

**[DISTRIBUTION] [MANUFACTURING] [CULTIVATING] OF A
CONTROLLED SUBSTANCE OTHER THAN MARIJUANA**

G.L. c. 94C, §§ 32-32D

**The defendant is charged with unlawfully (distributing)
(manufacturing) (cultivating) a controlled substance, namely
_____.**

**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 was a controlled
substance, namely _____ ;**

See G.L. c. 94C, § 31, for the statutory schedule of controlled substances.

***Second:* That the defendant (distributed) (manufactured)
(cultivated) some perceptible amount of that substance; and**

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

**To prove the first element, the Commonwealth must prove
beyond a reasonable doubt that the substance was in fact a
controlled substance, namely: _____. I instruct you as a
matter of law that our statutes define _____ as a controlled
substance. In determining whether the material in question was in**

fact _____, you may consider all the relevant evidence that was presented.

To prove the second element, the Commonwealth must prove beyond a reasonable doubt that the defendant (distributed) (manufactured) (cultivated) some perceptible amount of that substance.

Distribute The term “distribute” means to transfer, or to assist or participate in the transfer of a controlled substance to another person. The Commonwealth is not required to prove that any money or other compensation was involved.

- If warranted by the evidence, continue with the supplemental instruction “Simultaneous and Joint Acquisition of a Controlled Substance.”

Cultivate The term “cultivate” means the activities related to the raising, nourishing, or fostering the growth of plants.

Commonwealth v. Palmer, 464 Mass. 773, 778-79 (2013).

Manufacture The term “manufacture” means the production, preparation, and growing of a controlled substance.

Manufacturing includes the compounding, conversion or processing of a controlled substance.

(Compounding is the mixing of two or more existing parts together.)

(Conversion is the process of changing something from one thing to another.)

G.L. c. 94C, § 1.

To prove the third element, the Commonwealth must prove beyond a reasonable doubt that the defendant engaged in the activity knowingly or intentionally.

- The judge may use the detailed instruction on “Intent” from instruction 3.120, the detailed Instruction on “Knowledge” from Instruction 3.140, or the shorter versions below, if appropriate.

In other words, the defendant must have acted consciously, voluntarily and purposely, and not because of ignorance, mistake or accident. The Commonwealth is required to prove that the defendant knew the substance was a controlled substance, but it is not required to prove that the defendant knew which particular controlled substance it was. We often must decide from the actions of others what they knew or what they intended. You are to decide what the

defendant knew or intended from the evidence, together with any reasonable inferences that you choose to draw from it.

Commonwealth v. Rodriguez, 415 Mass. 447, 454 (1993); *Commonwealth v. DePalma*, 41 Mass. App. Ct. 798, 801 (1996).

If the Commonwealth proved all the elements beyond a reasonable doubt, you should return a verdict of guilty. If the Commonwealth failed to prove any element beyond a reasonable doubt, you must find the defendant not guilty.

SUPPLEMENTAL INSTRUCTION

Simultaneous and Joint Acquisition of a Controlled Substance

Where two or more people at the outset simultaneously and jointly acquire possession of a drug for their own use intending only to share it together, the crime is possession of a controlled substance, not distribution of a controlled substance.

Commonwealth v. Carrillo, 483 Mass. 269 (2019); *Commonwealth v. Jackson*, 464 Mass. 758, 763-63 (2013), citing *Commonwealth v. Johnson*, 413 Mass. 598, 605 (1992) (distinguishing between “circumstances where a defendant facilitates a transfer of drugs from a seller to a buyer,” which can constitute the crime of distribution even if the defendant intends to share some of the drug with the buyer, and “the passing of a drug between joint possessors who simultaneously acquire possession at the outset for their own use,” which does not constitute distribution).

