
UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Michael Elbery

v.

Daniel Sklut et al.

civil action

97-11743 MLW

combined

Plaintiff's Motion to Correct Court's Error of Law -

Mass. G.L. C. 269 s 10a -

On Summary Judgment Decision of 9-26-01

&

Motion for Certification by Mass. SJC

Question of State Law

&

Find No Probable Cause for the 269 - 10a Charge

Now comes the plaintiff and champion of the U.S. Constitution, no longer begging to pay to know the law, to request the Court, Judge Mark Wolf, correct an error of law made on the 9-26-01 decision of the summary judgment of the above docketed case.

The court, Wolf, makes claim that Mass. law C. 269 s. 10a at 1994 was "that a violation of C. 269 - 10a (carrying a firearm) occurs when an individual possesses a firearm outside his residence or place of business without a license to carry." See page 17 & 20 of Wolf's 9-26-01 decision on the summary judgment of the above docketed case. See also consolidated case, Elbery v. Sheketoff,

98-10163MLW, where Wolf advocates Sheketoff's case by corroborating this same error of law which was initiated by Attorney Bobby Sheketoff in order to maliciously prosecute and imprison this plaintiff.

Undisputed Facts of the Case

It is undisputed by this plaintiff that the plaintiff's E-Z Mini Storage unit on 8-5-94, date of underlying arrest causing this action, was neither his residence/home or his place of business. It is also undisputed that the plaintiff did not have a "license to carry" on 8-5-94.

Effect of the "Error of Law" - Mass. G.L.C. 269 s. 10a

The effect on the above case of the Court's "Error of Law", as above, concerning Mass. G.L. C. 269 10a (at 1994) is that there should have been found immunity and probable cause for the Shrewsbury Police defendants via summary judgment decision of 9-26-01 of this instant above docketed case. This in turn eliminates any trial on the case because the plaintiff's claims are dependent on there being found no immunity or probable cause for the outrageous conspiracy as complained.

Why is there a trial?

In other words, if the law, Mass. G.L. C. 269 10a (carrying a firearm) in 1994 was that "carrying" occurred when a citizen had possession of a firearm outside of his residence or place of business without a license to carry, then the plaintiff was guilty of "carrying" a "firearm" (handgun) at E-z on 8-5-94. The Shrewsbury Police defendants, as a result, would have had not only probable cause to arrest the plaintiff on the 10a carrying charge, because it is also undisputed that there were guns qualifying as handguns (firearms) in the plaintiff's E-Z unit, but there would have been

a conviction on the 269 - 10a charge at the underlying trial of that charge on 4-3-95 at Worcester District Court before Judge Zide.

The Real Law of the Case

On 4-3-95 a Mass. District Judge, Eliot Zide, found this plaintiff "not guilty" of all 6 of the 8-5-94 charges by the defendants. The plaintiff had a valid Mass. F.I.D. card allowing possession of the guns and ammunition in his locked garage style E-Z Mini Storage unit on 8-5-94. These facts are undisputed in this instant federal case. See Wolf's order of 9-26-01 on the summary judgment of this above docketed case.

That is the law of this case, as per Judge Zide. Judge Wolf's new invention of 269 10a, as above and per his 9-26-01 decision of this case's summary judgment, is directly in conflict to that Mass. judge's trial decision of "not guilty" and Mass. case law on the same issue, see below.

Since the guns and ammunition were in the E-Z unit that was leased to him, that E-z unit was under the "exclusive control" of the plaintiff. This is another undisputed fact of this case.

Mass. Case Law

Judge Zide's finding that this plaintiff was not guilty of the 269 - 10a charge or 5 269 -10h charges was due to the fact that all the plaintiff's guns were locked inside his E-Z Mini Storage unit which was under the "exclusive control" of the plaintiff on 8-5-94, the date of the underlying arrest.

