

SUPPLEMENTAL CHARGE - NO EARLY RELEASE ACT
(N.J.S.A. 2C:43-7.2)

(To be used in cases in which the count of the indictment does not specifically require the State to prove beyond a reasonable doubt any of the NERA elements)¹

If you find the defendant² guilty of **(insert specific crime and count of the indictment)**, you must then determine whether the State has proven beyond a reasonable doubt that the crime committed by the defendant is a violent crime. Under our law, a violent crime is a crime in which the defendant:

(Choose applicable conduct)

used or threatened the immediate use of a deadly weapon.³ For purposes of this determination, “deadly weapon” means any firearm or other weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner it is used or intended to be used, is known to be capable of producing death or serious bodily injury. Please note that this definition of “deadly weapon” differs from the previous definition that I gave you which included that a deadly weapon could be “an object that the victim reasonably believed to be capable of producing death or serious bodily injury.”⁴ **[insert specific example]** To find the defendant guilty of committing a violent crime, you must find that the defendant used or threatened the immediate use of a deadly weapon which was actually capable of producing death or serious bodily injury. “Serious bodily injury” means bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.⁵

¹ This instruction should be given for any count of an indictment that may trigger the No Early Release Act if the language of the indictment does not require a specific finding by the jury that the State has proven the necessary additional NERA elements. State v. Johnson, 166 N.J. 523 (2001). This charge will also be used when the defendant pleads guilty to an offense, but exercises (his/her) right to a jury trial on the NERA issue.

² In State v. Rumblyn, 166 N.J. 550 (2001), the Supreme Court held that NERA may apply to accomplices as well as principals.

³ Proof that a defendant used or threatened the use of a deadly weapon is a prerequisite to parole ineligibility under the No Early Release Act; mere possession does not suffice. State v. Pierre, 329 N.J. Super. 588, 748 A.2d 654 (L.1999), affirmed 330 N.J. Super. 7, 748 A.2d 1129.

⁴ For cases interpreting “deadly weapon” under the Act, see State v. Ainis, 317 N.J. Super. 127, 721 A.2d 329 (Law Div.1998), AIDS-infected hypodermic needle; State v. Perez, 331 N.J. Super. 497, 752 A.2d 378 (Law Div. 2000), triggerless handgun that maintained permanent characteristics of a firearm; State v. Pierre, 330 N.J. Super. 7, 748 A.2d 1129 (App. Div. 2000), unopened knife; State v. Burford, 163 N.J. 16, 746 A.2d 998 (2000), stolen automobile; State v. Cheung, 328 N.J. Super. 368, 746 A.2d 38 (App. Div. 2000), BB gun; State v. Grawe, 327 N.J. Super. 579, 744 A.2d 246 (App. Div. 2000), certif. denied 164 N.J. 560, 753 A.2d 1152, hand-held hammer; State v. Meyer, 327 N.J. Super. 50, 742 A.2d 614 (App. Div. 2000), certif. denied 164 N.J. 191, 752 A.2d 1292, pellet gun; State v. Austin, 335 N.J. Super. 486 (App. Div. 2000), inoperable BB gun.

⁵ N.J.S.A. 2C:11-1.

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(or)

caused death or serious bodily injury.⁶ “Serious bodily injury” means bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

(or)

used, or threatened the immediate use of physical force during an aggravated sexual assault or a sexual assault. For purposes of determining whether the defendant has committed a violent crime, the meaning of “physical force” is different from the level of force that I have previously defined and means an independent act of force or violence in addition to the act of sexual touching or penetration constituting physical force when the victim does not consent.⁷

If you are satisfied that the State has proven beyond a reasonable doubt that the defendant committed a violent crime by **(insert applicable elements)**, you must mark “yes” on the appropriate section of the verdict sheet which will be supplied to you. If you are not satisfied that the State has proven beyond a reasonable doubt that the defendant has committed a violent crime by **(insert applicable elements)**, you must mark “no” on the verdict sheet.

⁶ (NERA) applies only to violent crimes in which the actor actually causes death or serious bodily injury. State v. Staten, 327 N.J. Super. 349, 743 A.2d 365 (App. Div. 2000), certif. denied 164 N.J. 561, 753 A.2d 1153. (NERA) applies to vehicular homicide committed by causing death through the reckless operation of a vehicle. State v. Ferencsik, 326 N.J. Super. 228, 741 A.2d 101 (App. Div. 1999). In State v. Newman, 325 N.J. Super. 556, 740 A.2d 153 (App. Div. 1999), certif. denied 163 N.J. 396, 749 A.2d 370, it was held that reckless manslaughter is a “violent crime” within the meaning of (NERA) and that the statute that requires “knowingly” as the culpability element when no culpable mental state is expressly designated in a statute only applies to statutes defining offenses and does not apply to (NERA). However, to the extent that the holding in State v. Johnson suggests that NERA is a separate violent crime with additional separate elements, the requirement of a “knowing” level of culpability may need to be revisited.

⁷ State v. Thomas, 322 N.J. Super. 512, 731 A.2d 532 (App. Div. 1999), aff’d 166 N.J. 560 (2001).