

**CERTAIN PERSONS NOT TO HAVE ANY FIREARMS<sup>1</sup>**

**N.J.S.A. 2C:39-7(b)(1)<sup>2</sup>**

**NOTE**

**[The following should be charged before the beginning of the second trial if it is tried before the same jury that decided the possessory charge of a weapon or firearm]**

Now there is an additional charge for you to consider.

Count\_\_\_\_\_ charges the defendant with possession of a firearm by a previously convicted person.

**(Read Certain Persons count of the Indictment)<sup>3</sup>**

You must disregard completely your prior verdict, and consider anew the evidence previously admitted on the possession of a weapon. The defendant is entitled to the presumption of innocence. Each and every material fact that makes up the crime, including the element of possession, must be proven by the State beyond a reasonable doubt.<sup>4</sup>

**[CHARGE IN ALL CASES]**

Count\_\_\_\_\_ of the indictment charges defendant with violating a statute, which reads as follows:

Any person having been convicted in this State or elsewhere of [certain enumerated offenses<sup>5</sup>] OR [a predicate offense]<sup>6</sup> who purchases, owns,

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<sup>1</sup> This charge should not be used when the indictment charges a fourth-degree crime involving the possession of a prohibited weapon under N.J.S.A. 2C:39-7(a).

<sup>2</sup> This charge may not be appropriate where the prior conviction was for domestic violence. See Model Jury Charge for N.J.S.A. 2C:39-7(b)(2).

<sup>3</sup> If defendant is stipulating to the predicate offense, do not read the crime listed in the Certain Persons count.

<sup>4</sup> See State v. Ragland, 105 N.J. 189, 195 (1986).

<sup>5</sup> The crimes set forth in the statute include the commission or an attempt or conspiracy to commit aggravated assault, arson, burglary, escape, extortion, homicide, kidnapping, robbery, aggravated sexual assault, sexual assault, bias intimidation in violation of N.J.S.A. 2C:16-1, carjacking in violation N.J.S.A. 2C:15-2, gang criminality in violation of N.J.S.A. 2C:33-29, racketeering in violation of N.J.S.A. 2C:41-2, terroristic threats in violation of N.J.S.A. 2C:12-3, unlawful possession of a machine gun in violation of subsection a. of N.J.S.A. 2C:39-5, unlawful possession of a handgun in violation of paragraph (1) of subsection b. of N.J.S.A. 2C:39-5, unlawful possession of an assault firearm in violation of subsection f. of N.J.S.A. 2C:39-5, leader of a firearms trafficking network in violation of N.J.S.A. 2C:39-16, endangering the welfare of a child pursuant to N.J.S.A. 2C:24-4, stalking pursuant to N.J.S.A. 2C:12-10, or a crime involving domestic violence as defined in N.J.S.A. 2C:25-19, whether or not armed with or having in his/her possession a weapon enumerated in subsection r. of N.J.S.A. 2C:39-1. Additionally, the commission or an attempt or conspiracy to commit the following crimes are included: N.J.S.A. 2C:35-3 through N.J.S.A. 2C:35-6 inclusive; N.J.S.A. 2C:35-7; N.J.S.A. 2C:35-11; N.J.S.A. 2C:39-3; N.J.S.A. 2C:39-4; or N.J.S.A. 2C:39-9. When a defendant does not stipulate to a predicate offense under the certain persons statute, the State shall produce evidence of the predicate offense: the judgment of conviction with the unredacted nature of the offense, the degree of offense, and the date of conviction. See State v. Bailey, 231 N.J. 474 (2018).

<sup>6</sup> See State v. Brown, 180 N.J. 572, 585 (if defendant stipulates to the offense, the jury must be instructed

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possesses or controls a firearm is guilty of a crime.

In order for you to find defendant guilty, the State must prove each of the following elements beyond a reasonable doubt:

1. Exhibit\_\_\_\_\_is a firearm [or that there was a firearm].
2. Defendant purchased, owned, possessed or controlled the firearm [on the date alleged in the indictment].
3. Defendant is a person who previously has been convicted of [a certain enumerated crime named in the statute] **OR** [a predicate offense].

The first element the State must prove beyond a reasonable doubt is that exhibit\_\_\_\_\_is a firearm<sup>7</sup> [or that there was a firearm]. A “firearm” means any handgun,<sup>8</sup> rifle, shotgun, machine gun, automatic or semi-automatic rifle, or any gun, device or instrument in the nature of a weapon from which may be fired or ejected any solid projectable ball, slug, pellet, missile or bullet, or any gas, vapor or other noxious thing, by means of a cartridge or shell or by the action of an explosive or the igniting of flammable or explosive substances. It shall also include, without limitation, any firearm which is in the nature of an air gun, spring gun or pistol or other weapon of a similar nature in which the propelling force is a spring, elastic band, carbon dioxide, compressed or other gas or vapor, air or compressed air, or is ignited by compressed air, and ejecting a bullet or missile smaller than three-eighths of an inch in diameter, with sufficient force to injure a person.

