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## **Protest, Police, & Public Gun Possession**

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**Open carry at political gatherings.** Based on the siege of the U.S. Capitol and recent intelligence about further potential violence, law enforcement agencies are rightly concerned about how officers may legally handle situations in which members of the public carry.

**Rifles & shotguns — G.L. c. 269, § 12D.** Police should not hesitate to apply 269, § 12D<sup>1</sup> which prohibits the following:

- **Elements:**
  - A person may not carry on *any public way*<sup>2</sup>;
  - A *rifle or shotgun* that is either:
    - *Loaded* (meaning that it has any ammunition in the chamber or the magazine, including muzzle loading black powder and shot/ball<sup>3</sup>); or
    - *Unloaded and visible* (meaning the long gun is not enclosed in a case).
- **Right of arrest:** 269, § 12D warrantless arrest in presence.
  - *No breach of peace required.* You do not have to wait for a problem.
  - *Alternative approach:* Confiscate long gun and apply for a complaint. The clerk can later dismiss the complaint and order the return of the weapon or the DA can prosecute. You end the public safety risk; a magistrate makes the prosecution decision.
- **Bottom line:** If a long gun is visible (including a black powder musket!), then probable cause of a 12D violation exists. It does not matter whether the gun is loaded or unloaded. It cannot be visibly carried in a public area.

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<sup>1</sup> If you want to see the language of 269, 12D for yourself, it appears in Appendix A at the end of this update.

<sup>2</sup> 269, § 12D does not define the phrase, “any public way.” No appellate case in Massachusetts does either. Therefore, officers should apply 12D in any public area (e.g., roads, parks, sidewalks, plazas) or in any private area that is open to the public at the time (e.g., stores, facilities, stadiums, shopping malls). See, e.g., 90, § 24 (term “public way” for crime of OUI incorporates three types of areas — public ways, areas of public access, or areas of access for invitees or licensees).

<sup>3</sup> However, “blank cartridges” do not qualify as ammunition under 12D, although “blanks” do qualify as criminal if discharged from a firearm, rifle, or shotgun within 500’ of a dwelling or building in use under 269, § 12E. *Comm. v. Stephens*, 67 Mass. App. Ct. 906 (2006) (firing blanks at a person in anger *did* violate § 12E because it took place within the required 500’ of a home).

- **Invalid and valid legal defenses:**

- *LTC or FID is no defense!* You don't need to even request a valid license. The crime has already occurred.
- *Obviously assigned law enforcement and deployed military personnel are exempt.* Under 12D, this exemption only applies to a law enforcement officer or military member "authorized by a competent authority to . . . carry . . . and act[] within the scope of his [or her] duties." In other words, a patrol officer on duty with a rifle is exempt; a visiting, off-duty officer with one is subject to arrest. A National Guard member specifically deployed and equipped for an event is exempt; an active or reserve military member or veteran who shows up by choice is subject to arrest.
- *Other exemptions.* 12D also exempts "drills, parades, military reenactments or other commemorative ceremonies, color guards or memorial service firing squads, so-called, as permitted by law." [emphasis added] While offenders may try to claim they are participating in a "parade" of sorts, the phrase in the statute, "as permitted by law," is your rebuttal. Unless they can present you with a permit or letter that approves of their behavior, you should not entertain this argument. Let them bring it up in court after their arraignment.

Finally, a properly licensed hunter, "engaged in hunting," is exempt. The key to this exemption is the long gun holder must be actively hunting. The people who you will care about under 12D will not be in the woods hunting! People attending a properly licensed shooting gallery (140, § 56A) are exempt too. For obvious reasons, this will not be applicable to the suspects you encounter.

- **Penalties:** For a non-large capacity gun, HC NMT 2 years, and/or Fine NLT \$500, NMT \$5,000. For large capacity, SP NLT 1 year, NMT 10 years, and/or Fine NLT \$1,000, NMT \$10,000. Mandatory confiscation and destruction of the gun(s) upon conviction.

**Handguns — stay safe and apply four legal principles.** The law pertaining to firearms is a bit more complicated since Massachusetts does not forbid "open carry" in the same manner as it does with long guns. As a result:

- **Principle 1: Preserve officer and public safety.** Use sound tactics to immediately neutralize a threat, whether or not you know the legal status of the person carrying. See, e.g., *Comm. v. Fama*, 79 Mass. App. Ct. 365 (2011) (when police began their encounter with the defendant — who matched the description in a report about a man leaving the bus station with a gun — the officers did not know whether he could or could not legally possess a firearm; however, that lack of knowledge became legally irrelevant when the defendant quickly reached toward his backpack; police needed to frisk and seize any weapon immediately).

