

## APPENDIX

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**APPENDIX A**

**SJC Full Court Clerk <SJC-  
CommClerk@sjc.state.ma.us>  
Date: Fri, Feb 11, 2022 at 14:39  
Subject: FAR-28644 - Notice: FAR denied  
To: <jcassidy84@gmail.com>**

**Supreme Judicial Court for the Commonwealth of  
Massachusetts  
RE: Docket No. FAR-28644**

**COMMONWEALTH**

**vs.**

**JOHN E. CASSIDY**

**Bristol Superior Court No. 1173CR00221  
A.C. No. 2020-P-0872**

**NOTICE OF DENIAL OF APPLICATION FOR FUR-  
THER APPELLATE REVIEW**

**Please take note that on February 11, 2022, the ap-  
plication for further appellate review was denied.**

**Francis V. Kenneally Clerk**

**Dated: February 11, 2022**

**To: David B. Mark, A.D.A.  
John E. Cassidy**

COMMONWEALTH OF MASSACHUSETTS  
APPEALS COURT

20-P-872

COMMONWEALTH

vs.

JOHN E. CASSIDY.

MEMORANDUM AND ORDER PURSUANT TO  
RULE 23.0

The defendant was convicted of four counts of unlawful possession of a large capacity feeding device, in violation of G. L. c. 269, § 10 (m), one count of unlawful possession of a large capacity firearm, in violation of G. L. c. 269, § 10 (m), one count of unlawful possession of an assault weapon, in violation of G. L. c. 140, § 131M, and one count of unlawful possession of ammunition, in violation of G. L. c. 269, § 10 (h) (1). His convictions were affirmed by this court in a decision issued pursuant to our former Rule 1:28, see *Commonwealth v. Cassidy*, 91 Mass. App. Ct. 1109 (2017). The Supreme Judicial Court granted further appellate review and ultimately affirmed his convictions. See *Commonwealth v. Cassidy*, 479 Mass. 527 (2018). The defendant filed a petition for writ of certiorari in the United States Supreme Court which was denied on October 5, 2018. See *Cassidy v. Massachusetts*, 139 S. Ct. 276 (2018). He subsequently filed a motion in the Superior Court entitled "pro se defendant's motion for clarification and ruling." It was somewhat

difficult to follow. It purported to seek clarification about how certain firearms laws worked, or could be complied with, but at the end it also asked for the motion judge to "overturn his convictions as a law that cannot be complied with." The judge denied the motion and the defendant has now appealed pro se.

To the extent the defendant merely seeks clarification about the operation of the law, that is, relief in the nature of a declaratory judgment, a postjudgment motion in his criminal case is obviously not the proper procedural avenue for seeking it. However, to the extent the defendant seeks relief from judgment, we will treat his motion as one for a new trial. We begin by noting that to the extent the defendant seeks to relitigate claims decided by the Supreme Judicial Court in his direct appeal he is directly estopped from doing so. See *Commonwealth v. Arias*, 488 Mass. 1004 (2021). Further, we are without power to reverse or modify a decision of the Supreme Judicial Court, something that the defendant acknowledges. To the extent the defendant seeks such relief he must seek it directly from the Supreme Judicial Court, and we express no opinion on the proper procedural avenue for doing so, although of course the defendant is free to seek further appellate review of this decision from that court.

To some extent, the defendant appears to complain that some different approach to licensure for those who have brought into the Commonwealth firearms lawfully purchased and possessed in other states was

articulated by the court subsequent to the Supreme Judicial Court's decision in his case, in the case of *Commonwealth v. Harris*, 481 Mass. 767 (2019). To the extent the defendant argues that the Supreme Judicial Court has modified the law in *Harris* or has employed an approach in that case under which the outcome in his case would have been different, we are without authority to modify its decision in its final judgment in his direct appeal.

Beyond that, much of the defendant's argument appears to focus on the fact that he had a Texas license for his large capacity firearms and feeding devices. These arguments appear to turn on G. L. c. 140, § 129C (u), which allows some non-residents who have a license in another state to be exempt from certain Massachusetts licensing requirements "provided . . . 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 . . ." But, as the Supreme Judicial Court made clear in his direct appeal, this provision is not applicable to large capacity weapons and feeding devices and therefore, whatever the stringency of the licensing requirements in Texas, § 129C (u) is irrelevant to the defendant's case. See *Cassidy*, 479 Mass. at 532-533 & n.7.

The defendant argues that it is impossible for an out of state resident to comply with Massachusetts law when bringing firearms that are lawfully purchased and owned in another state into the Commonwealth.

It is not clear if this is intended as a claim that the statutes under which he was convicted or his conviction itself violates due process, but in any event, if he is referring to the licensure statutes for firearms, feeding devices, and ammunition that may permissibly be owned in Massachusetts, he is obviously incorrect. After complying with the licensing requirements set out in those statutes, a new resident may bring such firearms, feeding devices and ammunition into the state and may possess them lawfully. To the extent his complaint is about items that are simply unlawful to possess within the Commonwealth, or for which one or another new resident cannot for whatever reason comply with the licensure requirements, he may be correct, but in the absence of any constitutional limitation -- and the Supreme Judicial Court found that in his case none was implicated -- the fact that one may not bring into one state something that may not lawfully be possessed there, even though it may be lawfully be possessed in some other state, is an unremarkable feature of our Federal system.

The defendant also argues that there is an unlawful delegation of discretion in the statutory scheme. To the extent that the defendant argues that certain defenses available to him under G. L. c. 269, § 10 (a) are not available to him under § 10 (m), which relates to large capacity firearms and ammunition, the legislature was free to make that choice. Contrary to the suggestion in the defendant's brief, the statute does not convey discretion on any state official to allow



those defenses with respect to the weaponry described in § 10 (m). Although prosecutors of course have broad discretion in deciding what crimes to prosecute, they have no authority under the statute to charge persons who have violated § 10 (m), on the basis of some preference or judgment about some such defendants, only with crimes under § 10 (a) as a means to provide them with its defenses. Nor is there any evidence in the record that any prosecutor has ever done so. Beyond that, the defendant's claims about discretion in the system for firearms licensure, as well as all the other claims contained in his brief before us to the extent we understand its arguments, were ruled upon in the Supreme Judicial Court's opinion in his direct appeal.

The order of the motion judge entered July 29, 2019, denying the defendant's motion for clarification is affirmed.

So ordered.

By the Court (Rubin, Desmond & Shin, JJ.1),

Clerk

Entered: January 4, 2022.

1 The panelists are listed in order of seniority.

APPENDIX B

*COMMONWEALTH vs. JOHN CASSIDY.*

479 Mass. 527

January 5, 2018 · May 14, 2018

Court Below: Superior Court, Bristol County

Present: Gants, C.J., Lenk, Gaziano, Lowy, & Budd,  
JJ.

SJC-12350

Firearms. Constitutional Law, Right to bear arms, Vagueness of statute. Due Process of Law, Vagueness of statute. Evidence, Firearm. Statute, Validity Practice, Criminal, Instructions to jury.

At the trial of indictments charging the defendant with, inter alia, unlawful possession of a large capacity firearm and unlawful possession of a large capacity feeding device, the judge's instructions to the jury, while far from a model of clarity, adequately explained that the Commonwealth was required to prove that the defendant either knew that a firearm or feeding device he possessed qualified as having a large capacity under G. L. c. 269, § 10 (m), or knew that the firearm or feeding device was capable of holding more than ten rounds of ammunition; further, the evidence was sufficient to establish that the defendant knew that the weapon and feeding devices he possessed qualified as large capacity. [532-538] This court concluded that the statutes governing unlawful possession of an assault weapon, unlawful possession of a large capacity feeding device, unlawful possession of a large capacity firearm, and unlawful possession of ammunition are not unconstitutionally vague, where the

statutes clearly indicate what is required of individuals who wish to possess firearms legally in the Commonwealth [538-539]; further, the statutes do not violate the constitutional right to bear arms [539-540].

INDICTMENTS found and returned in the Superior Court Department on March 10, 2011. The cases were tried before Robert C. Cosgrove, J. After review by the Appeals Court, the Supreme Judicial Court granted leave to obtain further appellate review.

John E. Cassidy, pro se. Mary E. Lee, Assistant District Attorney, for the Commonwealth. David Rangaviz, Committee for Public Counsel Services, for Erickson Resende, amicus curiae, submitted a brief. William Burns, pro se, amicus curiae, submitted a brief.

**GAZIANO, J.** The defendant lawfully purchased an AK-47-style pistol and a nine millimeter pistol in Texas and brought them with him when he moved to Massachusetts in August, 2010, to attend Page 528 law school. At some point between that time and his March 11, 2011, arrest, the defendant was advised by a classmate that firearms must be registered in Massachusetts. See G. L. c. 140, §§ 129B, 131; G. L. c. 269, § 10 (a). Although he obtained the forms necessary to register for a license to possess a firearm in Massachusetts, the defendant did not file them and did not obtain a license to carry or a firearm identification (FID) card; at trial, he testified that he could not afford to pay the registration and licensing fees. Under Massachusetts law, the nine millimeter pistol, which could

hold twelve rounds of ammunition, fell within the definition of a large capacity weapon; such a weapon has separate licensing and registration requirements in the Commonwealth. See G. L. c. 269, § 10 (m). The AK-47-style pistol met the Massachusetts definition of an assault weapon; possession of such weapons is heavily restricted in the Commonwealth. [Note 1] See G. L. c. 140, §§121, 131M. During a search of the defendant's apartment pursuant to a search warrant, police officers located the two pistols, four high capacity magazines, several boxes of ammunition, and a bag containing loose rounds of various types of ammunition in the defendant's bedroom. He was charged with unlawful possession of these items. The defendant did not dispute that the weapons were his or that they were operable firearms; in a recorded interview, portions of which were read to the jury, he told an investigating officer that he had legally purchased the weapons in Texas and had brought them with him when he moved to Massachusetts. The defendant also testified similarly at trial. A Superior Court jury convicted the defendant of unlawful possession of an assault weapon, G. L. c. 140, § 131M; unlawful possession of four large capacity feeding devices, G. L. c. 269, § 10 (m); unlawful possession of a large capacity firearm, G. L. c. 269, § 10 (m); and unlawful possession of ammunition, G. L. c. 269, § 10 (h). [Note 2] On appeal, the defendant contends that his convictions of Page 529 possession of a large capacity firearm and large capacity feeding devices should be overturned because the Commonwealth failed to prove that he knew the firearm and feeding devices he possessed qualified as "large capacity," meaning that they were capable of

holding more than ten rounds of ammunition. See G. L. c. 140, § 121. He argues also that Massachusetts firearms statutes are unconstitutionally vague and that they violate his right to bear arms under the Second Amendment to the United States

Constitution and art. 17 of the Massachusetts Declaration of Rights; in addition, he contends similarly that the Commonwealth's interpretation of art. 17 to include a "collective" rather than an "individual" right likewise deprives him of his right to bear arms. We conclude that, to sustain a conviction under G. L. c. 269, § 10 (m), the Commonwealth must prove that a defendant either knew the firearm or feeding device met the legal definition of "large capacity" or knew it was capable of holding more than ten rounds of ammunition. Here, the judge adequately, if minimally, instructed the jury on the elements necessary to sustain a conviction, and a reasonable jury could have inferred that the defendant knew that the nine millimeter pistol and the magazines were capable of holding more than ten rounds of ammunition. We conclude also that the defendant has not shown a violation of his rights under the Second Amendment or art. 17 by any provision of G. L. c. 269, § 10. Accordingly, we affirm the defendant's convictions. [Note 3]

