tr. 2-110. On January 20, 2013, with his father's permission, Defendant displayed the firearm to Mr. Fennelly, who the jury heard had recently obtained his license to carry. Tr. 2-140; 180 Defendant was therefore temporarily handling the firearm for purposes of 'examination and trial,' and doing so "in the presence" of Mr. Fennelly, who was properly licensed, precisely as

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provided in s. 129C. Furthermore, pursuant to the final clause of subsection (m), Defendant's conduct was undertaken for the "lawful purpose" of effectuating a *bona fide* sale of the firearm, with or without the presence of a licensed individual.

The error of the trial court in this regard was its refusal to instruct the jury on the existence of a legal defense to the charge, which defense counsel attempted to pursue, and obliquely argued in her closing after the court refused to so instruct the jury. Tr. 3-169-70. The court noted Defendant's objection to the denial of the license instruction. Tr. 3-143.

Where a defendant raises a timely objection to a judge's instruction to the jury, the claim is reviewed for prejudicial error. See Commonwealth v. Vuthy Seng, 456 Mass. 490, 50 (2010). Instructions which fail to properly place upon the prosecution the burden of proof as to a defendant's state of mind constitute error subject to the harmless error doctrine. See Rose v. Clark, 478 U.S. 570 (1986); Sandstrom v. Montana, 442 US 510 (1979). Prejudicial error review is undertaken in two parts: (1) was there error; and (2) if so, was that error prejudicial. Commonwealth v. Cruz, 445 Mass. 589, 591 (2005). An error is not prejudicial if it "did not influence the jury, or had

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but very slight effect .... But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, [then] it is impossible to conclude that substantial rights were not affected." Commonwealth v. Flebotte, 417 Mass. 348, 353 (1994), quoting Commonwealth v. Peruzzi, 15 Mass. App. Ct. 437, 445 (1983). The burden of showing the absence of error is on the Commonwealth. Commonwealth v. Hanger, 377 Mass. 503, 510 (1979). "The Commonwealth also bears the risk of doubt when any exists as to the error being nonprejudicial." Commonwealth v. Alphas, 430 Mass. 8 (1999).

The error in this case cannot be harmless beyond a reasonable doubt where it deprived Defendant of a substantial ground of defense. Accordingly, the conviction must be vacated, and the case remanded for a new trial.

### **III. CONCLUSION**

Based article 4 of the Massachusetts Constitution, articles 1, 10, and 12 of the Massachusetts Declaration of rights; the 2nd, 5th, 6th, and 14th Amendments to the United States Constitution; and on the authorities cited and the reasons aforesaid, Defendant requests that the

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judgment of the trial court be vacated; that an order of acquittal enter on the charge of discharging a firearm within 500 feet of a building; that the case be remanded for a new trial on the charge of possession of a firearm without an FID card; and that the Court enter such further relief as may be just and proper.

Respectfully submitted,  
Michael Kelly  
By his attorney,

A handwritten signature in black ink, appearing to read 'Edward R. Molari', written over a horizontal line.

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**Commonwealth**

**v.**

**Michael Kelly**

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**Addendum**

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**Part I** ADMINISTRATION OF THE  
GOVERNMENT

**Title** PUBLIC SAFETY AND GOOD  
**XX** ORDER

**Chapter** LICENSES  
**140**

**Section** APPLICATION OF SEC. 129B;  
**129C** OWNERSHIP OR POSSESSION OF  
FIREARMS OR AMMUNITION;  
TRANSFERS; REPORT TO  
COMMISSIONER; EXEMPTIONS;  
EXHIBITING LICENSE TO CARRY,  
ETC. ON DEMAND

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Section 129C. No person, other than a licensed dealer or one who has been issued a license to carry a pistol or revolver or an exempt person as hereinafter described, shall own or possess any firearm, rifle, shotgun or ammunition unless he has been issued a firearm identification card by the licensing authority pursuant to the provisions of section one hundred and twenty-nine B.