Mass. case law agreed with Judge's Zide's finding of not guilty because the plaintiff's guns were all in the plaintiff's E-Z unit, which made them under his "exclusive control", and the plaintiff had a valid FID card at the date of arrest. The 269 - 10a charge was a legal impossibility according to the facts of the above docketed case and Mass. case law, as follows:

Com. v. Dunphy, 377 Mass. at 459, 386 N.E. 2d 1036, 1040 (1979), "If the evidence at trial shows that the defendant was within the

limits of his property or residence at the time of the alleged 10a "carrying" offense, he is not guilty. The terms "Property" and residence shall retain their common law meanings and denote those areas, including outside areas, over which the defendant enjoys "exclusive control".

After the Mass. Legislature amended C. 269 10a in 1991, the Mass. Court of Appeals held in Com. v. Statham, 650 N.E. 2d 358 (Mass. App. Ct. '95) that nothing had changed regarding 269-10a and firearms on property which was under the "exclusive control" of the possessor of those firearms. According to Statham at 359, the judge was correct in following Dunphy by instructing the jury that if the defendant possessed firearms within a property or residence under his exclusive control that he was not guilty of "carrying a firearm" under 269 - 10a.

The Mass. Court of Appeals went on to explain in Statham at 359 that the 1991 amendment to Mass. C. 269 s. 10a was merely a codification of existing case law.

"We presume that the Legislature in enacting the 1991 amendment, was aware of the Dunphy decision and merely put in statutory form what already had been declared by judicial exposition.

In absence of any statutory definition of the words "in or on his residence" in the applicable statute, we conclude that the case law interpretation controls." Statham at 359.

The 1991 amendments to M.G.L. C. 269 - 10a - A codification of Mass. case law.

The Mass. Court of Appeals further instructs in Statham at 359 that G.L. 269 s 10a as amended by St. 1990, C.511 s.2, which became effective on 1-2-91, substituted "knowingly has in his possession" for "carries in his person" in the first sentence of the pre- 1991 269-10a version of the statute. Statham further states that the legislature added an exemption to "carrying" or violation of the statute by inserting as exemption 1, "being present in or on his residence". As above, the Mass. Court of Appeals held that these 1991 amendments to 269 10a were codifications by the Mass. Legislature of Mass. Supreme Court

decisions regarding that statute.

The purpose of the insertion "knowingly has in his possession" per the amended version of 269-10a was to take away the element of movement, see Com. v. Antencio, 189 N.E.2d 223, 345 Mass. 627 ('63), that was required to convict of "carrying" in Massachusetts via 269-10a. See Mass. ST. 1990 C. 511 s. 2.

Ironically, the Mass. Attorney General's Office agrees with this plaintiff regarding 269-10a, as above, and published a document to its prosecutors itemizing the same law as above. See Law - 1 to the "Plaintiff's Motion for Summary Judgment" and see attached, Ex. 1.

Mass. C 269 - 10a and Judge Mark Wolf's Sophistry

Wolf deliberately invents a new post 1990 269-10a statute by blending the first sentence of the statute with its first exemption, thus creating, without authority of the people of the United States, a 269-10a that is violated by "possessing a firearm outside his residence or place of business without a license to carry ". See Wolf's 9-26-01 decision p. 17 & 20. See Ex.2. Judge Wolf's continued invention, per the 9-26-01 summary judgment decision of the consolidated case, Elbery v. Sheketoff 98-10163MLW p. 40, "That the obvious import of the 1991 amendment was to require that a person have a license to possess a firearm anywhere outside residence or place of business, and, therefore, to eliminate the previous qualification that a license was required only if the weapon was in the process of being moved" is all wrong according to the Mass. S.J.C., Mass. Court of Appeals, Mass. Attorney General's Office, and the Mass. District Judge, Zide, who on 4-3-95 found this plaintiff "not guilty" of the 269-10a "carrying charge" of 8-5-94 because the guns in the E-Z unit did not constitute "carrying" or a violation of 269-10a. But also see the "Plaintiff's Motion for Summary Judgment" of this instant case which provides all the same law, as above in this motion.

