

# **Petition Appendix**

2018 WL 3651860

Unpublished Disposition

NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED  
VOLUME. THE DISPOSITION WILL APPEAR IN THE REPORTER.  
Appeals Court of Massachusetts.

COMMONWEALTH

v.

ARMANDO LOPEZ.

17-P-1101

|  
Entered: August 2, 2018.

By the Court (Maldonado, Henry & Shin, JJ. <sup>3</sup>)

<sup>3</sup> The panelists are listed in order of seniority.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

\*1 A jury convicted the defendant, Armando Lopez, of possessing a firearm in his home without a firearm identification (FID) card and possessing ammunition in his home without an FID card. <sup>1</sup> See G. L. c. 269, § 10(h). In this consolidated appeal, the defendant contends the Commonwealth failed to establish that he did not possess a valid FID card and, further, that the posttrial motion judge (who was also the trial judge) erred in denying his motion for a new trial based on his claim that trial counsel was ineffective for failing to move to suppress the firearm and ammunition evidence on the grounds that the police violated the knock and announce rule. We affirm.

<sup>1</sup> The jury acquitted the defendant of possessing another firearm without a license, possessing that firearm without an FID card, and accessory to a felony after the fact.

Discussion. 1. Sufficiency. The defendant asserts the Commonwealth's proof was insufficient because it failed to introduce any evidence that he did not possess a valid FID card.

This challenge is controlled in all material respects by the Supreme Judicial Court's decision in Commonwealth v. Jones, 372 Mass. 403, 406 (1977), which held that the "[a]bsence of a license is not 'an element of the crime,' as that phrase is commonly used," of possession of a firearm or ammunition without an FID card. See Commonwealth v. Powell, 459 Mass. 572, 582 (2011), cert. denied, 565 U.S. 1262 (2012), citing Jones, *supra*. Accordingly, "the Commonwealth does not need to present evidence to show that the defendant did not have a license or FID card because the burden is on the defendant, under G. L. c. 278, § 7, ... to come forward with such evidence." *Ibid.* We discern no error.

2. Ineffective assistance of counsel. We also are not persuaded by the defendant's contention that his trial counsel's failure to move to suppress the firearm and ammunition on the ground that the police violated the knock and announce rule when searching his home rose to ineffective assistance of counsel.

To prevail on an ineffective assistance of counsel claim, the defendant must show that "an attorney's performance fell measurably below that which might be expected from an ordinary fallible lawyer and ... [that] such ineffectiveness has

likely deprived the defendant of an otherwise available substantial defense.” [Commonwealth v. Seino](#), 479 Mass. 463, 472 n.12 (2018), citing [Commonwealth v. Saferian](#), 366 Mass. 89, 96-97 (1974). When a defendant bases his ineffective assistance claim on the failure to file an evidentiary motion, the proper question is whether filing the motion “might have accomplished something material for the defense.” [Commonwealth v. Lally](#), 473 Mass. 693, 703 n.10 (2016), quoting from [Commonwealth v. Satterfield](#), 373 Mass. 109, 115 (1977). Failure to pursue a futile motion is not ineffective assistance of counsel. See [Commonwealth v. Vieux](#), 41 Mass. App. Ct. 526, 527 (1996), cert. denied, 520 U.S. 1245 (1997). Since the defendant brought his ineffective assistance of counsel claim in a motion for a new trial, we review the judge's decision for a significant error of law or for an abuse of discretion. See [Commonwealth v. Brescia](#), 471 Mass. 381, 392 (2015).

\*2 Here, trial counsel had no reason to believe that suppression of the firearm and ammunition on the basis of a violation of the knock and announce requirement would have had any chance of success. Even after extensive postconviction discovery, the only evidence that points to a violation of the knock and announce rule is the defendant's own self-serving affidavit, which the motion judge was free to reject. See [Commonwealth v. Pingaro](#), 44 Mass. App. Ct. 41, 48-49 (1997) (judge free to disregard self-serving affidavits). All other evidence suggests that the “SWAT” team executing the search warrant complied with the knock and announce requirement. The officers swore out affidavits explaining that an unannounced entry could cause a drug or contraband dealer to suspect attack or theft by a rival dealer and would place them in greater danger of attack. For that reason, the officers explained their additional preference for adhering to a knock and announce protocol. They had no reason to believe they departed from that command and safety protocol here.<sup>2</sup> Accordingly, counsel was not ineffective for failing to file a futile motion, and we discern no abuse of discretion.

