

Interstate Firearm Possession



By Paul Engel

October 5, 2024

- Do you lose your rights when you cross state lines?
- Does a state have the power to ignore licenses from another state?
- Can Massachusetts require visitors from out of state to get their permission before carrying a firearm in their state?

Can Massachusetts prosecute out-of-staters who can legally carry in their home state? That was the question before Massachusetts courts in two cases. Needless to say, when these courts agreed with the plaintiffs, the Commonwealth disagreed, appealing the cases to the Massachusetts Supreme Judicial Court. While we wait for the court to decide the case, let's look at the originating cases and the Commonwealth's argument.

Two Challenges

The two cases we're looking at here are almost identical. In fact, the court even mentioned that the case *Commonwealth v. Phillip Marquis* is similar to *Commonwealth v. Donnell*, so we'll focus on the latter.

The defendant Dean Donnell is charged in the Lowell District Court with carrying a firearm without a license under G.L. 269 §10(a). The defendant has filed a motion to dismiss the charge in the complaint claiming that:

1. 269 §10(a) is unconstitutional on its face.
2. 269 §10(a) is unconstitutional as applied to the

- defendant, and
3. 269 §10(a) violated the defendant's right to be free from cruel and unusual punishment.

[Commonwealth v. Dean F. Donnell](#)

In both cases the defendants were charged in Lowell District Court with carrying a firearm without a license. And in both cases the defendants claim that G.L. 269 §10(a) is unconstitutional on several counts. What is General Law (G.L.) 269 §10(a)?

Whoever, except as provided or exempted by statute, knowingly has in his possession; or knowingly has under his control in a vehicle; a firearm, loaded or unloaded, as defined in section one hundred and twenty-one of chapter one hundred and forty without either:

- (1) being present in or on his residence or place of business; or

- (2) having in effect a license to carry firearms issued under section one hundred and thirty-one of chapter one hundred and forty ...

[Massachusetts General Law, Chapter 269, Section 10\(a\)](#)

Under Massachusetts law, possession of a firearm without a license is prohibited. While the law provides some exceptions, the fact is Massachusetts law generally prohibits the bearing of a firearm. What arguments did the defendants make that G.L. 269 §10(a) is unconstitutional?

The defendant in his memorandum in support advances arguments that;

1. L. 269 §10(a) impermissibly infringes on the Second Amendment of the U.S. Constitution;
2. L. 296 §10(a) impermissibly shifts the burden of proof

- onto the defendant to prove he was in fact licensed;
3. Requiring non-residents to obtain licenses to carry firearms violates the Second Amendment because there is no historical analogue burdening the right to interstate travel;
 4. The holding of *Commonwealth v Harris* ... does not survive Constitutional muster and is inapplicable to the defendant's case; and
 5. The defendant's right to equal protection and the right to travel has been violated.

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Massachusetts Law and the Second Amendment

Does G.L. 269 §10(a) infringe on the Second Amendment?

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

[U.S. Constitution, Amendment II](#)

It sure seems like an infringement on the people's right to keep and bear arms. After all, what other right do the people possess where they have to get permission from the state to exercise it? Does requiring someone produce a license shift the burden of proof of a crime onto the defendant? Does requiring an out of state resident obtain a license in Massachusetts place an unconstitutional burden on their right to interstate travel? Was the court wrong in *Commonwealth v. Harris*? Does G.L. 269 §10(a) fail to protect the rights of residents from other states? These are all questions placed before the Lowell District Court.

The facts leading up the issuance of the complaint are not in dispute and for the purposes of this motion, the Court accepts them.

[Commonwealth v. Dean F. Donnell](#)

No one disputes the facts of either of these cases. Both men live in New Hampshire, and hold valid carry licenses in that state. And both men exercised their right to bear arms when they crossed the state line into Massachusetts.