No person shall sell, give away, loan or otherwise transfer a rifle or shotgun or ammunition other than (a) by operation of law, or (b) to an exempt person as hereinafter described, or (c) to a licensed dealer, or (d) to a person who displays his firearm identification card, or license to carry a pistol or revolver.

A seller shall, within seven days, report all such transfers to the commissioner of the department of criminal justice information services according to the provisions set forth in section one hundred and twenty-eight A, and in the case of loss, theft or recovery of any firearm, rifle, shotgun or machine gun, a similar report shall be made forthwith to both the commissioner of the department of criminal justice information services and the licensing authority in the city or town where the owner resides. Whoever fails to report the loss or theft of a firearm, rifle, shotgun or machine gun or the recovery of a firearm, rifle, shotgun or machine gun previously reported lost or stolen to the commissioner of the department of criminal justice information services and the licensing authority in the city or town where the owner resides shall be punished by a fine of not less than \$500 nor more than \$1,000 for a first offense, by a fine of not less than \$2,500 nor more than \$7,500 for a second offense and by a fine of not less than \$7,500 nor more than \$10,000 or imprisonment for not less than 1 year nor more than 5 years, or by both such fine and imprisonment, for a third or subsequent offense. Failure to so report shall be a cause for suspension or permanent revocation of a person's firearm identification card or license to carry firearms, or both. Notwithstanding this paragraph or any general or special law to the contrary, no person, who in good faith, reports a loss or theft under this paragraph for the first time shall be subject to suspension, revocation or be considered unsuitable under section 131 for the renewal of a lawfully held firearm identification card or license to carry firearms; provided, however, that persons reporting loss or theft under this paragraph or under section 129B on a second or subsequent occasion may be subject to suspension, revocation or be considered unsuitable under said section 131 for the renewal of a lawfully held firearm identification card or license to carry firearms.

The provisions of this section shall not apply to the following exempted

persons and uses:

- (a) Any device used exclusively for signalling or distress use and required or recommended by the United States Coast Guard or the Interstate Commerce Commission, or for the firing of stud cartridges, explosive rivets or similar industrial ammunition;
- (b) Federally licensed firearms manufacturers or wholesale dealers, or persons employed by them or by licensed dealers, or on their behalf, when possession of firearms, rifles or shotguns is necessary for manufacture, display, storage, transport, installation, inspection or testing;
- (c) To a person voluntarily surrendering a firearm, rifle or shotgun and ammunition therefor to a licensing authority, the colonel of the state police or his designee if prior written notice has been given by said person to the licensing authority or the colonel of the state police, stating the place and approximate time of said surrender;
- (d) The regular and ordinary transport of firearms, rifles or shotguns as merchandise by any common carrier;
- (e) Possession by retail customers for the purpose of firing at duly licensed target concessions at amusement parks, piers and similar locations, provided that the firearms, rifles or shotguns to be so used are firmly chained or affixed to the counter and that the proprietor is in possession of a firearm identification card or license to carry firearms;
- (f) Possession of rifles and shotguns and ammunition therefor by nonresident hunters with valid nonresident hunting licenses during hunting season;
- (g) Possession of rifles and shotguns and ammunition therefor by nonresidents while on a firing or shooting range;
- (h) Possession of rifles and shotguns and ammunition therefor by

nonresidents traveling in or through the commonwealth, providing that any rifles or shotguns are unloaded and enclosed in a case;

(i) Possession of rifles and shotguns by nonresidents while at a firearm showing or display organized by a regularly existing gun collectors' club or association;

(j) Any resident of the commonwealth returning after having been absent from the commonwealth for not less than 180 consecutive days or any new resident moving into the commonwealth, with respect to any firearm, rifle or shotgun and any ammunition therefor then in his possession, for 60 days after such return or entry into the commonwealth;