<sup>2</sup> Contrary to the defendant's assertion, the witnesses' trial testimony does not contradict these claims. The knock and announce command was not at issue at trial, and no one specifically asked the police witness whether the police knocked and announced before entering the premises.

Judgments affirmed.

Order denying motion for new trial affirmed.

#### All Citations

Slip Copy, 2018 WL 3651860 (Table)

November 8, 2018

480 Mass. 1111  
(This disposition is referenced  
in the North Eastern Reporter.)  
Supreme Judicial Court of Massachusetts.

Reported below: 93 Mass. App. Ct. 1121 (2018).

**Opinion**

Appellate review denied.

COMMONWEALTH

v.

Armando LOPEZ

**All Citations**

480 Mass. 1111, 113 N.E.3d 838 (Table)

---

End of Document

© 2019 Thomson Reuters. No claim to original U.S. Government Works.

*Commonwealth of Massachusetts*

SUFFOLK, SS.

At the SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT FOR CRIMINAL BUSINESS,

begun and holden at the CITY OF BOSTON, within and for the County of Suffolk, on the first Monday of April in the year of  
our Lord two thousand fourteen

THE JURORS for the COMMONWEALTH OF MASSACHUSETTS on their oath present that

**ARMANDO LOPEZ,**

on February 11, 2014, did own, possess or transfer possession of ammunition without complying with the requirements  
relating to the firearm identification card provided for in G.L. c. 140, § 129C.

A TRUE BILL

*Mark D. L...*

*Assistant District Attorney*

*[Signature]*

*Foreman of the Grand Jury*

*Superior Court Department - Criminal Business*

**APR 11 2014**

*April, Sitting, 2014*

*Returned into said Superior Court by the Grand Jurors and ordered to be filed.*

*[Signature]*  
*Clerk Of Court*

*Commonwealth of Massachusetts*

SUFFOLK, SS.

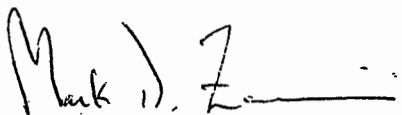
At the SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT FOR CRIMINAL BUSINESS,

begun and holden at the CITY OF BOSTON, within and for the County of Suffolk, on the first Monday of April in the year of  
our Lord two thousand fourteen.

THE JURORS for the COMMONWEALTH OF MASSACHUSETTS on their oath present that

**ARMANDO LOPEZ,**on February 11, 2014, did unlawfully possess a firearm, to wit: a revolver, without complying with the requirements  
relating to the firearm identification card provided for in G.L. c. 140, § 129C.

A TRUE BILL



Assistant District Attorney



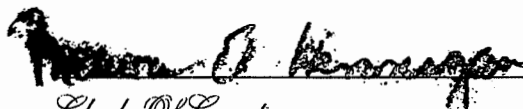
Foreman of the Grand Jury

Superior Court Department - Criminal Business

April, Sitting, 2014

**APR 11 2014**

Returned into said Superior Court by the Grand Jurors and ordered to be filed.



Clerk Of Court

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT DEPARTMENT  
SUCR2014-10323

COMMONWEALTH

v.

ARMANDO LOPEZ

---

PROPOSED

**PARTIES' STIPULATION**

---

Both parties stipulate and agree that: On the evening of March 5, 2013, six young men – Jonathan Castro, Elder Portillo, Erick Romero, Jose Melgar, Jorge Maldonado and Jonathan Lemus – all members of the 18<sup>th</sup> Street gang in Chelsea, joined one another and set out to attack two young men who were standing on the first floor porch at 52 Blossom Street, in Chelsea, believing that the two were members of MS-13, a rival gang, and, that one of them had attacked Portillo on a prior occasion. The group of six discussed their plan, discussed who among them was armed with weapons and set out on foot toward Blossom Street. Some were armed with knives; Castro with a loaded revolver. The two men on the porch were 21 year old Elder Morales Aldana and 22 year old Cesar Garamendia. Morales-Aldana was not MS-13, and neither he, nor Garamendia, had been involved in any prior attack upon Portillo.