1. Background. We recite the evidence the jury could have found in the light most favorable to the Commonwealth. See *Commonwealth v. Latimore*, 378 Mass. 671, 676-677 (1979). The defendant drove from Texas to Massachusetts in August, 2010, to attend law school. He brought two legally obtained firearms and legally obtained magazines and ammunition with him

and kept them in his bedroom in a two-bedroom apartment that he leased with another law student. On March 2, 2011, Dartmouth police officers executed a search warrant for the defendant's apartment. The officers found a nine millimeter pistol under a pillow on the defendant's bed; while there was no round in the chamber and the safety was engaged, the pistol was loaded. In a suitcase in a bedroom closet, officers Page 530 found an AK-47-style pistol with an empty magazine, two additional magazines -- one loaded and one unloaded -- that fit into that pistol, an extended magazine for the nine millimeter pistol, full boxes of ammunition, and a bag of loose ammunition. [Note 4] A tag on the suitcase and

identification cards found in the bedroom indicated that it was the defendant's bedroom. The officers crossed the street to the parking lot of the law school, where the defendant had been taken into custody. After waiving the Miranda rights, the defendant informed the officers that he had "an AK and a nine" in his bedroom that were "legit" in Texas but not yet registered in Massachusetts. In a video recorded interview at the police station, the defendant again indicated that he had bought the two firearms in Texas and had transported them to Massachusetts in his vehicle when he drove to Massachusetts to attend law school in August, 2010. He said that he had grown up around guns, had purchased the nine millimeter pistol for recreational use, and had fired both firearms in Texas. He also told the detective that the AK-47-style pistol was not loaded, and that the nine millimeter pistol had three or four rounds in the magazine "[b]ut definitely it's not full so it's not going to wear the spring out on it." He said

that, although he was not familiar with Massachusetts's firearms laws, he had learned from one of his law school classmates that he was required to register the firearms in Massachusetts. He obtained but did not file the registration forms, because he did not have enough money to pay the licensing fees. The defendant was charged with unlawful possession of an assault weapon, G. L. c. 140, § 131M; [Note 5] unlawful possession of Page 531 four large capacity feeding devices, G. L. c. 269, § 10 (m); unlawful possession of a large capacity firearm, G. L. c. 269, § 10 (m); and unlawful possession of ammunition, G. L. c. 269, § 10 (h). [Note 6] At trial on the seven firearm-related charges, two Dartmouth police officers testified concerning the search of the defendant's apartment and their interviews with him. Additionally, the head armorer of the Dartmouth police department, who is in charge of the department's firearms, identified the firearms, magazines, and various types of ammunition, test fired the two pistols, and testified that the firearms and magazines were fully functional. He indicated that the three magazines for the AK-47-style pistol each could hold thirty rounds of ammunition, the nine millimeter pistol with its original magazine could hold twelve rounds, and the extended magazine for the nine millimeter pistol was an after-market magazine that was "much larger than the one that came with the gun" and could hold either fifteen or twenty rounds. Finally, he testified that an application for a license to carry or an FID card costs one hundred dollars. See G. L. c. 140, §§ 129B (9A), 131 (i). Page 532 The defendant testified in his own defense. He said that the firearms were his, he had been hunting since he was eight years old, he purchased the firearms legally in Texas and

brought them with him when he started law school, and he had not applied for a license or FID card after his arrival in Massachusetts. The defendant was convicted of all of the firearms charges. The defendant initially sought relief before a single justice in the county court, pursuant to G. L. c. 211, § 3; that petition was denied without a hearing. The Appeals Court thereafter affirmed the defendant's convictions in a memorandum and order pursuant to its rule 1:28. We then granted the defendant's application for further appellate review.

2. Discussion. The defendant contends that his convictions under G. L. c. 269, § 10 (m), should be overturned because the Commonwealth failed to prove that he knowingly possessed a large capacity firearm and large capacity feeding devices. The defendant also argues that the statutes under which he was convicted are unconstitutionally vague because they are too complex to be understood and are enforced arbitrarily. In addition, he contends that the statutes violate his right to bear arms under the Second Amendment and art. 17 by impermissibly regulating possession of firearms. a. Knowledge that firearms and feeding devices have a large capacity. General Laws c. 269, § 10 (m), prohibits individuals from "knowingly" possessing or having under their control a large capacity weapon or large capacity feeding device unless they possess a class A or class B license to carry firearms. Under G. L. c. 140, § 121, a large capacity weapon is defined as "any firearm . . . (i) that is semiautomatic with a fixed large capacity



feeding device; (ii) that is semiautomatic and capable of accepting, or readily modifiable to accept, any detachable large capacity feeding device; (iii) that employs a rotating cylinder capable of accepting more than ten rounds of ammunition in a . . . firearm . . . ; or (iv) that is an assault weapon." A large capacity feeding device is "a fixed or detachable magazine, box, drum, feed strip or similar device capable of accepting, or that can be readily converted to accept, more than ten rounds of ammunition." *Id.* The defendant contends that in order to sustain his conviction under G. L. c. 269, § 10 (m), the Commonwealth was required to prove both that he knew he possessed a firearm and that he knew Page 533 that that firearm qualified as "large capacity." [Note 7] In support of this argument, he relies on *Staples v. United States*, 511 U.S. 600, 602 (1994), where the United States Supreme Court held that, in order to convict the defendant of the illegal possession of a machine gun, in violation of 26 U.S.C. § 5845(a)(6), prosecutors were required to prove that he knew his rifle had the characteristics that brought it within the statutory definition of a machine gun. The Court differentiated firearms and rifles from other dangerous devices, such as hand grenades, that are highly regulated under public welfare statutes. *Id.* at 609-610 (distinguishing *United States v. Freed*, 401 U.S. 601 [1971]). Because the type of weapon owned by that defendant might "give no externally visible indication that it is fully automatic," it was possible that the government's reading of the statute "would impose criminal sanctions on a class of persons whose mental state ignorance of the characteristics of weapons in their possession -- ma[d]e their actions entirely innocent." *Id.* at 614-615. By contrast,

the Commonwealth points to this court's decision in *Commonwealth v. O'Connell*, 432 Mass. 657, 663-664 (2000), in which this court held that the Commonwealth was not required to prove that a defendant was aware of the length of the shotgun he possessed in order to be convicted of possession of a sawed-off shotgun. "Although knowledge is an essential element of each crime, . . . the Commonwealth need not prove that the defendant knew that the physical characteristics of the firearm he possessed (such as barrel length) rendered it subject to regulation. . . . Where, as here, the jury could have inferred that the defendant knew a particular firearm was in his possession, his ignorance vis-à-vis that firearm's dimensions is not a valid defense." *Id.* The Commonwealth argues that "large capacity" is a type of physical characteristic similar to barrel length. "Our primary duty in interpreting a statute is 'to effectuate the intent of the Legislature in enacting it.'" *Sheehan v. Weaver*, 467 Mass. 734, 737 (2014), quoting *Water Dep't of Fairhaven v. Page 534 Department of Env'tl. Protection*, 455 Mass. 740, 744 (2010). "Ordinarily, where the language of a statute is plain and unambiguous, it is conclusive as to legislative intent." *Thurdin v. SEI Boston, LLC*, 452 Mass. 436, 444 (2008). That said, "[w]e will not adopt a literal construction of a statute if the consequences of such construction are absurd or unreasonable." *Attorney Gen. v. School Comm. of Essex*, 387 Mass. 326, 336 (1982). See *Black's Law Dictionary* 11-12 (10th ed. 2014) (defining "absurdity" as "being grossly unreasonable" and "[a]n interpretation that would lead to an unconscionable result, esp. one that . . . the drafters could not have intended"). "Where the words of the statute are ambiguous, we strive to make

it an effectual piece of legislation in harmony with common sense and sound reason and consistent with legislative intent" (quotations and citation omitted). *Commonwealth v. Pon*, 469 Mass. 296, 302 (2014). To determine the elements that the Commonwealth must prove, we begin with the text of G. L. c. 269, § 10 (m). That statute provides, in relevant part: "[A]ny 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 . . . , except as permitted or otherwise provided under this section or [G. L. c.] 140, shall be punished by imprisonment in a [S]tate 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 [G. L. c. 140, § 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." Courts generally interpret criminal statutes in a manner that is consistent with ordinary English usage. *Flores-Figueroa v. United States*, 556 U.S. 646, 652 (2009). "That is to say courts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word 'knowingly' as applying that word to each element." *Id.* As the Supreme Court has explained: "In ordinary English, where a transitive verb has an object, listeners in most contexts assume that an adverb (such as Page 535 knowingly) that modifies the transitive verb tells the listener how the

subject performed the entire action, including the object as set forth in the sentence. Thus, if a bank official says, 'Smith knowingly transferred the funds to his brother's account,' we would normally understand the bank official's statement as telling us that Smith knew the account was his brother's. Nor would it matter if the bank official said 'Smith knowingly transferred the funds to the account of his brother.' In either instance, if the bank official later told us that Smith did not know the account belonged to Smith's brother, we should be surprised. . . . Similar examples abound. If a child knowingly takes a toy that belongs to his sibling, we assume that the child not only knows that he is taking something, but that he also knows that what he is taking is a toy *and* that the toy belongs to his sibling" (emphasis in original). *Id.* at 650-651. See *Commonwealth v. Daley*, 463 Mass. 620, 624 (2012). See also A. Scalia & B.A. Garner, *Reading Law: The Interpretation of Legal Texts* 140-141, 147-151 (2012). The Commonwealth's reliance on *O'Connell*, 432 Mass. at 663-664, is misplaced. That case addresses a conviction under G. L. c. 269, § 10 (c), a statute that does not explicitly include the word "knowingly." [Note8] Accordingly, we did not construe the term "knowingly" as applying to the entire direct object of "a sawed-off shotgun," and required the Commonwealth to prove in that case only the defendant's knowledge that he possessed the firearm. *Id.* But see *Commonwealth v. Johnson*, 461 Mass. 44, 52-53 (2011) (concluding that G. L. c. 269, § 10 [h], which criminalizes unlawful possession of ammunition and does not explicitly include mens rea requirement, contains implicit knowledge requirement).