The second element the State must prove beyond a reasonable doubt is that defendant knowingly<sup>9</sup> purchased, owned, possessed or controlled a firearm. A person acts knowingly with respect to the nature of his conduct or the attendant circumstances if he is aware that the conduct is of that nature or that such circumstances exist or the person is aware of a high probability of their existence. A person acts knowingly with respect to a result of the conduct if he is aware that it is practically certain that the conduct will cause a result. “Knowing,” “with knowledge,” or

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only that defendant was convicted of a predicate offense). Defendant’s stipulation must be a knowing and voluntary waiver of rights, placed on the record in defendant’s presence; the prosecution is limited to announcing to the jury that the defendant has committed an offense that satisfies the statutory predicate-offense element. See Bailey, supra; see also State v. Alvarez, 318 N.J. Super. 137, 150-54 (App. Div. 1999) (defendant’s offer to stipulate that his or her prior convictions meet the status element of N.J.S.A. 2C:39-7 must be granted). Accord State v. Harvey, 318 N.J. Super. 167, 173 (App. Div. 1999).

<sup>7</sup> See N.J.S.A. 2C:39-1(f) for definition of “firearm.”

<sup>8</sup> Handgun means any pistol, revolver or other firearm originally designed or manufactured to be fired by the use of a single hand. N.J.S.A. 2C:39-1(k). The handgun need not be presently operable. State v. Gantt, 101 N.J. 573 (1986).

<sup>9</sup> N.J.S.A. 2C:2-2(c)(3) applies the culpable state of mind of knowingly, pursuant to N.J.S.A. 2C:2-2(b)(2), to this statutory crime.

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equivalent terms have the same meaning.

Knowledge is a condition of the mind. It cannot be seen. It can only be determined by inference from defendant's conduct, words or acts. A state of mind is rarely susceptible of direct proof but must ordinarily be inferred from the facts. Therefore, it is not necessary that the State produce witnesses to testify that an accused said that he had a certain state of mind when he did a particular thing. It is within your power to find that such proof has been furnished beyond a reasonable doubt by inference which may arise from the nature of his acts and conduct and from all he said and did at the particular time and place and from all surrounding circumstances established by the evidence.

To possess<sup>10</sup> an item under the law, one must have a knowing intentional control of that item accompanied by a knowledge of its character. So, a person who possesses the firearm must know or be aware that he possesses it, and he must know what it is that he possesses or controls, that is, that it is a firearm.

**[Where applicable charge the following:** Possession cannot merely be a passing control, fleeting or uncertain in its nature.] In other words, to "possess" within the meaning of the law, the defendant must knowingly procure or receive the item possessed or be aware of his control thereof for a sufficient period of time to have been able to relinquish his control if he chose to do so.

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

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

**[CHARGE THE FOLLOWING PARAGRAPHS WHICH APPLY TO CASE]**

**ACTUAL POSSESSION**

A person is in actual possession of a particular article or thing when he first, knows what it is: that is, he has knowledge of its character, and second, knowingly has it on his person at a given time.

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<sup>10</sup> N.J.S.A. 2C:2-1. Additionally, charge any applicable and appropriate statutory inferences. For example, see N.J.S.A. 2C:39-2, which creates certain statutory inferences when a weapon is found in a motor vehicle. See also, N.J.R.E. 303.

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**CONSTRUCTIVE POSSESSION<sup>11</sup>**

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 a thing, 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 Appropriate<sup>12</sup> ]**

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 the defendant had possession of the [contraband] unless there are other circumstance(s) tending to permit such an inference to be drawn.<sup>13</sup> Such evidence can include, but is not limited to [choose as appropriate]: placement and accessibility of the [contraband]; defendant's access to and connection with the place where the [contraband] was/were found; the defendant's proximity to the place where the [contraband] was/were found; the defendant's 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 the defendant's person or property when the [contraband] was/were found; [any other evidence

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<sup>11</sup> In State v. Spivey, 179 N.J. 229 (2004), the Supreme Court affirmed a conviction under N.J.S.A. 2C:39-4.1(a), possession of a firearm while committing certain drug offenses, and noted that the statute suggested a temporal and spatial link between possession of the firearm and the drugs. The Court ruled that 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, the possession charge may be supplemented by this language.

<sup>12</sup> State v. Randolph, 228 N.J. 566, 590-93 (2017).

<sup>13</sup> 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).

