

**DISTRIBUTION OF AN IMITATION
CONTROLLED DANGEROUS SUBSTANCE
(N.J.S.A. 2C:35-11)**

Count _____ of the indictment charges the defendant as follows:

(Read indictment)

The pertinent part of the statute (N.J.S.A. 2C:35-11) on which this indictment is based reads as follows:

- a. It is unlawful for any person to distribute any substance which is not a controlled dangerous substance or controlled substance analog:

[Read Appropriate Section or Sections of the Statute]¹

- (1) Upon the express or implied representation to the recipient that the substance is a controlled dangerous substance [or controlled substance analog]; or
- (2) Upon the express or implied representation to the recipient that the substance is of such nature, appearance or effect that the recipient will be able to distribute or use the substance as a controlled dangerous substance [or controlled substance analog]; or
- (3) Upon circumstances which would lead a reasonable person to believe that the substance is a controlled dangerous substance [or controlled substance analog].

The statute, read together with the indictment, identifies the elements which the State must prove beyond a reasonable doubt to establish guilt of the defendant on this (count of the) indictment.

They are as follows:

1. S _____ in evidence is not a controlled dangerous substance or controlled substance analog.
2. That either:

¹ The statute provides that this offense may be committed in three ways; that is by representation that the substance is a CDS, by representation that the substance can be used or distributed as a CDS, and under circumstances under which a reasonable person would believe the substance to be a CDS. The circumstances of the case will determine which one (or more) of these sections should be charged.

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A. The defendant made an expressed or implied representation to the recipient that S _____ in evidence is a controlled dangerous substance, specifically (e.g. cocaine)

or

B. The defendant made an expressed or implied representation to the recipient that S _____ in evidence is of such nature, appearance or effect that the recipient will be able to distribute or use S _____ in evidence as a controlled dangerous substance, specifically (e.g., cocaine)

or

C. The defendant possessed or had under his/her control with intent to distribute S _____ in evidence under circumstances which would lead a reasonable person to believe that the substance is a controlled dangerous substance, specifically (e.g., cocaine).

3. The defendant distributed S _____ in evidence.

4. The defendant, acted knowingly in distributing S _____ in evidence.²

As I have stated, the first element is that S _____ in evidence is not a controlled dangerous substance or controlled substance analog. Controlled dangerous substances are defined in another part of our law. A controlled substance analog is a substance that (1) has a chemical structure substantially similar to that of a controlled dangerous substance and (2) was specifically designed to produce an effect substantially similar to that of a controlled dangerous substance.³ You have heard testimony in this case that S _____ in evidence is _____. It is, of course, up to you to determine whether this testimony is credible. However, I instruct you that _____ is not a controlled dangerous substance. You have also heard testimony that _____ is not a controlled substance analog in that it would not produce an effect substantially similar to that of a controlled dangerous substance and that it was not specifically designed to produce such an effect. Again, it is solely up to you to determine whether this

² The statute does not specify a mental element. (Compare N.J.S.A. 2C:35-5 which specifies a knowingly or purposefully distribution of CDS.) Nonetheless, in light of N.J.S.A. 2C:2-2c(3) it would seem that a knowing distribution is required.

³ N.J.S.A. 2C:35-2.

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testimony is credible.

In regard to the second element, as I have instructed you, you must decide whether the State has proven beyond a reasonable doubt [charge appropriate section or sections]:

That either:

A. The defendant made an expressed or implied representation to the recipient that S _____ in evidence is a controlled dangerous substance, specifically (e.g. cocaine)

or

B. The defendant made an expressed or implied representation to the recipient that S _____ in evidence is of such nature, appearance or effect that the recipient will be able to distribute or use S _____ in evidence as a controlled dangerous substance, specifically (e.g., cocaine)

or

C. The defendant possessed or had under his/her control with intent to distribute S _____ in evidence under circumstances which would lead a reasonable person to believe that the substance is a controlled dangerous substance, specifically (e.g., cocaine).

[In determining whether the circumstances were such as to lead a reasonable person to believe that S _____ is a controlled dangerous substance, specifically (e.g., cocaine), you should of course consider all the evidence including whether S _____ was packaged in a manner normally used for the unlawful distribution of controlled dangerous substances; whether any distribution or attempted distribution of S _____ was accompanied by an exchange of or demand for money or other thing as consideration for S _____ and the value of the consideration exceeded the reasonable value of S _____; and whether the physical appearance of S _____ is substantially the same as that of a specific controlled dangerous substance.]⁴

[**Note:** When it is charged that the substance is an imitation of a controlled dangerous substance analog, the following charge, rather than the one set forth above, should be given as the instruction on the second element of the offense.]

In regard to the second element, you must decide whether the State has proven beyond a

⁴ N.J.S.A. 2C:35-11a(3)(a) through (c). This language only should be charged when the third alternative is applicable.

