



**FROM THE COMMITTEE
ON MODEL CRIMINAL
JURY INSTRUCTIONS**

The Committee on Model Criminal Jury Instructions has adopted the following amended model criminal jury instructions, M Crim JI 11.38 and 11.38a, used where felon in possession has been charged to provide that the possession must be “knowing.” These instructions are effective September 1, 2019.

**[AMENDED] M Crim JI 11.38 Felon Possessing Firearm:
Nonspecified Felony**

The defendant is charged with possession of [a firearm / ammunition] after having been convicted of a felony. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(1) First, that the defendant knowingly [possessed / used / transported / sold / distributed / received / carried / shipped / purchased¹] [a firearm / ammunition²] in this state.³

(2) Second, at that time, the defendant had previously been convicted of [*name felony*].⁴

[Use the following paragraph only if the defendant offers some evidence that more than three years has passed since completion of the sentence on the underlying offense.]

(3) Third, that less than three years had passed since [all fines were paid / all imprisonment was served / all terms of (probation / parole) were successfully completed].⁵

Use Note

1. “Purchase” of ammunition is not barred under the statute.
2. “Ammunition” is defined in MCL 750.224f(9)(a) as “any projectile that, in its current state, may be propelled from a firearm by an explosive.”
3. The prosecutor need not prove that the firearm was “operable.” *People v Peals*, 476 Mich 636, 656, 720 NW2d 196 (2006).
4. The judge, not the jury, determines whether the charged prior felony is a “felony” as defined in MCL 750.224f(9)(b), or a more serious “specified felony” as defined in MCL 750.224f(10). The jury determines whether the defendant has in fact been convicted of that charged prior felony. For prosecutions involving a “specified felony” use M Crim JI 11.38a.

5. The judge’s determination of the character of the felony as explained in Use Note 4 will determine whether the prohibition extends for three years or five years. Under subsection (1) of the statute, the three-year period applies to crimes defined in subsection (9)(b) as felonies; under subsection (2), the five-year ban applies to crimes defined as “specified” felonies in subsection (10).

History

M Crim JI 11.38 (formerly CJI2d 11.38) was added in October, 1993 when MCL 750.224f was enacted. The instruction was amended by the Committee in September, 2001, in conjunction with the adoption of M Crim JI 11.38a, to separate the “felony” and “specified felony” versions of the offense. The possession of ammunition by felons was barred in a May 2014 statutory amendment. Amended September 2005, March 2014 and January 2016. Amended September 2019 to add that possession must be “knowing” in accord with instructions for felony-firearm charges under MCL 750.227b.

Reference Guide

Statutes

MCL 750.224f.

Case Law

Old Chief v United States, 519 US 172 (1997); *People v Dupree*, 486 Mich 693, 788 NW2d 399 (2010); *People v Peals*, 476 Mich 636, 656, 720 NW2d 196 (2006); *People v Perkins*, 473 Mich 626, 640, 703 NW2d 448 (2005) (affirming *People v Perkins*, 262 Mich App 267, 686 NW2d 237 (2004)); *People v Henderson*, 391 Mich 612, 218 NW2d 2 (1974); *People v Brown*, 249 Mich App 382, 642 NW2d 382 (2002); *People v Swint*, 225 Mich App 353, 379, 572 NW2d 666 (1997); *People v Tice*, 220 Mich App 47, 53-55, 558 NW2d 245 (1996).

[AMENDED] M Crim JI 11.38a Felon Possessing Firearm: Specified Felony

The defendant is charged with possession of [a firearm / ammunition] after having been convicted of a specified felony. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(1) First, that the defendant knowingly [possessed / used / sold / distributed / received/ carried / shipped / transported / purchased¹] [a firearm / ammunition²] in this state.³

(2) Second, at that time, the defendant had previously been convicted of [*name specified felony*].⁴

[Use the following paragraphs only if the defendant offers some evidence that more than five years has passed since completion of the sentence on the underlying offense and that his or her firearm rights have been restored, MCL 28.424.]

(3) Third, that less than five years had passed since [all fines were paid / all imprisonment was served / all terms of (probation / parole) were successfully completed].⁵

(4) Fourth, that the defendant's right to [possess / use / transport / sell / receive] [a firearm / ammunition] has not been restored pursuant to Michigan law.⁶

Use Note

1. "Purchase" of ammunition is not barred under the statute.
2. "Ammunition" is defined in MCL 750.224f(9)(a) as "any projectile that, in its current state, may be propelled from a firearm by an explosive."
3. The prosecutor need not prove that the firearm was "operable." *People v Peals*, 476 Mich 636, 656, 720 NW2d 196 (2006).
4. The judge, not the jury, determines whether the charged prior felony is a "felony" as defined in MCL 750.224f(9)(b), or a more serious "specified felony" as defined in MCL 750.224f(10). The jury determines whether the defendant has in fact been convicted of that charged prior felony. For prosecutions involving a "nonspecified felony" use M Crim JI 11.38.
5. The judge's determination of the character of the felony as explained in Use Note 4 will determine whether the prohibition extends for three years or five years. Under subsection (1) of the statute, the three-year period applies to crimes defined in subsection (9)(b) as felonies; under subsection (2), the five-year ban applies to crimes defined as "specified" felonies in subsection (10).
6. This paragraph is to be given when the court determines that some evidence relating to restoration was admitted at trial. See *People v Henderson*, 391 Mich 612, 218 NW2d 2 (1974), addressing the burden of going forward and the burden of proof

where a defendant submits evidence that he or she was licensed to carry a concealed weapon.

History

This instruction was adopted by the committee in September, 2001 to separate the “specified felony” offense from the “felony” offense and to incorporate prosecutions under the former theory predicated upon the defendant’s failure to secure restoration of his or her firearm rights. The possession of ammunition by felons was barred in a May 2014 statutory amendment. Amended September 2005, March 2014 and January 2016. Amended September 2019 to add that possession must be “knowing” in accord with instructions for felony-firearm charges under MCL 750.227b.

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