(k) Any person under the age of fifteen with respect to the use of a rifle or shotgun by such person in hunting or target shooting, provided that such use is otherwise permitted by law and is under the immediate supervision of a person holding a firearm identification card or a license to carry firearms, or a duly commissioned officer, noncommissioned officer or enlisted member of the United States Army, Navy, Marine Corps, Air Force or Coast Guard, or the National Guard or military service of the commonwealth or reserve components thereof, while in the performance of his duty;

(l) The possession or utilization of any rifle or shotgun during the course of any television, movie, stage or other similar theatrical production, or by a professional photographer or writer for examination purposes in the pursuit of his profession, providing such possession or utilization is under the immediate supervision of a holder of a firearm identification card or a license to carry firearms;

(m) The temporary holding, handling or firing of a firearm for examination, trial or instruction in the presence of a holder of a license to carry firearms, or the temporary holding, handling or firing of a rifle or

shotgun for examination, trial or instruction in the presence of a holder of a firearm identification card, or where such holding, handling or firing is for a lawful purpose;

(n) The transfer of a firearm, rifle or shotgun upon the death of an owner to his heir or legatee shall be subject to the provisions of this section, provided that said heir or legatee shall within one hundred and eighty days of such transfer, obtain a firearm identification card or a license to carry firearms if not otherwise an exempt person who is qualified to receive such or apply to the licensing authority for such further limited period as may be necessary for the disposition of such firearm, rifle or shotgun;

(o) Persons in the military or other service of any state or of the United States, and police officers and other peace officers of any jurisdiction, in the performance of their official duty or when duly authorized to possess them;

(p) Carrying or possession by residents or nonresidents of so-called black powder rifles, shotguns, and ammunition therefor as described in such paragraphs (A) and (B) of the third paragraph of section 121, and the carrying or possession of conventional rifles, shotguns, and ammunition therefor by nonresidents who meet the requirements for such carrying or possession in the state in which they reside.

*[There is no clause (q).]*

(r) Possession by a veteran's organization chartered by the Congress of the United States, chartered by the commonwealth or recognized as a nonprofit tax-exempt organization by the Internal Revenue Service and possession by the members of any such organization when on official parade duty or ceremonial occasions.

(s) Possession by federal, state and local historical societies, museums,

and institutional collections open to the public, provided such firearms, rifles or shotguns are unloaded, properly housed and secured from unauthorized handling;

(t) the possession of firearms, rifles, shotguns, machine guns and ammunition, by banks or institutional lenders, or their agents, servants or employees, when the same are possessed as collateral for a secured commercial transaction or as a result of a default under a secured commercial transaction.

(u) Any nonresident who is eighteen years of age or older at the time of acquiring a rifle or shotgun from a licensed firearms dealer; provided, however, that such nonresident must hold a valid firearms license from his state of residence; provided, further, that the licensing requirements of such nonresident's state of residence are as stringent as the requirements of the commonwealth for a firearm identification card, as determined by the colonel of the state police who shall, annually, publish a list of those states whose requirements comply with the provisions of this clause.

Any person, exempted by clauses (o), (p) and (q), purchasing a rifle or shotgun or ammunition therefor shall submit to the seller such full and clear proof of identification, including shield number, serial number, military or governmental order or authorization, military or other official identification, other state firearms license, or proof of nonresidence, as may be applicable.

Nothing in this section shall permit the sale of rifles or shotguns or ammunition therefor to a minor under the age of eighteen in violation of section one hundred and thirty nor may any firearm be sold to a person under the age of 21 nor to any person who is not licensed to carry firearms under section one hundred and thirty-one unless he presents a valid firearm identification card and a permit to purchase issued under section

one hundred and thirty-one A, or presents such permit to purchase and is a properly documented exempt person as hereinbefore described.

*[Seventh paragraph effective until January 1, 2021. For text effective January 1, 2021, see below.]*

Nothing in this section shall permit the sale or transfer of any large capacity rifle or shotgun or large capacity feeding device therefor to any person not in possession of a Class A or Class B license to carry firearms issued under section 131, or of any large capacity firearm or large capacity feeding device therefor to any person not in possession of a Class A license to carry firearms issued under section 131.

