

## Unlawful possession of a firearm [rifle/shotgun] [stun gun].<sup>1</sup>

DFT is charged with unlawfully possessing a firearm [rifle/shotgun] [stun gun] on [DATE].

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<sup>1</sup> G.L. c. 269, § 10(a), applies to possession of a firearm, rifle, or shotgun outside of one's residence or place of business without a Massachusetts firearm license. Section 10(a)(1) establishes a "statutory exemption" that allows someone with a Massachusetts firearm identification ("FID") card "lawfully to possess a firearm within the holder's residence or place of business." *Commonwealth v. Harris*, 481 Mass. 767, 780 (2019). Section 10(h) applies to possession of a firearm, rifle, shotgun, or ammunition within one's residence or place of business without an FID card. "Firearm" is defined to include a "stun gun." See G.L. c. 140, § 121. "Stun gun" was added to the definition of "firearm" in 2018. St. 2018, c. 123.

Section 10(a) defines unlawful possession of a firearm somewhat differently than unlawful possession of a rifle or shotgun.

For a firearm, § 10(a) provides for the punishment of "[w]hoever, 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 [G.L. c. 140, § 121] 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 [G.L. c. 140, § 131]; or
- (3) having in effect a license to carry firearms issued under [G.L. c. 140, § 131F]; or
- (4) having complied with the provisions of [G.L. c. 140, §§ 129C and 131G (licensing exemptions for specified persons and activities)]; or
- (5) having complied as to possession of an air rifle or BB gun with the requirements imposed by [G.L. c. 269, § 12B (minor under age 18 accompanied by adult or having a sporting or hunting license and permit)]."

For a rifle or shotgun, § 10(a) provides for punishment of "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 [G.L. c. 140, § 131]; or
- (3) having in effect a license to carry firearms issued under [G.L. c. 140, § 131F]; or
- (4) having in effect a firearms identification card issued under [G.L. c. 140, § 129B]; or
- (5) having complied with the requirements imposed by [G.L. c. 140, § 129C (licensing exemptions)] 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 [G.L. c. 269, § 12B (minor under age 18 accompanied by adult or having a sporting or hunting license and permit)]."

To prove DFT guilty of this offense, the Commonwealth must prove four [five/six] elements beyond a reasonable doubt:

1. DFT knowingly possessed the object in question < *see footnote if the indictment specifies a particular object*<sup>2</sup> > [< *add only if the object is found in a vehicle*:> or knowingly had the object under his control in a vehicle];
2. The object met the legal definition of a firearm [rifle/shotgun] [stun gun];
3. DFT knew that the object was a firearm [rifle/shotgun] [stun gun]; and
4. DFT did not have a valid license to carry a firearm [< *for a charge of illegal possession of a rifle or shotgun under 269/10(a), or for a charge of illegal possession of a firearm or stun gun in one's home or business under 269/10(h), add the following*> or a firearms identification (FID) card].<sup>3</sup>

< *If there is evidence that DFT was exempt from licensing requirements, then add the following*:>

5. DFT did not qualify for one of the legal exemptions that allow someone to possess a firearm [rifle/shotgun] outside their home or business without a license.<sup>4</sup>

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<sup>2</sup> If the indictment specifies a particular object, the judge should consider substituting the language in the indictment for "object in question" throughout the instruction.

<sup>3</sup> See *Commonwealth v. Guardado*, 491 Mass. 666, 686–690 (2023). Before *Guardado*, lack of a license was an affirmative defense. See *Guardado*, 491 Mass. at 687, 689, discussing *Commonwealth v. Gouse*, 461 Mass. 787, 799–808 (2012).

<sup>4</sup> Exemptions to the licensing requirement are affirmative defenses, including exemptions referenced in G.L. c. 269, § 10(a)(4) (firearm) and § 10(a)(5) (rifle/shotgun) for certain persons and activities under G.L. c. 140, § 129C, referenced in § 10(a)(4) (firearm) for non-residents engaged in certain activities under G.L. c. 140, § 131G, and referenced in § 10(a)(5) (firearm) and § 10(a)(6) (rifle/shotgun) for air rifles or BB guns possessed by minors under age 18 in certain circumstances. See *Guardado*, 491 Mass. at 685–686 (equating exemption under § 10(a)(4) (firearm) with affirmative defenses). See also G.L. c. 278, § 7 (criminal defendant relying on "a license" or "authority" must "prove the same; and, until so proved, the presumption shall be that he is not so authorized"); *Commonwealth v. Davis*, 359 Mass. 758, 758 (1971) (rescript), a portion of which was abrogated by *Guardado*.

