



THE TRIAL COURT OF MASSACHUSETTS
EXECUTIVE OFFICE OF THE TRIAL COURT

John Adams Courthouse
One Pemberton Square, 1M
Boston, MA 02108

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Chief Justice of the Trial Court

MASSACHUSETTS TRIAL COURT POLICY
Retaining and Transferring Exhibits after Criminal Trials

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INTRODUCTION

This Trial Court Policy governs the retention and transfer of nondocumentary exhibits after convictions and after delinquency and youthful offender adjudications.¹ Unless a court orders an exhibit transferred from the clerk's office to another governmental entity² or returned to its owner, a clerk's office is responsible for retaining the exhibit after trial until final disposition of the appeal, if any, and for the duration of the defendant's incarceration or any period of parole or probation for the offense, or longer if the court so orders. G. L. c. 278A, § 16(a); Mass. R. A. P. 9.

A judge must order an exhibit transferred when required to do so by statute. A judge may order an exhibit transferred by agreement or when a clerk establishes good cause for transfer. *See Dist. Att'y for the N. Dist. v. Superior Court Dep't*, 482 Mass. 336, 341–342 & n.11 (2019). See Parts I-III below.

Any exhibit retained by a clerk's office must be stored in a manner that is reasonably designed to preserve its integrity, as required by the exhibit-preservation statute, G. L. c. 278A, § 16(a), and 515 CMR 7.00 *et seq.* See Part IV below.

¹ Nondocumentary exhibits include, but are not limited to, weapons, drugs, and biological material (e.g., blood, hair, semen). Other rules govern the retention of papers and other documentary records. See, e.g., G. L. c. 212, § 26 (clerks' custody of transferred records); G. L. c. 221, § 2 (clerks' duties to keep records of proceedings); G. L. c. 221, § 27A (disposal of papers and records); S.J.C. Rule 1:06 (specifying how clerks should keep dockets and records).

² A governmental entity is "an official body of the commonwealth, or of a county, city or town within the commonwealth." G. L. c. 278A, § 1. A clerk's office is a governmental entity. *Dist. Att'y for the N. Dist. v. Superior Court Dep't*, 482 Mass. 336, 340 (2019).

EXHIBIT TRANSFER

I. Exhibits transferred by statute³

A. Certain firearms, other weapons, and ammunition – judge must order exhibit transferred to state police

After a conviction or delinquency or youthful offender adjudication of an offense involving one of the following items, a judge generally must order the item transferred to the state police. G. L. c. 269, § 10(e), § 10A; § 11B, § 11C, § 12B, & § 12D(c):⁴

- handguns and other short-barreled firearms, § 10(a);
- certain knives and other hand-held weapons (e.g., switchblades, metallic knuckles, nunchaku), § 10(b);
- machine guns and sawed-off shotguns, § 10(c);
- ammunition, § 10(h)(1);
- large-capacity weapons and feeding devices, § 10(m);
- gun silencers, G. L. c. 269, § 10A;
- firearms with serial numbers removed, G. L. c. 269, § 11B & § 11C;
- BB guns, G. L. c. 269, § 12B;
- rifles or shotguns, G. L. c. 269, § 12D.

The exhibit-preservation statute requires that the state police, as a governmental entity, retain the item for the longer of the defendant’s period of incarceration or period of parole or probation supervision for the offense, G. L. c. 278A, § 16(a). No authority prevents a court from ordering that the state police preserve an exhibit for longer than the statutory period. As such, in instances where the appellate period for a particular offense(s) exceeds the period of incarceration or probation, judges should order the state police to retain the evidence for the appellate period.