The six men walked down Blossom Street in two groups: two of them on the right hand sidewalk and four of them on the left hand sidewalk; all in single file; all wearing hoods; all spaced apart by ten or so steps; all walking toward 52 Blossom Street, up ahead on their right side.

When the first man in each line neared Morales-Aldana and Garamendia, who were standing on the porch, they began to run up toward the victims on the porch.

Elder Portillo ran up the steps and assaulted the victim, Morales-Aldana with a knife. Morales-Aldana tried to defend himself by swinging a chain-link bicycle lock at Portillo. A second attacker, Erick Romero, ran closely behind Portillo and also reached the steps near Morales-Aldana. Cesar Garamendia, standing only steps from Morales-Aldana, was likewise put in fear by the actions of Portillo and Romero. Maldonado, Melgar and Lemus stood in front of the porch, either in the street or on the sidewalk. The sixth attacker, Jonathan Castro, fourth in the line of four, ran across the street toward the victims and fired several gunshots from his revolver at the men on the porch, as those men ran toward the doorway and into the vestibule of the building. Two of the bullets struck Morales-Aldana – one in the chest and a second in the back of the head. Elder Morales-Aldana collapsed in the vestibule and died that night from the gunshot wounds.

The six attackers fled. Castro hid his gun, gloves, jacket and hat in a yard near Blossom Street. Castro and Melgar then traveled to Castro's Everett home. There, Castro told his girlfriend that he had shot a man in Chelsea. Within hours, State and Chelsea Police found Castro and Melgar at Castro's home. During police questioning at the Chelsea Police Station, Castro admitted that he had shot the victim three or four times and said, in essence, that the reasons were gang motivated.

Respectfully Submitted  
For the Commonwealth,

By:



Mark D. Zanini  
David D. McGowan  
Assistant District Attorneys

Defense Counsel,

John Moss, Esq.  
For the defedant

Dated: June 17, 2015



VOLUME: IV  
PAGES: 1-101  
EXHIBITS: None  
FOR I.D.: D-F

SUFFOLK, SS.                      COMMONWEALTH OF MASSACHUSETTS  
   SUPERIOR COURT DEPARTMENT  
   NO. SUCR 2014-10323

\* \* \* \* \*  
COMMONWEALTH OF MASSACHUSETTS       \*  
   \*  
-v-     \*  
   \*  
ARMANDO LOPEZ                               \*  
   \*  
\* \* \* \* \*

TRANSCRIPT OF THE PROCEEDINGS

BEFORE: HONORABLE JANET L. SANDERS  
          Suffolk Superior Courthouse  
          Boston, Massachusetts  
          Monday, June 22, 2015

Mark Zanini, Assistant District Attorney  
David McGowan, Assistant District Attorney  
    On behalf of the Commonwealth.

John P. Moss, Attorney at Law  
    On behalf of the Defendant.

NANCY M. KING, CVR  
OFFICIAL COURT REPORTER  
SUFFOLK SUPERIOR COURT

INDEX

<u>WITNESSES</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
------------------	---------------	--------------	-----------------	----------------

(None.)

PAGE

CHARGE CONFERENCE				3
-------------------	--	--	--	---

CLOSING ARGUMENTS:

(By Mr. Moss)				30
---------------	--	--	--	----

(By Mr. Zanini)				41
-----------------	--	--	--	----

JURY CHARGE				51
-------------	--	--	--	----

E X H I B I T S

<u>NUMBER</u>	<u>PAGE</u>
---------------	-------------

(None.)

FOR IDENTIFICATION

<u>LETTER</u>	<u>PAGE</u>
---------------	-------------

D	Commonwealth's Proposed Jury Instruction	8
---	--	---

E	Cassette Tape of Jury Charge	97
---	------------------------------	----

F	Communication from Jury	98
---	-------------------------	----

1 barrel was less than sixteen inches, so long as  
2 he knew, or the Commonwealth proved that he knew  
3 it was a gun with its obvious dangers. And then  
4 there's this fourth element with respect to  
5 Count 1, that is here the Commonwealth must prove  
6 that this, if all the other elements are  
7 satisfied, that the gun was outside of  
8 Mr. Lopez's residence, and again that he is  
9 liable for that because he was engaged in a joint  
10 venture. The Commonwealth has to prove that. If  
11 you find that the Commonwealth has failed to  
12 prove a joint venture between Mr. Lopez and  
13 Ms. Castro and/or Ms. Cornejo, then he cannot be  
14 found guilty of Count 1, because the Commonwealth  
15 is relying on this theory of joint venture with  
16 respect to Count 1.