When an adverb such as "knowingly" is explicitly inserted in a statute to modify a verb, it necessarily must modify the object of that verb: it matters what the defendant knowingly had in his or her possession. Then, "once [theadverb] is understood to modify the object of [that] verb[], there is no reason to believe it does not Page 536 extend to the phrase which limits that object." Flores-Figueroa, 556 U.S. at 657 (Scalia, J., concurring in part and concurring in the judgment). Thus, in G. L. c. 269, § 10 (m), "knowingly" is an adverb that modifies both the transitive verb phrase, "has in his possession," and the entire direct object of the verb, "large capacity weapon." Accordingly, as one of the elements of a charge under G. L. c. 269, § 10 (m), the Commonwealth must prove that a defendant either knew a firearm or feeding device he or she possessed

qualifies as having a large capacity under the statute or knew that the firearm or feeding device is capable of holding more than ten rounds of ammunition. Here, the judge instructed the jury on the elements they were required to find in order to convict the defendant of unlawful possession of large capacity weapons and feeding devices as follows: "[T]he Commonwealth must prove three things beyond a reasonable doubt[:] first, that the defendant possessed and had under his control a large capacity weapon [or feeding device]; second, that what the defendant possessed or had under his control met the legal definition of a large capacity weapon [or feeding device]; and, third, that the defendant knew that he possessed or had under his control a large capacity weapon [or feeding device]." The judge then provided the statutory definitions for large capacity weapons and feeding devices. While far

from a model of clarity, and not a form of words we would encourage to be used in the future, the judge's instructions

were appropriate. He adequately explained the elements of the offense, including the requirement that the defendant must know that he possessed a large capacity weapon or feeding device. [Note 9] In addition to challenging the jury instruction, the defendant also challenges the sufficiency of the Commonwealth's evidence to establish that he knew that the weapon and feeding devices he possessed qualified as "large capacity." In reviewing a challenge to the sufficiency of the evidence, we ask "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt" (emphasis in original). Page 537 Latimore, 378 Mass. at 677, quoting *Jackson v. Virginia*, 443 U.S. 307, 319(1979). There was no direct evidence that the defendant knew that the nine millimeter pistol and the magazines had large capacities as defined under Massachusetts law. "But knowledge 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) ("firing a fully automatic weapon would make the regulated characteristics of the weapon immediately apparent to its owner"). See *Commonwealth v. Romero*, 464 Mass. 648, 653 (2013) ("Proof of possession of [contraband] may be established by circumstantial evidence, and the inferences that can be drawn therefrom" [citation omitted]). The same is true for knowledge

that a firearm or feeding device qualifies as "large capacity" under Massachusetts law. Based on the evidence, as viewed in the light most favorable to the Commonwealth, the jury could have inferred that the defendant knew that the nine millimeter pistol and four magazines could hold more than ten rounds of ammunition. The defendant had owned the firearms and magazines for a significant period of time; he testified that he purchased the nine millimeter pistol at a particular gun store in Houston sometime "between the end of 2008 . . . [and the] beginning of 2009," and the AK-47-style pistol at the same store during the fall of 2009. He had fired the firearms in Texas. He was familiar with firearms more generally, had owned other firearms in the past, and had been hunting since he was eight years old. The defendant also demonstrated knowledge of the nine millimeter pistol's capacity by indicating that he did not fully load the magazine so that he would not wear out the spring. In addition, the three magazines for the AK-47-style pistol each were capable of holding thirty rounds of ammunition, and were noticeably larger than a magazine that holds ten rounds. Similarly, the extended, after-market magazine for the nine millimeter pistol, which the defendant had purchased separately, could hold either fifteen or twenty rounds; it, too, was noticeably larger than the stock magazine that was in the pistol when it was found, which the firearms expert testified holds twelve rounds. Given the defendant's testimony about purchasing, loading, and shooting the two firearms; the manner in which he kept the AK-47-style pistol with its magazine unloaded; the manner in which he kept

the nine millimeter pistol partially loaded (to save the spring from wear), but locked (for safety and accessibility); Page 538 and the obvious large size of the thirty-round "banana-style" magazines and the after-market magazine, the jury reasonably could have inferred that the defendant was aware that the magazines held more than ten rounds of ammunition. b. Vagueness. The defendant also challenges the statutes under which he was convicted as being unconstitutionally vague, arguing that they are too complex to be understood and also are enforced arbitrarily. "A law is void for vagueness if persons of common intelligence must necessarily guess at its meaning and differ as to its application . . . or if it subjects people to an unascertainable standard" (quotations and citations omitted). Chief of Police of Worcester v. Holden, 470 Mass. 845, 854 (2015). See United States v. Williams, 553 U.S. 285, 304 (2008) ("A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement"). The defendant cites statistics showing that more than one-half of firearm charges in Massachusetts are dismissed and few result in sentences of incarceration. Standing alone, however, these statistics are insufficient to demonstrate arbitrary enforcement. "What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is." Williams, 553 U.S. at 306.



Thus, statutes are determined to be unconstitutionally vague when officials possess unfettered discretion to decide whom to charge. See *Kolender v.*

*Lawson*, 461 U.S. 352, 360-361 (1983) (statute requiring individuals to carry "'credible and reliable' identification" was unconstitutionally vague on its face "because it encourages arbitrary enforcement by failing to describe with sufficient particularity what a suspect may do in order to satisfy the statute"); *Commonwealth v. Williams*, 395 Mass. 302, 304-306 (1985) (ordinance prohibiting sauntering and loitering "in such a manner as to obstruct . . . travellers" was unconstitutionally vague); *Commonwealth v.*

*Sefranka*, 382 Mass. 108, 110 (1980) (term "lewd, wanton and lascivious person" is unconstitutionally vague). There is no such indeterminacy here. The statutes challenged by the defendant clearly indicate what is required of individuals who wish to possess firearms legally in the Commonwealth. The Page 539 defendant testified that he was aware before his arrest that Massachusetts required registration of firearms, and that he had not registered either of his weapons because of the cost. In some circumstances, the Supreme Court has concluded that ignorance of the law may be a defense, where proscribed conduct is completely passive and a defendant has no reason to know of the requirements of the law. See *Lambert v. California*, 355 U.S. 225, 228-230 (1957) (holding that defendant could not be convicted of violating felon registration ordinance by virtue of her mere presence in city). Such a claim is unrelated to a facial vagueness challenge, and does not appropriately

describe the defendant's conduct here. The defendant's vagueness claim therefore fails.

c. Right to bear arms. Finally, the defendant argues that the statutes under which he was convicted violate his constitutional right to bear arms, protected by the Second Amendment and art. 17. [Note 10] In *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008), the Supreme Court held that a complete ban on handguns and a requirement that firearms held in a home be kept unloaded and disassembled violated the Second Amendment. Two years later, in *McDonald v. Chicago*, 561 U.S. 742, 791 (2010), the Court held that the Second Amendment also applies to the States through the Fourteenth Amendment to the United States Constitution. Yet, "the right secured by the Second Amendment is not unlimited." *Heller*, supra at 626. Regulations other than total handgun bans are permissible so long as they do not interfere with the Second Amendment's "core lawful purpose of selfdefense." *Id.* at 630, 636. Since then, we have rejected challenges to Massachusetts's firearms

statutes on Second Amendment and art. 17 grounds. See, e.g., *Commonwealth v. Gouse*, 461 Mass. 787, 800-801 (2012); *Commonwealth v. Johnson*, 461 Mass. 44, 57-59 (2011); *Commonwealth v. Loadholt*, 460 Mass. 723, 723-724, 726 (2011); *Commonwealth v. Powell*, 459 Mass. 572, 573 (2011), cert. denied, 565 U.S. 1262 (2012). Relying on *Heller*, 554 U.S. at 626-627, we determined that "an individual's Second Amendment right does not prohibit laws regulating who may purchase, possess, and carry firearms, and where such weapons may be Page 540 carried." *Johnson*, supra at 57. Furthermore, "the requirement of licensing before one may possess a firearm or ammunition does not by itself render the licensing statute unconstitutional on its face." *Id.* at 58, citing *Loadholt*,

supra at 726. That ruling is dispositive here. The assault weapon statute under which the defendant was convicted, G. L. c. 140, § 131M, also is not prohibited by the Second Amendment, because the right "does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 625. The Second Amendment does not grant "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* At 626. A ban on assault weapons is more similar to the restriction on shortbarreled shotguns upheld in *United States v. Miller*, 307 U.S. 174, 178 (1939), than the handgun ban overturned in *Heller*. "In the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well[-]regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument." *Miller*, supra. See *Heller*, supra at 627 (suggesting that "weapons that are most useful in military service -- M-16 rifles and the like -- may be banned"). Several United States Courts of Appeals have upheld similar bans on assault weapons. See *Heller v. District of Columbia*, 670 F.3d 1244, 1247-1248, 1262 (D.C. Cir. 2011) ("the prohibition of semi-automatic rifles and large-capacity magazines does not effectively disarm individuals or substantially affect their ability to defend themselves"). See, e.g., *Kolbe v. Hogan*, 849 F.3d 114, 121 (4th Cir.), cert. denied, 138 S. Ct. 469 (2017); *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 247-248 (2d Cir. 2015), cert. denied sub nom. *Shew v. Malloy*, 136 S. Ct. 2486 (2016); *Friedman v. Highland Park*, 784

F.3d 406, 412 (7th Cir. 2015), cert. denied, 136 S. Ct. 447 (2015). The defendant's claims that the Commonwealth's firearms statutes violate the Second Amendment and art. 17 on vagueness grounds, or because they deprive citizens of their right to bear arms, therefore fail.

Judgments affirmed.

Appendix.

Model Jury Instruction Regarding Unlawful Possession of Large

Capacity Weapons and/or Feeding Devices

The defendant is charged with unlawfully possessing a large capacity (weapon) (feeding device).

In order to prove the defendant guilty of this offense, the Commonwealth must prove four elements beyond a reasonable doubt: First: That the defendant possessed an item; Second: That the item meets the legal definition of "large capacity (weapon)(feeding device)"; Third: That the defendant knew that (he) (she) possessed that (weapon) (feeding device); and Fourth: That the defendant knew that the (weapon) (feeding device) met the legal definition of a large capacity (weapon) (feeding device) or was capable of holding more than ten rounds of ammunition. To prove the first element, the Commonwealth must prove beyond a reasonable doubt that the defendant possessed the (firearm) (feeding device). A person "possesses" something if (he) (she) has direct physical control or custody of it at a given time. To prove the second element, the Commonwealth must prove beyond a reasonable doubt that the item in question met the legal definition of a large capacity (weapon) (feeding device). (A large capacity weapon is defined in our law as any firearm, rifle, or shotgun that is semiautomatic and has a

fixed large capacity feeding device or is capable of accepting, or readily modifiable to accept, any detachable large capacity feeding device, or any firearm, rifle, or shotgun that employs a rotating cylinder capable of accepting more than ten rounds of ammunition or more than five shotgun shells.) (A large capacity feeding device is defined in our law as a fixed or detachable magazine, box, drum, feed strip, or similar device capable of accepting, or that can be readily converted to accept, more than ten rounds

of ammunition or more than five shotgun shells.) To prove the third element, the Commonwealth must prove beyond a reasonable doubt that the defendant knew that (he) (she) was in possession of a (weapon) (feeding device). To prove the fourth element, the Commonwealth must prove beyond a reasonable doubt either that the defendant knew that that the (weapon) (feeding device) met the legal definition of "large capacity" or that the defendant knew that the (weapon) (feeding device) was capable of accepting, or readily modifiable to accept, more than ten rounds of ammunition or more than five shotgun shells. This requires you to make a decision about the defendant's state of mind at the time of the alleged unlawful possession of a large capacity (weapon) (feeding device). You may examine the defendant's actions and words, and all of the surrounding circumstances, to help you determine the extent of the defendant's knowledge.