B. Controlled Substances or Narcotic Drugs – judge must order exhibit transferred to local police department (or to state police)

After a conviction or delinquency or youthful offender adjudication, a judge must order controlled substances or narcotic drugs transferred to the evidence officer of the police department that held the drugs before trial. G. L. c. 94C, § 47A, first and fifth paragraphs. That police department must preserve the exhibit for the longer of the following periods:

1. as long as the defendant remains incarcerated or on parole or subject to probation supervision for the offense, G. L. c. 278A, § 16(a);
2. if an appeal is filed, until final disposition of the case after appeal, G. L. c. 94C, § 47A, fifth paragraph;
3. if no appeal is filed, until expiration of the appeal period, under Rule 4 of the Massachusetts Rules of Appellate Procedure, G. L. c. 94C, § 47A, fifth paragraph
 - if no appeal is filed, then after expiration of the appeal period under Mass. R. A. P. 4 expires, the judge, as required by G. L. c. 94C, § 47A, fifth paragraph, must order the police department’s evidence officer to deliver the drugs to the state police, which, in turn, must

³ This Policy discusses commonly applicable, but not necessarily all possible, statutes that require transfer of exhibits. If, in a given case, there is a question whether an exhibit is required to be transferred, the statute under which the offense was prosecuted should be consulted to determine whether transfer is required.

⁴ Each of these statutes directs that the item “shall,” by court order, be forwarded to the state police, with one exception: items specified in G. L. c. 269, §§ 10(a)-(c), (h)(1), & (m) shall be forwarded “unless otherwise ordered by the court,” G. L. c. 269, § 10(e), e.g., if the item was stolen and is ordered returned to the lawful owner.

preserve the drugs as long as the defendant remains incarcerated or on parole or subject to probation supervision for the offense, G. L. c. 278A, § 16(a).

No authority prevents a court from ordering that controlled substances or narcotic drugs be preserved for longer than the statutory periods.

C. Currency – depending on its ownership and connection to a crime, currency may be returned to third-party owner, forfeited to Commonwealth as subject of asset forfeiture, forfeited to state treasurer, or retained by clerk’s office

After a conviction or delinquency or youthful offender adjudication:

- the judge may order any currency lawfully owned by a third party returned to that party.⁵ See *Commonwealth v. Sacco*, 401 Mass. 204, 207 n.3 (1987), citing G. L. c. 276, § 3;
- currency that is the subject of a forfeiture petition by the Commonwealth may be transferred to the Commonwealth, under G. L. c. 94C, 47(f)(1);⁶
- currency that was seized pursuant to the Third clause of G. L. c. 276, § 1, must be forfeited to the state treasurer, G. L. c. 276, § 3(c), unless the currency was marked for identification or entered as an exhibit at trial and has independent evidentiary value, such as if it tested positive for a particular substance or “was collected for its potential evidentiary value during the investigation of a crime.” G. L. c. 278A, § 16(a). Currency with independent evidentiary value that is not forfeited to the treasurer must be retained by the clerk’s office until final disposition of any appeal and until the expiration of the defendant’s incarceration and any period of parole or probation for the offense, or longer if the court so orders, in the manner outlined in Part IV below.

The Executive Office of the Trial Court has promulgated an “Order to Transfer or Forfeit Exhibit(s)” form to document exhibits to be transferred or forfeited pursuant to statute.

II. Exhibits transferred by agreement

After a conviction or delinquency or youthful offender adjudication, a judge may order transfer of an exhibit by agreement unless statutorily required to transfer the exhibit elsewhere (e.g., see Part I[A] above).

III. Clerk’s motion to transfer exhibit

The following procedure applies only when an exhibit is not transferred by statute or by agreement, nor returned by motion, and when the clerk believes he or she is unable to store the exhibit for long-term preservation.

A. Clerk’s motion

After a conviction or delinquency or youthful offender adjudication, if a clerk is in possession of an exhibit that is not statutorily required to be transferred or otherwise transferred or returned, the clerk must retain the exhibit unless the clerk establishes good cause to believe retaining the exhibit would be impracticable. G. L. c. 278A, § 16(a); *Dist. Att’y for the N. Dist.*, 482 Mass. at 341. See Part IV below for how a clerk’s office should store exhibits and for how long.

⁵ The evidence-preservation statute does not require preservation of “evidence or biological material . . . if it is to be returned to a third party.” G. L. c. 278A, § 16(a).

⁶ If the currency has independent evidentiary value, such as if it tested positive for a particular substance or “was collected for its potential evidentiary value during the investigation of a crime.” G. L. c. 278A, § 16(a), the Commonwealth, as a governmental entity, must retain the evidence, as required by the evidence preservation statute. G. L. c. 276A, § 16(a).

