

## POSSESSION OF A CONTROLLED SUBSTANCE

The defendant is charged with unlawful possession of \_\_\_\_\_ .

Section 34 of chapter 94C of our General Laws provides as follows:

“No person knowingly or intentionally  
shall possess a controlled substance  
unless such substance was obtained directly [from],  
or pursuant to a valid prescription or order from,  
a [licensed] practitioner [who was] acting in the course of  
his professional practice,  
or except as otherwise authorized [by law].”

In order to prove the defendant guilty of this offense, the  
Commonwealth must prove three things beyond a reasonable doubt:

*First:* That the substance in question is a controlled substance,  
namely: \_\_\_\_\_ ;

*Second:* That the defendant possessed some perceptible amount of  
that substance; and

*Third:* That the defendant did so knowingly or intentionally.

As to the first element, I instruct you as a matter of law that \_\_\_\_\_ is

**defined as a controlled substance by our statute. It is your duty to determine whether or not the material in question is in fact \_\_\_\_\_. In doing so, you may consider all the relevant evidence in the case, including the testimony of any witness who may have testified either to support or to dispute the allegation that the material in question was \_\_\_\_\_.**

*Commonwealth v. Dawson*, 399 Mass. 465, 466-467, 504 N.E.2d 1056, 1057-1058 (1987) (since offense may be proven by circumstantial evidence, it is not mandatory that drug be introduced or chemically analyzed, although sight identification alone would rarely be sufficient); *Commonwealth v. Cantres*, 405 Mass. 238, 245-246, 540 N.E.2d 149, 153-154 (1989) (same; familiarity can be based on prior use or sale coupled with observation of present substance); *Commonwealth v. LaPerle*, 19 Mass. App. Ct. 424, 428, 475 N.E.2d 81, 84 (1985) (a quantity visible to the naked eye but measurable only on an analytical balance will support a possession conviction); *United States v. Drougas*, 748 F.2d 8, 15 (1st Cir. 1984) (same). See G.L. c. 94C, § 31 for the schedule of controlled substances.

*Here instruct on the definition of "Possession" (Instruction 3.220).*

**Finally, the Commonwealth must prove beyond a reasonable doubt that the defendant not only possessed \_\_\_\_\_, but did so knowingly or intentionally. You may find that the defendant knowingly or intentionally possessed \_\_\_\_\_ if he (she) did so consciously, voluntarily and purposely, and not because of ignorance, mistake or accident.**

*See Instructions 3.120 (Intent) and 3.140 (Knowledge).*

*If the defendant maintains that the controlled substance was lawfully possessed pursuant to a prescription, see Instruction 3.160 (License or Authority).*

SUPPLEMENTAL INSTRUCTION

*DPH, State Police, or U.Mass. Medical Center certificate of analysis.*

**You may**

**consider a properly-executed certificate from (an analyst employed by the Department of Public Health) (a chemist employed by the Department of State Police) (an analyst employed by the University of Massachusetts Medical School) as evidence of the chemical composition, purity and weight of the substance tested. You are not required to accept such evidence, but you may.**

*See Instruction 3.260 (Prima Facie Evidence).*

G.L. c. 22C, § 39 (State Police chemist's certificate of drug analysis); G.L. c. 111, § 13 (D.P.H. or U.Mass. Medical School chemist's certificate of drug analysis). See also G.L. c. 94C, § 47A (in misdemeanor cases, officer's testimony that he or she sent drugs by registered mail for analysis, together with return receipt, is prima facie evidence that drugs are those seized). *Commonwealth v. Chappee*, 397 Mass. 508, 520, 492 N.E.2d 719, 726 (1986) (certificate remains probative evidence throughout trial even if contradicted); *Commonwealth v. Sheline*, 391 Mass. 279, 285-286, 461 N.E.2d 1197, 1202-1203 (1984) (certificate should be sanitized of any aliases); *Commonwealth v. Claudio*, 405 Mass. 481, 541 N.E.2d 993 (1989) (erroneous to charge that certificate creates a "presumption" that must be followed "unless there is any evidence to the contrary to rebut that presumption"); *Commonwealth v. Reynolds*, 36 Mass. App. Ct. 963, 635 N.E.2d 254 (1994) (immaterial that certificate of analysis lacked notary public's seal).

*Commonwealth v. Verde*, 444 Mass. App. Ct. 279, 827 N.E.2d 701 (2005), held that the admission of a drug analysis certificate under G.L. c. 111, § 13 raises no Confrontation Clause problem under *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004). See also *Commonwealth v. Luis E. Melendez-Dias*, 69 Mass. App. Ct. 1114, 870 N.E.2d 676, 2007 WL 2189152 (No. 05-P-1213, July 31, 2007) (unpublished opinion under Appeals Court Rule 1:28) (following *Verde*), further app. review denied, 449 Mass. 1113, 874 N.E.2d 407 (2007), cert. granted, — U.S. —, 128 S.Ct. 1647 (2008).

A certificate of analysis is not a prerequisite to proving that a substance is a controlled substance. *Commonwealth v. Alisha A.*, 56 Mass. App. Ct. 311, 313, 777 N.E.2d 191, 193 (2002); see also *Commonwealth v. Dawson*, 399 Mass. 465, 467, 504 N.E.2d 1056, 1057 (1987) (“Proof that a substance is a particular drug need not be made by chemical analysis and may be made by circumstantial evidence”).

NOTES:

1. **Medical necessity defense unavailable for marihuana.** A defendant may not offer as a defense to marihuana possession that it provides the only effective alleviation of the side effects of scleroderma, a disease resulting in the painful buildup of scar tissue throughout the body. Any benefit resulting from alleviation of the defendant’s medical symptoms would not outweigh the possible negative impact on the enforcement of the drug laws. *Commonwealth v. Hutchins*, 410 Mass. 726, 575 N.E.2d 741 (1991).

2. **Constructive possession.** In the case of constructive possession, possession implies “knowledge coupled with the ability and intention to exercise dominion and control.” *Commonwealth v. Brzezinski*, 405 Mass. 401, 409, 540 N.E.2d 1325, 1331 (1989); *Commonwealth v. Amparo*, 43 Mass. App. Ct. 922, 923, 686 N.E.2d 201, 202 (1997) (setting aside verdict where no evidence that defendant “rented, occupied, spent a great deal of time or exercised control over the apartment or its contents”). Behavior tending to show that defendant knew of the presence of drugs is not sufficient, by itself, to prove that he had the ability and intent to control the drugs. *Commonwealth v. Cruz*, 34 Mass. App. Ct. 619, 623, 614 N.E.2d 702, 705 (1993); *Amparo*, 43 Mass. App. Ct. at 924, 686 N.E.2d at 202 (evidence that defendant attempted to flee out back door and possessed beeper insufficient).

3. **Joint possession.** To be a joint possessor, one must actively and personally participate in the procurement of the drugs. *Commonwealth v. Minor*, 47 Mass. App. Ct. 928, 928, 716 N.E.2d 658, 659 (1999) (holding insufficient evidence that defendant contributed to pool of money with which co-defendant bought drugs).