

**DISTRIBUTION OF A CONTROLLED SUBSTANCE;
POSSESSION WITH INTENT TO DISTRIBUTE A CONTROLLED SUBSTANCE**

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The defendant is charged with having unlawfully (distributed)
(possessed with the intent to distribute) a Class ____ controlled substance,
namely _____ .

Section ____ of chapter 94C of our General Laws provides as follows:

“Any person who knowingly or intentionally . . .
(distributes) (possesses with intent to . . . distribute)
a controlled substance
[categorized by the law] in Class ____ . . .
shall be punished”

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

First: That the substance in question is a Class ____ controlled
substance, namely _____ ;

Second: That the defendant (distributed some perceptible amount of
that substance to another person or persons) (possessed some perceptible
amount of that substance with the intent to distribute it to another person

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or persons); and

***Third:* That the defendant did so knowingly or intentionally.**

The relevant statutory sections (G.L. c. 94C, §§ 32 [Class A], 32A [Class B], 32B [Class C], 32C [Class D], and 32D [Class E]) also penalize manufacturing, dispensing, cultivating, or possession with intent to manufacture, dispense or cultivate a controlled substance. Where such alternatives are charged, the model instruction may be adapted as necessary. Definitions of “manufacture” and “dispense” may be found in G.L. c. 94C, § 1.

Since the enactment of St. 1987, c. 266, the District Court has final jurisdiction only over first offenses involving distribution of Class A, B or C controlled substances, but has final jurisdiction over both first and subsequent offenses involving distribution of Class D or E controlled substances.

See G.L. c. 94C, § 31 for the statutory schedule of controlled substances.

As to the first element, I instruct you as a matter of law that our statutes define _____ as a Class ____ controlled substance. It is your duty to determine whether or not the material in question is in fact _____. In doing so, you may consider all the relevant evidence in the case, including the testimony of any witness who may have testified either to support or to dispute the allegation that the material in question was _____.

As to the second element, (distribution) (possession with intent to distribute), the term “distribute” means to actually deliver a controlled substance to another person. It is irrelevant whether any money or other compensation was involved.

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If the charge is possession with intent to distribute.

First define "possession" from Instruction 3.220.

If it has been proved that the defendant did possess a controlled substance, you will have to determine whether it was held solely for his (her) own use, or whether it was intended for distribution to others. Among the factors you may consider in making that determination are (how large a quantity of drugs were possessed) (how pure in quality the drugs were) (what the street value of the drugs was) (what the defendant's financial resources were) (how the drugs were packaged) (whether other items were found along with the drugs which might suggest drug sales, such as cutting powder or packaging materials, scales, or large amounts of cash) (whether there is any evidence suggesting that a sale was in progress) (whether there is any evidence that these drugs were part of a larger stash of drugs) (whether there is any evidence that the defendant repeatedly traveled at short intervals to known drug centers).

A number of relevant but complex definitions are given in G.L. c. 94C, § 1. To "distribute" is to "deliver other than by administering or dispensing." To "deliver" is defined in turn as "to transfer, whether by

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actual or constructive transfer, a controlled substance from one person to another, whether or not there is an agency relationship.” “Administer” is defined as “the direct application of a controlled substance whether by injection, inhalation, ingestion, or any other means . . . by . . . a practitioner, or . . . a nurse at the direction of a practitioner in the course of his professional practice, or . . . an ultimate user or research subject at the direction of a practitioner in the course of his professional practice.” To “dispense” is defined as “to deliver a controlled substance to an ultimate user or . . . [his] agent . . . by a practitioner or pursuant to the order of a practitioner, including the prescribing and administering of a controlled substance and the packaging, labeling, or compounding necessary for such delivery.” Because of their complexity, it is recommended that the jury be given these definitions in full only where there is an issue as to whether the drugs were possessed or distributed lawfully.

The third thing the Commonwealth must prove beyond a reasonable doubt is that the defendant not only (distributed a Class ____ controlled substance) (possessed a Class ____ controlled substance with the intent to distribute it), but did so knowingly or intentionally. You may find that the defendant acted knowingly or intentionally if he (she) did so consciously, voluntarily and purposely, and not because of ignorance, mistake or accident.

See Instructions 3.120 (Intent) and 3.140 (Knowledge).

The Commonwealth is required to prove only that the defendant knew that she possessed a controlled substance, but not necessarily that she knew she possessed any particular drug. *Commonwealth v. DePalma*, 41 Mass. App. Ct. 798, 802, 673 N.E.2d 882, 885 (1996) (cocaine).

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. **DPH, State Police or U. Mass. Medical School certificate of analysis.** See the supplemental instruction to Instruction 7.820. For the statutory pretrial procedure for destroying all but a sample of large quantities of controlled substances, see G.L. c. 94C, § 47A.
2. **Forfeiture motions to forfeit drug proceeds** can be filed in a criminal case pursuant to G.L. c. 94C,

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§ 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, 496 N.E.2d 426, 427-428 (1986). While § 47(b) contains no dispositional provisions, the funds should be distributed in the same manner as specified in § 47(d) — i.e., half to the prosecuting district attorney, and half to the involved police department(s). *District Attorney for the Northwestern Dist. v. Eastern Hampshire Div. of Dist. Court Dep't*, 452 Mass. 199, 892 N.E.2d 710 (2008).