*[Seventh paragraph as amended by 2014, 284, Sec. 41 effective January 1, 2021. See 2014, 284, Sec. 112. For text effective until January 1, 2021, see above.]*

Nothing in this section shall permit the sale or transfer of a large capacity rifle, shotgun or firearm or large capacity feeding device therefor to a person not in possession of a license to carry firearms issued pursuant to section 131.

The possession of a firearm identification card issued under section one hundred and twenty-nine B shall not entitle any person to carry a firearm in violation of section ten of chapter two hundred and sixty-nine and, the possession of a firearm identification card issued under section 129B shall not entitle any person to possess any large capacity rifle or shotgun or large capacity feeding device therefor in violation of subsection (m) of said section 10 of said chapter 269.

Any person who, while not being within the limits of his own property or residence, or such person whose property or residence is under lawful search, and who is not exempt under this section, shall on demand of a

police officer or other law enforcement officer, exhibit his license to carry firearms, or his firearm identification card or receipt for fee paid for such card, or, after January first, nineteen hundred and seventy, exhibit a valid hunting license issued to him which shall bear the number officially inscribed of such license to carry or card if any. Upon failure to do so such person may be required to surrender to such officer said firearm, rifle or shotgun which shall be taken into custody as under the provisions of section one hundred and twenty-nine D, except that such firearm, rifle or shotgun shall be returned forthwith upon presentation within thirty days of said license to carry firearms, firearm identification card or receipt for fee paid for such card or hunting license as hereinbefore described. Any person subject to the conditions of this paragraph may, even though no firearm, rifle or shotgun was surrendered, be required to produce within thirty days said license to carry firearms, firearm identification card or receipt for fee paid for such card, or said hunting license, failing which the conditions of section one hundred and twenty-nine D will apply. Nothing in this section shall prevent any person from being prosecuted for any violation of this chapter.



**Part IV** CRIMES, PUNISHMENTS AND  
PROCEEDINGS IN CRIMINAL  
CASES

**Title I** CRIMES AND PUNISHMENTS

**Chapter** CRIMES AGAINST PUBLIC PEACE  
**269**

**Section** CARRYING DANGEROUS  
**10** WEAPONS; POSSESSION OF  
MACHINE GUN OR SAWED-OFF  
SHOTGUNS; POSSESSION OF  
LARGE CAPACITY WEAPON OR  
LARGE CAPACITY FEEDING  
DEVICE; PUNISHMENT

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Section 10. (a) Whoever, except as provided or exempted by statute, knowingly has in his possession; or knowingly has under his control in a vehicle; a firearm, loaded or unloaded, as defined in section one hundred and twenty-one of chapter one hundred and forty without either:

- (1) being present in or on his residence or place of business; or
- (2) having in effect a license to carry firearms issued under section one hundred and thirty-one of chapter one hundred and forty; or
- (3) having in effect a license to carry firearms issued under section one hundred and thirty-one F of chapter one hundred and forty; or
- (4) having complied with the provisions of sections one hundred and twenty-nine C and one hundred and thirty-one G of chapter one hundred

and forty; or

(5) having complied as to possession of an air rifle or BB gun with the requirements imposed by section twelve B; and whoever knowingly has in his possession; or knowingly has under control in a vehicle; a rifle or shotgun, loaded or unloaded, without either:

(1) being present in or on his residence or place of business; or

(2) having in effect a license to carry firearms issued under section one hundred and thirty-one of chapter one hundred and forty; or

(3) having in effect a license to carry firearms issued under section one hundred and thirty-one F of chapter one hundred and forty; or

(4) having in effect a firearms identification card issued under section one hundred and twenty-nine B of chapter one hundred and forty; or

