

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

*The offense found in G.L. c. 269, § 10(a) is commonly referred to as “carrying” a firearm, to distinguish it from the offense of “possession” of a firearm without a firearm ID card, found in § 10(h). The name is no longer really accurate, since St. 1990, c. 511 (effective January 2, 1991) eliminated movement of the firearm as an element of § 10(a).*

### I. FIREARM WITH BARREL UNDER 16 INCHES

The defendant is charged under section 10(a) of chapter 269 of our General Laws with knowingly possessing a firearm unlawfully.

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

***First:*** That the defendant possessed a firearm (or) (that he [she] had a firearm under his [her] control in a vehicle);

***Second:*** That what the defendant (possessed) (or) (had under his [her] control in a vehicle) met the legal definition of a “firearm”; (and)

***Third:*** That the defendant *knew* that he (she) (possessed a firearm) (or) (had a firearm under his [her] control in a vehicle).

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

A. *If there is evidence that it was in the defendant's residence or place of business.*

and ***Fourth:*** that the defendant possessed the firearm outside of his (her) residence or place of business. A person's "residence" or "place of business" does not include common areas of an apartment or office building, but only areas that are under that person's exclusive control.

B. *If there is evidence that the defendant had a license to carry firearms.*

and ***Fourth:*** that the defendant did *not* have a valid license to possess a firearm outside his (her) home or office.

C. *If there is evidence that the defendant was exempt from the licensing requirement.*

and ***Fourth:*** that the defendant did *not* qualify for one of the exemptions in the law that are a substitute for having a license to possess a firearm outside his (her) home or business.

The statute exempts a defendant who:

- "(1) [was] present in or on his residence or place of business; or
- (2) [had] in effect a license to carry firearms issued under [G.L. c. 140, § 131]; or
- (3) [had] in effect a license to carry firearms issued under [G.L. c. 140, § 131F to a nonresident or alien]; or
- (4) [had] complied with the provisions of [G.L. c. 140, §§ 129C and 131G, granting certain categorical exemptions from the requirement of a license to carry]; or
- (5) [had] complied as to possession of an air rifle or BB gun with the requirements imposed by [G.L. c. 269, § 12B]."

General Laws c. 278, § 7 places on the defendant the burden of producing evidence of one of these exemptions; the Commonwealth must then disprove beyond a reasonable doubt the applicability of the claimed exemption. Until there is such evidence, the exemptions are not at issue. *Commonwealth v. Seay*, 376 Mass. 735, 738, 383 N.E.2d 828, 830 (1978) (former statute); *Commonwealth v. Jones*, 372 Mass. 403, 406-407, 361 N.E.2d 1308, 1310-1311 (1977) (same); *Commonwealth v. Davis*, 359 Mass. 758, 270 N.E.2d 925 (1971) (same); *Commonwealth v. Baker*, 10 Mass. App. Ct. 852, 853, 407 N.E.2d 398, 399 (1980) (lack of license need not be charged in complaint).

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

**“a pistol, revolver or other weapon . . . loaded or unloaded,  
from which a shot or bullet can be discharged  
and . . . the length of [whose] barrel  
is less than sixteen inches . . . .”**

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

G.L. c. 140, § 121. *Commonwealth v. Williams*, 422 Mass. 111, 120, 661 N.E.2d 617, 624 (1996) (not necessary that firearm be loaded); *Commonwealth v. Bartholomew*, 326 Mass. 218, 219, 93 N.E.2d 551, 552 (1950) (same); *Commonwealth v. Tuitt*, 393 Mass. 801, 810, 473 N.E.2d 1103, 1110 (1985) (jury can determine from inspection that “firearm”); *Commonwealth v. Fancy*, 349 Mass. 196, 204, 207 N.E.2d 276, 282 (1965) (same); *Commonwealth v. Sampson*, 383 Mass. 750, 753, 422 N.E.2d 450, 452 (1981); *Commonwealth v. Sperrazza*, 372 Mass. 667, 670, 363 N.E.2d 673, 675 (1977) (testimony about “revolver” or “handgun” will support inference that barrel was under 16 inches).

*If the firearm may have been “under [the defendant’s] control in a vehicle.”* **To**

**establish that a firearm was under the defendant’s “control” in a vehicle, it is not enough for the Commonwealth just to prove that the defendant was present in the same vehicle as the firearm. The Commonwealth must also prove that the defendant knew that the firearm was there, and that the defendant had both the ability and the intention to exercise control over the firearm, although this did not have to be exclusive control.**

*See Instruction 3.220 (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, 838 N.E.2d 592 (2005); *Commonwealth v. Sann Than*, 442 Mass. 755, 748, 817 N.E.2d 705 (2004).

