

POSSESSION OF MARIJUANA

G.L. c. 94C § 34

The defendant is charged with unlawful possession of marijuana.

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 marijuana) (was marijuana concentrate) (were marijuana plants);**

***Second:* That the substance:**

[if marijuana] (weighed more than two ounces and was *not* within the defendant's primary residence);¹ (weighed more than ten ounces);²

[if marijuana concentrate] (weighed more than five grams)³;

[if marijuana plants] (consisted of more than 12 marijuana plants)⁴

and

¹ A person aged 21 years or older is no longer prohibited from possessing 1 oz. or less of marijuana outside their residence, or 10 oz. or less inside their residence. G.L. c. 94G, § 7(a)(1) & 7(a)(2). Possessing more than 1 oz. but less than 2 oz. of marijuana is a civil infraction, as is possession of less than 2 oz. by someone under the age of 21. G.L. c. 94G, 13L.

² G.L. c. 94G, § 7(a)(2).

³ G.L. c. 94G, § 7(a)(1).

⁴ G.L. c. 94G, §§ 7(a)(2), 13(e).

***Third:* That the defendant knowingly or intentionally possessed (that marijuana) (that marijuana concentrate) (those marijuana plants);**

In order to prove the first element, the Commonwealth must prove beyond a reasonable doubt that the substance (was marijuana) (was marijuana concentrate) (were marijuana plants). In determining whether the material in question (was marijuana) (was marijuana concentrate) (were marijuana plants), you may consider any relevant evidence that was presented.

In order to prove the second element, the Commonwealth must prove beyond a reasonable doubt the (weight of) (quantity of) (location of) the substance. Specifically, it must prove beyond a reasonable doubt that the substance:

[>2 ounces] weighed more than two ounces and *was not* within the defendant's primary residence.

[>10 ounces] weighed more than ten ounces.

[Concentrate] weighed more than five grams.

[Plants] consisted of more than 12 marijuana plants

To prove the third element, the Commonwealth must prove beyond a reasonable doubt that the defendant possessed the (marijuana) (marijuana concentrate) (marijuana plants) knowingly or intentionally.

- The judge may here use the detailed instruction on “Possession” from Instruction 3.220, or the shorter version below, if appropriate.

A person possesses something when they have direct physical control or custody of it at a given time (or when they have constructive possession of it).

- The judge may use the detailed instruction on “knowledge” from instruction 3.140 or the shorter version below, if appropriate.

The defendant must also have knowingly or intentionally possessed the marijuana. 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 warranted by the evidence, continue with the supplemental instruction on constructive possession or joint possession.

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 INSTRUCTIONS

Constructive Possession

A person also possesses something even without having physical custody of it if they have: (1) knowledge of its existence, (2) the ability to exercise control over it, either directly or through another person, and (3) the intent to exercise control over it.

However, I caution you that merely being present in the vicinity of (marijuana) (marijuana concentrate) (marijuana plants), even if one knows that (it is) (they are) there, does not amount to possession.

If relevant: **So, too, possession is not proved simply by evidence that a person was associated with another who controlled the (marijuana) (marijuana concentrate) (marijuana plants) or the place where (it was) (they were) found.**

Commonwealth v. Fernandez, 48 Mass. App. Ct. 530, 531-32 (2000) (constructive vs. actual possession are not different theories; simply different ways to prove the same legal principle). See *Commonwealth v. Than*, 442 Mass. 748, 754-755 (2004); *Commonwealth v. Owens*, 414 Mass. 595, 607 (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 (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 (1991) (defendant's presence in vehicle with contraband is not itself sufficient); *Commonwealth v. Ramos*, 51 Mass. App. Ct. 901, 903 (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 (1991); *Commonwealth v. Handy*, 30 Mass. App. Ct. 776, 780-781 (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 (1990), *aff'd*, 410 Mass. 1005 (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 (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 (1983) (same); *Commonwealth v. Gill*, 2 Mass. App. Ct. 653, 656-657 (1974) (same); *Commonwealth v. Miller*, 4 Mass. App. Ct. 379, 383-384 (1976) (same rule applicable to van; possession also inferable from attempted flight); *Commonwealth v. Deagle*, 10 Mass. App. Ct. 563, 567-568 (1980) (proximity and knowledge do not establish possession unless they permit inference of control).

Joint Possession

A person can “possess” something even if they are not its sole owner or holder. For example, a person is considered to “possess” something if it is owned or held jointly with another person who is keeping it for both of them. A person is also considered to “possess” something when they have agreed with another person to put it in a place where both of them will have access to or control over it.

Commonwealth v. Beverly, 389 Mass. 866, 870 (1983) (possession of controlled substance need not be exclusive; it may be joint and constructive); *Commonwealth v.*

Conroy, 333 Mass. 751, 755 (1956) (lookout was in joint possession of accomplice's burglarious tools); *Commonwealth v. Conlin*, 188 Mass. 282, 284 (1905) (depositing bag of burglarious tools with another while retaining key was possession); *Commonwealth v. Gonzalez*, 23 Mass. App. Ct. 990, 992 (1987) (possession may be joint and constructive); *Commonwealth v. Romaine*, 8 Mass. App. Ct. 421, 426 (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 (1979) (joint possession of items in auto trunk inferable against passenger only with other evidence).

Affirmative Defense Pertaining to Marijuana Plants

If the defendant has produced evidence that another person shared their primary residence and that the defendant possessed only 12 or fewer marijuana plants inside the residence, the Commonwealth bears the burden of proving beyond a reasonable doubt that it was the defendant who possessed more than 12 plants.

G.L. c. 94G, §§ 7(a)(2) and 13(e).

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 products.** Marijuana products are “products that have been manufactured and contain marijuana 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.”

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).

7. **Penalties** for violation of section 7 of chapter 94G are contained in section 13. Penalties for possession by people under the age of 21 are contained in G.L. c. 94C, § 32L.