

**POSSESSION OF A PRESCRIPTION LEGEND DRUG WITH INTENT TO
DISTRIBUTE**
(N.J.S.A. 2C:35-10.5(a)(3))

Count _____ of the indictment charges the defendant as follows:

(Read Indictment)

The pertinent part of the statute (N.J.S.A. 2C:35-10.5a(3)) on which this indictment is based reads as follows:

A person who knowingly: (3) distributes or possesses or has under his control with intent to distribute a prescription legend drug or stramonium preparation in an amount of at least five but fewer than 100 dosage units unless lawfully prescribed or administered by a licensed physician, veterinarian, dentist or other practitioner authorized by law to prescribe medication is guilty of a crime.

In order for you to find defendant guilty of the charge, the State must prove the following elements beyond a reasonable doubt: (charge all that apply)

1. S-__ is (insert appropriate prescription legend drug).
2. Defendant distributed S-__ on the date alleged in the Indictment.
3. Defendant knowingly or purposely distributed S-__ in evidence.

OR

1. S _ is (insert appropriate prescription legend drug).
2. Defendant [possessed] or [had under his/her control], S-__ on the date alleged in the Indictment.
3. Defendant knowingly or purposely possessed or obtained S-__ in evidence.
4. When defendant knowingly possessed S-__ or had S-__ under his/her control, defendant had the intent to distribute it.

For Distribution Cases

The **first** element the State must prove is that S-__ is a Prescription Legend Drug. “Prescription legend drug” is any drug which under federal or State law requires dispensing by prescription or order of a licensed physician, veterinarian, or dentist and is required to bear the statement “Rx only” or similar wording indicating that such drug may be sold or dispensed only upon the prescription of a licensed medical practitioner and is not a controlled dangerous substance

or stramonium preparation. To establish this element, the State must prove beyond a reasonable doubt that S-__ is _____, a prescription legend drug.¹

In regard to the **second** element, that the defendant distributed S-__, "distribute" means the actual, constructive or attempted transfer,² from one person to another of a prescription legend drug. It is not necessary that S-__ be transferred in exchange for payment or promise of payment of money or anything of value.³

The State must prove beyond a reasonable doubt that the defendant knowingly distributed S-__. A person acts knowingly with respect to the nature of his/her conduct or the attendant circumstances if he/she is aware that his/her conduct is of that nature, or that such circumstances exist, or he/she is aware of the high probability of their existence. A person acts knowingly as to a result of his/her conduct if he/she is aware that it is practically certain that conduct will cause such a result. "Knowing", "with knowledge", or equivalent terms have the same meaning.⁴

Knowledge is a condition of the mind. It cannot be seen. It can only be determined by inferences from conduct, words or acts. Therefore, it is not necessary for the State to produce witnesses to testify that a particular defendant stated, for example, that he/she acted with knowledge when he/she had control over a particular thing. It is within your power to find that proof of knowledge has been furnished beyond a reasonable doubt by inference which may arise from the nature of the acts and the surrounding circumstances.

A person acts purposely with respect to the nature of his/her conduct or a result thereof if it is his/her conscious object to engage in conduct of that nature or to cause such a result. A person acts purposely with respect to attendant circumstances if he/she is aware of the existence of such circumstances or he/she believes or hopes that they exist. "With purpose," "designed," "with design" or equivalent terms have the same meaning.⁴

The terms "knowingly" and "purposefully," like intent, refer to conditions of the mind that cannot be seen. It is not necessary for the State to prove the existence of such mental states by direct evidence such as a statement by the defendant that he/she had particular knowledge or a particular purpose. Knowledge and purpose as separate propositions of proof do not commonly exist. They must ordinarily be discovered as other mental states are from circumstantial evidence;

¹ This definition is taken from the definition of "prescription legend drug" set forth in N.J.S.A. 2C:35-2.

² This definition is taken from the definitions of "distribute" and "deliver" set forth in N.J.S.A. 2C:35-2.

³ State v. Heitzman, 209 N.J. Super. 617, 621 (App. Div. 1986), aff'd 107 N.J. 603 (1987).

⁴ N.J.S.A. 2C:2-2b(2).

that is, by reference to the defendant's conduct, words or acts and all the surrounding circumstances.

For Possession with Intent Cases

The first element the State must prove is that S-__ is a Prescription Legend Drug. (Read the definition above).

In regard to the second element, that the defendant had under his/her control or possessed S-__ in evidence, "possess" means. To "possess" an item under the law, one must have a knowing, intentional control of that item accompanied by knowledge of its character. So, a person who possesses an item such as **(IDENTIFY RELEVANT ITEM(S))** must know or be aware that he/she possesses it/them, and he/she must know what it is that he/she possesses or controls (that it is _____). [**WHERE APPLICABLE**, charge: Possession cannot merely be a passing control, fleeting or uncertain in its nature.] In other words, to "possess" an item, one must knowingly procure or receive an item or be aware of his/her control thereof for a sufficient period of time to have been able to relinquish his/her control if he/she chose to do so. To have under one's control means to be able to direct.⁵

A person may possess _____ (an item) even though it was not physically on his/her person at the time of the arrest, if he/she had in fact, at some time prior to his/her arrest had control over it.

Possession means a conscious, knowing possession, either actual or constructive.

[CHARGE THOSE FOLLOWING PARAGRAPHS WHICH APPLY TO YOUR CASE]

ACTUAL POSSESSION

A person is in actual possession of an item when he/she first, knows what it is: that is, he/she has knowledge of its character, and second, knowingly has it on his/her person at a given time.

⁵ This definition is taken from the model jury charge for Possession of CSAEM set forth in N.J.S.A.2C:24-4b(5)(b)

CONSTRUCTIVE POSSESSION⁶

Possession may be constructive instead of actual. As I just stated, a person who, with knowledge of its character, knowingly has direct physical control over an item at a given time is in actual possession of it.