(5) having complied with the requirements imposed by section one hundred and twenty-nine C of chapter one hundred and forty upon ownership or possession of rifles and shotguns; or

(6) having complied as to possession of an air rifle or BB gun with the requirements imposed by section twelve B; shall be punished by imprisonment in the state prison for not less than two and one-half years nor more than five years, or for not less than 18 months nor more than two and one-half years in a jail or house of correction. The sentence imposed on such person shall not be reduced to less than 18 months, nor suspended, nor shall any person convicted under this subsection be eligible for probation, parole, work release, or furlough or receive any deduction from his sentence for good conduct until he shall have served 18 months of such sentence; provided, however, that the commissioner of correction may on the recommendation of the warden, superintendent, or other person in charge of a correctional institution, grant to an offender committed under

this subsection a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of a relative; to visit a critically ill relative; or to obtain emergency medical or psychiatric service unavailable at said institution. Prosecutions commenced under this subsection shall neither be continued without a finding nor placed on file.

No person having in effect a license to carry firearms for any purpose, issued under section one hundred and thirty-one or section one hundred and thirty-one F of chapter one hundred and forty shall be deemed to be in violation of this section.

The provisions of section eighty-seven of chapter two hundred and seventy-six shall not apply to any person 18 years of age or older, charged with a violation of this subsection, or to any child between ages fourteen and 18 so charged, if the court is of the opinion that the interests of the public require that he should be tried as an adult for such offense instead of being dealt with as a child.

The provisions of this subsection shall not affect the licensing requirements of section one hundred and twenty-nine C of chapter one hundred and forty which require every person not otherwise duly licensed or exempted to have been issued a firearms identification card in order to possess a firearm, rifle or shotgun in his residence or place of business.

(b) Whoever, except as provided by law, carries on his person, or carries on his person or under his control in a vehicle, any stiletto, dagger or a device or case which enables a knife with a locking blade to be drawn at a locked position, any ballistic knife, or any knife with a detachable blade capable of being propelled by any mechanism, dirk knife, any knife having a double-edged blade, or a switch knife, or any knife having an automatic spring release device by which the blade is released from the

handle, having a blade of over one and one-half inches, or a slung shot, blowgun, blackjack, metallic knuckles or knuckles of any substance which could be put to the same use with the same or similar effect as metallic knuckles, nunchaku, zoobow, also known as klackers or kung fu sticks, or any similar weapon consisting of two sticks of wood, plastic or metal connected at one end by a length of rope, chain, wire or leather, a shuriken or any similar pointed starlike object intended to injure a person when thrown, or any armband, made with leather which has metallic spikes, points or studs or any similar device made from any other substance or a cestus or similar material weighted with metal or other substance and worn on the hand, or a manrikigusari or similar length of chain having weighted ends; or whoever, when arrested upon a warrant for an alleged crime, or when arrested while committing a breach or disturbance of the public peace, is armed with or has on his person, or has on his person or under his control in a vehicle, a billy or other dangerous weapon other than those herein mentioned and those mentioned in paragraph (a), shall be punished by imprisonment for not less than two and one-half years nor more than five years in the state prison, or for not less than six months nor more than two and one-half years in a jail or house of correction, except that, if the court finds that the defendant has not been previously convicted of a felony, he may be punished by a fine of not more than fifty dollars or by imprisonment for not more than two and one-half years in a jail or house of correction.

(c) Whoever, except as provided by law, possesses a machine gun, as defined in section one hundred and twenty-one of chapter one hundred and forty, without permission under section one hundred and thirty-one of said chapter one hundred and forty; or whoever owns, possesses or carries on his person, or carries on his person or under his control in a vehicle, a sawed-off shotgun, as defined in said section one hundred and twenty-one

of said chapter one hundred and forty, shall be punished by imprisonment in the state prison for life, or for any term of years provided that any sentence imposed under the provisions of this paragraph shall be subject to the minimum requirements of paragraph (a).