Once again, if the firearms in question, on 8-5-94, were outside the plaintiff's "residence or place of business" but still in a location that was not a "public place" or was in a place "under

the plaintiff's exclusive control there was no violation of 269 - 10a and all that was required was an F.I.D. card which the plaintiff had, and there was no probable cause to arrest the plaintiff for 269-10a. Although Wolf does not have the courage to say it, he is claiming by the above "invention of law" that this plaintiff was guilty of "carrying" via 269-10a on 8-5-94 at E-z. Wolf is in effect taking liberty to reverse the "not guilty verdict" of the Mass. District Judge, Zide, on 4-3-95 regarding that 269-10a "carrying" charge.

Are there two "firearm possession" laws in Mass?

The Mass. Legislature was not creating a new "possession" statute with its 1991 amendment to 269-10a, it simply took away the movement element by inserting "knowingly under his control". The "Carrying Stute," (as it titled in the Mass. G.L.) 269-10a, still requires that an individual have the firearm on his person or under his control in a car (not a car in dead storage) to be in violation of the statute. See law above. Mass already had a "simple firearms possession" statute, 269-10h.

The Agenda for the 12-10-01 Trial of the case

The reason there will be a trial, part of one, is simple.

Judge Mark Wolf has no intention of dismissing this plaintiff's above docketed case; he does not want to give anybody the opportunity to point their finger at him while claiming obvious corruption. Every citizen can understand that there could have been no probable cause for the defendants to arrest this plaintiff at E-z. Every citizen will agree that even in anti-gun Massachusetts there can be no probable cause to arrest this plaintiff for "carrying guns" when the guns (firearms) were locked inside the plaintiff's E-Z storage unit. Making the plaintiff's claim of injustice complete is the Mass. District Judge's "not guilty" verdict on the 10a carrying charge, while the prosecutor and arresting cops declined

to show for trial because the charges were so bogus.

Mark Wolf is going to let the jury do the "dirty work" via a questionnaire verdict slip.

The verdict slip will be given to the jury after the close of the plaintiff's case. This so the police defendants will be unfettered , and instead, entertained by the trial. The jury will have to decide two fact questions as follows:

1. Was Elbery's E-Z unit, where the guns were found, his place of business?

2. Was Elbery's E-Z unit, where the guns were found, his residence?

The jury will answer "no" to each of these undisputed facts.

Wolf will then apply his "invented" 269-10a law to these facts, as found by the jury, and find (create) as a "matter of law" that the defendants had probable cause to arrest the plaintiff at E-Z for a violation of 269-10a because the E-Z unit was neither the plaintiff's place of business or residence. The "real law" of the case , "exclusive control" will be ignored.

Judge Wolf will comment that many criminal cases that result in "not guilty" verdicts, nonetheless, had sufficient probable cause to arrest.

Since Elbery's cases in the courts, (crusade for justice), including his "Motion for New Trial" in Worcester Superior Court, have become a troubling embarrassment to the judiciary in Massachusetts, this Wolf - tactic will also provide the necessary publicity to discredit this plaintiff at the hands of a jury of unsuspecting citizens. The law is complex - they will trust Judge Wolf - they will never know the truth.

The defendants and same bugs at Framingham District Court, 00-3006, will point and laugh. A few corrupt the American Justice system at society's expense.

The question to the jury should be - Was the E-Z unit under Elbery's "exclusive control"?

WHEREFORE,

THE plaintiff respectfully requests the Court to observe and apply the correct M.G.L. C. 269 -10a law, as above and per the "Plaintiff's Motion for Summary Judgment", via recognition of "Exclusive Control" that cause the defendant's to have had NO PROBABLE CAUSE on 8-5-94 to arrest this plaintiff at E-Z.

THE plaintiff respectfully requests that the Court correct his M.G.L. C. 269 -10a "error of law" on the above docketed case and the Sheketoff case, 98-10163MLW.

In the alternative, this plaintiff motions the Court to apply for certification to the Mass. S.J.C. under S.J.C. Rule 1:03 regarding this M.G.L. C. 269 10a "question of law" (Carrying and Exclusive Control) as applied to the facts of this case. The Court has stated in the Sheketoff decision, p. 39, that the 1991 amendments to C. 269 - 10a has not been interpreted by the Mass. courts. See Ex. 3.