Constructive possession means possession in which the possessor does not physically have the item on his or her person but is aware that the item is present and is able to and has the intention to exercise control over it. So, someone who has knowledge of the character of an item and knowingly has both the power and the intention at a given time to exercise control over it, either directly or through another person or persons, is then in constructive possession of that item.

MERE PRESENCE - Read if Applicable⁷

Defendant's mere presence at or near a place where [contraband] is/are discovered is not in itself, without more, proof beyond a reasonable doubt that defendant was in constructive possession of [that contraband]. It is, however, a circumstance to be considered with the other evidence in determining whether the State has proven possession of the [contraband] beyond a reasonable doubt.

Where defendant is one of the persons found in the area where [contraband] is/are discovered, you may not conclude, without more, that the State has proven beyond a reasonable doubt that he/she had possession of the [contraband] unless there are other circumstance(s) tending to permit such an inference to be drawn.⁸ Such evidence can include, but is not limited to [choose as appropriate]: placement and accessibility of the [contraband]; defendant's access to and

⁶ In State v. Spivey, 179 N.J. 229 (2004), the New Jersey Supreme Court affirmed a conviction under N.J.S.A. 2C:39-4.1(a), Possession of a Firearm While Committing Certain Drug Offenses. There, the Court noted that the statute suggests a temporal and spatial link between possession of the firearm and the drugs. The Court held: "The evidence must permit the jury to infer that the firearm was accessible for use in the commission of the [drug] crime." In the appropriate case, therefore, the possession charge may be supplemented by this language.

⁷ State v. Randolph, 228 N.J. 566, 590-93 (2017).

⁸ State v. Jackson, 326 N.J. Super. 276, 280 (App. Div. 1999); See State v. Brown, 80 N.J. 587, 593 (1979) and State v. Sapp, 71 N.J. 476 (1976), rev'g on dissent 144 N.J. Super. 455, 460 (1975).

connection with the place where the [contraband] was/were found; his/her proximity to the place where the [contraband] was/were found; his/her demeanor when confronted by police after the [contraband] was/were found; whether defendant made any inculpatory statements after the [contraband] was/were found; whether defendant possessed other [contraband] on his/her person or property when the [contraband] was/were found; [any other evidence deemed part of the totality of circumstances].⁹

In summary, the State must prove more than defendant's mere presence at the time that the [contraband] was/were found. There must be other circumstance(s) tying defendant to the [contraband] in order for the State to prove constructive possession beyond a reasonable doubt.¹⁰

JOINT POSSESSION

Possession may be sole or joint. If one person alone has actual or constructive possession of an item, possession is sole. If two or more persons share actual or constructive knowing possession of an item, possession is joint.

[RESUMPTION OF MAIN CHARGE]

In regard to the **third element**, the State must prove, as I have stated, that the defendant acted knowingly or purposefully in having under his/her control or possessing S-__ in evidence, (Read definition of knowingly/purposefully above).

In regard to the **fourth element**, that the defendant had the intent to distribute S-__ in evidence, "distribute" means the actual, constructive or attempted transfer,¹¹ from one person to another of a prescription legend drug. The intent must refer to the defendant's purpose to distribute S-__ in evidence (prescription legend drug) and not merely to possess S-__. It is not necessary that the item transfer in exchange for payment or promise of payment of money or anything of value.¹²

⁹ State v. Randolph, 228 N.J. at 590-93, citing State v. Palacio, 111 N.J. 543, 549-54 (1988) and State v. Shipp, 216 N.J. Super. 662, 664-66 (App. Div. 1987). See Palacio, Shipp, and State v. Montesano, 298 N.J. Super. 597, 615 (App. Div. 1997), certif. denied, 150 N.J. 27 (1997), for circumstances more specifically related to presence in or near an automobile in which drugs are found.

¹⁰ State v. Whyte, 265 N.J. Super. 518, 523 (App. Div. 1992), aff'd o.b. 133 N.J. 481 (1993); Jackson, 326 N.J. Super. at 280.

¹¹ This definition is taken from the definitions of "distribute" and "deliver" set forth in N.J.S.A. 2C:35-2.

¹² State v. Heitzman, 209 N.J. Super. 617, 621 (App. Div. 1986), aff'd 107 N.J. 603 (1987).

"Intent" means a purpose to do something, a resolution to do a particular act or accomplish a certain thing. Intent is a state of mind, and it is very rare that intent is proven by witnesses who can testify that an accused said he/she had a certain intent when he/she engaged in a particular act. The intention may be gathered from a person's acts, conduct, from all the person said and did at the particular time and place, and from all of the surrounding circumstances. You may consider any evidence as to the quantity, purity, and packaging¹³ of S-__ in evidence, together with all the other evidence in the case to aid you in your determination of the element of intent to distribute.

To reiterate, the elements of this offense are that:

1. S-__ is (insert appropriate prescription legend drug).
2. Defendant distributed S-__ on the date alleged in the Indictment.
3. Defendant knowingly or purposely distributed S-__ in evidence

OR

1. S-__ is (insert appropriate prescription legend drug).
2. Defendant [possessed] or [had under his/her control], S-__ on the date alleged in the Indictment.
3. Defendant knowingly or purposely possessed or obtained S-__ in evidence.
4. When defendant knowingly possessed S-__ or had S-__ under his/her control, defendant had the intent to distribute it.

If you find that the State has proven all these elements beyond a reasonable doubt, then you must return a verdict of guilty. On the other hand, if you find that the State has failed to prove any one of these elements beyond a reasonable doubt, then you must return a verdict of not guilty.

¹³ See State v. Perez, 218 N.J. Super. 478, 482-486 (App. Div. 1987).