#### FOOTNOTES

[Note 1] As the defendant argued, under Texas law, there is no separate category of "high capacity" handguns, and no license is required to possess a handgun in an individual's home or vehicle, or to possess a rifle. See Tex. Penal Code Ann. §§

46.01, 46.02, 46.05. [Note 2] Before sentencing, the Commonwealth entered nolle prosequis on one count charging assault and battery, one count charging assault by means of a dangerous weapon (a metal folding chair), and one count charging assault and battery by means of a dangerous weapon. Those charges stemmed from an alleged altercation between the defendant and his housemate, which led to the issuance of the search warrant; the charges were not prosecuted at trial.

[Note 3] We acknowledge the amicus briefs submitted by Erickson Resende and William Burns.

[Note 4] General Laws c. 140, § 121, distinguishes rifles from firearms, defining a rifle as "a weapon having a rifled bore with a barrel length equal to or greater than [sixteen] inches" and a firearm as "a pistol, revolver or other weapon of any description . . . of which the length of the barrel or barrels is less than [sixteen] inches." One of the officers testified that when he first discovered the defendant's AK-47-

style pistol, he thought it was an AK-47-style rifle, but "[b]ased on the specifications of the firearm, it was later found to be a pistol."

[Note 5] Under G. L. c. 140, § 121, "'Assault weapon', shall have the same meaning as a semiautomatic assault weapon as defined in the federal Public Safety and Recreational Firearms Use Protection Act, 18 U.S.C. [§] 921(a)(30) as appearing in such section on September 13, 1994, and shall include, but not be limited to, any of the weapons, or copies or duplicates of the weapons, of any caliber, known as: (i) Avtomat Kalashnikov (AK) (all models); (ii) Action Arms Israeli Military Industries UZI and Galil; (iii) Beretta Ar70 (SC-70); (iv) Colt AR-15; (v) Fabrique National

FN/FAL, FN/LAR and FNC; (vi) SWD M-10, M-11, M-11/9 and M-12; (vii) Steyr AUG; (viii) INTRATEC TEC-9, TEC-DC9 and TEC-22; and (ix) revolving cylinder shotguns, such as, or similar to, the Street Sweeper and Striker 12; provided, however, that the term assault weapon shall not include: (i) any of the weapons, or replicas or duplicates of such weapons, specified in appendix A to 18 U.S.C. [§] 922 as appearing in such appendix on September 13, 1994, as such weapons were manufactured on October 1, 1993; (ii) any weapon that is operated by manual bolt, pump, lever or slide action; (iii) any weapon that has been rendered permanently inoperable or otherwise rendered permanently unable to be designated a semiautomatic assault weapon; (iv) any weapon that was manufactured prior to the year 1899; (v) any weapon that is an antique or relic, theatrical prop or other weapon that is not capable of firing a projectile and which is not intended for use as a functional weapon and cannot be readily modified through

a combination of available parts into an operable assault weapon; (vi) any semiautomatic rifle that cannot accept a detachable magazine that holds more than five rounds of ammunition; or (vii) any semiautomatic shotgun that cannot hold more than five rounds of ammunition in a fixed or detachable magazine." [Note 6]

As discussed, the defendant also was charged with assault by means of a

dangerous weapon (a metal folding chair), G. L. c. 265, § 15 (b); assault and

battery, G. L. c. 265, § 13A; and assault and battery by means of a dangerous weapon, G. L. c. 265, § 15A (b).

The Commonwealth did not pursue these charges. See note 2, *supra*. [Note 7] The defendant also contends

that if the weapons and feeding devices had not been considered "large capacity," he would not have been required to obtain an FID card to possess them within his home. In support of this argument, the defendant cites G. L. c. 140, § 129C (u), which allows some non-residents who hold a license in another State to be exempt from Massachusetts licensing requirements "provided . . . that the licensing requirements of such nonresident's [S]tate of residence are as stringent as the requirements of the [C]ommonwealth for a firearm identification card . . . ." The defendant presented no evidence, however, that his Texas license would have satisfied that requirement. [Note 8] General Laws c. 269, § 10 (c), provides, in relevant part: "[W]hoever 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 [G. L. c. 140, § 121], shall be punished . . . ." [Note 9] A model instruction for prosecution of charges of unlawful possession of large capacity weapons and feeding devices is set forth in the Appendix. [Note 10] Because he did not apply for a license to carry or an FID card, the defendant cannot properly raise an as-applied challenge, see *Commonwealth v. Johnson*, 461 Mass. 44, 58 (2011), citing *Commonwealth v. Powell*, 459 Mass. 572; 589-590 (2011), cert. denied, 565 U.S. 1262 (2012), and he appropriately does not do so.



APPENDIX C

*COMMONWEALTH vs. BRIAN K. HARRIS.*

481 Mass. 767- March 29, 2019

Court Below: District Court, Lowell Division

Present: Gants, C.J., Gaziano, Lowy, Budd, Cypher, & Kafker, JJ.SJC-12607

Firearms. License. Constitutional Law, Right to bear arms, Right to travel. Practice, Criminal, Instructions to jury, Conduct of prosecutor.

A District Court judge did not err in denying the criminal defendant's facial challenge to G. L. c. 269, § 10 (a), which provides for punishment of any individual who, except as provided or exempted by statute, knowingly has in his or her possession, or knowingly has under his or her control in a vehicle, a loaded or unloaded firearm, where, even if possession of a Massachusetts firearm license were an element of the statute rather than an affirmative defense, the defendant lacked such a license. [771-773] There was no merit to a criminal defendant's contention that G. L. c. 269, § 10 (a), and G. L. c. 140, § 129C (h), unconstitutionally prohibit nonresidents from traveling with handguns in or through the Commonwealth. [773-774] A District Court judge did not err in denying the defendant's motion to dismiss a criminal complaint charging him with illegal possession of a firearm, where there was probable cause to believe that the defendant, who possessed a valid New Hampshire firearm license at the time police took his firearm, had been living in Massachusetts for several months but did not apply for a

Massachusetts firearm license within sixty days of his arrival in the Commonwealth. [774-776] At the trial of a criminal complaint charging the defendant with illegal possession of a firearm, the judge did not err in denying the defendant's request for a jury instruction on 18 U.S.C. § 926A, which allows a person to transport a firearm and ammunition from one State through a second State to a third State without regard for the second State's gun laws, where the facts of the case did not warrant such an instruction; further, there was no basis for instructing on the exception for a gun owner who is in or on his or her residence or place of business, given that the firearm was recovered from the defendant's vehicle and he claimed to have no residence or place of business in the Commonwealth, and the instruction on residence did not deprive the defendant of an affirmative defense or confuse the jury with respect to the exemption for nonresidents who possess Massachusetts temporary firearm licenses. [777-782] At a criminal trial, a question posed by the prosecutor on redirect examination did not create a substantial risk of a miscarriage of justice, where the defendant had opened the door to the admission of the evidence. [782-783] COMPLAINT received and sworn to in the Lowell Division of the District Court Department on May 1, 2017. Page 768 A motion to dismiss was heard by Barbara Savitt Pearson, J., and the cases were tried before James W. Coffey, J. The Supreme Judicial Court granted an application for direct appellate review.

Christopher DeMayo for the defendant. Ashlee R. Mastrangelo, Assistant District Attorney (Melissa Weisgold Johnsen, Assistant District Attorney, also present) for the Commonwealth. Maura Healey, Attorney General, & Thomas E. Bocian, Assistant Attorney General, for the Attorney General, amicus curiae, submitted a brief.

**GAZIANO, J.** This case concerns challenges to the firearms licensing statute by the defendant, a firearm owner licensed to carry firearms in New Hampshire, who moved to the Commonwealth and did not obtain a Massachusetts firearm license within the sixty-day statutory time period for new residents. Upon his return from a brief visit to New Hampshire, the defendant, who was intoxicated, got into a confrontation with his girlfriend in the early morning hours of September 12, 2015; she fled the apartment and called police. Officers returned with her to the apartment and spoke with the defendant, who agreed that he owned a Glock 43 pistol, and told them that it was in the trunk of his vehicle. Officers retrieved the weapon for "safekeeping" and kept the defendant overnight at the police station for his own safety after they determined he was too intoxicated to drive. The defendant was not arrested, but two criminal complaints subsequently issued from the District Court charging him with unlawful possession of a firearm in violation of G. L. c. 269, § 10 (h) (1); unlawful possession of ammunition in violation of G. L. c. 269, § 10 (h) (1); and unlawful possession of a firearm in violation of G. L. c. 269, § 10 (a). [Note 1] A District Court jury convicted the defendant

on all charges. He appealed, and we allowed his application for direct appellate review. Page 769 The defendant challenges the denial of his motion to dismiss the complaint charging unlawful possession of a firearm in violation of G. L. c. 269, § 10 (a), on constitutional grounds. [Note 2] In the alternative, he requests a new trial on the grounds of asserted errors in the jury instructions and purported prejudice as a result of assertedly improper questioning of a witness by the prosecutor. We affirm. [Note 3] Discussion. 1. Motion to dismiss. a. Factual background. The limited facts before the judge were drawn predominantly from a police report submitted as an exhibit to the defendant's motion to dismiss. In January 2015, Patty [Note 4] and the defendant started dating. At the time, Patty was living in an apartment in Tewksbury. In late May 2015, the defendant moved into Patty's apartment. On June 4, 2015, Patty and the defendant removed some of her belongings from the apartment to make room for the defendant's belongings. That night, the defendant woke Patty by yelling. He pushed her across the room and pinned her to a wall. The defendant had found a photograph of Patty's former boyfriend. The defendant said that he would "mutilate" the former boyfriend "in front of [Patty] . . . or worse." He also said that he would "assassinate anyone [he] want[ed] anytime [he] want[ed]," and told Patty that he was "the most brutal person [she] will meet." The defendant counted rounds of ammunition and identified jackets he would wear at his victims' funerals. On September 11, 2015, the defendant and Patty were in the

Tewksbury apartment. They had a verbal argument about Patty's work schedule, during which the defendant was verbally abusive. He went to the bedroom closet, where he retrieved a weapon that Patty identified as his "Glock." There was no indication that the firearm was loaded, but Patty also saw ammunition. The defendant removed articles of his clothing from the closet; packed them, with the Glock, in a backpack; and left the apartment. The defendant planned to "stay in New Hampshire for the night." The defendant did not end up staying in New Hampshire. Rather, at approximately 1 a.m. on September 12, 2015, "after drinking," he came home to Tewksbury. He was intoxicated. Patty was asleep and did not hear the defendant enter the apartment. Page 770 The defendant "threw on the lights and pulled the blankets off" Patty. He became enraged when she told him that "he was drunk" and that she "wanted nothing to do with him in [that] state." He began throwing items around and "trashing the apartment," while yelling at Patty and using obscene language. Thinking about the Glock and the defendant's earlier actions, Patty became fearful for her safety. In an attempt to calm the defendant, Patty called his father, but this resulted in the defendant becoming yet more enraged. Patty grabbed her dog and keys, and called police as she fled the apartment; the defendant ran after her. After Patty got into her vehicle, the defendant "banged on" its exterior. Patty drove to a prearranged location, where she waited for the police. At approximately 1:30 a.m., multiple uniformed officers responded in marked cruisers. Patty

informed them that she was unsure if the defendant "had the Glock in [his] vehicle or in his possession," and consented to a protective sweep of the apartment. The officers formed a contact team and entered the apartment building. An officer used a cellular telephone to call the defendant, and requested that he step outside. The defendant complied. He said that he "had gone out drinking" before "coming home" to Tewksbury. He also acknowledged that he did not have a Massachusetts firearm license. Instead, he produced a New Hampshire firearm license. The defendant said that he had a Glock 43 (a nine millimeter pistol) in the trunk of his vehicle. He consented to a search of the vehicle, during which officers located the firearm and ammunition. At the scene, Patty requested an emergency protection order under G. L. c. 209A. A judge issued the order, which was served on the defendant. Pursuant to the order, officers confiscated the defendant's firearm and ammunition for safe keeping. While they were doing so, the defendant commented that he "had connections" and would regain possession of the Glock. He also said that the protection order "won't stick." The defendant was not arrested. Rather, he was placed in protective custody when, after he failed multiple sobriety tests, officers determined that he would be unable to drive safely from the scene. As a result of the restraining order, the Atkinson, New Hampshire, police chief revoked the defendant's New Hampshire firearm license. Criminal complaints against the defendant ultimately were filed; he moved to dismiss the complaints. At a hearing

on the Page 771 motion, the defendant asserted an affirmative defense predicated on his by-then-revoked New Hampshire firearm license. In addition, he maintained that he was a New Hampshire resident who had been traveling "in or through the Commonwealth" at the time of the domestic dispute. The judge noted, however, that the defendant's residency status was a disputed issue of fact that could not be decided on a motion to dismiss. The judge denied the defendant's motion and found probable cause to believe the defendant was a resident of the Commonwealth and had been living with Patty in Tewksbury while unlawfully possessing a firearm. We discern no error in the judge's decision.