To establish good cause⁷ to believe retaining the exhibit would be impracticable, the clerk shall file a [motion for transfer](#) with the court setting forth the basis on which the clerk believes retaining the exhibit would be impracticable. Impracticability includes, but is not limited to, whether transfer is necessary for exhibit preservation. Examples of impracticability include, but are not limited to, the following:

- [Dangerous items](#). Good cause exists where the clerk’s office lacks secure storage space or trained personnel to store a dangerous item safely. Dangerous items include, but are not limited to, dangerous weapons. *See Dist. Att’y for the N. Dist.*, 482 Mass. at 343.
- [Non-dangerous items](#). Good cause exists where the clerk has inadequate space to store the item. The clerk’s affidavit should address how many evidence rooms exist, what is stored in them, and the extent to which they are filled. *See Dist. Att’y for the N. Dist.*, 482 Mass. at 343 & n.14. In the event a court is housed in multiple locations (e.g., Middlesex Superior Court, which has sittings in Lowell and Woburn), the clerk should refer to all locations available for storage.

The Executive Office of the Trial Court has promulgated a “Clerk’s Motion to Transfer Exhibit(s) and Court’s Order” form.

B. Court’s ruling on clerk’s motion

Upon the filing of a clerk’s motion to transfer:

- the parties should be given notice and an opportunity to be heard on the motion
- the court is not required to hold an evidentiary hearing, but must make factual findings and give reasons for granting or denying the motion, either orally or in writing.⁸

C. If a judge orders an exhibit transferred

The court’s order of transfer must:

- specify how the exhibit is to be delivered to the entity or party ordered to receive the item;
- order retention of the exhibit until the final disposition of an appeal, if any,⁹ including in instances where the exhibit is to be retained by a governmental entity, rather than a clerk’s office;
- if the recipient is a governmental entity, include notice that the recipient is subject to the exhibit-preservation requirements of G. L. c. 278A, § 16(a), and 515 Code of Mass. Regs. 7.00 *et seq.*

When a judge orders an exhibit transferred, the clerk must require the entity or party receiving the exhibit to sign a written receipt for the item. The Executive Office of the Trial Court has promulgated a new “Certification of Receipt of Transferred or Forfeited Exhibit(s)” form. The new form replaces the “Certification and Receipt for Return of Exhibits” form, which was last revised in March of 2015.

⁷ “A clerk’s office may seek to satisfy the good cause standard by proffer or affidavit.” *Dist. Att’y for the N. Dist.*, 482 Mass. at 341.

⁸ A judge may use the “Court’s Order” portion (page 2) of the “Clerk’s Motion to Transfer Exhibit(s) and Court’s Order” form for this purpose.

⁹ See Mass. R. A. P. 9(b).

EXHIBIT STORAGE

IV. Clerks' offices' storage of exhibits

A clerk's office must store exhibits for the longer of the following: until final disposition of the appeal, Mass. R. A. P. 9(a)(1), or expiration of the defendant's incarceration and any period of parole or probation for the offense, G. L. c. 278A, § 16(a), or longer, if the court so orders.

Exhibits must be stored "in a manner that is reasonably designed to preserve" them. G. L. c. 278A, § 16(a).¹⁰

In storing exhibits, the clerk shall comply with the standards set forth in 515 Code of Mass. Regs. 7.00 *et seq.*, *Dist. Att'y for the N. Dist.*, 482 Mass. at 340 n.8, and must:

1. package each item separately in breathable containers (such as paper envelopes and cardboard boxes) to avoid moisture damage, commingling of items, and cross-contamination;
2. label each package with the case name, docket number, and, if appropriate, item number;
3. avoid extremes of temperature and humidity, including direct exposure to sunlight;
4. store weapons and other dangerous items, not statutorily required to be transferred, in a secure vault or other locked storage area (using a lock independent of other locks used in the courthouse); firearms should be made safe and stored unloaded (ammunition should be stored separate from firearms); and
5. limit access to storage areas to designated personnel, with a log of such access, and track movement of exhibits, manually or electronically, to memorialize the chain of custody; each clerk must report this exhibit-storage activity annually to the administrative office of his or her court department.

¹⁰ This Policy concerns long-term storage of exhibits after trial, but the principles outlined here also apply, as practicable, when a clerk's office stores exhibits during trial.