*Commonwealth v. Brown*, 401 Mass. 745, 519 N.E.2d 1291 (1988); *Commonwealth v. Bailey*, 29 Mass. App. Ct. 1007, 563 N.E.2d 1378 (1990); *Commonwealth v. Diaz*, 15 Mass. App. Ct. 469, 471-472, 446 N.E.2d 415, 416-417 (1983); *Commonwealth v. Gray*, 4 Mass. App. Ct. 296, 299, 362 N.E.2d 543, 545 (1977); *Commonwealth v. Mott*, 2 Mass. App. Ct. 47, 53-54, 308 N.E.2d 557, 561-562 (1974).

**As I mentioned before, the Commonwealth must prove beyond a reasonable doubt that the defendant knew that he (she) (possessed this item) (or) (had this item under his [her] control in a vehicle), and also knew that the item was a “firearm,” within the common meaning of that term. If it was a conventional firearm, with its obvious dangers, the Commonwealth**

**is not required to prove that the defendant knew that the item met the *legal* definition of a firearm.**

*See Instruction 3.140 (Knowledge).*

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

## II. RIFLE OR SHOTGUN

**The defendant is charged under section 10(a) of chapter 269 of our General Laws with knowingly possessing a rifle or shotgun unlawfully.**

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

***First:* That the defendant possessed a rifle or shotgun (*or*) (that he [she] had a rifle or shotgun under his [her] control in a vehicle);**

***Second:* That what the defendant (possessed) (*or*) (had under his [her] control in a vehicle) met the legal definition of a “rifle” or a “shotgun”; (and)**

***Third:* That the defendant *knew* that he (she) (possessed a rifle or**

shotgun) (or) (had a rifle or shotgun under his [her] control in a vehicle.

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

A. *If there is evidence that it was in the defendant's residence or place of business.*

and ***Fourth:*** that the defendant possessed the rifle or shotgun outside of his (her) residence or place of business. A person's "residence" or "place of business" does not include common areas of an apartment or office building, but only areas that are under that person's exclusive control.

B. *If there is evidence that the defendant had a license to carry firearms.*

and ***Fourth:*** that the defendant did *not* have a valid license to carry a firearm.

C. *If there is evidence that the defendant was exempt from the licensing requirement.*

and ***Fourth:*** that the defendant did *not* qualify for one of the exemptions in the law that are a substitute for having a license to carry a firearm.

*See notes to I, above.*

**A "rifle" is defined in our law as:**

**“a weapon having a rifled bore  
with a barrel length equal to or greater than sixteen inches,  
capable of discharging a shot or bullet  
for each pull of the trigger.”**

**A “shotgun” is defined as:**

**“a weapon having a smooth bore  
with a barrel length equal to or greater than eighteen inches  
with an overall length equal to or greater than twenty-six inches,  
capable of discharging a shot or bullet  
for each pull of the trigger.”**

**The term “barrel length” refers to “that portion of a firearm . . .  
through which a shot or bullet is driven, guided or stabilized, and  
[includes] the chamber.”**

G.L. c. 140, § 121.

*If the rifle or shotgun may have been “under [the defendant’s] control in a vehicle.”*

**To establish that a rifle or shotgun was under the defendant’s  
“control” in a vehicle, it is not enough for the Commonwealth  
just to prove that the defendant was present in the same vehicle**

**as the rifle or shotgun. The Commonwealth must also prove that the defendant knew that the rifle or shotgun was there, and that the defendant had both the ability and the intention to exercise control over the rifle or shotgun, although this did not have to be exclusive control.**

*See notes to I, above.*

**As I mentioned before, the Commonwealth must prove beyond a reasonable doubt that the defendant knew that he (she) (possessed this item) (*or*) (had this item under his [her] control in a vehicle), *and* also knew that the item was a “rifle” or “shotgun” within the common meaning of that term. If it was a conventional rifle or 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 rifle or shotgun.**

*See notes to I, above.*



SUPPLEMENTAL INSTRUCTIONS

1. *Non-firing firearm, rifle or shotgun.*

**A weapon that was originally a (firearm) (rifle or shotgun) may become so defective or damaged that it will no longer fire a projectile, and then the law no longer considers it to be a (firearm) (rifle or shotgun). But a weapon remains a (firearm) (rifle or shotgun) within the meaning of the law when a slight repair, replacement or adjustment will again make it an effective weapon.**

*Commonwealth v. Colton*, 333 Mass. 607, 608, 132 N.E.2d 398, 398 (1956) (insertion of ammo clip); *Bartholomew*, 326 Mass. at 220, 93 N.E.2d at 552 (insertion of firing pin); *Commonwealth v. Raedy*, 24 Mass. App. Ct. 648, 652-656, 512 N.E.2d 279, 282-284 (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, 489 N.E.2d 216, 217 (1986) (not a firearm where bent part rendered inoperable until repaired). See *Commonwealth v. Gutierrez*, 82 Mass. App. Ct. 1118, 977 N.E.2d 105 (No. 11-P-1612, October 25, 2012) (unpublished opinion under Appeals Ct. Rule 1:28) (noting objective “slight repair” standard for operability of firearm).