(d) Whoever, after having been convicted of any of the offenses set forth in paragraph (a), (b) or (c) commits a like offense or any other of the said offenses, shall be punished by imprisonment in the state prison for not less than five years nor more than seven years; for a third such offense, by imprisonment in the state prison for not less than seven years nor more than ten years; and for a fourth such offense, by imprisonment in the state prison for not less than ten years nor more than fifteen years. The sentence imposed upon a person, who after a conviction of an offense under paragraph (a), (b) or (c) commits the same or a like offense, shall not be suspended, nor shall any person so sentenced be eligible for probation or receive any deduction from his sentence for good conduct.

(e) Upon conviction of a violation of this section, the firearm or other article shall, unless otherwise ordered by the court, be confiscated by the commonwealth. The firearm or article so confiscated shall, by the authority of the written order of the court be forwarded by common carrier to the colonel of the state police, who, upon receipt of the same, shall notify said court or justice thereof. Said colonel may sell or destroy the same, except that any firearm which may not be lawfully sold in the commonwealth shall be destroyed, and in the case of a sale, after paying the cost of forwarding the article, shall pay over the net proceeds to the commonwealth.

(f) The court shall, if the firearm or other article was lost by or stolen from the person lawfully in possession of it, order its return to such person.

(g) Whoever, within this commonwealth, produces for sale, delivers or

causes to be delivered, orders for delivery, sells or offers for sale, or fails to keep records regarding, any rifle or shotgun without complying with the requirement of a serial number, as provided in section one hundred and twenty-nine B of chapter one hundred and forty, shall for the first offense be punished by confinement in a jail or house of correction for not more than two and one-half years, or by a fine of not more than five hundred dollars.

(h)(1) Whoever owns, possesses or transfers a firearm, rifle, shotgun or ammunition without complying with the provisions of section 129C of chapter 140 shall be punished by imprisonment in a jail or house of correction for not more than 2 years or by a fine of not more than \$500. Whoever commits a second or subsequent violation of this paragraph shall be punished by imprisonment in a house of correction for not more than 2 years or by a fine of not more than \$1,000, or both. Any officer authorized to make arrests may arrest without a warrant any person whom the officer has probable cause to believe has violated this paragraph.

(2) Any person who leaves a firearm, rifle, shotgun or ammunition unattended with the intent to transfer possession of such firearm, rifle, shotgun or ammunition to any person not licensed under section 129C of chapter 140 or section 131 of chapter 140 for the purpose of committing a crime or concealing a crime shall be punished by imprisonment in a house of correction for not more than 2 1/2 years or in state prison for not more than 5 years.

(i) Whoever knowingly fails to deliver or surrender a revoked or suspended license to carry or possess firearms or machine guns issued under the provisions of section one hundred and thirty-one or one hundred and thirty-one F of chapter one hundred and forty, or firearm identification card, or receipt for the fee for such card, or a firearm, rifle, shotgun or

machine gun, as provided in section one hundred and twenty-nine D of chapter one hundred and forty, unless an appeal is pending, shall be punished by imprisonment in a jail or house of correction for not more than two and one-half years or by a fine of not more than one thousand dollars.

(j) For the purposes of this paragraph, "firearm" shall mean any pistol, revolver, rifle or smoothbore arm from which a shot, bullet or pellet can be discharged.

Whoever, not being a law enforcement officer and notwithstanding any license obtained by the person pursuant to chapter 140, carries on the person a firearm, loaded or unloaded, or other dangerous weapon in any building or on the grounds of any elementary or secondary school, college or university without the written authorization of the board or officer in charge of the elementary or secondary school, college or university shall be punished by a fine of not more than \$1,000 or by imprisonment for not more than 2 years or both. A law enforcement officer may arrest without a warrant and detain a person found carrying a firearm in violation of this paragraph.

Any officer in charge of an elementary or secondary school, college or university or any faculty member or administrative officer of an elementary or secondary school, college or university that fails to report a violation of this paragraph shall be guilty of a misdemeanor and punished by a fine of not more than \$500.

