

**POSSESSION WITH INTENT TO DISTRIBUTE
MARIJUANA**

G.L. c. 94C, §§ 32C
as modified by G.L. c. 94G, § 7(a)(4)

This instruction recognizes the exemptions in G.L. c. 94G, § 7(a)(4), which allows gifting up to one ounce of marijuana. The distribution of marijuana for remuneration still remains unlawful for any amount.

The defendant is charged with possession of marijuana 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 marijuana) (contained marijuana).**

***Second:* That the defendant knowingly possessed some of that substance; and**

***Third:* That the defendant:**

[The Commonwealth must prove at least one of the following:]

- A. [Amount in excess of permissible gifting amount of one ounce] **intended to distribute more than (one ounce of marijuana) (5 grams of marijuana concentrate) to someone else.**
- B. [Any amount for remuneration] **intended to distribute (a substance containing) marijuana for money or something of value such as**

cash, credit, property, or an agreement to do or not do something.

- C. [Any amount after advertisement or promotion] **intended to distribute (a substance containing) marijuana to another after advertising or promoting the transfer to the public.**
- D. [To a person under 21] **intended to distribute any (amount of) (type of) (a substance containing) marijuana to a person under 21 years of age.**

To prove the first element, the Commonwealth must prove beyond a reasonable doubt that the substance (was) (contained) marijuana. In determining whether the material in question (was) (contained) marijuana, 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 that substance.

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

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

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

- The judge may 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 it¹).

To prove the third element, the Commonwealth must prove beyond a reasonable doubt that the defendant:

[The Commonwealth must prove at least one of the following:]

- A. [Amount in excess of permissible gifting amount of one ounce] **intended to distribute more than (one ounce of marijuana) (5 grams of marijuana concentrate) to someone else. The Commonwealth is not required to prove that any money or other compensation was involved.**
- B. [Any amount for remuneration] **intended to distribute (a substance containing) marijuana for money or something of value such as**

¹ If warranted by the evidence, continue with the supplemental instruction on constructive or joint possession.

cash, credit, property, or an agreement to do or not do something.

- C. [Any amount after advertisement or promotion] **intended to distribute (a substance containing) marijuana, after its availability had been made known to the public by advertisement or promotion.**
- D. [To a person under 21] **intended to distribute any (amount of) (type of) (a substance containing) marijuana to a person under 21 years of age. The Commonwealth is not required to prove that any money or other compensation would be involved.**

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

- 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 of the elements beyond a reasonable doubt, you should return a verdict of guilty. If the

Commonwealth failed to prove one or more elements 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 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. 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 deposit 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 only possession of marijuana, not possession of marijuana with intent to distribute.

Commonwealth v. Carrillo, 483 Mass. 269 (2019); *Commonwealth v. Johnson*, 413 Mass. 598, 604 (1992).

NOTES:

1. 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

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Revised February 2026

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).

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 defined in G.L. c. 94C, § 1, as "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 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).

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).