b. Massachusetts firearm license. In his motion to dismiss, the defendant raised both facial and as-applied challenges to the constitutionality of G. L. c. 269, § 10 (a). On appeal, he pursues only a facial challenge, and that only summarily. [Note 5] "A facial challenge is an attack on a statute itself as opposed to a particular application." *Los Angeles v. Patel*, 135 S. Ct. 2443, 2449 (2015). "Facial challenges are disfavored" because they "run contrary to the fundamental principle of judicial restraint" and "threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution" (citation omitted). See *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450-451 (2008). See also *Hightower v. Boston*, 693 F.3d 61, 76-77 (1st Cir.2012). A facial challenge fails when the statute at

issue has a "plainly legitimate sweep" (citation omitted). *Washington State Grange*, supra at 449. General Laws c. 269, § 10 (a), provides for punishment of any individual who, "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." Page 772 The statute defines a number of categories of persons who are "exempted by statute" from punishment under G. L. c. 269, § 10 (a). Exemptions apply to new residents of the Commonwealth, see G. L. c. 140, § 129C (j); holders of a Massachusetts firearm license, see G. L. c. 140, §§ 131 (a), (b), 131F; holders of certain firearm licenses issued by other jurisdictions, see G. L. c. 140, §§ 129C (u), 131G; those with firearm identification (FID) cards who possess firearms in their residences or places of business, see G. L. c. 269, § 10 (a) (1); G. L. c. 140, § 129C; and certain nonresidents traveling in or through the Commonwealth, see G. L. c. 140, §§ 129C (h), 131F, 131G. In addition, exemptions exist for specific types of firearms, certain persons, and specified uses. [Note 6] The defendant contends that the statutory exemption for an individual who possesses a Massachusetts firearm license, see G. L. c. 140, §§ 131 (a), (b), 131F; G. L. c. 269, § 10 (a) (2), (3), on its face violates Federal due process protections and rights under the Second Amendment to the United States Constitution, because, to invoke the exemption, a defendant must proffer evidence of a Massachusetts firearm license. The defendant argues that the initial burden of production as to a license, or lack thereof, should rest on the



Commonwealth because "lack of a license" is an element of G. L. c. 269, § 10 (a), rather than an affirmative defense to the offense. On this basis, the defendant asks this court to reverse the denial of his motion to dismiss and, accordingly, his conviction under G. L. c. 269, § 10 (a). This court previously has rejected similar arguments. We have long held that possession of a Massachusetts firearm license is an affirmative defense to G. L. c. 269, § 10 (a), and not an element of that offense. See *Commonwealth v. Allen*, 474 Mass. 162, 174 (2016); *Commonwealth v. Gouse*, 461 Mass. 787, 803-805 (2012); *Commonwealth v. Powell*, 459 Mass. 572, 582 (2011), cert. denied, 565 U.S. 1262 (2012). Because it is an affirmative defense, a defendant has the initial burden of production as to possession of a Massachusetts firearm license. See *Gouse*, supra at 802. "If such evidence is presented, however, the burden is on the prosecution to persuade the trier of facts beyond a reasonable doubt that the defense does not exist" (citation omitted). *Id.* See Page 773 G. L. c. 278, § 7. [Note 7] This system comports with due process, *Commonwealth v. Jefferson*, 461 Mass. 821, 834-835 (2012), and the Second Amendment. See *Commonwealth v. Eberhart*, 461 Mass. 809, 813 (2012); *Gouse*, supra at 801; *Commonwealth v. Loadholt*, 460 Mass. 723, 727 (2011). Moreover, the defendant's argument cannot redress his grievance, i.e., the denial of his motion to dismiss. As noted, he argues that "the prosecution must prove non-licensure" as an element of G. L. c. 269, § 10 (a). It was undisputed, however

that the defendant lacked a Massachusetts firearm license. He told police that he did not have a Massachusetts firearm license, and agreed in his memorandum in support of his motion to dismiss, as well as at the hearing on that motion, that he lacked such a license. In his appellate brief, the defendant asserts that he "did not have a Massachusetts firearms license." Therefore, even if licensure were an element of G. L. c. 269, § 10 (a), there was no doubt that the defendant lacked a Massachusetts firearm license. The judge did not err in denying the motion to dismiss. c. Traveling in or through the Commonwealth. General Laws c. 140, § 129C (h); establishes a statutory exemption that may be raised as an affirmative defense to an alleged violation of G. L. c. 269, § 10. See G. L. c. 269, § 10 (a) (4). Under G. L. c. 140, § 129C (h), nonresidents may travel "in or through the commonwealth" while in "[p]ossession of rifles and shotguns and ammunition," provided that the "rifles or shotguns are unloaded and enclosed in a case." In his memorandum in support of his motion to dismiss, and at the motion hearing, the defendant argued that he was a resident of New Hampshire who "fit[] precisely within the class of exempted persons . . . set forth" in G. L. c. 140, § 129C (h). The judge determined, however, that there was no probable cause to believe that the defendant was traveling in or through the Commonwealth. Rather, she found probable cause to believe that the Page 774 defendant was living in the Commonwealth with his girlfriend. [Note 8] On appeal, the defendant adopts a new and different argument. He contends that G. L. c. 269,

§ 10 (a), and G. L. c. 140, § 129C (h), are facially unconstitutional because, taken together, they violate the right to interstate travel, the right to equal protection, and rights guaranteed by the Second Amendment, as they prohibit a nonresident from traveling in or through the Commonwealth with a handgun, unless the nonresident first obtains a Massachusetts firearm license. Therefore, the defendant argues, the judge erred in denying the motion to dismiss. The defendant's arguments are unavailing. On appeal, he does not explain how G. L. c. 269, § 10 (a), and G. L. c. 140, § 129C (h), act together to prohibit nonresidents from traveling with handguns in or through the Commonwealth. As indicated, he provided no such explanation below. Nor does he address on appeal the language of G. L. c. 140, § 131G, under which a nonresident of Massachusetts, who is a resident of the United States, and who possesses a firearm permit or license issued by a jurisdiction that prohibits licensure of felons and those convicted of certain narcotics offenses, "may carry a pistol or revolver in or through" Massachusetts for a number of purposes. In any event, because the defendant did not raise this argument below, it is waived. See Mass. R. Crim. P. 13 (a) (2), as appearing in 442 Mass. 1516 (2004). See also *Commonwealth v. Alexis*, 481 Mass. 91, 101 (2018); *Commonwealth v. Bettencourt*, 447 Mass. 631, 633 (2006). d. New Hampshire firearm license. The defendant argues that, at the time police took the Glock for "safekeeping," he possessed a valid New Hampshire firearm license that allowed him to carry firearms in the

Commonwealth notwithstanding any Massachusetts firearms provisions. The United States Supreme Court has said, however, that the full faith and credit clause [Note 9] "does not compel a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is Page 775 competent to legislate" (quotation and citation omitted). *Baker v. General Motors Corp.*, 522 U.S. 222, 232 (1998). In our Federal system, "each state is permitted to create its own laws so long as they do not run afoul of the Constitution, federal laws, and treaties." *Hamilton v. Pallozzi*, 848 F.3d 614, 628 (4th Cir.), cert. denied, 138 S. Ct. 500 (2017). See art. VI, cl. 2, of the United States Constitution. At the time police discovered the defendant's firearm, a New Hampshire statute allowed a New Hampshire licensee to "carry a loaded pistol or revolver in [that] state." [Note 10] See N.H. Rev. Stat. Ann. § 159:6. Although the Commonwealth afforded exceptions to nonresidents who possessed certain firearm and hunting licenses issued by other jurisdictions, see G. L. c. 140, §§ 129C (f), 131G, and allowed nonresidents to obtain temporary firearm licenses, see G. L. c. 140, § 131F, no statute in the Commonwealth granted full reciprocity to holders of New Hampshire firearm licenses. Similarly, when New Hampshire's licensing requirement was in effect, the statute did not provide reciprocity to holders of Massachusetts firearm licenses. See N.H. Rev. Stat. Ann. § 159:6-d. The privilege to conceal and carry a loaded pistol or revolver that was conferred by New Hampshire's firearm licensing statute, N.H. Rev. Stat.

Ann. § 159:6, is conferred in the Commonwealth through a "Class A" license, the issuance of which is subject to limitations for certain classes of persons, such as convicted felons, substance abusers, and the mentally ill. See G. L. c. 140, § 131 (a), (d). [Note 11] See, e.g., *Chief of Police of Worcester v. Holden*, 470 Mass. 845, 853 (2015); *Jefferson*, 461 Mass. at 830; *Loadholt*, 460 Mass. at 726 & n.6. A New Hampshire firearm license was available to any "suitable person." See N.H. Rev. Stat. Ann. § 159:6(I)(a). Ultimately, this matter concerns different jurisdictions making Page 776 differing determinations about firearm licensing and regulation. See *Hamilton*, 848 F.3d at 628 & n.15. The Commonwealth is not required to substitute its statutes for those of New Hampshire. See *Pacific Employers Ins. Co. v. Industrial Acc. Comm'n of Cal.*, 306 U.S. 493, 502 (1939) ("the conclusion is unavoidable that the full faith and credit clause does not require one state to substitute for its own statute, applicable to persons and events within it, the conflicting statute of another state"). The judge who denied the defendant's motion to dismiss found probable cause to believe that the defendant had been living in Massachusetts when police became aware of his firearm. The facts available indicated that, at that point, the defendant had been a resident of Massachusetts for several months. Under Massachusetts requirements, a "new resident moving into the commonwealth, with respect to any firearm . . . then in his [or her] possession," may lawfully possess such firearms "for [sixty] days," G. L. c. 140, § 129C (j), after which he or she must obtain a

Massachusetts firearm license in order to possess the firearm outside the home or place of business. [Note 12] See G. L. c. 140, § 131 (a), (b); G. L. c. 269, § 10 (a) (2). The defendant could have applied for a Massachusetts firearm license within the sixty-day period following his arrival in the Commonwealth, but during more than three months of residency, he chose not to do so. There was no error in the denial of the motion to dismiss.