*< If DFT is charged under 269/10(a), rather than under 269/10(h), then add the following element:<sup>5</sup>>*

[5/6]. DFT possessed the firearm [rifle/shotgun] outside his residence or place of business.

First, the Commonwealth must prove that DFT knowingly **possessed** the object in question [or knowingly had the object under his control in a vehicle]. *< If a further instruction on knowledge is appropriate, the judge may use the language in the Supplemental Instruction that follows this model instruction.>* A person can possess an object by having direct physical control over it. For example, you possess whatever you have in your pocket. [*< If there is evidence of constructive possession.>* A person can also possess an object if the person:

- knows of the object;
- has the ability to exercise control over it, either directly or through another person; and
- has the intent to exercise control over it.<sup>6</sup>

For example, under the law, you possess items that you keep in your dresser drawer at home.<sup>7</sup> ]

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<sup>5</sup> The home/business exemption under G.L. c. 269, § 10(a), is an affirmative defense. *Guardado*, 491 Mass. at 682–684 (judge must instruct on home/business exemption only if there is evidence that, when viewed in the light most favorable to the defendant, supports the defense). If the evidence raises the defense, the Commonwealth bears the burden of disproving it beyond a reasonable doubt. *Id.* The residence exemption applies to a firearm stored in a vehicle only if the vehicle “is located within or on the defendant’s residence.” *Id.* at 684. The business exemption applies to a firearm located within a business’s parking lot “only if the parking lot is within the exclusive control of the business.” *Id.* at 684–685. Whether the business exemption applies only to a person who is the owner or proprietor of the business was not decided in *Guardado*. See *id.* at 686 n.9.

<sup>6</sup> “Possession implies ‘control and power,’ ... exclusive or joint ..., or, in the case of ‘constructive possession,’ knowledge coupled with the ability and intention to exercise dominion and control.” *Commonwealth v. Brzezinski*, 405 Mass. 401, 409 (1989) (citations omitted).

<sup>7</sup> If the case involves a firearm found in a dresser drawer, the judge should consider using a different example, to avoid an appearance of commenting on the evidence. Alternatives include: “I am in possession of my car keys, even though they are next door on my desk.”

You must determine whether DFT possessed the object in question from all of the facts and the reasonable inferences that you may draw from those facts. Merely being present near an object [*<add as appropriate:>* being associated with a person who controls an object or controls a place where an object is found, living in an apartment where an object is found, or being in a vehicle where an object is present] does not amount to possession. To find that someone possessed an object, you must find that the person knew of the object and had the ability and intent to exercise control over it. [*<Add if relevant:>* The possession does not have to be exclusive to one person. Someone can possess an item jointly with another person.<sup>8</sup>]

**Second**, the Commonwealth must prove that the object in question met the legal definition of a firearm [shot gun] [stun gun] [rifle] [shotgun]. A “firearm” is any pistol, revolver, or other weapon that is capable of discharging a shot or bullet and that has a barrel shorter than 16 inches.<sup>9</sup> The barrel is the part of a firearm through which a shot or bullet is driven, guided, or stabilized, and includes the chamber.<sup>10</sup>

[*<If DFT is charged with illegal possession of a stun gun:>* A “stun gun” is any portable device or weapon that is designed to pass or emit an electrical shock to temporarily incapacitate, injure, or kill someone. Such a device is a stun gun whether it passes an electrical shock by means of a dart or projectile via a wire lead, and whether it does so by emitting an electrical current, impulse, wave or beam.<sup>11</sup> ]

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<sup>8</sup> *Brzezinski*, 405 Mass. at 409.

<sup>9</sup> The definition of “firearm” excludes “any 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.

<sup>10</sup> G.L. c. 140, § 121.

<sup>11</sup> G.L. c. 140, § 121.