Then find, with correct application of Mass. C. 269 - 10a, at 8-5-94, that the plaintiff's guns were undisputedly under his "Exclusive Control" at E-Z and there "as a matter of law" could be NO PROBABLE CAUSE to arrest the plaintiff on that 269-10a "carrying charge".



Michael Elbery
SECC Prison
10-11-01

PLAINTIFF REQUESTS HEARING

CC: the press, T.V., Web page

Proof of Service

I the plaintiff, Michael Elbery, sent this motion for change in error of 269-10a law to the Clerk - USDC - Mass. , 1 Courthouse Way, Boston, Mass. 02210 via U.S. certified mail prepaid, and to Attorney Fabiano, 10 Winthrop Sq., Boston, Mass 02110 via first class mail prepaid all on 10-13-01.

I certify that the above is true and correct, signed under the pains and penalties of perjury on this 11th day of October, 2001.

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Ex. 1

place. *Commonwealth v. Morales*, 14 Mass. App. Ct. 1034, 1035 (1982). Cf. *Commonwealth v. Domingue*, 18 Mass. App. Ct. 987, 990 (1984).

Note: The following two paragraphs relate to cases defining "carrying" in the pre-1991 statute. Carrying is an essential element of **section 10(a)*** offenses committed prior to January 2, 1991. For offenses committed on or after January 2, 1991, possession is the controlling concept. [Possession as a legal construct is also discussed in the chapter on Narcotics Offenses]. "Carrying" remains an operative concept for offenses falling under **sections 10(b)*** (carrying other dangerous weapons), **section 10(c)*** (carrying a sawed-off shotgun), and **10(j)*** (carrying firearms on school grounds).

2 Momentary possession is not enough. The idea of the [pre-1991] statute requires movement of the firearm on the person from one place to another. *Commonwealth v. Atencio*, 345 Mass. 627, 631 (1963)*. Momentary possession for the sole purpose of firing a gun is not "carrying." *Commonwealth v. Osborne*, 5 Mass. App. Ct. 657, 659 (1977)*. See *Commonwealth v. Ashley*, 16 Mass. App. Ct. 983, 984 (1983) ("The offense is not the handling or having a gun in hand, but carrying it on one's person").

"Carrying" may be shown circumstantially. See *Commonwealth v. Domingue*, 18 Mass. App. Ct. 987, 989-990 (1984) (where defendant's car was observed at the scene of the shooting, and some minutes later defendant was found in his place of business with a freshly fired gun of the same caliber, he could be inferred to have carried it from the scene of the crime). A person found standing or sitting alone outside his home with a weapon may be inferred to have carried it to the place where he is apprehended. *Commonwealth v. Ballou*, 350 Mass. 751, 756 (1966). See *Commonwealth v. Cullinan*, 9 Mass. App. Ct. 895 (1980) (defendant found firing a gun in public); *Commonwealth v. Samaras*, 10 Mass. App. Ct. 910 (1980) (defendant arrested in front of his home with a gun in his pocket); *Commonwealth v. Ashley*, 16 Mass. App. Ct. 983, 984 (1983) (defendant arrested in another's home with a revolver on his person).

Possession; City of Boston

A Home Rule Petition approved by the Legislature in 1993 (St. 1993, c. 491) bans the possession or carrying of a firearm in the City of Boston by any person under twenty-one years of age. A first offense may be punished by a fine of up to one thousand dollars; a second or subsequent offense by a sentence of up to two and one-half years on the House of Correction. Police are authorized to seize any firearm that may be evidence of a violation of the ordinance.

Mere Possession Not a Lesser Included Offense

M.G.L. c. 269, § 10(h)*, was amended effective January 2, 1991, to prohibit the practice of avoiding the mandatory sentencing provisions of **section 10(a)*** by permitting pleas to the discretionary penalties of **section 10(h)***. By legislative decree, unlicensed possession of a firearm outside of one's home or place of business may not be treated as a lesser included offense of **section 10(a)***, or prosecuted as a violation of **section 10(h)***. See *Commonwealth v. Cowan*, 40 Mass. App. Ct. 939, 940 (1996) ("We know of no sound reason for concluding that the Legislature may not constitutionally require a jury to render a straight up guilty or not guilty on an entire offense charged, precluding consideration of possible lesser included offenses"). See also *Commonwealth v. Alvarado*, 423 Mass. 266, 267 n.1 (1996) (improper finding of guilt where there "was no evidence that [a] motor vehicle was the defendant's 'residence or place of business'").