17 Now Count 2 alleges possession of a  
18 firearm inside the home, and here as the  
19 Commonwealth described it in its closing argument  
20 the allegation is that a gun was retrieved  
21 outside the home but then transported to  
22 Mr. Lopez, and that he took actual possession of  
23 it in the home. Entirely up to you to decide  
24 whether the Commonwealth proved that that's what  
25 happened. The Commonwealth has to prove that

1 beyond a reasonable doubt. But essentially it's  
2 the same elements I've described for Count 1. The  
3 only exception here is that the Commonwealth  
4 doesn't have to show the firearm was outside the  
5 home. It only has to show, or it has to show the  
6 elements, first that this weapon, this item was a  
7 firearm as I've defined it for you, that the  
8 defendant was in possession of it and here the  
9 Commonwealth is proceeding on a theory of actual  
10 possession, that he took physical possession of  
11 it, and third, that he knew that the item was  
12 indeed a firearm.

13 So I've talked about Counts 1 and 2,  
14 but they both charge him with possession of a  
15 firearm. They both relate to events alleged to  
16 have occurred in March, 2013. They both concern  
17 the same firearm. One indictment concerns the  
18 firearm when it was alleged to be outside the  
19 home. The other concerns the firearm when it's  
20 alleged to be inside the home of Mr. Lopez.

21 Counts 4 and 5 also relate to firearms,  
22 but now we're talking February 11, 2014. And with  
23 respect to Count 4, that accuses the defendant of  
24 possessing a firearm, and Count 5 alleges that he  
25 as in possession of ammunition, essentially of

1 the ammunition inside the firearm that the  
2 Commonwealth alleges was found. Here, I'm not  
3 going to go over the elements, reiterate my  
4 instructions, but again it requires that the  
5 Commonwealth prove beyond a reasonable doubt that  
6 the item that was found was indeed a firearm,  
7 that the defendant knew that it was a firearm,  
8 and that the defendant was in possession of that  
9 firearm. And here, I just kind of refer back,  
10 remind you that possession includes not only  
11 physical possession, holding it in one's hand,  
12 but constructive possession. Did the defendant  
13 have the ability and intention to exercise  
14 dominion and control over the object? The  
15 Commonwealth has to prove that beyond a  
16 reasonable doubt.

17 The final element concerns possession  
18 of ammunition, and that requires the defendant -  
19 I'm sorry, the Commonwealth. The Commonwealth has  
20 to prove, the burden is always on the  
21 Commonwealth, the following three elements beyond  
22 a reasonable doubt. First, that the item in  
23 question was ammunition. Second, the defendant  
24 possessed that item. Third, that he did so  
25 knowingly and intentionally. With respect to the

1 first element, ammunition is defined by the law  
2 as cartridges or cartridge casing, primers,  
3 bullets or propellant powder designated for use  
4 in any firearm, rifle or shotgun. The second  
5 element the Commonwealth has to prove beyond a  
6 reasonable doubt is the defendant was in  
7 possession of the ammunition. I just harken back  
8 to the instructions I gave you on what that  
9 means. And finally, the Commonwealth must prove  
10 beyond a reasonable doubt the defendant knew that  
11 the item was ammunition.

12 So I've just finished instructing you  
13 on the final element of possession of ammunition.  
14 I flipped the tape there. But let me talk to the  
15 lawyers to see what else I need to talk about.

16  
17 **SIDE BAR CONFERENCE:**

18 THE COURT: Mr. Zanini?

19 MR. ZANINI: Satisfied.

20 THE COURT: Mr. Moss?

21 MR. MOSS: Just my same objections on  
22 joint venture possession and gangs.

23 THE COURT: Reasons as articulated  
24 earlier are essentially incorporated herein?

25 MR. MOSS: Yes.

1 THE COURT: Okay, good.

2 MR. MOSS: Thank you.

3 THE COURT: I'm going to pick juror in  
4 seat number 4 as the foreperson. Seated right  
5 next to him was a juror who slept through part of  
6 my instructions, so I'm inclined to - the  
7 appellate court has been very strict on me being  
8 attentive to this. I couldn't do anything during  
9 my instructions. I'm inclined to designate her as  
10 an alternate. I don't want to embarrass her, but  
11 basically I don't want her on the jury. She's in  
12 seat number 5. This is the one I'm talking about.