There is no question that the holding of the U.S. Supreme Court in *New York State Rifle and Pistol Association, Inc. v. Bruen*, ..., has changed the legal landscape on how the second amendment of the Constitution is interpreted, particularly how it affects existing firearm statutes and challenges to their constitutionality

[Commonwealth v. Dean F. Donnell](#)

Yes, the Supreme Court case *NYSRPA v. Bruen* has changed the legal landscape, specifically that exercising the right to keep and bear arms is presumptively constitutional, and that governments must prove not only that their laws follow the text of the Constitution, but the historical tradition of American law.

In fact, the Supreme Judicial Court in *Commonwealth v. Guardado*, ... recognized for the first time that the Second Amendment to the U.S. Constitution guarantees an individual's right to possess and carry a firearm outside of his home.

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Not until the 2023 case *Commonwealth v. Guardado* did the Supreme Judicial Court of Massachusetts recognize what the Second Amendment actually says: The people have a right to both keep (own) and bear (carry) arms..

Prior to *Guardado*, Massachusetts treated the possession or carrying a firearm outside of one's home as a "privilege" that was conferred on a person by the state.

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The court admits that, for years, Massachusetts treated the right to keep and bear arms as a “privilege” granted by the state. That Massachusetts officials and judges simply ignored the plain language of the Constitution and substituted their own opinions.

It was against the Bruen backdrop that the SJC reversed the longstanding law in Massachusetts that licensure to possess a firearm was not an essential element of the felony of unlawful possession of a firearm outside of the home, Massachusetts had previously required that holding a valid license to carry a firearm was an exception to the otherwise prohibition of carrying a firearm and that requiring a defendant to produce a license at trial did not infringe on Constitutionally protected conduct.

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As I’ve already pointed out, Massachusetts law generally prohibits the carry of a firearm, with certain exceptions. Only after the Bruen decision did the SJC change its position. Which clearly informed the judge in the Lowell District Court, John F. Coffey, in deciding these two cases.

The conduct of the defendant in the instant case clearly is covered by the Second Amendment. Therefore, the burden falls on the Commonwealth to justify the law showing that it is consistent with the Country’s tradition of firearm regulation.

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Following the advice from the Supreme Court in their Bruen decision, Judge Coffey states that carrying a firearm is clearly covered by the Second Amendment, placing the burden of proof on the Commonwealth to show that their laws are consistent with America’s history when it comes to firearm regulation.

As the defendant in the instant case is not a resident of

Massachusetts and was in compliance with his home states laws on the possession of the firearm, the Commonwealth needed to show some historical analogue relating to disparate treatment of nonresidents and must point to some “historical precedent from before, during, and even after the founding [that] evinces a comparable tradition of regulation.”

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The defendants in both cases were not residents of Massachusetts, and were in compliance with their home state’s laws. Specifically, they held valid carry licenses, but that has not been good enough for Massachusetts in the past.

Full Faith and Credit

The Commonwealth argues that under the holding in *Commonwealth v. Harris supra*, Massachusetts is not obligated to recognize an out of state resident right to carry a firearm under the Full Faith and Credit clause of the Constitution. They claim that the Commonwealth is not required to substitute its statutes for those of New Hampshire. ... and Bruen does not affect the ability of states to require a license as long as the license criteria are objective.

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The Commonwealth argues that a decision of their court supersedes the Constitution of the United States? After all, Article IV, Section 1 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.

[U.S. Constitution, Article IV, Section 1](#)

The Commonwealth of Massachusetts is required to give full

faith and credit to the public acts and records of all the other states. Shouldn't that include the validation that a person is not prohibited from carrying a firearm? After all, the Commonwealth of Massachusetts accepts New Hampshire issued drivers licenses as valid for operating a motor vehicle. So why not carry licenses for carrying a firearm?

Furthermore, no one is requiring Massachusetts to substitute New Hampshire laws for their own, only to recognize the valid licenses held by their residents.

