POSSESSION OF BURGLARIOUS TOOLS

The defendant is charged with an offense that is commonly referred to as "possessing burglarious tools." Section 49 of chapter 266 of our General Laws provides as follows:

> **"Whoever knowingly has in his possession . . .**
>
> **[a] tool or implement [that is] adapted and designed for cutting through, forcing or breaking open a building, room, vault, safe or other depository,**
>
> **in order to steal therefrom money or other property, or to commit any other crime,**
>
> **knowing (the tool or implement) to be adapted and designed for (that) purpose . . .**
>
> **shall be punished . . . ."**

In order to prove the defendant guilty of this offense, the Commonwealth must prove five things beyond a reasonable doubt:

First: **That the defendant knowingly possessed a tool or implement, specifically a _____ ;**

Second: **That such tool or implement could reasonably be used to**

break into a (building) (room) (vault or safe) (place for keeping valuables);

Third: **That the defendant knew that the tool or implement could reasonably be used for that purpose;**

Fourth**: That the defendant intended to use the tool or implement for that purpose;**

Fifth: **That the defendant had the specific intention of (stealing _____ from) (committing a crime in) that place.**

Here the jury must be instructed on "Possession" (Instruction 3.220).

"The gist of the offense lies in the possession of the tools, the purpose for which they are possessed and, their suitability for that purpose." *Commonwealth v. Aleo,* 18 Mass. App. Ct. 916, 917, 464 N.E.2d 102, 103 (1984). The defendant must have intended to use the tool to effectuate the breaking and entering. *Commonwealth* v. *Redmond*, 53 Mass. App. Ct. 1, 6, 757 NE2d 249, 253 (2001).

The model instruction is structured to address the most common variety of the offense defined in G.L. c. 266, § 49, which also punishes "mak[ing] or mend[ing], or begin[ning] to make or mend" such items, and bans burglarious "engine[s]" and "machine[s]" as well as tools and instruments. The instruction may be adapted as necessary.

SUPPLEMENTAL INSTRUCTION

Licit implements. **To qualify as a "burglarious tool," it is not necessary that a tool or implement be designed or usable only for unlawful purposes. Items which are commonly used for lawful purposes, such as screwdrivers or chisels or kitchen knives, are considered to be**

"burglarious tools" if they can be used to break into a (building) (room) (vault or safe) (place for keeping valuables), and are possessed for that reason.

While burglarious intent can be inferred from mere possession of tools uniquely or very highly adapted to burglarious purposes, common items can be burglarious tools if they can be used and are possessed for burglarious purposes. *Commonwealth v. Dellinger,* 10 Mass. App. Ct. 549, 561, 409 N.E.2d 1337, 1346 (1980), aff'd in part and rev'd in part on other grounds, 383 Mass. 780, 422 N.E.2d 1346 (1981). See *Commonwealth v. Jones,* 355 Mass. 170, 176-177, 243 N.E.2d 172, 176 (1969) (screwdriver and kitchen knife); *Commonwealth v. Tivnon,* 8 Gray 375, 380-381 (1857) (chisel). But see *Commonwealth v. Purcell,* 19 Mass. 1031, 1031, 477 N.E.2d 190, 192 (1985) (even if worn to facilitate burglary, gloves cannot be burglarious instruments). A burglarious instrument does not lose its character as such because it needs repair. *Aleo, supra.* Innocent tools are admissible in evidence when mixed with burglarious tools. *Commonwealth v. Williams,* 2 Cush. 582, 586 (1849).

NOTES:

1. **Attempted break-in unnecessary**. An attempted break-in is not a required element of this offense, since the offense is complete when tools are procured with a burglarious intent. *Tivnon, supra.*

2. **Breaking and entering is distinct offense.** Possession of burglarious tools and breaking and entering (G.L. c. 266, § 18) are separate offenses, and neither is a lesser included offense of the other. *Commonwealth v. Johnson,* 406 Mass. 533, 535, 548 N.E.2d 1251, 1253 (1990).

3. **"Depository"**. It is not necessary to prove that a depository was located within a building, *Commonwealth v. Tilley,* 306 Mass. at 412, 416, 28 N.E.2d 247, 247 (1940), or that the defendant intended to break into any particular depository, *Tivnon, supra.* A boat storage area open on one side is not a depository. *Commonwealth v. Schultz,* 17 Mass. App. Ct. 958, 458 N.E.2d 328 (1983). An auto trunk is a depository. *Tilley, supra.* A locked passenger automobile reasonably can be inferred to be a depository, even without proof that the particular vehicle was used to store valuables. *Commonwealth v. Dreyer,* 18 Mass. App. Ct. 562, 564-565, 468 N.E.2d 863, 865-866 (1984). A bolt cutter used to cut through a bicycle chain attaching a bicycle to a bicycle rack is not a burglarious tool, since it is not "adapted and designed for cutting through, forcing or breaking open a . . . depository." The chain itself cannot be a depository "as it has no capacity to hold property for safekeeping." Even if the rack is considered a depository, it is "highly implausible that a small pair of bolt cutters could be used to cut open the metal frames of a bicycle rack" and therefore the cutters were probably not intended for use on the rack. And "because the bicyclist furnishes the chain, . . . it requires a strained interpretation of the statute to conclude that the chain and rack together" constitute a depository. *Commonwealth v. Antonio Ortiz,* 38 Mass. App. Ct. 1107, 646 N.E.2d 435 (No. 94-P-381, February 8, 1995) (unpublished opinion under Appeals Court Rule 1:28).

4. **Intended crimes**. It is not necessary that burglary or theft be the intended crime. *Commonwealth v. Krasner,* 358 Mass. 727, 729-731, 267 N.E.2d 208, 209-210, S.C. 360 Mass. 848, 274 N.E.2d 347 (1971) (trespass); *Tilley,* 306 Mass. at 414-415, 28 N.E.2d at 247 (stealing from auto trunk). However, if the complaint charges the defendant only with the first of the two intent alternatives in the statute ("to steal therefrom such money and other

property as might be found therein") the Commonwealth is so limited in its proof, and may not convict upon proof of the second intent alternative ("to commit any other crime"). *Commonwealth v. Graud,* 8 Mass. App. Ct. 915, 915-916, 395 N.E.2d 466, 466 (1979); *Commonwealth v. Armenia,* 4 Mass. App. Ct. 33, 38, 340 N.E.2d 901, 904 (1976). See *Commonwealth v. Aldrich,* 23 Mass. App. Ct. 157, 165, 499 N.E.2d 856, 861 (1985). To satisfy the second intent alternative, the "any other crime" must be intended to be committed in the "building, room, vault, safe or other depository." *Krasner, supra; Schultz, supra.*

5. **Motor vehicle master keys.** Since the enactment of St. 1966, c. 269, the statute has also included a separate branch punishing possession of a motor vehicle master key, the effect of which is that possession of motor vehicle master keys can no longer be prosecuted under the generic branch of the statute. *Commonwealth v. Collardo,* 13 Mass. App. Ct. 1013, 1014, 433 N.E.2d 487, 489 (1982).