

**SALE OF DRUG PARAPHERNALIA;
POSSESSION WITH INTENT TO SELL DRUG PARAPHERNALIA**

The defendant is charged with (selling drug paraphernalia) (possessing drug paraphernalia with the intent to sell it). Section 32I of Chapter 94C of our General Laws provides as follows:

“No person shall (sell) (possess with intent to sell) . . . drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to (plant) (propagate) (cultivate) (grow) (harvest) (manufacture) (compound) (convert) (produce) (process) (prepare) (test) (analyze) (pack) (repack) (store) (contain) (conceal) (ingest) (inhale) (or) (otherwise introduce into the human body) a controlled substance in violation of [the law].”

In order to prove that the defendant is guilty of this charge, the Commonwealth must prove three things beyond a reasonable doubt:

First: That the item(s) in question is (are) drug paraphernalia. Our law defines “drug paraphernalia” to include:

“[A]ll equipment, products, devices, and materials of any kind which are primarily intended, or designed for use in (planting) (propagating) (cultivating) (growing) (harvesting) (manufacturing) (compounding) (converting) (producing) (processing) (preparing) (testing) (analyzing) (packaging) (repackaging) (storing) (containing) (concealing) (ingesting) (inhaling) (or) (otherwise introducing into the human body) a controlled substance in violation of [the law].”

Our law also lists a number of factors that you as the jury are to consider in determining whether a particular item is “drug paraphernalia.” They include the following:

- “The proximity of the [item], in time and space, to [any] direct violation of [the law governing controlled substances];**
- The proximity of the [item] to [any] controlled substances;**
- The existence of any residue of controlled substances on the [item];**
- Instructions, oral or written, provided with the [item] concerning its use;**

- **Descriptive materials accompanying the [item] which explain or depict its use;**
- **National and local advertising concerning its use;**
- **The manner in which the [item] is displayed for sale;**
- **Whether the owner, or anyone in control of the [item], is a supplier of [similar] or related [items] to the community, such as a licensed distributor or dealer of tobacco products;**
- **Direct or circumstantial evidence of the ratio of sales of the [item] to the total sales of the business enterprise;**
- **The existence and scope of legitimate uses for the [item] in the community;**
- **Expert testimony concerning its use;**
- **[and any other factors you find to be relevant.]”**

G.L. c. 94C, § 1, as amended by St. 1998, c. 50, § 1, and St. 2006, c. 172, § 1. *Commonwealth v. Jasmin*, 396 Mass. 653, 658, 487 N.E.2d 1383, 1387 (1986) (jury is to determine whether an item is drug paraphernalia, on instructions that include, among other considerations, reference to the statutory factors).

Because of the large number of alternatives in the statutory definition of “drug paraphernalia,” it is recommended that the judge mention only those potentially relevant to the evidence in the case. The judge may also wish to permit the deliberating jury to have a copy of the statutory definition and list of relevant factors. See *Commonwealth v. Dilone*, 385 Mass. 281, 287 n.2, 431 N.E.2d 576, 580 n.2 (1982) (endorsing giving the jury a written copy of all or parts of charge). The appendix (Instruction

7.841) to this instruction may be used for that purpose.

If the Commonwealth has proved that the item constitutes drug paraphernalia, then the *Second* thing the Commonwealth must prove beyond a reasonable doubt is that the defendant (sold that item) (knowingly possessed that item with the intent to sell it).

***Thirdly:* The Commonwealth must prove beyond a reasonable doubt that when the defendant (sold that item, he [she] knew it to be drug paraphernalia) (possessed that item with the intent to sell it, he [she] knew or reasonably should have known that it would be used to [plant] [propagate] [cultivate] [grow] [harvest] [manufacture] [compound] [convert] [produce] [process] [prepare] [test] [analyze] [package] [repackage] [store] [contain] [conceal] [ingest] [inhale] or otherwise introduce into the human body a controlled substance in violation of the law).**

For a definition of “possession,” see Instruction 3.220.

Where it is charged that the violation occurred within 1,000 feet of school property or within 100 feet of a public park or playground, here give Instruction 7.860.

NOTES:

1. **Hypodermic syringe or needle no longer drug paraphernalia.** Statute 2006, c. 172 (effective July 13, 2006) amended the definition of drug paraphernalia in G.L. c. 94C, § 1 to eliminate the reference to equipment used to “inject” drugs, and to eliminate from the list of examples the prior reference to “hypodermic syringes, needles and

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other objects used, primarily intended for use or designed for use in parenterally injected controlled substances for the human body.”

2. **Aggravated offense to sell to person under 18.** Selling drug paraphernalia to a person under eighteen years of age is an aggravated form of this offense. G.L. c. 94C, § 32I(b). Where the aggravated offense is charged, the model instruction must be adapted to include that additional element.

3. **Constitutionality.** A properly-drafted statute may ban drug paraphernalia without violating the First Amendment or being unconstitutionally vague on its face. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 102 S.Ct. 1186 (1982). Neither the statutory prohibition in G.L. c. 94C, § 32I nor the definition of drug paraphernalia in G.L. c. 94C, § 1 are unconstitutionally vague. *Commonwealth v. Jasmin*, 396 Mass. 653, 656-658, 487 N.E.2d 1383, 1386-1387 (1986).

4. **Manufacture or Purchase.** The model instruction may be appropriately adapted to cover a charge of purchase or manufacture “with intent to sell drug paraphernalia,” which is also prohibited by G.L. c. 94C, § 32I.