Section 10(h)* punishes the "non-public" possession of firearms, rifles, shotguns, or ammunition by persons who have not been issued a license to carry firearms under M.G.L. c. 140, §§ 131 or 131F, or who are not in compliance with the requirements relating to firearms identification cards. See M.G.L. c. 140, §§ 129B & 129C. As with a license to carry, the Commonwealth is not required to prove that a defendant *knew* that he was required to have a firearms identification card to possess a weapon legally. See *Commonwealth v. Sampson*, 383 Mass. 750, 762 (1981)*.

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373 Mass. 132, 135 (1977)* (firearm protruded from under defendant's seat); *Commonwealth v. Bailey*, 29 Mass. App. Ct. 1007, 1008 (1990) (same); *Commonwealth v. Diaz*, 15 Mass. App. Ct. 469, 471-472 (1983) (gun in borrowed car beneath defendant's feet); *Commonwealth v. Donovan*, 17 Mass. App. Ct. 83, 85-86 (1983) (gun under seat of borrowed car mixed in with defendant's belongings); *Commonwealth v. Kitchings*, 40 Mass. App. Ct. 591, 599-600 (1996) (defendant virtually lived in the van in which the guns were being transported). *See also Commonwealth v. Bean*, 15 Mass. App. Ct. 168, 170 (1983)* (defendant attempted to conceal ammunition handed to him by the driver); *Commonwealth v. Groves*, 25 Mass. App. Ct. 933, 937 (1987) (defendant's brother threw from the car a weapon that the two men had earlier used to carry out a robbery). *Cf. Commonwealth v. Perez*, 27 Mass. App. Ct. 550, 553 (1989) (drugs on front seat of defendant's car); *Alicea v. Commonwealth*, 410 Mass. 384, 387-388 (1991) (defendant became visibly agitated when a trooper searching his borrowed vehicle neared the spot where drugs were concealed). *Compare Commonwealth v. Almeida*, 381 Mass. 420, 422-423 (1980) (an inference of knowledge could not be drawn solely from the fact that defendant was driving a borrowed car with a gun hidden in the console); *Commonwealth v. Brown*, 401 Mass. 745, 748 (1988) (same, firearms hidden beneath passenger seat of stolen vehicle); *Commonwealth v. Bennefield*, 373 Mass. 452, 453-454 (1977)* (knowledge could not be imputed to a front seat passenger simply because a gun was found beneath the feet of a passenger in the rear seat); *Commonwealth v. Hill*, 15 Mass. App. Ct. 93, 94-97 (1983) (no evidence that defendant knew that a purse beneath his feet concealed a handgun).

While knowledge supports an inference of control, knowledge alone does not establish dominion and control. *Commonwealth v. Gray*, 5 Mass. App. Ct. 296, 299 (1977)*. Other evidence may, however, bridge the gap. A defendant, for example, may be shown to have exercised control over a firearm locked in a glove compartment or trunk. *Commonwealth v. Collins*, 11 Mass. App. Ct. 583, 586 (1981)* (defendant carried ammunition that fit guns concealed in the trunk); *Commonwealth v. Lucido*, 18 Mass. App. Ct. 941, 943 (1984) (knowledge and control inferred from defendant's possession of a

key to the glove compartment containing his personal letters and a gun); *Commonwealth v. Reilly*, 23 Mass. App. Ct. 53, 55 (1986) (same); *Commonwealth v. Montgomery*, 23 Mass. App. Ct. 909, 910 (1986) (defendant carried an ammunition clip fitting the handgun found on the floor of the car).