2. *Firearms identification card.*

**A “firearms identification card” is not the same thing as a “license to carry a firearm.” When a person has a valid firearms identification card, that card gives him the right to possess a firearm within his residence or place of business. But it does not give him the right to possess it**

**outside of his (her) home or business, which requires a license to possess a firearm.**

G.L. c. 140, §§ 129B-129D. A firearms identification card is a defense to a charge of carrying a rifle or shotgun, but not other firearms. G.L. c. 269, § 10(a).

**3. *Passenger in vehicle.* Merely being present in a motor**

**vehicle in which a (firearm) (rifle or shotgun) is found is not sufficient by itself to permit an inference that the person knew about the presence of the (firearm) (rifle or shotgun) without other indications of knowledge.**

*Commonwealth v. Albano*, 373 Mass. 132, 134-136, 365 N.E.2d 808, 810-811 (1977) (gun in plain view; defendant acted suspiciously); *Commonwealth v. Bailey*, 29 Mass. App. Ct. 1007, 563 N.E.2d 1378 (1990) (gun in plain view near defendant's feet; car had been broken into; attempted escape); *Commonwealth v. Lucido*, 18 Mass. App. Ct. 941, 943, 467 N.E.2d 478, 480 (1984) (gun in glove compartment with defendant's personal letters); *Commonwealth v. Montgomery*, 23 Mass. App. Ct. 909, 910, 499 N.E.2d 853, 854 (1986) (gun on defendant's side of auto and defendant had appropriate ammo clip); *Commonwealth v. Donovan*, 17 Mass. App. Ct. 83, 85-86, 455 N.E.2d 1217, 1219 (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, 519 N.E.2d 1291 (1988) (insufficient to prove defendant drove stolen car, in which guns were found under passenger seat and both occupants bent forward in unison when stopped); *Commonwealth v. Almeida*, 381 Mass. 420, 422-423, 409 N.E.2d 776, 778 (1980) (insufficient to prove gun inside console of borrowed auto); *Commonwealth v. Boone*, 356 Mass. 85, 87, 248 N.E.2d 279, 280 (1969) (insufficient to prove defendant a passenger in an auto with a gun under a seat); *Commonwealth v. Hill*, 15 Mass. App. Ct. 93, 94-97, 443 N.E.2d 1339, 1340-1341 (1983) (insufficient to prove gun inside woman's purse at male passenger's feet).

**4. *Absence of evidence of license.* You have heard some reference**

**to (a license to carry a firearm) (a legal exemption from the**

**requirement of a license to carry a firearm). There was no evidence in this case that the defendant had a license to carry a firearm, and no evidence that the defendant qualified for one of the legal exemptions that are a substitute for having such a license. For that reason, the issue of a license or exemption is not relevant to your deliberations in this case, and therefore you should put it out of your mind.**

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

**5. *Knowledge of licensing requirement.***

**You have heard some mention that the defendant did not know that he (she) was required to have a license before carrying a firearm under these circumstances. The Commonwealth is *not* required to prove that the defendant knew that the law required him (her) to have a license before (possessing a firearm) (*or*) (having a firearm under his [her] control in a vehicle) outside of his (her) home or place of business.**

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

## NOTES:

1. **Elements.** “To sustain a conviction under G.L. c. 269, § 10(a), the Commonwealth must prove that the defendant knowingly possessed a firearm without either being present in his residence or place of business or having in effect a license to carry firearms or [in the case of a rifle or shotgun] a firearm identification card. The Commonwealth must prove that the gun the defendant possessed met the definition of a working firearm set forth in G.L. c. 140, § 121, that is, that it had a barrel less than sixteen inches long [or was a rifle or shotgun] and was capable of discharging a bullet.” *Commonwealth v. White*, 452 Mass. 133, 136, 891 N.E.2d 675, 678 (2008).