2. New trial. In the alternative, the defendant seeks a new trial Page 777 on the grounds of purportedly improper jury instructions [Note 13] and the prosecutor's questioning of one of the witnesses. a. Jury instructions. The defendant argues that a new trial is required because the judge denied his request for an instruction on 18 U.S.C. § 926A, as well as because the judge assertedly did not instruct on G. L. c. 269, § 10 (a) (1). This latter instruction was not requested at trial, but in fact was given by the judge. The defendant contends further that the instructions deprived him of an affirmative defense under G. L. c. 140, § 129C (j), and potentially confused the jury. The defendant did not object to the instructions at trial. We evaluate the instructions provided to a jury "as a whole, looking for the interpretation a reasonable juror would place on the judge's words," and not in a hypermechanical manner (citation omitted). See *Commonwealth v. Vargas*, 475 Mass. 338, 349 (2016). i. Interstate transportation of firearms. Because the defendant requested an instruction with respect to 18 U.S.C. § 926A, and objected when the request was denied, we review for

prejudicial error. [Note 14] See *Commonwealth v. Okoro*, 471 Mass. 51, 67 (2015). Under that analysis, we determine, first, whether there was error and, if so, whether the error was prejudicial. See *Commonwealth v. Cruz*, 445 Mass. 589, 591 (2005). An error is not prejudicial when we can say with confidence that it "did not influence the jury, or had but very slight effect" (citation omitted). *Commonwealth v. Brown*, 456 Mass. 708, 725 (2010). On the other hand, if we are unable to say "with fair assurance," and "after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error," then the error was prejudicial (citation omitted). See *Allen*, Page 778 474 Mass. at 168. Pursuant to 18 U.S.C. § 926A, any person who is not prohibited under Federal law from transporting, shipping, or receiving a firearm "shall be entitled to transport a firearm for any lawful purpose from any place where he may lawfully possess and carry such firearm to any other place where he may lawfully possess and carry such firearm if, during such transportation the firearm is unloaded, and neither the firearm nor any ammunition being transported is readily accessible or is directly accessible from the passenger compartment of such transporting vehicle." The defendant maintains that 18 U.S.C. § 926A is applicable here because, at the time his firearm was discovered by Tewksbury police, he was a nonresident "in the midst of a trip" from Londonderry, New Hampshire, to Atkinson, New Hampshire, "by way of Tewksbury." The defendant points to no authority supporting

his interpretation of 18 U.S.C. § 926A, nor are we aware of any. This provision consistently has been construed to "allow[] a person to transport a firearm and ammunition from one state through a second state to a third state, without regard to the second state's gun laws, provided that the traveler is licensed to carry a firearm in both the state of origin and the state of destination and that the firearm is not readily accessible during the transportation." *Revell v. Port Auth. of N.Y. & N.J.*, 598 F.3d 128, 132 (3d Cir. 2010), cert. denied, 562 U.S. 1178 (2011). See 18 U.S.C. § 926A; *Torraco v. Port Auth. of N.Y. & N.J.*, 615 F.3d 129, 132 (2d Cir. 2010) (18 U.S.C. § 926A "allows individuals to transport firearms from one state in which they are legal, through another state in which they are illegal, to a third state in which they are legal, provided that several conditions are met"). See also *Bieder v. United States*, 662 A.2d 185, 188-189 (D.C. 1995) (where possession of firearm is lawful in Virginia and New York, 18 U.S.C. § 926A warrants instruction for defendant arrested in District of Columbia while driving from Virginia to New York). We decline to depart from the accepted understanding of 18 U.S.C. § 926A. Therefore, we consider whether an instruction concerning that statute was warranted given the facts at trial. From the time he moved to Tewksbury in late May 2015, until September 12, 2015, the defendant possessed at least one handgun Page 779 in the Tewksbury apartment. As a new resident of the Commonwealth, he was afforded sixty days in which to obtain a Massachusetts FID card or firearm license.



See G. L. c. 140, § 129C (j); G. L. c. 269, § 10 (a) (4). There is no indication that the defendant did so, or attempted to do so, during this period. On September 11, 2015, the defendant placed a handgun in a backpack and transported it from Tewksbury to a shooting range in New Hampshire. He spent several hours at the range, and thereafter "had a couple beers." After several hours of drinking beer, the defendant drove to Londonderry, New Hampshire, to deposit multiple firearms in a storage unit. He then drove to Manchester, New Hampshire, where he dropped off a friend. He returned to Tewksbury between 11:30 p.m. on September 11 and 1 a.m. on September 12. Officers responded to the scene at approximately 1:30 a.m. on September 12 and later discovered the Glock in the trunk of the defendant's vehicle. In sum, on the evening of September 11, 2015, the defendant began his journey in the Commonwealth, he sojourned in New Hampshire, and he returned to Massachusetts sometime late in the evening on September 11 or in the early morning hours of September 12. He did not transport a firearm "from one state through a second state to a third state." *Revell*, 598 F.3d at 132. See *Torraco*, 615 F.3d at 132. Moreover, because he had not obtained a Massachusetts FID card or firearm license within sixty days of moving to the Commonwealth, he was unable lawfully to possess firearms in the Commonwealth, and therefore was unable to transport firearms lawfully into or from the Commonwealth pursuant to 18 U.S.C. § 926A. See *Torraco*, *supra* at 138 (because petitioners "began the pertinent

legs of their travels in New Jersey," under 18 U.S.C. § 926A, "possession and carriage of the firearms in that state needed to be lawful" in order for that statute to apply). There was no error in the trial judge's decision that an instruction concerning the provisions of 18 U.S.C. § 926A was not warranted. ii. Residence or place of business. The defendant argues for the first time on appeal that the judge erred in not instructing the jury to consider whether he had possessed the firearm outside his residence or place of business. The defendant did not request the instruction at trial, nor did he object. Therefore, we must determine whether there was a substantial risk of a miscarriage of justice. See *Jefferson*, 461 Mass. at 836. We conclude there was not. Page 780 General Laws c. 269, § 10 (a) (1), establishes a statutory exemption that allows an individual who has a Massachusetts FID card lawfully to possess a firearm in his or her residence or place of business. See *Powell*, 459 Mass. at 587-588 ("FID card allows the holder to own or possess a firearm within the holder's residence or place of business"). See also *Commonwealth v. McGowan*, 464 Mass. 232, 240-241 (2013). Thus, G. L. c. 269, § 10 (a) (1), is an affirmative defense. See, e.g., *Commonwealth v. Anderson*, 445 Mass. 195, 214 (2005). Although the defendant did not raise this defense, the judge, as was proper, nonetheless instructed the jury that G. L. c. 269, § 10 (a) (1), "exempts a defendant . . . who was present in or on his or her residence or place of business." The defendant is mistaken in his argument before this court that the judge did not instruct on this exemption. In any event,

the firearm was recovered from the defendant's vehicle, and, at trial, he argued consistently that he had no residence or place of business in the Commonwealth. The defendant, therefore, provided little basis for the judge to have instructed on G. L. c. 269, § 10 (a) (1). Moreover, there was no indication that the defendant had applied for or obtained an FID card. Absent such a card, the defendant could not have been acquitted under G. L. c. 269, § 10 (a) (1). He suffered no prejudice. iii. Sixty-day grace period and temporary licenses. The defendant argues that the jury instruction with respect to G. L. c. 140, § 129C (j), deprived him of a "potential" defense under that provision. In addition, he argues that a portion of the instruction might have confused the jury concerning temporary Massachusetts firearm licenses that are issued under G. L. c. 140, § 131F. Because the defendant did not object at trial, we review for a substantial risk of a miscarriage of justice. See *Jefferson*, 461 Mass. at 836. Because the defendant did not have a Massachusetts firearm license, the central issue at trial was whether he was living in Massachusetts on September 12, 2015, and, if so, for how long prior to that date. The Commonwealth's theory was that the defendant lived in Massachusetts from late May 2015 through September 12, 2015, a period of more than sixty days. The defendant maintained that he had never lived in Massachusetts. A number of provisions of the Massachusetts firearm licensing scheme create exceptions for new residents and nonresidents. The judge properly instructed the jury on them. Page 781 As discussed, for example, G.

L. c. 140, § 129C (j), provides a sixty-day period during which a new resident of the Commonwealth who arrives in Massachusetts with firearms may possess those firearms without a Massachusetts FID card or firearm license. See G. L. c. 269, § 10 (a) (4). In his charge, the judge explained that G. L. c. 140, § 129C (j), exempted any "new resident moving into the Commonwealth with respect to a firearm, rifle, shotgun, or ammunition then in his possession for [sixty] days after" moving to "the Commonwealth." Because G. L. c. 269 does not define the term "resident," the judge instructed that a defendant "can only have one domicile under the law," but "can have lots of residences[,] so we use the [term] residence in its common everyday meaning and understanding that a person may have more than one residence at any one given time." The judge instructed further that, for the purposes of G. L. c. 140, § 129C (j), the Commonwealth had the burden of proving beyond a reasonable doubt that the defendant had been a Massachusetts resident. While the defendant did not request an instruction on G. L. c. 140, § 129C (j), the evidence suggested that he was a new resident of the Commonwealth. Accordingly, the judge properly instructed the jury on that provision. See *Commonwealth v. Gonzalez*, 465 Mass. 672, 682 (2013). Relying on these instructions, had the jury found that the defendant was a resident of the Commonwealth on September 12, 2015, but that he had resided in Massachusetts for fewer than sixty days, they would have been required to acquit him. In addition, the judge instructed that a nonresident who obtains a