- **Principle 2: Demand their license to carry under 140, § 129C.** While there is no automatic prohibition against “open carry” in Massachusetts, officers may *always* demand to see a license if lawfully present.<sup>4</sup> 140, 129C states: “Any person . . . shall on demand of a . . . law enforcement officer, exhibit his license to carry firearms, or his firearm identification card . . . [or explain his exempt status] . . . Upon failure to do so[,] such person may be required to surrender to such officer said firearm . . . which shall be taken . . . [and] returned forthwith upon presentation within thirty days of [the proper license].”<sup>5</sup>

Even before recent events unfolded, cases from around the country recognized that law enforcement must be empowered to safely investigate provocative displays — even ones where the underlying behavior might ultimately be deemed lawful. See, e.g., *Deffert v. Moe*, 111 F.Supp.3d 797 (2015) (police were not liable for handcuffing, frisking and detaining Johann Deffert for 13 minutes; even though Deffert was within his rights to carry, officers reasonably believed that he could be a danger to himself or others; a 911 caller saw Deffert walking in a residential neighborhood across the street from a church on Sunday; he was wearing camouflage and loudly singing a Disney song; he had a pistol in a leg holster, with a tactical light and laser mounted on it).

- **Principle 3: If possession unlawful, arrest or confiscate and complaint.** The value of your 129C power is it lets you determine quickly whether possession is lawful or unlawful. If it is unlawful, you will arrest for the felony of unlawful possession under 269, § 10 or, at a minimum, confiscate the firearm and apply for a complaint.

When in doubt, confiscate the weapon(s) and release the citizen without it. Remember, 129C places the burden on the citizen to present proof of their legal gun status. Another statute, 278, § 7, places that same burden on a citizen who is later prosecuted.

- **Principle 4: If possession lawful, consider whether an associated crime is occurring or confiscate the firearm pending an administrative hearing.** If it is crystal clear that the citizen with the firearm is in lawful possession, officers must assess, based on the circumstances, whether:
  - ***An associated crime is occurring.*** For example, if the individual is in an area where those in charge have forbidden gun possession by posted or verbal notice, consider an arrest for **trespass** under the authority of 266, § 120 (warrantless arrest in presence).<sup>6</sup>
  - Or, a direct or indirect threat to use the firearm may justify arrest for the felony of **assault with a dangerous weapon** (ADW) pursuant to 265, § 15B.

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<sup>4</sup> This discussion assumes that officers are approaching the suspect on foot at a political gathering. If officers make a motor vehicle stop in order to initiate contact, the law’s application becomes more complicated because 140, § 129C is not a basis to stop a moving vehicle. For a more in depth understanding, see *LED’s Criminal Procedure, Chapter 3* and discussion of “plus” factors for reasonable suspicion of unlawful gun possession.

<sup>5</sup> You do not need to provide *Miranda* warnings when you demand to see a citizen’s license under your 129C authority. *Comm. v. Haskell*, 438 Mass. 790 (2003).

<sup>6</sup> For more information on trespass, disorderly conduct, or damaging or defacing property, see *LED’s Criminal Law, Chapters 32, 23, and 33*.

Or, if the individual has intentionally or recklessly caused public alarm, by fighting, threats, agitated behavior, or creating a hazardous condition with no legitimate purpose, then he is subject to arrest for **disorderly conduct** pursuant to 272, §§ 53 and 54 (warrantless arrest in presence). See, e.g., *Comm. v. Molligi*, 70 Mass. App. Ct. 108 (2007) (defendant just held an open knife in his hand outside of a bar; he said nothing; the knife was legal to possess, but pedestrians were frightened; when police tried to speak with him, he ran across the street; this was a hazardous condition for no legitimate reason).

Or, if the individual has intentionally or recklessly **damaged or defaced property**, then officers have felony arrest power for a violation of 266, § 126A, regardless of the amount of the damage.

Of course, there are other crimes that might apply depending on the facts.

- **Exigent confiscation of firearm.** Finally, in a case called *Pasqualone v. Gately*, 422 Mass. 398 (1996), our SJC recognized that, in clearly exigent circumstances, officers would be justified in temporarily confiscating an LTC holder's weapon.<sup>7</sup> If officers take this step in the field, they should:
  - Confiscate the gun, ammunition, and license to carry (LTC);
  - Let the license holder leave afterwards since this is not a crime;
  - Write a detailed incident report;
  - Email a copy of the report immediately to the licensing officer (LO) in the town or city who issued the underlying LTC; and
  - Request that the LO immediately suspend the LTC of the individual for "suitability" based on the "credible evidence that the LTC holder presents a risk to public safety."