[< *If DFT is charged with illegal possession of a rifle*:> A "rifle" is any weapon that has a rifled bore, is capable of discharging a shot or bullet for each pull of the trigger, and has a barrel length equal to or greater than 16 inches.<sup>12</sup> The barrel is the part of a rifle through which a shot or bullet is driven, guided, or stabilized, and includes the chamber. ]

[< *If DFT is charged with illegal possession of a shotgun*:> A "shotgun" is any weapon that has a smooth bore, is capable of discharging a shot or bullet for each pull of the trigger, and has a barrel length of at least 18 inches and an overall length of at least 26 inches.<sup>13</sup> The barrel is the part of a shotgun through which a shot or bullet is driven, guided, or stabilized, and includes the chamber. ]

[< *If there is evidence that the weapon was defective/damaged*:> You have heard evidence that the firearm [rifle/shotgun] in this case was [defective/damaged]. If a weapon becomes so [defective/damaged] that it cannot fire a shot or bullet, the law no longer considers it a firearm [rifle/shotgun]. But if a "relatively slight repair, replacement, or adjustment" would make the weapon operable again, then under the law it remains a firearm [rifle/shotgun].<sup>14</sup> ]

**Third**, the Commonwealth must prove that DFT knew that the object was a firearm [rifle/shotgun] [stun gun]. When determining whether DFT knew that the object was a firearm [rifle/shotgun] [stun gun], you may consider DFT's actions and words, all of the surrounding circumstances, and the reasonable inferences that you draw from the evidence. If the item was a conventional firearm [rifle/shotgun] [stun gun] with its obvious dangers, the

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<sup>12</sup> G.L. c. 140, § 121.

<sup>13</sup> G.L. c. 140, § 121.

<sup>14</sup> *Commonwealth v. Housewright*, 470 Mass. 665, 679 n.16 (2015), citing *Commonwealth v. Jefferson*, 461 Mass. 821, 828 (2012); *Commonwealth v. Bartholomew*, 326 Mass. 218, 220 (1950).

Commonwealth does not have to prove, however, that DFT knew that the object met the legal definition of a firearm [rifle/shotgun] [stun gun].<sup>15</sup>

Fourth, the Commonwealth must prove that DFT did not have a valid license to carry a firearm [*< for a charge of illegal possession of a rifle or shotgun under 269/10(a), or for a charge of illegal possession of a firearm or stun gun in one's home or business under 269/10(h), add the following.>* or a firearms identification (FID) card ] at the time he possessed the firearm [rifle/shotgun] [stun gun].

[*< If there is a question about the difference between a license to carry and an FID card:>* A "license to carry a firearm" is not the same thing as a "firearms identification card," or "FID card." A license to carry a firearm allows a person to possess a firearm [rifle/shotgun] [stun gun] either inside or outside his home or place of business.<sup>16</sup> An FID card allows a person to possess a firearm [stun gun] only inside his home or place of business.<sup>17</sup> ] [*< add for rifles/shotguns>* , and also allows a person to possess a rifle or shotgun either inside or outside their home or business.<sup>18</sup> ]

[*< If there is evidence that defendant was exempt from licensing requirements, then add the following:>*

Fifth, the Commonwealth must prove that DFT did not qualify for a statutory exemption from the requirement to have a license to carry a

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<sup>15</sup> *Commonwealth v. Marrero*, 484 Mass. at 342, 343–347 (2020).

<sup>16</sup> G.L. c. 269, § 10(a) ("No person having in effect a license to carry firearms for any purpose, issued under [G.L. c. 140, §§ 131 or 131F] shall be deemed to be in violation of [G.L. c. 269, § 10]).

<sup>17</sup> *Commonwealth v. Powell*, 459 Mass 572, 587 (2011) ("An FID card allows the holder to own or possess a firearm within the holder's residence or place of business, but not to carry it to or in any other place."); *Phipps v. Police Comm'r of Boston*, 94 Mass. App. Ct. 725, 731 n.10 (2019) ("A person may . . . apply for a firearm identification card, which allows holders to own or possess a firearm, but only within their residence or place of business. See G.L. c. 140, §§ 129B, 129C.").