**DISTRIBUTION, MANUFACTURING, OR CULTIVATING
A CONTROLLED SUBSTANCE OTHER THAN MARIJUANA**

NOTES:

1. **Class of substance no longer referenced in instruction; sentencing.** The particular controlled substance alleged in the complaint is an essential element of the offense for the Commonwealth to prove, and different penalties attach to each class of controlled substances. *Commonwealth v. McGilvery*, 74 Mass. App. Ct. 508, 511 (2009). While the set penalties are based on whether the substance is a Class A, B, C, D, or E controlled substance, the class of a particular substance is determined as a matter of law, not as a matter of fact. See *Commonwealth v. Lezynski*, 466 Mass. 113, 119 (2013). Mass. G. Evid. §202 (judicial notice of law is mandatory). The question for the jury is whether the Commonwealth has proven the identity of the particular substance alleged. As such, the revised instruction no longer includes reference to what class the alleged substance falls into. If the jury has found that the Commonwealth has proven beyond a reasonable doubt the identity of the particular controlled substance alleged in the complaint, then the judge can take judicial notice as a matter of law that it falls within the specified class and sentence accordingly. Of course, the drug proven and class judicially noticed must be consistent with what is charged in the complaint. *McGilvery*, 74 Mass. App. Ct. at 512 (different classes are not lesser included offenses of each other).

2. **DPH, State Police or U. Mass. Medical School certificate of analysis.** Although G.L. c. 94C, § 47A, provides for the introduction of a certificate of analysis, it may only be admitted in conjunction with live testimony from the analyst who performed the underlying analysis, *Melendez Diaz v. Massachusetts*, 557 U.S. 305, 310-11 (2009), or by stipulation. If the defendant is stipulating to the identity of the controlled substance and not just to the introduction of the certificate of analysis, the stipulation must be signed by the prosecutor, defense counsel, and defendant, and placed before the jury before the close of evidence. *Commonwealth v. Ortiz*, 466 Mass. 475, 484-85 (2013). See also Mass. R. Crim. P. 23(a).

3. **Possession is not a lesser included offense of distribution** of a controlled substance. See *Commonwealth v. Garcia*, 34 Mass. App. Ct. 386, 391 (1993) (automatic standing does not apply to charge of distribution as possession is not an element of the offense). Separate convictions for distribution and possession with intent to distribute are not duplicative where separate quantities of a controlled substance are involved. *Commonwealth v. Diaz*, 383 Mass. 73, 82-85 (1981).

4. **Legal Justification / Authority to prescribe.** See G.L. c. 94C, § 9, pertaining to the authorized possession, administration, and dispensation of controlled substances.

5. **Unlawful dispensing of a controlled substance.** In *Commonwealth v. Brown*, 456 Mass. 708 (2010), the Supreme Judicial Court held that a physician may be convicted of (unlawfully) *dispensing* a controlled substance only when providing a medically appropriate prescription to the ultimate user without having registered properly with the state under G.L. c. 94C, § 7. *Ibid.* at 721, n. 7. This instruction does not cover that scenario. When a physician, for no legitimate purpose, provides a prescription to a person seeking it for “illicit ends,” the crime is *distribution* of a controlled substance.

6. **Forfeiture and Bias.** As to whether a judge has discretion to exclude questions at trial to prosecution witnesses about potential forfeitures and bias, see *Commonwealth v. Koulouris*, 406 Mass. 281, 286-87 (1989) (reversible error to preclude defendant from exploring bias based on DEA agent’s involvement in forfeiture proceeding). However, see *Commonwealth v. Sendele*, 18 Mass. App. Ct. 755, 760-61 (1984) (no abuse of discretion by trial judge excluding questions on cross-examination of police officer where personal benefit and bias from a future forfeiture action was too remote, inconsequential, and improbable).

7. **Motions to forfeit drug proceeds** can be filed in a criminal case pursuant to G.L. c. 94C, § 47(b), without the need for a separate in rem civil forfeiture action in the Superior Court pursuant to § 47(d). As to time and hearing requirements, see *Commonwealth v. Goldman*, 398 Mass. 201, 203-204 (1986).