13 MR. MOSS: So she's in the back row with  
14 the eyeglasses.

15 THE COURT: Yes.

16 THE CLERK: I'll pick her as an  
17 alternate by agreement.

18 THE COURT: Yes. I doing that just to  
19 embarrass her.

20 **END SIDE BAR.**

21  
22 THE COURT: Let me just say a few words  
23 about your deliberations, and also take care of a  
24 couple of housekeeping matters. When your retire  
25 to the jury room to begin, each of you should

COMMONWEALTH OF MASSACHUSETTS  
APPEALS COURT

SUFFOLK, ss.

No. 2017-P-1101

COMMONWEALTH  
Appellee

v.

ARMANDO LOPEZ  
Appellant

---

**BRIEF OF THE DEFENDANT-APPELLANT ON APPEAL FROM  
JUDGMENTS IN THE SUFFOLK SUPERIOR COURT, DOCKET NO.  
1484CR10323**

---

MAX BAUER, ESQ.  
BBO# 688891  
11 Beacon St.  
Suite 914  
Boston, MA 02108  
781-629-9527  
Attorneymaxbauer@gmail.com

DATED: December 2017



**ISSUES PRESENTED**

- I. The Commonwealth bears the burden to establish a search was constitutional. Here the Commonwealth failed to demonstrate compliance with the search warrant's announcement requirement. Therefore, should the evidence obtained pursuant to that warrant be suppressed?
- II. One element of unlawful possession of a firearm and/or ammunition is that a defendant lacked a firearm identification ("FID") card. In this case, the Commonwealth offered no evidence regarding that element. Therefore, did the Commonwealth fail to prove the element of lack of an FID card beyond a reasonable doubt?

**STATEMENT OF THE CASE**

**I. PRIOR PROCEEDINGS**

On April 11, 2014, an indictment (no. 1484CR10323) issued in the Suffolk Superior Court, charging the appellant, Armando Lopez, with one count of possession of a firearm without a license in violation of G.L. c. 269, § 10(a) (Count 1); two counts of possession of a firearm without a firearm identification card ("FID card") in violation of G.L.

c. 269, § 10(h) (Counts 2 and 4); one count of accessory after the fact to a felony in violation of G.L. c. 274, § 4 (Count 3); and one count of possession of ammunition without an FID card in violation of G.L. c. 269, § 10(h) (Count 5). (A. 3-7.)<sup>1</sup>

On April 3, 2015, the defendant filed a motion to suppress based on the staleness of the information in the search warrant affidavit. (A. 13, 18.) On April 16, 2015, after a non-evidentiary hearing on this motion, the motion to suppress was denied. (A. 13, 18.) The defendant did not move to suppress based on the manner of execution.

On June 23, 2015, following a five-day jury trial before the Honorable Justice Janet L. Sanders, the defendant, Armando Lopez, was found guilty on two of the five counts: possession of a firearm without an FID card (Count 4) and possession of ammunition without an FID card (Count 5). (A. 14; Tr. V/31-32.)<sup>2</sup> On June 30, 2015, he was sentenced on the firearm

---

<sup>1</sup> The transcript will be referenced as "(Tr. [volume]/[page])" and the record appendix as "(A. [page])."

<sup>2</sup> Both the June 22 and June 23 transcripts are listed as Volume IV but June 23 should correspond with Volume V.

possession charge (Count 4) to two years in the Suffolk County House of Correction and two years of probation from and after on the ammunition charge (Count 5). (A. 15; Tr. VI/7.) On June 30, 2015, he filed a notice of appeal. (A. 15, 19.)

This case was entered in this Honorable Court on July 29, 2016.