Possession (Carrying)

Note: As amended effective January 2, 1991, M.G.L. c. 269, § 10(a)*, no longer requires proof that a defendant "carried" an unlicensed firearm outside of his home or place of business. Simple possession of a firearm in a "public" place is sufficient.

While the statute provides an exception for the possession of a firearm within a person's residence or place of business (consistent with judicial interpretation of the pre-1991 statute), it forbids the unlicensed or unauthorized possession of a firearm in any public area, including the common areas of a private building. *See Commonwealth v. Seay*, 376 Mass. 735, 742-743 (1978)* (foyer of an apartment building); *Commonwealth v. Samaras*, 10 Mass. App. Ct. 910 (1980) (sidewalk). Whether a place is "public" depends upon the extent to which it is within a defendant's exclusive dominion and control, a concept distinct from mere ownership. *Commonwealth v. Belding*, 42 Mass. App. Ct. 435, 437 (1997) (defendant's ownership of a three family house did not give him "exclusive control" of its common hallways). *Compare Sanford v. Belemyessi*, 362 Mass. 123, 125 (1972) (tenant maintained exclusive control over a porch and flight of exterior stairs). "Exclusive control" is defined by common law concepts of property. Because the determination is fact-driven it presents an issue to be resolved by the jury. *See Commonwealth v. Statham*, 38 Mass. App. Ct. 582, 584-585 n.3 (1995) (refusing to construe a building's "curtilage" as within a defendant's "exclusive control" as a matter of law); *Commonwealth v. Dunphy*, 377 Mass. 453, 458-459 (1979) (same); *Commonwealth v. Belding, supra*, at 439 (same, whether defendant was "in or on" his residence when the shot was fired). If a defendant possesses a valid firearms identification card, the Commonwealth must prove beyond a reasonable doubt that the firearm was possessed in a public

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place. *Commonwealth v. Morales*, 14 Mass. App. Ct. 1034, 1035 (1982). Cf. *Commonwealth v. Domingue*, 18 Mass. App. Ct. 987, 990 (1984).

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felon.

Hurley checked the Shrewsbury computer system, which indicated that Elbery did not have an F.I.D. Sampson checked with Worcester. He was told that Elbery had no F.I.D. and that his license to possess a firearm had been revoked.

X At this point, the Shrewsbury Police had probable cause to obtain a warrant to search Elbery's vehicle.

The existence of probable cause is to be evaluated on the basis of the collective information of the law enforcement officers engaged in a particular investigation.

United States v. Diallo, 29 F.3d 23, 25-26 (1st Cir. 1996) (internal citations and quotation marks omitted). The Supreme Court has defined probable cause to search as "a fair probability that contraband or evidence of a crime will be found in a particular place." Illinois v. Gates, 462 U.S. 213, 238 (1983).

X In this case, the Shrewsbury Police had probable cause to believe that Elbery was violating Massachusetts General Laws, ch. 269, §§ 10 (a) and (h), which prohibit possession of a firearm without an F.I.D. and possession of a firearm outside of an individual's residence or business without a license to carry. Generally, possession includes constructive, as well as actual, possession. See Commonwealth v. Sadberry, 692 N.E.2d 103, 105 (Mass. App. Ct. 1998). A person who is not in direct physical

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also defeat's Elbery's state law malicious prosecution claim. Elbery was charged with possessing a firearm without an F.I.D. in violation of Massachusetts General Law ch. 269, § 10(h) and also with violating § 10(a) of that statute, which prohibits possessing outside his residence or place of business a firearm without a license to carry it. As described earlier, the evidence is sufficient to prove that when Elbery was charged it was reasonable, although evidently not right, for the defendants to believe Elbery did not have an F.I.D. Moreover, the evidence indicates that the E-Z storage was neither Elbery's business nor his residence. Generally, a "residence" is defined as "[a] personal presence at some place of abode with no present intention of definite and early removal" Black's Law Dictionary at 1176 (5th ed.). An "abode" is one's home. Id. at 7. In addition, the lease for the E-Z storage area prohibited Elbery from residing there. There is no evidence that he did so, or that he used the storage area as a place of business. Therefore, the evidence at this point is sufficient to prove that there was probable cause to support the prosecution of each of the charges against Elbery.

