

UNLAWFULLY DISTRIBUTING MARIJUANA¹

G.L. c. 94C, § 32C

The defendant is charged with unlawfully distributing (marijuana) (a product containing marijuana) to another.

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 (marijuana) (contained marijuana);**

***Second:* That the defendant:**

[The Commonwealth must prove one or more of the following:]²

(Any amount for remuneration³) distributed (marijuana) (marijuana concentrate) (a marijuana product) for money or something of value;

(Any amount after advertisement or promotion⁴) distributed (marijuana) (marijuana concentrate) (a marijuana product) which had been advertised or promoted to the public;

¹ There is a separate offense of furnishing marijuana to a person under the age of 21, punishable by up to one year in the house of correction or a fine of no more than \$2,000, or both. G.L. c. 94G, § 13(i). See Instruction 7.815.

² If the Commonwealth pursues more than one theory, the judge should consider whether a special verdict form and unanimity instruction are required.

³ See G.L. c. 94G, § 7(a)(4).

⁴ See G.L. c. 94G, § 7(a)(4).

(An unlawful amount⁵) **distributed to another person more than (two ounces of marijuana) (5 grams of marijuana concentrate);**

***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 (marijuana) (marijuana concentrate) (a marijuana product). In determining whether the material in question was in fact (marijuana) (marijuana concentrate) (a marijuana product), you may consider any relevant evidence that was presented.

To prove the second element, the Commonwealth must prove beyond a reasonable doubt:

(Any amount for remuneration) **that the defendant distributed any amount of (marijuana) (marijuana concentrate) (a marijuana product) for money or something of value and can be cash, credit, property, or an agreement to do or not to do something.**

(Any amount after advertisement or promotion) **that the defendant distributed (marijuana) (marijuana concentrate) (a marijuana product), the**

⁵ See G.L. c. 94G, § 7(a)(4).

availability of which had been made known to the public by advertisement or promotion. The Commonwealth is not required to prove that the defendant received anything of value in return.

(An unlawful amount) that the defendant distributed to another person more than (two ounces of marijuana) (5 grams of marijuana concentrate). The Commonwealth is not required to prove that any money or other compensation was involved. However, the Commonwealth must prove beyond a reasonable doubt that what was distributed weighed more than (one ounce) (five grams).

The term “distribute” means to deliver or transfer the (marijuana) (marijuana concentrate) (a marijuana product) to another person.

- If warranted by the evidence, continue with the supplemental instruction on joint and simultaneous possession.

To prove the third element, the Commonwealth must prove that the defendant distributed the (marijuana) (marijuana concentrate) (a marijuana product) knowingly or intentionally.

- 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. 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.

If the Commonwealth proved every element 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 return a verdict of not guilty.

SUPPLEMENTAL INSTRUCTIONS

Simultaneous and Joint Acquisition of Marijuana

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 marijuana, not distributing marijuana to another.

See Commonwealth v. Carrillo, 483 Mass. 269 (2019); *Commonwealth v. Johnson*, 413 Mass. 598, 604 (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).

NOTES:

1. **Definition of marijuana.** Marijuana consists “of all parts of any plant of the genus *Cannabis*, not excepted below and whether growing or not; the seeds thereof; and resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture or preparation of the plant, its seeds or resin including tetrahydrocannabinol as defined in section 1 of chapter 94C; provided, however that ‘marijuana’ shall not include (i) the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture or preparation of the mature stalks, fiber, oil or cake made from the seeds of the plant or the sterilized seed of the plant that is incapable of germination; (ii) hemp; or (iii) the weight of any other ingredient combined with marijuana to prepare topical or oral administrations, food, drink or other products.” G.L. c. 94G, §1.

2. **Definition of marijuana concentrate.** “Marijuana concentrate” is defined in G.L. c. 94G, § 7, as “the resin extracted from any part of the plant or the genus *Cannabis* and every compound, manufacture, salt, derivative, mixture or preparation of that resin but shall not include the weight of any other ingredient combined with marijuana to prepare marijuana products.”

3. **Definition of marijuana product.** Marijuana products are “products that have been manufactured and contain marijuana and or an extract from marijuana, including concentrated forms of marijuana and products composed of marijuana and other ingredients that are intended for use or consumption, including edible products, beverages, topical products, ointments, oils and tinctures.” G.L. c. 94G, § 1.

4. **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 identify 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).

5. **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.)

6. **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).