Massachusetts temporary firearm license pursuant to G. L. c. 140, § 131F, lawfully may carry firearms in the Commonwealth for specific purposes. The judge also explained that, under G. L. c. 140, § 131G, a nonresident without a Massachusetts firearm license may carry "a pistol or revolver in or through the Commonwealth for the purpose of taking part in a pistol or revolver competition or attending any meeting or exhibition of any organized group of firearm collectors or for the purpose of hunting provided that such person is a resident of the United States and has a permit or license to carry firearms issued under the laws of any state, district, or territory which has licensing requirements which prohibit the issuance of permits or licenses to Page 782 persons who have been convicted of a felony or who have been convicted of unlawful use or possession or sale of narcotics or harmful drugs." Given these instructions, had the jury found that the defendant was a nonresident when police discovered his firearm, and that he had acquired a temporary Massachusetts firearm license under G. L. c. 140, § 131F, or that he was traveling in or through Massachusetts to participate in a firearm competition, a firearm collectors' meeting or exhibition, or to hunt, they would have been obligated to acquit him. In sum, the instructions encompassed exemptions under which the defendant could have been acquitted regardless of whether the jury found that he was a resident, as the Commonwealth asserted, or a nonresident, as he maintained. The instructions accurately informed the

jury of the elements of the offense, as well as the affirmative defenses. They did not deprive the defendant of an affirmative defense under G. L. c. 140, § 129C (j), and were not likely to confuse the jury with respect to the exemption for nonresidents who possess Massachusetts temporary firearm licenses. See G. L. c. 140, § 131F. We conclude that the instructions did not create a substantial risk of a miscarriage of justice. b. Asserted prosecutorial misconduct. The defendant contends that the Commonwealth caused him prejudice by asking Patty whether he "had something against Massachusetts." Because the defendant did not object, we review for a substantial risk of a miscarriage of justice. See *Commonwealth v. Ferreira*, 460 Mass. 781, 788 (2011). During cross-examination, defense counsel asked Patty whether the defendant told "just about everybody that he had no intention of ever living in Massachusetts," to which Patty responded, "I can't answer that in a yes or no without explanation." On redirect, the Commonwealth probed the same issue; the prosecutor asked whether the defendant had told Patty that he "never wanted to live in Massachusetts," but nonetheless had moved into the Tewksbury apartment with her. Patty answered in the affirmative. The prosecutor then clarified, "So he had something against Massachusetts . . . [b]ut he found himself here anyway?" To which Patty responded, "Correct." Evidence "that otherwise may be inadmissible may become admissible where the defendant opens the door to its admission." *Commonwealth v. Quinn*, 469 Mass. 641, 732-733 (2014). Here, Page 783 "defense counsel

invited a fuller explanation" of Patty's testimony, see *Commonwealth v. McCowen*, 458 Mass. 461, 479 (2010), and the prosecutor was permitted to respond. See *id.* The defendant's dislike of Massachusetts was a cornerstone of his defense strategy. On direct examination of the defendant's uncle, counsel asked, "[H]as [the defendant] ever expressed any statement about living in Massachusetts?" The uncle responded, "He dislikes Massachusetts." Later, the defendant himself testified, "I'm not good with [Massachusetts] gun laws. . . . I just don't like -- I don't like it down here basically." Given this, the question that the prosecutor posed to Patty did not create a substantial risk of a miscarriage of justice.

Judgment affirmed.

#### FOOTNOTES

[Note 1] Initially, the defendant also was charged with unlawful possession of a large capacity weapon or large capacity feeding device, in violation of G. L. c. 269, § 10 (m). The Commonwealth did not proceed to trial on that charge. In addition, the Commonwealth entered *nolle prosequi* with respect to the charge of unlawful possession of a firearm in violation of G. L. c. 269, § 10 (h) (1). The conviction of unlawful possession of ammunition in violation of G. L. c. 269, § 10 (h) (1), was placed on file, and the defendant was sentenced to the mandatory minimum sentence of eighteen months' incarceration for unlawful possession of a firearm in violation of G. L. c. 269, § 10 (a). [Note 2] The defendant did not appeal from his other convictions.

[Note 3] We acknowledge the amicus brief submitted by the Attorney General. [Note 4] A pseudonym. [Note 5] Often, as here, those who do not apply for a Massachusetts firearm license are not entitled to assert as-applied challenges to the licensing laws because they cannot demonstrate that they sought, and were denied, a Massachusetts firearm license. See *Commonwealth v. Johnson*, 461 Mass. 44, 58 (2011). The defendant gave no indication that he had applied for a Massachusetts firearm license. Nor has he argued that applying for a license would have been futile. See *Hamilton v. Pallozzi*, 848 F.3d 614, 620-621 (4th Cir.), cert. denied, 138 S. Ct. 500 (2017). Therefore, he would not have been able to proceed on an as-applied challenge. See *Commonwealth v. Cassidy*, 479 Mass. 527, 539 n.10, cert. denied, 139 S. Ct. 276 (2018); *Commonwealth v. Allen*, 474 Mass. 162, 174 (2016); *Commonwealth v. Powell*, 459 Mass. 572, 590 (2011), cert. denied, 565 U.S. 1262 (2012). [Note 6] See G. L. c. 140, §§ 121, 129C (a)-(u), 131, 131F, 131G; G. L. c. 269, § 10 (a) (1)-(4). [Note 7] In relevant part, G. L. c. 278, § 7, states that "[a] defendant in a criminal prosecution, relying for his justification upon a license . . . shall prove the same; and, until so proved, the presumption shall be that he is not so authorized." This court has said that "[a]lthough the language of § 7 suggests that the defendant must shoulder the entire burden of proof (i.e., the burden of production and the burden of persuasion) as discussed, we have interpreted it only to impose the burden of production on the defendant, maintaining the ultimate burden of disproving a



properly raised affirmative defense on the prosecution." *Commonwealth v. Gouse*, 461 Mass. 787, 807 (2012). [Note 8] As discussed, G. L. c. 140, § 129C (h), exempts nonresidents who are traveling in or through the Commonwealth with rifles and shotguns. There is no indication that the defendant ever possessed a rifle or a shotgun in the Commonwealth. Accordingly, G. L. c. 140, § 129C (h), is inapplicable to these facts.

[Note 9] Article IV, § 1, of the United States Constitution states, "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." [Note 10] In 2017, New Hampshire repealed its licensure requirement, see 2017 N.H. Laws § 1:1, effective Feb. 22, 2017; this allowed its residents to conceal and carry loaded pistols and revolvers in New Hampshire without a license. See N.H. Rev. Stat. Ann. § 159:6.III. [Note 11] We note that Federal law contemplates similar restrictions on the possession and transport of firearms. See 18 U.S.C. § 922(g) ("It shall be unlawful for" felons, fugitives, users or addicts of controlled substances, those with mental illness, aliens, dishonorably discharged service members, those subject to protection orders, and those convicted of domestic violence to "possess" or "transport" interstate "any firearm or ammunition"). See also *District of Columbia v. Heller*, 554 U.S. 570, 626-627 (2008). [Note 12] In *Commonwealth v. Wood*, 398 Mass. 135, 137 (1986), this court addressed

whether G. L. c. 140, § 129C (j), served as an exemption to the version of G. L. c. 269, § 10 (a), that was then in effect. At that time, G. L. c. 269, § 10 (a), punished those who "carrie[d]" firearms, and G. L. c. 140, § 129C (j), exempted those who "possesse[d]" firearms. See *Wood*, supra; St. 1990, c. 511, §§ 2, 3. Therefore, this court concluded that G. L. c. 140, § 129C (j), did not serve as an exemption to G. L. c. 269, § 10 (a). See *Wood*, supra. General Laws c. 269, § 10 (a), was amended in 1990, however, to prohibit the unlawful "possession" of a firearm. See St. 1990, c. 511, §§ 2, 3. The purpose of the amendment was to "regulate the possession of firearms . . . for the immediate preservation of the public welfare." See St. 1990, c. 511. The amendment remains applicable today. See G. L. c. 269, § 10 (a). Therefore, G. L. c. 140, § 129C (j), which applies to the possession of firearms, now serves as an exemption to G. L. c. 269, § 10 (a), which prohibits the unlawful possession of firearms. See *Commonwealth v. Cornelius*, 78 Mass. App. Ct. 413, 419 (2010) ("by satisfying the exception set out in G. L. c. 140, § 129C[j], new residents . . . satisfy the firearm exemption set out in G. L. c. 269, § 10[a][4], for a limited period of time, without also complying with the provisions of G. L. c. 140, § 131G"). [Note 13] The defendant also contends that the Commonwealth "misconstrued" the firearm licensing statute during closing argument by addressing a statutory exemption that was available to a nonresident "passing through [the Commonwealth] with his firearm." The defendant did not object at trial. Thus, we review for a substantial risk of

a miscarriage of justice. See *Commonwealth v. Ferreira*, 460 Mass. 781, 788 (2011). General Laws c. 140, §§ 131F and 131G, allow nonresidents of the Commonwealth to travel in or through Massachusetts with a pistol or revolver, provided several conditions are met. The judge instructed the jury as to both G. L. c. 140, §§ 131F and 131G. The Commonwealth's closing argument did not misconstrue the applicable statutory provisions. Therefore, the defendant's argument is without merit. [Note 14] The defendant argues also that 18 U.S.C. § 926A preempts the Massachusetts firearms statutes. As the judge properly denied the request for an instruction on 18 U.S.C. § 926A, we need not reach this issue. See 18 U.S.C. § 927.

Commonwealth v. Cassidy 1173CR0021 filed 8/2011 &  
refiled 10/2012


APPENDIX D

**HUNTER EDUCATION CERTIFICATE**

THE PERSON NAMED BELOW HAS SUCCESSFULLY COMPLETED THE TEXAS PARKS AND RECREATION DEPARTMENT'S HUNTER EDUCATION COURSE WHICH MEETS THE INTERNATIONAL HUNTER EDUCATION ASSOCIATION RECOMMENDED STANDARDS.

CERTIFICATION DATE	09/24/2000	STUDENT NO.	634231	BIRTH DATE	12/10/1984
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JOHNE CASSIDY  
2727 SYNOFT RD #514  
HOUSTON TX 77082  
INSTRUCTOR NO. 004496

  
*John E. Smith*  
EXECUTIVE DIRECTOR



**NRA**

The  
National  
Rifle  
Association  
of America

**THE NATIONAL RIFLE  
ASSOCIATION OF AMERICA**

AMERICAN ASSOCIATION OF ARCHERS

JOHN S. GARDNER

For successful completion of the

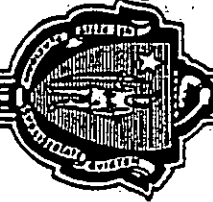
**HOME FIREARM SAFETY  
COURSE  
(NON-SHOOTING COURSE)**

*William W. ...*

*James T. ...*

*1844185-32*





The Commonwealth of Massachusetts  
Department of State Police

BASIC FIREARMS SAFETY CERTIFICATE

The following named individual has successfully completed a Basic Firearms Safety Course as prescribed by G.L. c. 140, § 131P and 815 CMR 3.00.

John Cassidy  
(Name) 12/10/1984  
(Date of Birth)

James F. Doolley NRA Home Safety LTC-007  
(Instructor's Name) (Course Certificate Number)

BFS002153 Yes  
(Instructor's Certification Number) (Valid for FID Only)

I hereby certify the person named in this certificate has successfully completed a Basic Firearms Safety Course as prescribed by G.L. c. 140, § 131P and 815 CMR 3.00.

Instructor's Signature James F. Doolley Date Course Completed 08/01/2011



IN THE NAME AND BY THE AUTHORITY OF  
THE STATE OF TEXAS.

**Notary Public Commission**

WHEREAS TO ALL TO WHOM THESE PRESENTS SHALL COME - GREETINGS:

DATE  
08-20-12

NAME  
ADDRESS  
CITY

has been appointed by the Secretary of State of Texas a Notary Public in the State of Texas. Now, therefore, the above named person is hereby commissioned a Notary Public for the State of Texas under the laws of the State of Texas with all rights, privileges and emoluments appertaining to said office.

*[Signature]*

*[Signature]*

EXPIRES 08-02-016

A NOTARY PUBLIC BEFORE ENTERING ON THE DUTIES OF OFFICE, SHALL TAKE THE OFFICIAL OATH OF OFFICE ON THE REVERSE SIDE OF THIS FORM. THE OATH SHALL BE SIGNED AND SWORN TO OR AFFIRMED BY THE NOTARY PUBLIC IN THE PRESENCE OF A NOTARY PUBLIC OR OTHER PERSON AUTHORIZED TO ADMINISTER OATHS IN THIS STATE. A NOTARY PUBLIC CANNOT EXECUTE HIS OR HER OWN OATH OF OFFICE.