At that point, the LO may provide written notice of a suspension to the LTC holder and direct that his guns, ammunition, and LTC remain in police custody pending the outcome of any appeal. See 140, § 131(f) and *Comm. v. Adams*, 482 Mass. 514 (2019).

The LO could also direct that the guns, ammunition, and LTC be returned since, at that point, the "clear and present" danger would be over. See 140, § 129D and *Adams, supra*.

Stay safe, stay well,

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<sup>7</sup> The facts of *Pasqualone* did not amount to an exigent situation because, although the licensed gun owner was the manager at a half-way house with parolees and had misrepresented his criminal record on his license application, he was initially cooperative with police and stored his guns properly in his own, locked apartment within the half-way house. It is a significantly different situation when officers encounter a licensed gun owner who, unlike Antonio Pasqualone in his home, has deliberately *brought* his gun to, and *visibly* carried it at, a politically charged public event.

**Appendix A**

**Chapter 269, Section 12D.** (a) Except as exempted or provided by law, no person shall carry on his person on any public way a loaded rifle or shotgun having cartridges or shells in either the magazine or chamber thereof. For purposes of this section, "loaded shotgun or loaded rifle" shall mean any shotgun or rifle having ammunition in either the magazine or chamber thereof, such ammunition including a live cartridge, primer (igniter), bullet or propellant powder designed for use in any firearm, rifle or shotgun and, in the case of a muzzle loading or black powder shotgun or rifle, containing powder in the flash pan, a percussion cap and shot or ball; but the term "loaded shotgun or loaded rifle" shall not include a shotgun or rifle loaded with a blank cartridge, which contains no projectile within such blank or within the bore or chamber of such shotgun or rifle.

Whoever violates the provisions of this subsection shall be punished by a fine of not less than \$500 nor more than \$5,000 or by imprisonment in the house of correction for not more than two years, or by both such fine and imprisonment, and may be arrested without a warrant; provided, however, that if such rifle or shotgun is a large capacity weapon, as defined in section 121 of chapter 140, such person shall be punished by a fine of not less than \$1,000 nor more than \$10,000 or by imprisonment for not less than one year nor more than ten years, or by both such fine and imprisonment, and may be arrested without a warrant.

(b) Except as exempted or provided by law, no person shall carry on his person on any public way an unloaded rifle or shotgun, unless such rifle or shotgun is enclosed in a case.

Whoever violates the provisions of this subsection shall be punished by a fine of not less than \$100 nor more than \$1,000, and may be arrested without a warrant; provided, however, that if such unloaded rifle or shotgun is a large capacity weapon and is carried simultaneously with a fully or partially loaded large capacity feeding device, such person shall be punished by a fine of not less than \$1,000 nor more than \$10,000 or by imprisonment for not less than one year nor more than ten years, or by both such fine and imprisonment, and may be arrested without a warrant.

This subsection shall not apply to drills, parades, military reenactments or other commemorative ceremonies, color guards or memorial service firing squads, so-called, as permitted by law.

(c) Upon a conviction of a violation of any provision of this section, such rifle or shotgun shall be confiscated by the commonwealth and, upon written order of the court, such weapon shall be forwarded to the colonel of the state police, who may dispose of such weapon in the manner prescribed in section 10.

(d) The provisions of this section shall not apply to the carrying of a loaded or unloaded rifle or shotgun on a public way by (i) any officer, agent or employee of the commonwealth or any other state or the United States, including any federal, state or local law enforcement personnel; (ii) any member of the military or other service of any state or the United States, including members of the national guard, reserves and junior reserve officer training corps; (iii) any duly authorized law enforcement officer, agent or employee of any municipality of the commonwealth; provided, however, that any such person described in clauses (i) to (iii), inclusive, shall be authorized by a competent authority to so carry a loaded or unloaded rifle or shotgun on a public way and such person is acting within the scope of his duties or training; or (iv) a person who is lawfully engaged in hunting and is the holder of a valid hunting or sporting license issued pursuant to chapter 131. This section shall not apply to the operation of a shooting gallery, licensed and defined under the provisions of section 56A of chapter 140, nor to persons using the same.