2. **Air rifles and BB guns.** In decisions under the earlier version of G.L. c. 269, § 10(a), air guns, BB guns and CO<sub>2</sub> guns were held to be regulated solely by G.L. c. 269, § 12B and not by § 10(a). *Commonwealth v. Fenton*, 395 Mass. 92, 94-95, 478 N.E.2d 949, 950-951 (1985); *Commonwealth v. Rhodes*, 389 Mass. 641, 644, 451 N.E.2d 1151, 1153 (1983). The current text of § 10(a) applies to anyone who carries “a firearm . . . without . . . having complied as to possession of an air rifle or BB gun with the requirements imposed by [§ 12B].” Thus, compliance with § 12B is a defense to a prosecution under § 10(a), just as the possession of a firearm license would be. *Commonwealth v. Sayers*, 438 Mass. 238, 240, 780 N.E.2d 24, 26 (2002).

3. **Ballistics certificate.** “A certificate by a ballistics expert of the firearms identification section of the department of public safety or of the city of Boston of the result of an examination made by him of an item furnished him by any police officer, signed and sworn to by such expert, shall be prima facie evidence of his findings as to whether or not the item furnished is a firearm, rifle, shotgun, machine gun, sawed off shotgun or ammunition, as defined by [G.L. c. 140, § 121], provided that in order to qualify as an expert under this section he shall have previously qualified as an expert in a court proceeding.” G.L. c. 140, § 121A. The certificate’s prima facie effect must be put to the jury in permissive terms. *Commonwealth v. Crawford*, 18 Mass. App. Ct. 911, 912, 463 N.E.2d 1193, 1194 (1984). See Instruction 3.260 (Prima Facie Evidence).

The admission of such a certificate is the “record of a primary fact made by a public officer in the performance of [an] official duty” that raises no Confrontation Clause problem under *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004). *Commonwealth v. Morales*, 71 Mass. App. Ct. 587, 884 N.E.2d 546 (2008).

4. **Constitutionality.** The one-year mandatory sentencing provision of § 10(a) is constitutional. *Commonwealth v. Jackson*, 369 Mass. 904, 344 N.E.2d 166 (1976).

5. **Flare guns.** A flare gun is not a “firearm” for purposes of G.L. c. 269, § 10(a). *Sampson*, 383 Mass. at 753-761, 422 N.E.2d at 452-456.

6. **Necessity defense.** The Supreme Judicial Court has assumed that a threat of death or serious injury, if it is direct and immediate, may excuse momentary carrying of a firearm. *Commonwealth v. Lindsey*, 396 Mass. 840, 843-845, 489 N.E.2d 666, 668-669 (1986). See *Commonwealth v. Iglesia*, 403 Mass. 132, 135-136, 525 N.E.2d 1332, 1333-1334 (1988); *Commonwealth v. Franklin*, 376 Mass. 885, 888 n.2, 385 N.E.2d 227, 230 n.2 (1978). See Instruction 9.240 (Necessity or Duress).

7. **Notice of affirmative defense.** Massachusetts R. Crim. P. 14(b)(3) requires a defendant who intends to rely upon a defense based upon a license, a claim of authority or ownership, or exemption to file an advance notice of such defense with the prosecutor and the clerk-magistrate. The rule provides that if the defendant does not comply with that 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.

8. **Notice of license revocation.** See *Police Comm’r of Boston v. Robinson*, 47 Mass. App. Ct. 767, 773, 774, 716 N.E. 2d 652, 656 (1999) (proving notice of license revocation by certified mail requires proof of receipt); *Commonwealth v. Hampton*, 26 Mass. App. Ct. 938, 940, 525 N.E.2d 1341, 1343 (1988) (defendant who purposefully or wilfully evaded notice of license revocation sent by certified mail had constructive notice of license revocation).

9. **Probable cause.** Possession of a firearm, standing alone and without indication that the person was involved in criminal activity, does not provide probable cause to believe that the person was unlicensed to carry that

firearm. *Commonwealth v. Couture*, 407 Mass. 178, 552 N.E.2d 538, cert. denied, 498 U.S. 951, 111 S.Ct. 372 (1990). However, additional evidence of criminal activity and flight would provide such probable cause. *Commonwealth v. Brookins*, 416 Mass. 97, 104, 617 N.E.2d 621, 625 (1993).

10. **“Residence.”** See *Commonwealth v. Coren*, 437 Mass. 723, 734, 774 N.E.2d 623, 632 (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, 386 N.E.2d 1036, 1039-1040 (1979) (jury issue whether backyard was common area); *Commonwealth v. Morales*, 14 Mass. App. Ct. 1034, 1035, 442 N.E.2d 740, 741 (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, 470 N.E.2d 799, 802 (1984) (defendant privileged to carry at place of business); *Commonwealth v. Samaras*, 10 Mass. App. Ct. 910, 910, 410 N.E.2d 743, 744 (1980) (no privilege to carry on sidewalk in front of defendant’s house).