This argument is not persuasive because at the time of the Harris decision, carrying a firearm outside of the home was a privilege, and the Harris Court held that Massachusetts didn't have to give Full Faith and Credit to New Hampshire laws conferring that same privilege.

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How about the fact that the Harris decision was wrong? Massachusetts law may declare that carrying a firearm is a privilege, but the Constitution clearly states not only that it's a right, but that it shall not be infringed. As the Supremacy Clause clearly states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

[U.S. Constitution, Article VI](#), Clause 2

Not only was the judge bound to follow the Constitution, he was bound to uphold it above not only the laws, but above the Constitution of the Commonwealth of Massachusetts.

Firearm Licensing

The Commonwealth is correct that a concurring opinion in Bruen did state that the ability of States to require a license is not affected, but the holding in Bruen basically took away all subjective criteria for the issuance of such a license, The Commonwealth points to no historical precedent limiting the reach of one's exercise to a federal constitutional right to only within that resident's states borders.

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While the Supreme Court did hold that state licensing requirements were not affected by its decision, that was only the arbitrary decision of the court, unsupported by the Constitution of the United States. Even so, what right does the Commonwealth have to limit the exercise of a constitutionally protected right outside its own borders? How can the Commonwealth claim to be giving full faith and credit to the public acts of other states if they provide such an arbitrary exception for carry licenses?

Moving on to the defendant's claim that GL 269, sec. 10(a) violates the defendant's right to travel and equal protection, the Commonwealth also asserts that it does not violate the right to travel and equal protection clause because the Commonwealth's license requirements do not prohibit him from traveling in Massachusetts, they only prohibit him from carrying a firearm while traveling in Massachusetts. The Commonwealth further argues that the licensing requirements don't treat non-residents differently than a residents because they can apply for a temporary nonresident license to carry, or they can travel through the state while complying with statutory exemptions of unloading the firearm and storing it secured in a locked compartment and the travel is for a specific purpose such as training or competition.

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Personally, I think the right to travel and equal protection

claims are the weakest of the case. As the Commonwealth points out, both defendants were free to travel in the state as long as they complied with state law, and they could have carried firearms if they had obtained a state license to do so. However, while these points may be the weakest, the court still upheld them.

The Commonwealth's argument against the defendant's claim that GL 269, sec. 10(a) violates his rights under the equal protection clause because he can obtain a temporary nonresident license to carry is also unpersuasive. As stated above, prior to the Bruen decision, Massachusetts treated the carrying of a firearm as a privilege. While it allowed nonresidents to apply to obtain a license for that privilege, nonresidents were not treated the same as residents. Residents of Massachusetts obtaining a license were granted the license for five years. A temporary non resident license was only valid for one year.

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The court points out that a resident and non resident license were not equal, since a non resident license is only valid for one fifth the time of a resident license. But what about the licensing scheme as a whole?

The Commonwealth next argues that the Massachusetts licensing scheme imposes a permissible burden because of the substantial state interest in preventing certain people from possessing firearms. However, under federal law, certain people are prohibited from obtaining/possessing firearms. 8 U.S.C. § 922(g), makes it unlawful for certain categories of persons to ship, transport, receive, or possess firearms or ammunition, ...

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The problem with this Commonwealth argument is that Massachusetts does not use its licensing scheme to prevent certain people from possessing firearms, as the law clearly

states, it permits by exception, certain people to carry firearms. Since New Hampshire requires a background check to be issued a carry license, Massachusetts should have been satisfied that said certain person would have been denied a carry license in the first place.

While Judge Coffey uses a federal law to make it unlawful for certain categories of persons to possess firearms, that law itself has constitutional issues, since public safety is a state power, not a federal one, under the Tenth Amendment.