As to whether a judge has discretion to exclude questions at trial to prosecution witnesses about potential forfeitures, allegedly probative of bias, see *Commonwealth v. Sendele*, 18 Mass. App. Ct. 755, 760-761, 470 N.E.2d 811, 814 (1984).

3. **Possession a lesser included offense.** Possession of a controlled substance is a lesser included offense of a charge of distribution or possession with intent to distribute that controlled substance. *Commonwealth v. Perry*, 391 Mass. 808, 813-814, 464 N.E.2d 389, 393 (1984); *Commonwealth v. Ruggerio*, 32 Mass. App. Ct. 964, 966, 592 N.E.2d 753, 755 (1992). Knowingly being present where heroin is kept (G.L. c. 94C, § 35) is not a lesser included offense of a charge of distribution or possession with intent to distribute a Class A controlled substance, which does not require presence. *Commonwealth v. Saez*, 21 Mass. App. Ct. 408, 412 n.3, 487 N.E.2d 549, 552 n.3 (1986); *Commonwealth v. Rodriguez*, 11 Mass. App. Ct. 379, 381, 416 N.E.2d 540, 542 (1981).

A defendant cannot be convicted and sentenced both for possession of and for possession with intent to distribute the same quantity of drugs. *Commonwealth v. Amendola*, 26 Mass. App. Ct. 713, 713 n.1, 532 N.E.2d 75, 76 n.1 (1988). See *Kuklis v. Commonwealth*, 361 Mass. 302, 307, 280 N.E.2d 155, 159 (1976). Such separate convictions for distributing and for possession with intent to distribute are not duplicitous where separate quantities of a controlled substance are involved. *Commonwealth v. Diaz*, 383 Mass. 73, 82-85, 417 N.E.2d 950, 956-958 (1981).

4. **Sufficiency of evidence of intent to distribute.** See *Commonwealth v. Clermy*, 421 Mass. 325, 331, 656 N.E.2d 1253, 1257 (1995) (packaging of drugs in many small packets as well as possession of telephone pager, a traditional accouterment of illegal drug trade); *Commonwealth v. Roman*, 414 Mass. 642, 645, 609 N.E.2d 1217, 1219 (1993) (possession of large amount of illegal drugs raises inference of intent to distribute); *Commonwealth v. Johnson*, 413 Mass. 598, 602 N.E.2d 555 (1992) (purchase with another's money intending to transfer drugs to such person constitutes distribution); *Commonwealth v. Scala*, 380 Mass. 500, 511, 404 N.E.2d 83, 90 (1980) (relevant factors include quantity possessed); *Commonwealth v. Rugaber*, 369 Mass. 765, 770, 343 N.E.2d 865, 867-868 (1976) (same); *Commonwealth v. Ellis*, 356 Mass. 574, 578-579, 254 N.E.2d 408, 411 (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, 721 N.E.2d 395, 397 (1999) (manner of packaging, area of high drug activity, vigorous attempt to avoid apprehension); *Commonwealth v. Pena*, 40 Mass. App. Ct. 905-906, 661 N.E.2d 119, 120 (1996) (area of high drug dealing). But see *Commonwealth v. Reid*, 29 Mass. App. Ct. 537, 538-539, 562 N.E.2d 1362, 1364 (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, 629 N.E.2d 1341, 1346 (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, 604 N.E.2d 1338, 1341 (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, 563 N.E.2d 253, 255 (1990) (possession as bailee with intent to retransfer to its owner constitutes distribution); *Commonwealth v. LaPerle*, 19 Mass. App. Ct. 424, 428, 475 N.E.2d 81, 84 (1985) (where other indicia of distribution, minute quantity can suffice, since defendant not required to have intended to distribute the precise quantity possessed); *Sendele*, 18 Mass. App. Ct. at 758-759, 470 N.E.2d at 813 (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, 459 N.E.2d 136, 138 (1984) (relevant factors include apparent prior drug sales); *Commonwealth v. Woodon*, 13 Mass. App. Ct. 417, 422-424, 433 N.E.2d 1234, 1238-1239 (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, 403 N.E.2d 953, 957, 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, 767 N.E.2d 103, 105 (2002) (prosecutor's

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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, 444 N.E.2d 948, 950 (1983) (reversible error to exclude question to police witness whether quantity consistent with personal use); *Commonwealth v. Huffman*, 11 Mass. App. Ct. 185, 190, 414 N.E.2d 1032, 1035 (1981) (reversible error to exclude defendant's testimony that drugs intended solely for personal use), aff'd on other grounds, 385 Mass. 122, 430 N.E.2d 1190 (1982).