*[There is no paragraph (k).]*

(l) The provisions of this section shall be fully applicable to any person proceeded against under section seventy-five of chapter one hundred and nineteen and convicted under section eighty-three of chapter one hundred and nineteen, provided, however, that nothing contained in this section



shall impair, impede, or affect the power granted any court by chapter one hundred and nineteen to adjudicate a person a delinquent child, including the power so granted under section eighty-three of said chapter one hundred and nineteen.

*[First paragraph of paragraph (m) effective until January 1, 2021. For text effective January 1, 2021, see below.]*

(m) Notwithstanding the provisions of paragraph (a) or (h), any person not exempted by statute who knowingly has in his possession, or knowingly has under his control in a vehicle, a large capacity weapon or large capacity feeding device therefor who does not possess a valid Class A or Class B license to carry firearms issued under section 131 or 131F of chapter 140, except as permitted or otherwise provided under this section or chapter 140, shall be punished by imprisonment in a state prison for not less than two and one-half years nor more than ten years. The possession of a valid firearm identification card issued under section 129B shall not be a defense for a violation of this subsection; provided, however, that any such person charged with violating this paragraph and holding a valid firearm identification card shall not be subject to any mandatory minimum sentence imposed by this paragraph. The sentence imposed upon such person shall not be reduced to less than one year, nor suspended, nor shall any person convicted under this subsection be eligible for probation, parole, furlough, work release or receive any deduction from his sentence for good conduct until he shall have served such minimum term of such sentence; provided, however, that the commissioner of correction may, on the recommendation of the warden, superintendent or other person in charge of a correctional institution or the administrator of a county correctional institution, grant to such offender a temporary release in the custody of an officer of such institution for the following purposes only: (i) to attend the funeral of a spouse or next of kin; (ii) to visit a critically ill



close relative or spouse; or (iii) to obtain emergency medical services unavailable at such institution. Prosecutions commenced under this subsection shall neither be continued without a finding nor placed on file. The provisions of section 87 of chapter 276 relative to the power of the court to place certain offenders on probation shall not apply to any person 18 years of age or over charged with a violation of this section.

*[First paragraph of paragraph (m) as amended by 2014, 284, Sec. 91 effective January 1, 2021. See 2014, 284, Sec. 112. For text effective until January 1, 2021, see above.]*

(m) Notwithstanding the provisions of paragraph (a) or (h), any person not exempted by statute who knowingly has in his possession, or knowingly has under his control in a vehicle, a large capacity weapon or large capacity feeding device therefor who does not possess a valid license to carry firearms issued under section 131 or 131F of chapter 140, except as permitted or otherwise provided under this section or chapter 140, shall be punished by imprisonment in a state prison for not less than two and one-half years nor more than ten years. The possession of a valid firearm identification card issued under section 129B shall not be a defense for a violation of this subsection; provided, however, that any such person charged with violating this paragraph and holding a valid firearm identification card shall not be subject to any mandatory minimum sentence imposed by this paragraph. The sentence imposed upon such person shall not be reduced to less than one year, nor suspended, nor shall any person convicted under this subsection be eligible for probation, parole, furlough, work release or receive any deduction from his sentence for good conduct until he shall have served such minimum term of such sentence; provided, however, that the commissioner of correction may, on the recommendation of the warden, superintendent or other person in charge of a correctional institution or the administrator of a county

correctional institution, grant to such offender a temporary release in the custody of an officer of such institution for the following purposes only: (i) to attend the funeral of a spouse or next of kin; (ii) to visit a critically ill close relative or spouse; or (iii) to obtain emergency medical services unavailable at such institution. Prosecutions commenced under this subsection shall neither be continued without a finding nor placed on file. The provisions of section 87 of chapter 276 relative to the power of the court to place certain offenders on probation shall not apply to any person 18 years of age or over charged with a violation of this section.