<sup>18</sup> G.L. c. 269, § 10(a)(4) (rifle/shotgun) (FID card issued under G.L. c. 140, § 129B, authorizes possession of rifle/shotgun outside home/office).

firearm outside his home or office [ *< or, for a rifle/shotgun>* to possess either a license to carry a firearm or an FID card. ]

[*< If DFT is charged under 269/10(a) rather than under 269/10(h), then add:>*

[**Fifth/Sixth**], the Commonwealth must prove that DFT possessed the firearm [rifle/shotgun] outside his residence or place of business. [*<Add if appropriate.>* A person's "residence" or "place of business" means only areas under the exclusive control of the person or business. It does not include common areas of an apartment building or office building. ] ]

## SUPPLEMENTAL INSTRUCTIONS

### "Knowingly"

DFT acted "knowingly" if he did something voluntarily and intentionally, and not because of mistake, accident, negligence or other innocent reason. You must determine what DFT himself actually did or did not know at the time, not what a reasonable person would have known.

This requires you to make a decision about DFT's state of mind. It is obviously impossible to look directly into a person's mind. But in our everyday affairs, we often look to the actions of others to decide what their state of mind is. You should consider all of the evidence, and any reasonable inferences you draw from the evidence, in determining whether the defendant acted with the knowledge that [he possessed the object] [the object was a firearm [rifle/shotgun] [stun gun].

### Ignorance of the Law

You have heard evidence that DFT did not know that they were required to have a license to carry or a firearm identification card before possessing a firearm [rifle/shotgun] [stun gun]. The Commonwealth does not have to prove that DFT knew that the law required them to have a license to carry or firearm identification card before possessing ammunition. For that reason, the evidence that DFT did not know of these requirements is not

relevant to your deliberations and you should not discuss it at all during your deliberations.

### Unlawful possession of a Loaded Firearm<sup>19</sup>

DFT is also charged with unlawfully possessing a **loaded** firearm.<sup>20</sup>

To prove DFT guilty of this charge, the Commonwealth must prove each of the elements of unlawful possession of a firearm, plus two additional elements. If the Commonwealth failed to prove one or more of the elements of unlawful possession of a firearm, then you must find DFT not guilty of the charge of unlawful possession of a loaded firearm.

The two additional elements that the Commonwealth must prove for unlawful possession of a loaded firearm are:

1. The firearm was loaded with ammunition; and
2. DFT knew the firearm was loaded with ammunition.

To prove that the firearm was loaded with ammunition, the Commonwealth must prove that the firearm [*< if applicable >* or an attached feeding device] contained at least one cartridge, cartridge case, or bullet, or some primer or propellant powder designed for use in any firearm, rifle or shotgun.<sup>21</sup>

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<sup>19</sup> G.L. c. 269, § 10(n) provides: "Whoever violates [§ 10(a) or (c)] by means of a loaded firearm, loaded sawed off shotgun or loaded machine gun shall be further punished...." "Loaded" means "that ammunition is contained in the weapon or within a feeding device attached thereto." See G.L. c. 269, § 10(o).

"General Laws c. 269, § 10(n), provides a sentencing enhancement to the crime of unlicensed possession of a firearm where an unlicensed firearm was loaded. It does not create a stand-alone offense; in order to be convicted under G.L. c. 269, § 10(n), an individual must first have been convicted under G.L. c. 269, § 10(a) or (c)." *Commonwealth v. Brown*, 479 Mass. 600, 604 (2018). Though unlawful possession of a firearm in violation of § 10(a) "is one of the predicate offenses of § 10(n)," a violation of § 10(a) "is not and cannot be [a] lesser included offense" of § 10(n). *Commonwealth v. Taylor*, 96 Mass. App. Ct. 143, 147 (2019).

<sup>20</sup> See *Commonwealth v. Brown*, 479 Mass. 600, 604 (2018); *Commonwealth v. Dancy*, 90 Mass. App. Ct. 703, 705 (2016).

<sup>21</sup> G.L. c. 269, § 10(o).



When determining whether DFT **knew** that the firearm was loaded, you may consider DFT's actions and words, and all of the surrounding circumstances and the reasonable inferences that you draw from those circumstances.<sup>22</sup>

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<sup>22</sup> "[A] rational jury could infer that an individual who possessed a firearm was aware that it was loaded. See *Commonwealth v. Cassidy*, 479 Mass. 527, 537 (2018). '[K]nowledge can be inferred from circumstantial evidence, including any external indications signaling the nature of the weapon.' *Staples v. United States*, 511 U.S. 600, 615 n.11 (1994)." *Brown*, 479 Mass. at 608.