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deemed part of the totality of circumstances].<sup>14</sup>

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.<sup>15]</sup>

**JOINT POSSESSION**

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

**[Choose the appropriate next paragraph from the following two]**

**[If defendant does not stipulate to the predicate offense(s), use the following paragraph]**

The third element the State must prove beyond a reasonable doubt is that defendant is a person who previously has been convicted of a certain enumerated crime. The statute specifically provides that "any person having been convicted in this State or elsewhere of the crime of [Select the enumerated crime listed in the indictment for the Certain Persons count and see footnote 5 supra] who possesses or controls a firearm is guilty of a crime." The term "convicted of the crime(s) of ..." means evidence of a judgment of conviction<sup>16</sup> entered by a court of competent jurisdiction in this State, New Jersey, or elsewhere.<sup>17</sup> **[Read if appropriate:** If defendant has been convicted in another state, territory, commonwealth or other jurisdiction of the United States, or any country in the world, in a court of competent jurisdiction, of a crime which in said other jurisdiction or country is comparable to the crime(s) of \_\_\_\_\_, then defendant is subject to the provisions of this statute.<sup>18]</sup> Here, the State has introduced evidence that the defendant was

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<sup>14</sup> State v. Randolph, supra, 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.

<sup>15</sup> 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.

<sup>16</sup> In New Jersey Superior Court, this document is known as a Judgment of Conviction. However, in Municipal Courts throughout this state and in other jurisdictions, the name of the document may vary.

<sup>17</sup> When a defendant does not stipulate to a predicate offense under the certain persons statute, the State shall produce evidence of the predicate offense: the judgment of conviction with the unredacted nature of the offense, the degree of offense, and the date of conviction. See Bailey, supra. The court should redact from the Judgment of Conviction any information not relevant to what the Bailey holding permits.

<sup>18</sup> N.J.S.A. 2C:39-7(c).

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previously convicted of [specify unredacted nature of offense, degree, and date of conviction].

**[or]**

**[Where defendant does stipulate to the predicate offense, use the following]**

The third element the State must prove beyond a reasonable doubt is that defendant is a person who previously has been convicted of a crime named in the statute or [of the predicate offense]. In this matter, the parties have stipulated, or agreed, that defendant has previously been convicted of such a crime [or a predicate offense]. You are instructed as follows with regard to the stipulation: that you should treat these facts as being undisputed, that is, the parties agree that these facts are true. As with all evidence, undisputed facts can be accepted or rejected by the jury in reaching a verdict.

**[Charge in all cases]**

Normally evidence [of defendant's prior conviction(s)] or [of the predicate offense(s)] is not permitted under our rules of evidence. This is because our rules specifically exclude evidence that a defendant has committed prior crimes when it is offered only to show that he has a disposition or tendency to do wrong and therefore must be guilty of the present offense. However, our rules do permit evidence of prior crimes when the evidence is used for some other purpose.<sup>19</sup>

In this case, the evidence has been introduced for the specific purpose of establishing an element of the present offense.<sup>20</sup> You may not use this evidence to decide that defendant has a tendency to commit crimes or that he is a bad person. That is, you may not decide that, just because the defendant has committed [a] prior crime[s], he must be guilty of the present crime[s]. The evidence produced by the State concerning [a] prior conviction[s] is to be considered in determining whether the State has established its burden of proof beyond a reasonable doubt.<sup>21</sup>

**[Charge if applicable (where the same jury has already convicted the defendant of another possessory weapons offense or offenses – a bifurcated trial situation):<sup>22</sup>**

On the issue of possession, although you may consider evidence previously introduced, the

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<sup>19</sup> See State v. Marrero, 148 N.J. 469, 495-96 (1997); State v. Cusick, 219 N.J. Super. 452, 466-67 (App. Div. 1987) (cited in State v. Oliver, 133 N.J. 141, 158 (1993)).

<sup>20</sup> If defendant testifies, this portion of the charge should be altered.

<sup>21</sup> Brown, 180 N.J. at 583 (absence of information about all of the elements of the crime might cause the jury to question the criminality of the defendant's conduct, and in turn influence the jury when it considers the possession element.)

<sup>22</sup> The defendant may affirmatively request that this charge not be given. Alvarez, 318 N.J. Super. at 155.

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State must prove beyond a reasonable doubt that defendant possessed the [firearm] before you may find the defendant guilty on this charge. In deciding whether the State has carried its burden of proof, you must set aside your previous verdict on this question and begin your deliberations anew.<sup>23</sup>]

**[Charge in all cases]**

In summary, the State must prove three elements beyond a reasonable doubt - first, that exhibit\_\_\_\_\_is a firearm (or that there was a firearm); second, that defendant knowingly purchased, owned, possessed or controlled the firearm on\_\_\_\_\_ [the date alleged in the indictment]; and third, **[choose the appropriate phrase:]** that defendant is a person who previously has been convicted of a certain enumerated crime named in the statute **OR** [of the predicate offense].

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

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<sup>23</sup> Alvarez, 318 N.J. Super. at 154-55.