District Court Conclusion

A law-abiding resident of New Hampshire who is exercising his Constitutional right should not become a felon by exercising that right while he is traveling thorough Massachusetts merely because he has not obtained a Massachusetts license to carry, which now, under the holding of Bruen, has to be issued to an applicant unless the applicant is otherwise disqualified. The standard for who is a disqualified individual must be the same. Otherwise, a state may decide to impose different requirements on the exercise of any Constitutional right. For example, some states could impose different age limits on voting in elections.

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While I agree that the exercise of a constitutionally protected right should not make someone a felon because they did not pay a tax and get government permission, the judge did make a couple of mistakes. First, the power to determine who is disqualified to possess a firearm was not delegated to the Congress. The Fifth Amendment clearly states:

No person shall ... be deprived of life, liberty, or property, without due process of law;

[U.S. Constitution, Amendment V](#)

The only way for someone to be deprived of the property they have in their rights is via due process of law. In this case, only as punishment for conviction of a crime does the removal of a right meet the due process requirement. Since Congress only has general legislative authority over lands legally owned by the federal government (Article I, Section 8, Clause 17), they do not have the power to determine punishments for crimes within the states; only the states themselves can do that.

Also, the judge was wrong when he said "For example, some states could impose different age limits on voting in elections." If the judge had bothered to read Amendment XXVI, he would find that the states can set their own voting age, as long as it is not older than 18 years of age.

This Court can think of no other constitutional right which a person loses simply by traveling beyond his home state's border into another state continuing to exercise that right and instantaneously becomes a felon subject to mandatory minimum sentence of incarceration. Anecdotally, a law abiding New Hampshire resident exercising his constitutional right to carry while shopping at the Pheasant Tree Mall in Nashua, New Hampshire would become a felon when he shops in a section of a store at that Mall, which happens to be in Tyngsborough, Massachusetts.

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Well said, and I find the examples of the Pheasant Tree Mall especially poignant.

Therefore, the Court finds that GL. 269, sec. 10{a) is unconstitutional as applied to this particularly situated defendant and Allows the motion to dismiss on that ground.

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Petition to Supreme Judicial Court

As I stated before, while the District Court found for the out of staters in both cases, the Commonwealth wasn't happy about it. So they appealed to the Massachusetts Supreme Judicial Court.

Now comes the Commonwealth and requests, ... that this Court grant direct appellate review and consolidate the cases of Commonwealth v. Dean F. Donnell, Jr. (23-P-1338) (hereinafter referred to "Donnell") and Commonwealth v. Philip Marquis (23-P-1278). These cases involve pending appeals of the allowance of the defendants' motions to dismiss by the same motion judge in the Lowell District Court, which invoke novel but erroneous applications of Second Amendment constitutional law. The motion judge erroneously ruled that out-of-state residents may not be prosecuted for unlawful possession of firearms in Massachusetts if they were legally entitled to possess those weapons in their home state.

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The Commonwealth claims that Judge Coffey did "invoke novel but erroneous applications of Second Amendment constitutional law." That may be true, but he did follow the Constitution of the United States, which supersedes the opinions of judges, even if they call their decision "constitutional law."

The same motion judge has already dismissed seven cases in total under this erroneous theory. The judge's rationale deprives the Commonwealth of its right and obligation to enforce its laws equally for all those who are within its borders. The grounds for this application are set forth below.

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In addition to the two cases the Commonwealth is asking to be consolidated, there are five others currently in the Appeals Court. The Commonwealth makes a grave error in this motion. The Commonwealth's right to enforce its laws do not extend to laws that violate the Constitution of Massachusetts or the

United States. When Judge Coffey found that G.L. 269 §10(a) violates the Constitution of the United States, he also found that the Commonwealth had neither right nor duty to enforce that law.

Both Commonwealth v. Dean F. Donnell, Jr. and Commonwealth v. Philip Marquis involve defendants who were legally entitled to possess firearms in New Hampshire but were not licensed to possess those firearms in Massachusetts. Both defendants were charged with illegally possessing firearms in Massachusetts. Neither defendant had attempted to acquire a non-resident license to carry firearms within the Commonwealth of Massachusetts prior to the respective offenses at issue.