On November 28, 2016, the defendant filed a motion in the Superior Court for a new trial based on ineffective assistance of counsel for failing to challenge the execution of the search warrant (A. 16, 23-34).<sup>3</sup> In this motion, the defendant relied on an affidavit of trial counsel (A. 36-37) and the recollection of the defendant (A. 22). This Court stayed the direct appeal while that motion was pending. (See docket no. 2016-P-1051.)

As a result of the new trial motion, on March 20, 2017, the Superior Court ordered the Commonwealth to provide an affidavit of the trooper who had provided the relevant trial testimony, and contact information

---

<sup>3</sup> Out of an abundance of caution, this motion was filed under seal but the motion itself contains no impounded information.

for members of the SWAT team.<sup>4</sup> (A. 16, 40.) A subsequent investigation revealed no SWAT team members remembered the breach of the door but all indicated that the normal procedure was to knock and announce and all believed it was exceptional for them to not comply with that procedure. (A. 55-56.)

On June 9, the defendant filed a supplemental, memorandum in support of his motion for new trial accompanied by a motion to report a question of law pursuant to Mass. R. Crim. P. 34.

On July 19, the motion for new trial was denied. (Sanders, J.) (A. 17, 60.) On August 18, the defendant filed a notice of appeal from that denial. (A. 17, 61.) On August 25, the motion to report a question of law was denied. (A. 17, 63)

## **II. STATEMENT OF FACTS**

### **1. Role of the Defendant**

This case arises out of an investigation into a murder in Chelsea, Massachusetts, on March 5, 2013. (Tr. II/19.) The Commonwealth did not allege the defendant, Armando Lopez, participated in the murder.

---

<sup>4</sup> In this context, the term SWAT team is used interchangeably with STOP team.

(Id.) He was merely identified in the subsequent investigation as potentially possessing the murder weapon after the fact and acting as an accessory after the fact. An informant had alleged that Mr. Lopez took the murder weapon and other evidence (jacket, mask) (III/74-91).

## 2. Search Warrant Execution

On February 11, 2014, the police obtained a warrant to search 15 Thornton Street, #4, Revere, Massachusetts. The warrant included the following specific provision: "You **are not** also authorized to enter the premises without announcement." (A. 24, quoting search warrant<sup>5</sup>) (emphasis added).

The State Police had a SWAT team conduct the entry into the residence. (Tr. II/100.)<sup>6</sup> The execution was considered by the police a "high risk" search warrant execution. (T. III/9.) The possible existence of a firearm purportedly justified the SWAT team assisting in the executing the search warrant. (Tr.

---

<sup>5</sup> The search warrant itself is impounded pursuant to a court order. (Hely, J.) (A. 18.) See Mass. R.A.P. 16(m) ("Wherever possible, counsel shall not disclose impounded material.").

<sup>6</sup> The investigative team also included the Revere Police Department. (Tr. II/154.)

Amendment..."); *Santiago*, 452 Mass. at 575 n. 1 (noting Massachusetts uses a higher standard for the no-knock issue than federal law, relying on *Macias* and declining to adopt *Richards* "reasonable suspicion" standard); *State v. Cable*, 51 So.3d 434, 444 (Fla. 2010) (notwithstanding *Hudson*, remedy of suppression for knock-and-announce violation proper as matter of Florida law).

**II. THERE WAS LEGALLY INSUFFICIENT EVIDENCE ADDUCED AGAINST THE DEFENDANT BECAUSE THE COMMONWEALTH PRESENTED NO EVIDENCE THAT HE WAS NOT DULY AUTHORIZED TO HAVE POSSESSED THE GUN - A REQUIREMENT UNDER DUE PROCESS PRINCIPLES.<sup>10</sup>**

The lack of possession of a license to carry/FID card is an element of illegal gun possession. See *Com. v. Johnson*, 461 Mass. 44, 55 n. 14 (2011); *Com. v. McCollum*, 79 Mass. App. Ct. 239, 247 (2011)

---

<sup>10</sup> The defendant specifically acknowledges that recent decisions of the Supreme Judicial Court with respect to this argument are adverse to his position. See, e.g., *Com. v. Gouse*, 461 Mass. 787 (2012); *Com. v. Eberhart*, 461 Mass. 809 (2012). However, the defendant respectfully raises this argument under the Second, Fifth, Sixth and Fourteenth Amendments to the United States Constitution to preserve it for further judicial review. Subsequent to those decisions, and relying on its own Second Amendment cases, the Supreme Court rejected the reasoning of the Supreme Judicial Court in a Second Amendment case. *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1028 (2016) (per curiam).

