

**POSSESSION WITH INTENT TO DISTRIBUTE
A CONTROLLED SUBSTANCE OTHER THAN MARIJUANA**

G.L. c. 94C, §§ 32-32D

[See Instruction 7.835 for Possession with Intent to Distribute Marijuana]

The defendant is charged with possession of a controlled substance, namely _____, with the intent to distribute it.

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 knowingly possessed some perceptible amount of that substance;**

***Third:* That the defendant intended to distribute it to someone else.**

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

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determining whether or not 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 knowingly possessed some perceptible amount of that substance. The Commonwealth is required to prove that the defendant knew they possessed a controlled substance, but it is not required to prove that they knew which particular controlled substance it was.

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

- The judge may use the detailed instruction 3.140 (Knowledge) or this shorter version, if appropriate.

A person acts knowingly if they act consciously, voluntarily and purposely, and not because of ignorance, mistake or accident.

- 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).

- If warranted by the evidence, continue with the supplemental instruction on constructive possession or joint possession.

To prove the third element, the Commonwealth must prove beyond a reasonable doubt that the defendant intended to distribute the substance. The word “distribute” means to transfer or deliver, or to assist or participate in the transfer or delivery, of a controlled substance to another person. The Commonwealth is not required to prove that any money or other compensation was involved.

G.L. c. 94C, § 1.

The Commonwealth must prove, however, that the defendant intended to distribute the substance to someone else.

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

We often must decide from the actions of others what they intended. You are to decide what the defendant intended from the evidence, together with any reasonable inferences that you choose to draw from it.

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

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.

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However, I caution you that merely being present in the vicinity of controlled substances, even if one knows that it is 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 substance or the place where it was 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. Santana, 95 Mass. App. Ct. 265 (2019); 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

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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. Ronayne*, 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).

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 possession of a controlled substance with intent to distribute.

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).

NOTES:

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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. **Sufficiency of evidence of intent to distribute.** See *Commonwealth v. Clermy*, 421 Mass. 325, 331 (1995) (packaging of drugs in many small packets as well as possession of telephone pager, a traditional accoutrement of illegal drug trade); *Commonwealth v. Roman*, 414 Mass. 642, 645, (1993) (possession of large amount of illegal drugs raises inference of intent to distribute); *Commonwealth v. Johnson*, 413 Mass. 598 (1992) (purchase with another's money intending to transfer drugs to such person constitutes distribution); *Commonwealth v. Scala*, 380 Mass. 500, 511 (1980) (relevant factors include quantity possessed); *Commonwealth v. Rugaber*, 369 Mass. 765, 770 (1976) (same); *Commonwealth v. Ellis*, 356 Mass. 574, 578-579 (1970) (inference from large quantities of one drug not applicable to small quantities of another drug); *Commonwealth v. Martin*, 48 Mass. App. Ct. 391, 392-393 (1999) (manner of packaging, area of high drug activity, vigorous attempt to avoid apprehension); *Commonwealth v. Pena*, 40 Mass. App. Ct. 905-906 (1996) (area of high drug dealing). But see *Commonwealth v. Reid*, 29 Mass. App. Ct. 537, 538-539 (1990) (despite arrest in "area of high drug activity," court held that "[o]n the scanty evidence of the defendant's actions, . . . it was equally as likely that the defendant was the purchaser as that he was the seller"). See *Commonwealth v. Watson*, 36 Mass. App. Ct. 252, 259-260 (1994) ("[S]parse furnishings of the apartment indicated that it was a stash house, used solely for storing and selling drugs."); *Commonwealth v. Monterosso*, 33 Mass. App. Ct. 765, 770-771 (1992) (several persons making short visits to defendant's apartment shortly before the search supported inference of drug distribution as opposed to possession for personal use). *Commonwealth v. Poole*, 29 Mass. App. Ct. 1003, 1004 (1990) (possession as bailee with intent to retransfer to its owner constitutes distribution); *Commonwealth v. LaPerle*, 19 Mass. App. Ct. 424, 428, (1985) (where other indicia of distribution, minute quantity can suffice, since defendant not required to have intended to distribute the precise quantity possessed); *Commonwealth v. Sendele*, 18 Mass. App. Ct. 755, 758-759 (relevant factors include quantity, purity, packaging, separation from personal quantity, cash, price list, repeated travel to notorious drug centers); *Commonwealth v. Miller*, 17 Mass. App. Ct. 991, 991 (1984) (relevant factors include apparent prior drug sales); *Commonwealth v. Wooden*, 13 Mass. App. Ct. 417, 422-424 (1982) (relevant factors include cash, whether sale in progress, whether part of larger stash; separate packages relevant only if more consistent with distribution than personal use); *Commonwealth v. Fiore*, 9 Mass. App. Ct. 618, 624, cert. denied, 449 U.S. 938 (1980) (relevant factors include street value of drugs).

See also *Commonwealth v. Marchese*, 54 Mass. App. Ct. 916, 918 (2002) (prosecutor's comment that there was no evidence of defendant's personal use of drugs improper because it could be construed as "asking the jury to infer the defendant's guilt from his failure to produce direct evidence of his use of cocaine"); *Commonwealth v. McShan*, 15 Mass. App. Ct. 921, 922 (1983) (reversible error to exclude question to police witness whether quantity consistent with personal use); *Commonwealth v. Huffman*, 11 Mass. App. Ct. 185, 190 (1981) (reversible error to exclude defendant's testimony that drugs intended solely for personal use), aff'd on other grounds, 385 Mass. 122 (1982).

3. **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

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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).

4. **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.)

5. **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).