The provisions of this paragraph shall not apply to the possession of a large capacity weapon or large capacity feeding device by (i) any officer, agent or employee of the commonwealth or any other state or the United States, including any federal, state or local law enforcement personnel; (ii) any member of the military or other service of any state or the United States; (iii) any duly authorized law enforcement officer, agent or employee of any municipality of the commonwealth; (iv) any federal, state or local historical society, museum or institutional collection open to the public; provided, however, that any such person described in clauses (i) to (iii), inclusive, is authorized by a competent authority to acquire, possess or carry a large capacity semiautomatic weapon and is acting within the scope of his duties; or (v) any gunsmith duly licensed under the applicable federal law.

(n) Whoever violates paragraph (a) or paragraph (c), by means of a loaded firearm, loaded sawed off shotgun or loaded machine gun shall be further punished by imprisonment in the house of correction for not more than 2 1/2 years, which sentence shall begin from and after the expiration of the sentence for the violation of paragraph (a) or paragraph (c).

(o) For purposes of this section, "loaded" shall mean that ammunition is

contained in the weapon or within a feeding device attached thereto.

For purposes of this section, "ammunition" shall mean cartridges or cartridge cases, primers (igniter), bullets or propellant powder designed for use in any firearm, rifle or shotgun.

**Part IV** CRIMES, PUNISHMENTS AND  
PROCEEDINGS IN CRIMINAL  
CASES

**Title I** CRIMES AND PUNISHMENTS

**Chapter** CRIMES AGAINST PUBLIC PEACE  
**269**

**Section** DISCHARGE OF A FIREARM  
**12E** WITHIN 500 FEET OF A DWELLING  
OR OTHER BUILDING IN USE;  
EXCEPTIONS

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Section 12E. Whoever discharges a firearm as defined in section one hundred and twenty-one of chapter one hundred and forty, a rifle or shotgun within five hundred feet of a dwelling or other building in use, except with the consent of the owner or legal occupant thereof, shall be punished by a fine of not less than fifty nor more than one hundred dollars or by imprisonment in a jail or house of correction for not more than three months, or both. The provisions of this section shall 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 section fifty-six A of chapter one hundred and

forty; and (f) the discharge of blank cartridges for theatrical, athletic, ceremonial, firing squad, or other purposes in accordance with section thirty-nine of chapter one hundred and forty-eight.

Commonwealth of Massachusetts  
Appeals Court

SUFFOLK, ss.

No. 2018-P-1052

Commonwealth  
Plaintiff  
v.

Michael Kelly  
Defendant

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**Certificate Pursuant to Mass. R. A. P. 16(k)**

I, Edward Molari, do hereby certify, pursuant to Mass. R. A. P. 16(k), that the attached brief complies with the rules of court pertaining to filing of briefs, including Mass. R. A. P. 16(a)(6) (brief shall include memorandum of decision), Mass. R. A. P. 16(e) (record references to pages of appendix and all facts referenced), Mass. R. A. P. 16(f) (statutes, rules, and regulations at issue reproduced in addendum), Mass. R. A. P. 16(h)(50 page limit on principal briefs; 20 page limit on reply briefs), Mass. R. A. P. 18 (relevant documents and any order of impoundment in chronological order in appendix), and Mass. R. A. P. 20 (8.5 x 11 pages, left bound, with strong cover if wired, volumes not more than 1.5 inches, not less than 1.5 inch left/right margins, not less than 1 inch top/bottom margins, Courier font, double spaced).



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Commonwealth of Massachusetts  
Appeals Court

SUFFOLK, ss.

No. 2018-P-1052

Commonwealth  
*Plaintiff*  
v.

Michael Kelly  
*Defendant*

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**Certificate of Service**

I certify that on September 4, 2018 I served two copies of the attached brief and record appendix by sending them first class mail, postage prepaid, to:

Middlesex County District Attorney's Office  
15 Commonwealth Ave.  
Woburn, MA 01801



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