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That, however, is the point. The law that prohibited these two men from carrying firearms in Massachusetts, in this two instances, has been found unconstitutional and therefore void in these cases.

Finally, states have always been free to regulate who was allowed to possess arms within their territorial borders, what types of weapons were prohibited, and where arms could be carried, imposing differing standards in each sovereign.

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There's a difference between being free to regulate and to get away with regulating. Since 1791 the States have been prohibited from infringing on the right to keep and bear arms without due process of law. This is where the burden of proof argument makes sense. If there is a question as to whether or not someone can bear arms, the burden of proof must be on the state. By placing financial and training requirements on the exercise of a constitutionally protected right, the state effectively places the burden on the people to prove they are not prohibited, violating due process.

The motion judge concluded that applying Massachusetts firearm licensing laws to nonresidents within its border violates an out-of-state resident's constitutional rights to travel and equal protection. This was clearly erroneous; neither defendant had sought a Massachusetts firearms license. Therefore, the defendants were treated exactly the same as Massachusetts residents would have been who had made no efforts to avail themselves of the licensing statute.

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The Commonwealth claims the rights of the two defendants were not violated because they didn't seek Massachusetts' permission to exercise a right protected by the Constitution of the United States. Not only does Massachusetts want non residents to get permission before possessing a firearm in their state, this is the process the state wants them to go through:

To apply for a Non-Resident License to Carry Firearms or a Resident Alien Permit:

- You must apply for a non-resident license to carry firearms or a resident alien permit through the Firearms Records Bureau.
- You will need:
 - A complete [non-resident firearms license](#) or [resident alien permit](#)
 - The required application fee
 - A [Massachusetts Basic Firearms Safety Course](#) certificate
- You may need:
 - An in-person appearance
 - A visa or copy of immigration card

[Apply for a firearms license – Massachusetts Government Website](#)

This is not all. For example:

Every applicant is required to appear in-person at the Firearms Records Bureau (FRB) for the first non-resident license to carry (LTC) application. ...

Renewals will be processed solely by mail, and you will still need to renew your LTC annually. However, subsequent in-person appearances may be required at the discretion of the FRB. If required, you will receive an appointment notice by mail or email with your scheduled date and time to appear at this office. Appointments will be scheduled in the order that completed applications are received.

[Application for Non-Resident Temporary License to Carry Firearms](#)

Not only are you required to apply in-person for your initial application, but you may be required to appear at any of your renewals as well. While this may not be a great expense of inconvenience for someone in New Hampshire, for someone like me in Nashville, TN, it's a very big deal. And don't forget, you not only have to pay for a firearm safety course, but your instructor must be certified by the Colonel of the Massachusetts State Police. Then there's the annual fee of \$100, all so you can exercise a right protected by the Constitution of the United States. Yet the Commonwealth of Massachusetts sees this as a "permissible burden" to the exercise of a constitutionally protected right. Tell me, do you believe the Commonwealth would think the same thing if every government employee had to go through a similar process to exercise their right to enforce their laws? Somehow, I don't think so.

Conclusion

It's nice to see a judge that not only recognizes they are bound to the supreme law of the land, but willing to act on it. While I'm not surprised that the Commonwealth sees differently, the real question is, what does the Supreme

Judicial Court think? History tells me they are much more likely to find for the Commonwealth than for the defendants, no matter what the Constitution says. In such a case, will these two men appeal to the federal courts? Since the State of Massachusetts would be party to the case, they could go directly to the Supreme Court under Article III, Section 2, Clause 2. I suppose we will have to wait and see. While we wait, consider the laws in your state. Do they follow the Constitution of the United States or are they contrary to it? As Alexander Hamilton wrote in Federalist #78:

No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves;

[Alexander Hamilton – Federalist Papers #78](#)

Who is superior, the people or their representatives? Which version of America do you want to live in?

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