

POSSESSION

I have told you that the Commonwealth must prove that the defendant possessed _____.

What does it mean to “possess” something? A person obviously “possesses” something if he (she) has direct physical control or custody of it at a given time. In that sense, you possess whatever you have in your pocket or purse right now.

However, the law does not require that someone necessarily have actual physical custody of an object to “possess” it. An object is considered to be in a person's possession without physical custody if he (she) has

- knowledge of the object,
- the ability to exercise control over that object, either directly or through another person, and
- the intent to exercise control over the object .

For example, the law considers you to be in possession of things which you keep in your bureau drawer at home, or in a safe deposit box at your bank.

Whether the defendant possessed _____ is something that you must determine from all the facts and any reasonable inferences that you can draw from the facts. However, I caution you to remember that merely being present in the vicinity of a _____, even if one knows that it is there, does not amount to possession.

If relevant: **Neither is possession proved simply because the defendant was associated with a person who controlled the _____ or the property where _____ was found.**

To show possession, there must be evidence justifying a conclusion that the defendant had knowledge of the _____ coupled with the ability and the intent to exercise control over the _____. Only then may the defendant be considered to have possessed the _____.

Commonwealth v. Than, 442 Mass. 748, 754-755, 817 N.E.2d 705, 710 (2004); *Commonwealth v. Owens*, 414 Mass. 595, 607, 609 N.E.2d 1208, 1216 (1993) (constructive possession of controlled substance requires proof that defendant knew location of illegal drugs plus ability and intent to exert dominion and control). See *Than*, supra, 442 Mass. 748 at 751, 817 N.E.2d at 708 (constructive possession inferable from defendant's proximity to gun in motor vehicle, where evidence that, when stopped by police, defendant "first leaned forward and to the right before complying with the order to raise his hands[,] . . . [and] [a] loaded handgun was found protruding from under the passenger seat in the vehicle he was operating"); *Alicea v. Commonwealth*, 410 Mass. 384, 387, 573 N.E.2d 487, 489 (1991) (defendant's presence in vehicle with contraband is not itself sufficient); *Commonwealth v. Ramos*, 51 Mass. App. Ct. 901, 903, 744 N.E.2d 107, 110 (2001) (constructive possession not inferable from proximity of gun to defendant's personal letters that were found in an envelope "addressed to the defendant, at a different address"); *Commonwealth v. Ramos*, 30 Mass. App. Ct.

915, 566 N.E.2d 1141 (1991); *Commonwealth v. Handy*, 30 Mass. App. Ct. 776, 780-781, 573 N.E.2d 1006, 1009-1010 (1991) (constructive possession supported by proof of ownership or tenancy, personal effects in proximity to contraband, large amounts of cash, or admissions); *Commonwealth v. Arias*, 29 Mass. App. Ct. 613, 618, 563 N.E.2d 1379, 1383 (1990), *aff'd*, 410 Mass. 1005, 572 N.E.2d 553 (1991) (constructive possession inferable from presence in early morning in heavily-barricaded, sparsely-furnished apartment, in absence of owner or tenant); *Commonwealth v. Rarick*, 23 Mass. App. Ct. 912, 912, 499 N.E.2d 1233, 1233-1234 (1986) (in shared dwelling, possession of controlled substance may be inferred from proximity to defendant's effects in areas particularly linked to defendant); *Commonwealth v. Rodriguez*, 16 Mass. App. Ct. 944, 945-946, 450 N.E.2d 1118, 1119 (1983) (same); *Commonwealth v. Gill*, 2 Mass. App. Ct. 653, 656-657, 318 N.E.2d 628, 630-631 (1974) (same); *Commonwealth v. Miller*, 4 Mass. App. Ct. 379, 383-384, 349 N.E.2d 362, 365 (1976) (same rule applicable to van; possession also inferable from attempted flight); *Commonwealth v. Deagle*, 10 Mass. App. Ct. 563, 567-568, 409 N.E.2d 1347, 1350-1351 (1980) (proximity and knowledge do not establish possession unless they permit inference of control).

SUPPLEMENTAL INSTRUCTION

Joint possession.

A person can also “possess” something even if he is not its sole owner or holder. For example, a person is considered to “possess” something which he owns or holds jointly with another person, who is keeping it for both of them. A person is also considered to “possess” something which he owns or holds jointly with another person, and which they have agreed to deposit somewhere where both of them will have access to it.

Commonwealth v. Beverly, 389 Mass. 866, 870, 452 N.E.2d 1112, 1115 (1983) (possession of controlled substance need not be exclusive; it may be joint and constructive); *Commonwealth v. Conroy*, 333 Mass. 751, 755, 133 N.E.2d 246, 249 (1956) (lookout was in joint possession of accomplice's burglarious tools); *Commonwealth v. Conlin*, 188 Mass. 282, 284, 74 N.E. 351, 352 (1905) (depositing bag of burglarious tools with another while retaining key was possession); *Commonwealth v. Gonzalez*, 23 Mass. App. Ct. 990, 992, 504 N.E.2d 1067, 1069 (1987) (possession may be joint and constructive); *Commonwealth v. Ronayne*, 8 Mass. App. Ct. 421, 426, 395 N.E.2d 350, 353 (1979) (joint flight from burglary supported inference of joint possession of, though only one defendant carried, tire

iron); *Commonwealth v. Johnson*, 7 Mass. App. Ct. 191, 194, 386 N.E.2d 798, 800 (1979) (joint possession of items in auto trunk inferable against passenger only with other evidence).