THE COMMISSION CERTIFICATE AND EXECUTED OATH OF OFFICE IS YOUR OFFICIAL RECORD AND IS TO BE RETAINED BY YOU.

EDUCATIONAL MATERIALS ARE ATTACHED

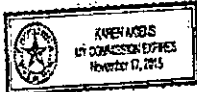
STATE OF TEXAS

COUNTY OF Harris

NOTARY PUBLIC OATH OF OFFICE

I, John Cassidy, do solemnly swear (or affirm), that I will faithfully execute the duties of the office of notary public of the State of Texas, and will to the best of my ability preserve, protect, and defend the Constitution and laws of the United States and this state, so help me God.

Sworn to and subscribed before me this 13<sup>th</sup> day of August 20 12



*[Signature]*  
Notary Public Signature

THE REVERSE SIDE OF THIS PAGE CONTAINS YOUR OFFICIAL NOTARY PUBLIC COMMISSION.

61a

*Commonwealth v. Cassidy* 1173CR0021 filed 8/2011,  
10/2012, and refiled 5/2019

**APPENDIX E**

John Cassidy  
17 Hathaway Pond Circle  
Rochester, MA 02770

May 2, 2011  
Chief Legal Council  
LaDonna Hatton  
470 Worcester Road  
Framingham, MA 01702

Dear LaDonna Hatton:

I was referred to you to request an annual report that is issued by the colonel of the Massachusetts state police. After speaking with varying state employees, I have found that the reports must be issued by the end of the fiscal year which I am told is June. I would like two,(2), reports: the current for this fiscal year, 2010-2011, and the report for 2011-2012 be it already published or please forward me the report once it has been written since the end of this fiscal year is close.

The report I am seeking is an annual report that the colonel publishes that lists those states whose requirements comply with the provisions of the firearms licensing for Massachusetts. For more clarity or reference please see chapter 140 section 129C subsection (u) of Massachusetts General Laws. The report is referenced in this subsection (u).

Thank you and I would like to receive both reports as soon as possible, if the most recent report has not been generated yet due to the fiscal year not ending yet I

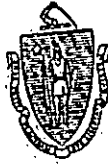


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would request that the report from 2010-2011 be sent to my address now and that the second report for 2011-2012 be sent once it is prepared and published for the upcoming year. Thank you for timely response and effort.

Sincerely,  
/s/ 5-2-2011

John Cassidy  
Phone: (775)250-3815



The Commonwealth of Massachusetts  
Department of State Police

Office of the Chief Legal Counsel  
470 Worcester Road

DEVAL L. PATRICK  
GOVERNOR

THOMAS P. MURRAY  
LIEUTENANT GOVERNOR

MARY ELIZABETH HEFFERNAN  
SECRETARY

COLONEL MARIAN J. MCGOVERN  
SUPERINTENDENT

Framingham, Massachusetts 01702

May 12, 2011

Mr. John Cassidy  
17 Hathaway Pond Circle  
Rochester, MA 02770

Re: Records Request  
State Police Annual Report

Dear Mr. Cassidy:

The Office of the Chief Legal Counsel for the Department of State Police ("Department") received your records request dated May 2, 2011 seeking an annual report regarding the above-referenced matter. The Department is in the process of responding to your request. Upon completion of the Department's review of your request, we will respond accordingly. Any response by the Department will be subject to the exemptions set forth in M.G.L. c. 4, sec. 7, cl. 26 (e)-(q). In addition, when responding to a public records request, the Department may, pursuant to 950 CMR 32.06, charge the requesting party for the costs associated with researching, segregating, copying, and assembling the requested information.

Sincerely,

*Pamela Rautenberg*

Pamela Rautenberg  
Paralegal Specialist

/pfr

cc: LaDonna J. Halton, Chief Legal Counsel

64a

John Cassidy  
32 Scott Street  
Fairhaven, MA 0271  
September 5, 2011

Chief Legal Council  
LaDonna Hatton  
470 Worcester Road  
Framingham, MA 01702

Dear LaDonna Hatton:

I was referred to you to request an annual report that is issued by the colonel of the Massachusetts state police back in late April 2011. The report I am seeking is an annual report that the colonel publishes that lists those states whose requirements comply with the provisions of the firearms licensing for Massachusetts. I received a letter from your office on May 12th, 2011 acknowledging the receipt of my letter and that I would be sent the requested report at a later date. Since then I have moved and thus changed addresses. My current mailing address is at the top of this letter, and I am only writing you to inform you of the change of address.

Please ensure all mail pertaining to the requested documents are sent to my current address. Thank you for your time and attention to this matter.

Sincerely,  
/s/ 8-16-2011

John Cassidy  
Phone: (775)250-3815  
August 30, 2012

65a

Catherine Bailey  
General Counsel Massachusetts State Police General  
Headquarters  
470 Worcester Road  
Framingham, MA 01702  
USPS track# 7005 2570 0001 6709 8638

Re: Massachusetts Public Records Request  
Dear Catherine Bailey:

This is a request under the Massachusetts Public Records Law (M. G. L. Chapter 66, Section 10). I am requesting that I be provided a copy of the following records:

The Annual report that the colonel of the state police publishes that is referenteq in M.G.L. ch. 140 section 129C subsection. (u).

I recognize that you may charge reasonable costs for copies, as well as for personnel time needed to comply with this request. If you expect costs to exceed \$7.00, please provide a detailed fee estimate.

Since the colonel publishes this list, if I can obtain it from the website or the place s/he publishes it instead of incurring costs by requesting duplicate copies that would be better for me. Electronic distribution is also great for me, as I enjoy 'going green.'

Thank you for your time regarding this matter. I have sent three (3) prior letters requesting lists from prior years and have never received them so I would appreciate attention to this matter or a letter letting me know the outcome. I would like to see 2010, 2011 and 2012 if available. Enjoy the remaining week ma'am!!

66a

As you may be aware, the Public Records Law requires you to provide me with a written response within 10 calendar days. If you cannot comply with my request, you are statutorily required to provide an explanation in writing.

Sincerely,

/s/ 8-30-2012

John Cassidy  
508-817-7631

Commonwealth v. John Cassidy 1173CR00221 filed  
5/2019

**APPENDIX F**

On Tuesday, April 2, 2019, 9:13 AM, Dunne, Michaela  
(CHS)

<michaela.dunne@state.ma.us> wrote:

Good Morning -

Please see answers in red below. Please understand  
this office can not provide legal advice.

Regards, Michaela Dunne

Firearms Records Bureau

From: St Rip [mailto:sripper2015@yahoo.com]

Sent: Thursday, March 28, 2019 9:10 AM

To: FRB EFA10 (CHS) <frb.efa10@mass.gov>

Subject: HELP ASAP

Hello, I was told this is best way to get some questions  
answered in regards to firearms after calling the fire-  
arms records bureau. Here are some questions, and  
once answered am I allowed a follow up question?

1. How are large capacity firearms and magazines  
regulated, and what license is required and the cost?

**In order to possess any type of firearm in Mas-  
sachusetts, you must have a firearms license. All  
handguns and large capacity rifles and shotguns**

require a LTC. The cost is \$100 and you must apply through the police department in the town where you live.

2. What are the exemptions to licenses for large capacity?

I do not understand this question?

3. How do I find out if I have an 'assault weapon'?

Refer to the definition in MGL c. 140, s.

121: <https://malegislature.gov/Laws/General-Laws/PartI/TitleXX/Chapter140/Section121>

4. Can you give me a basic idea of how I would move to your state and continue to own my firearms?

In Massachusetts, you must have a Massachusetts LTC to either possess or carry your firearms, even in your home. When you move into the state, you have 60 days to obtain a LTC from the police department in the town where you live. During that time you can keep your guns in your home properly stored. You must take a Massachusetts safety course, so I suggest starting this process as soon as you move here.

You can bring any of your firearms with you, except anything that would be considered an assault weapon, and any magazines over 10 rounds.

69a

5. Can you own firearms inside your home without a license? Can you own ammunition inside your home without a license?

**NO**

From: St Rip [mailto:sripper2015@yahoo.com]

Sent: Wednesday, April 03, 2019 7:52 AM

To: Dunne, Michaela (CHS)  
<michaela.dunne@mass.gov>

Subject: Re: HELP ASAP

Hello. Thanks for responses. You responded to question #2 that you dont understand the question, so I hope replying to you Robin is okay.

What I am trying to ask:

Are there any exemptions for large capacity firearms and/or magazines? Thats is exceptions given for any reasons to own and possess?

A hearty thank you for your time

Sent from Yahoo Mail for iPhone

On Wednesday, April 3, 2019, 1:44 PM, Dunne, Michaela (CHS)

<michaela.dunne@state.ma.us> wrote:

**The only exemptions are for law enforcement of-ficers**





Commonwealth v. John Cassidy 1173CR00221 filed  
8/2011, updated 2/2012.

**APPENDIX G**

www.mass.gov/chsb/frb/frb\_forms.html

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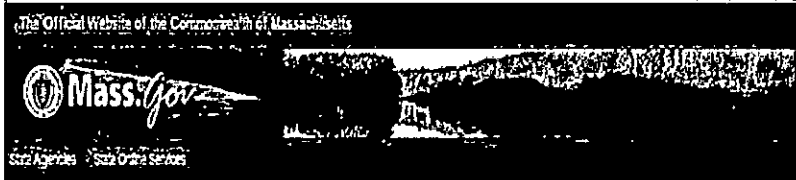
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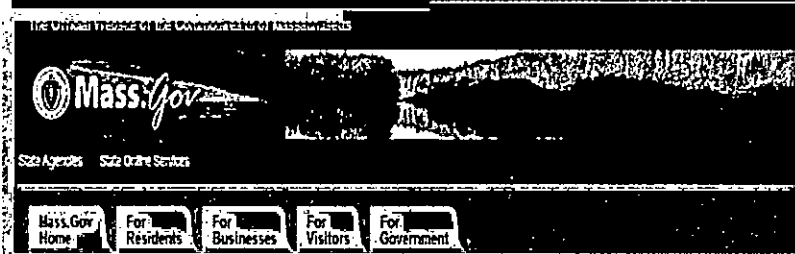
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MARY ELIZABETH HEFFERNAN, SECRETARY



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- Look up a state law

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- Probation Reform Working Group, Report and Recommendations
- Open Meeting Notices
- John R. Justice Grant Program & Materials
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Statewide Fair and Impartial Policing Website Launched


With the goal of promoting communication and better understanding between law enforcement and local communities, the Massachusetts Executive Office of Public Safety and Security has developed the Fair and Impartial Policing (FAIP) website. FAIP is a web-based initiative designed to give Massachusetts law enforcement professionals and members of the community new insight into the issues related to what is commonly referred to as "racial profiling."

"These program materials are valuable in educating law enforcement and members of the community about each others' perspective and provide effective tools necessary for positive interactions. We anticipate that these positive interactions will promote increased trust and effectiveness in community policing," stated Secretary Heffernan.

The FAIP training modules, developed with a federal grant, are accessible, free of charge, here. Topics covered in the modules

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- ONLINE SERVICES**
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The FAIP training modules, developed with a federal grant, are accessible, free of charge, [here](#). Topics covered in the modules include cultural influences, unconscious biases and innate biological factors that influence how individuals react during a range of community and police interactions. In each module, experts from both the police and community perspectives analyze

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