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reasonable doubt [charge appropriate section or sections]:

A. The defendant made an expressed or implied representation to the recipient that S _____ in evidence is a controlled substance analog, *i.e.*, the defendant expressly or impliedly represented that S _____ in evidence has a chemical structure substantially similar to (*e.g. cocaine*) and that S _____ in evidence was specifically designed to produce an effect substantially similar to that of (*e.g. cocaine*)

or

B. The defendant made an expressed or implied representation to the intended recipient that S _____ is of such a nature or effect that the recipient will be able to distribute or use S _____ in evidence as a controlled substance analog, *i.e.* the defendant expressly or impliedly represented that the recipient will be able to distribute or use S _____ as a substance that has a chemical structure substantially similar to (*e.g., cocaine*) and as a substance that was specifically designed to produce an effect substantially similar to (*e.g. cocaine*)

or

C. The defendant possessed or had under his/her control with intent to distribute S _____ in evidence under circumstances which would lead a reasonable person to believe that the S _____ in evidence is a controlled substance analog, *i.e.* that S _____ in evidence has a chemical structure substantially similar to that of (*e.g., cocaine*) and that S _____ in evidence was specifically designed to produce an effect substantially similar to (*e.g. cocaine*).

[In determining whether the circumstances were such as to lead a reasonable person to believe that S _____ is a controlled substance analog, you should of course, consider all the evidence, including whether S _____ was packaged in a manner normally used for the unlawful distribution of controlled dangerous substances or controlled substance analogs; whether any distribution or attempted distribution of S _____ was accompanied by an exchange of or demand for money or other thing as consideration for S _____, and the value of the consideration exceeded the reasonable value of S _____; and whether the physical appearance of S _____ is substantially the same as that of a specific controlled dangerous substance or controlled substance analog.]⁵

⁵ N.J.S.A. 2C:35-11a(3)(a) through (c). This language should only be charged when the third alternative is applicable.

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In regard to the third element, that the defendant distributed S _____ in evidence, to "distribute" means the transfer, actual, constructive or attempted,⁶ from one person to another of a controlled dangerous substance (or controlled substance analog). It is not necessary that the drugs be transferred in exchange for payment or promise of payment of money or anything of value.⁷

In regard to the fourth element, the State must prove, as I have stated, that the defendant acted knowingly in distributing 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 a high probability of their existence. A person acts knowingly with respect to a result of his/her conduct if he/she is aware that it is practically certain that his/her conduct will cause such a result. "Knowing," "with knowledge" or equivalent terms have the same meaning.⁸

Remember that when we speak of knowingly, we are speaking of a condition of the mind that cannot be seen. It is not necessary for the State to prove the existence of such mental state by direct evidence such as a statement by the defendant that he/she had particular knowledge. Knowledge as a separate proposition of proof does not commonly exist. It must ordinarily be discovered as other mental states are from circumstantial evidence; that is, by reference to the defendant's conduct, words or acts and all the surrounding circumstances.

It should be noted that the law provides that it shall not be a defense that the defendant mistakenly believed a substance to be a controlled dangerous substance [or controlled substance analog.]⁹ Thus, if you were to find that the defendant acted knowingly in distributing S _____ in evidence but mistakenly believed that S _____ in evidence was a controlled dangerous substance [or controlled substance analog], as opposed to an imitation controlled dangerous substance [or imitation controlled substance analog], the defendant's mistaken belief as to the character of S _____ evidence would not prevent you from finding that the defendant acted knowingly in distributing S _____ in evidence.

⁶ This definition is taken from the definitions of "distribute" and "deliver" set forth in N.J.S.A. 2C:35-2.

⁷ State v. Heitzman, 209 N.J.Super. 617, 621 (App. Div. 1986), aff'd 107 N.J. 603 (1987).

⁸ N.J.S.A. 2C:2-2b(1).

⁹ N.J.S.A. 2C:35-11c.

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To reiterate, the four elements of this offense are that

1. S _____ in evidence is not a controlled dangerous substance or controlled substance analog.
2. A. The defendant made an expressed or implied representation to the recipient that S _____ in evidence is a controlled dangerous substance, specifically (e.g., cocaine)
or
B. The defendant made an expressed or implied representation to the recipient that S _____ in evidence is of such nature, appearance or effect that the recipient will be able to distribute or use S _____ in evidence as a controlled dangerous substance, specifically (e.g., cocaine)
or
C. The defendant possessed or had under his/her control with intent to distribute S _____ in evidence under circumstances which would lead a reasonable person to believe that the substance is a controlled dangerous substance, specifically (e.g., cocaine).
3. The defendant distributed S _____ in evidence.
4. The defendant acted knowingly in distributing S _____ in evidence.

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