Similarly, Elbery is not entitled to summary judgment on his claim that his Fourth and Fourteenth Amendment rights were violated as a result of a malicious prosecution. Procedural Due Process does not provide a basis for a federal claim based on malicious

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with a more agreeable counsel, malpractice cannot be established by the mere disagreement between the attorney and his client. If it could, the proper standard of professional conduct would be dictated by uneducated lay persons rather than by the conduct of the reasonable, trained, and experienced attorneys. In this case, there is not evidence beyond mere disagreements between Elbery and Sheketoff to prove malpractice.

More specifically, the undisputed facts include the following. Elbery wanted Sheketoff to file a motion to dismiss based on his FID card and instructed him to do so. Sheketoff told Elbery on more than on occasion that he believed that it would not be prudent to file a motion to dismiss the firearms charges based on the FID card. Sheketoff refused to file the motion. Sheketoff told Elbery that if he did not agree with this strategy, he should seek a new attorney. Therefore, this case involves a disagreement between a client and his counsel based on the attorney's professional judgment rather than a failure of an attorney to effectuate his agreement to follow his client's instructions. It is, therefore, distinguishable from the cases on which Elbery relies to excuse his failure to proffer expert evidence. See Whitney, supra; Gilbert, supra; McInnis, supra; Olfe, supra.

Defendants are also correct in their contention that expert testimony is necessary to interpret the relevant statutes and case

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Ex 3

law at the time of Elbery's arrest, especially in light of the fact that the amendments to M.G.L. c. 269 were relatively new and had not been interpreted by the Massachusetts courts at the time of Elbery's arrest. In response to this argument, Elbery asserts that "[t]he existing gun laws at 8-5-94 in Mass. made it incontrovertible that the guns in Elbery's E-Z unit were not a violation of C.269-10a or any other law." Elbery Opposition at 4.

Citing a number of cases interpreting the prior version of the relevant statute, Elbery contends that he was not in violation of the statute because the storage area was not a "public" place. Elbery Memorandum at 11. Elbery argues that "if the guns in controversy are in an area within the exclusive control of Elbery there can be no 10a violations/charges." Id. at 12 (citing Commonwealth v. Dunphy, 386 N.E.2d 1036 (1979) ("[T]he unlicensed carrying of a firearm within one's residence or place of business by one having a valid firearm identification card is not a criminal offense." (internal quotation marks and citation omitted))).

Moreover, Elbery asserts that because the storage facility was the equivalent of a residence, the gun charge was incorrect as a matter of law because the statute contained an exemption for "carrying" in one's home or place of business. Elbery Opposition at 12 (attempting to analogize to Commonwealth v. Hamilton, 508 N.E.2d 871 (Mass. App. Ct. 1987) (noting that hotel guest receives

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heightened Fourth Amendment protection)).

However, Elbery's arguments, based on decisions rendered before M.G.L. c. 269, § 10(a) was amended in 1991, actually demonstrate the need for expert testimony in this case. Not only has Elbery failed to present such testimony, it is unlikely that any competent attorney would opine that Sheketoff was negligent. Rather, it appears that his views concerning the proper interpretation of M.G.L. c. 269, § 10 were not only reasonable, they were right.

As defendants point out, prior to 1991, the statute prohibited "carrying" a firearm without a license. See Mass. Gen. Laws Ann. ch. 269, § 10, Historical and Statutory Notes, at 552. In 1991, the statute was amended to prohibit possession of a firearm, outside of an individual's residence or place of business, without a license. Id. Previously, an individual without a firearm identification card could possess a firearm, but not carry it - meaning move it. See Commonwealth v. Morse, 425 N.E.2d 769, 771 (Mass. App. Ct. 1981); Commonwealth v. Osborne, 368 N.E.2d 828 (Mass. App. Ct. 1977). The obvious import of the 1991 amendment was to require that a person have a license to possess a firearm anywhere outside his residence or place of business and, therefore, to eliminate the previous qualification that a license was required only if the weapon was in the process of being moved.