(Commonwealth must prove that the defendant (1) possessed (2) a firearm capable of discharging a shot or bullet (3) outside his residence or place of business, and (4) without a license or an FID card.). (How could it not be?) However, in 2012, despite acknowledging the due process burden, the SJC established that possessing a license/FID card is an affirmative defense that must be raised by the defendant. See *Com. v. Gouse*, 461 Mass. 787, 803-06 (2012); *Com. v. Eberhart*, 461 Mass. 809, 813-14 (2012); *Com. v. Jefferson*, 461 Mass. 821, 834-35 (2012).

Simply put, the aforementioned state caselaw is inconsistent with the fundamental principle that the government has the burden to prove every element of the crime. See *Apprendi*, 530 U.S. at 477; see also *Commonwealth v. Moreira*, 385 Mass. 792, 794 (1982) ("[I]t is constitutionally impermissible to shift to a defendant the burden of disproving an element of a crime charged."). A federal appellate judge recently reached this exact conclusion with regard to the element of lack of authorization. *Powell v. Tompkins*, 783 F.3d 332, 353-54 (1st Cir. 2015)

(Torruella, J., dissenting), *cert. denied*, 136 S. Ct. 1448 (2016) (SJC interpretation of this statute not "consistent with due process"; Massachusetts "state legislature made lack of a license an element of the offense"). Another federal judge had previously reached the same conclusion. *Gonzalez v. Dickhaut*, No. 08-11657, 2010 WL 4955559 (D. Mass. Nov. 30, 2010) (Zobel, J.).

The SJC maintains that *Gouse* and its progeny do comport with due process. See *Com. v. Blanchard*, 476 Mass. 1026, 1029 (2017). But its reasoning is based on convenience. See *Gouse*, 461 Mass. at 805-06. And convenience never prevails over the constitutionally-mandated burden of proof.<sup>11</sup> See *Moreira*, 385 Mass. at 794; see also *Crawford v. Washington*, 541 U.S. 36, 62 (2004) (the Constitution does not allow "dispensing with [a] jury trial because a defendant is obviously

---

<sup>11</sup> The evidence of lack of an FID card is, moreover, amply available to the Commonwealth. Convenience is thus a particularly inappropriate justification for shifting the burden to the defendant. See *Morrison v. California*, 291 U.S. 82, 93 (1934) ("What was known to [the defendant], so far as the evidence discloses, was known also to the [Commonwealth], and provable with equal case"); *In re Winship*, 397 U.S. 358, 364 (1970).



guilty."); see also *Powell*, 783 F.3d at 357 (Torruella, J., dissenting).

At Mr. Lopez's trial, the Commonwealth presented no evidence whatsoever that he lacked an FID card. The Commonwealth presented evidence solely as to an act that is in and of itself<sup>12</sup> absolutely protected by the Second Amendment to the United States Constitution, i.e., an individual's personal possession of a firearm. See *McDonald v. Chicago*, 561 U.S. 742, 767, 778 (2010) (Second Amendment is a fundamental right incorporated to the States). Therefore, the trial judge's denial of his motion for a required finding of not guilty was error.

Here, there is simply no constitutionally-legitimate basis upon which to allow the burden-shifting in this regard. See *Moreira*, 385 Mass. at 794. The precedent of the SJC that permits a conviction for possession of a firearm without proof of the essential element that the defendant lacks an FID card thus violate due process under the Fifth and

---

<sup>12</sup> The defendant does not, of course, suggest that a defendant in such a case cannot be found guilty of a separate crime that was committed with a firearm but in this case, his only convictions were of possession of a firearm and ammunition.

Fourteenth Amendments to the United States  
Constitution and article 12 of the Massachusetts  
Declaration of Rights.

**CONCLUSION**

For the foregoing reasons, this Honorable Court  
should reverse the judgments of the trial court, and  
order the allowance of the motion for new trial and  
the entry of a finding of not guilty on each count.

Respectfully Submitted,  
ARMANDO LOPEZ,  
By his Attorney,

/s/ Max Bauer

---

MAX BAUER, ESQ.  
BBO # 688891

December 12, 2017