

**POSSESSION OF A SAWED-OFF SHOTGUN<sup>1</sup>**  
**(N.J.S.A. 2C:39-3b)**

Count \_\_\_\_\_ charges defendant with possession of a sawed-off shotgun.

**[READ COUNT OF INDICTMENT]**

The pertinent part of the statute on which the indictment is based states that: “[a]ny person who knowingly has in his possession any sawed-off shotgun is guilty of a crime[.]”

In order to convict defendant of this offense, you must be satisfied that the State has proved each of the following two elements beyond a reasonable doubt:

1. (That Exhibit S-\_\_\_\_\_ is a sawed-off shotgun) (that there was a sawed-off shotgun); and
2. That defendant knowingly possessed (Exhibit S-\_\_\_\_\_) (a sawed-off shotgun).

The first element that the State must prove beyond a reasonable doubt is (that Exhibit S-\_\_\_\_\_ is a sawed-off shotgun) (that there was a sawed-off shotgun). The term "shotgun" means any firearm designed to be fired from the shoulder and using the energy of the explosive in a fixed shotgun shell to fire through a smooth bore either a number of ball shots or a single projectile for each pull of the trigger. The term "shotgun" also means any firearm designed to be fired from the shoulder which does not fire fixed ammunition.<sup>2</sup> A sawed-off shotgun is any of the following: (1) a shotgun having a barrel(s) of less than 18 inches measured from the breech to the muzzle; (2) a rifle<sup>3</sup> having a barrel of less than 16 inches in length measured from the breech to the muzzle; or (3) any firearm made from a rifle or shotgun that, as modified, has an overall length of less than 26 inches.<sup>4</sup>

New Jersey law classifies a sawed-off shotgun as a prohibited weapon. This means that one cannot obtain a permit or license for a sawed-off shotgun and that a sawed-off shotgun cannot lawfully be possessed in this state.<sup>5</sup> The State is not required to prove that (Exhibit S-\_\_\_\_\_) (the sawed-off shotgun) was operable, *i.e.*, capable of firing a shot or

<sup>1</sup> N.J.S.A. 2C:39-3b is now included in the Graves Act. N.J.S.A. 2C:43-6c; L. 2007, c. 341, § 5 (effective January 13, 2008).

<sup>2</sup> N.J.S.A. 2C:39-1n. Note that fixed ammunition is ammunition encased in an explosive cartridge that propels the round.

<sup>3</sup> N.J.S.A. 2C:39-1m defines the term "rifle" to mean any firearm designed to be fired from the shoulder using the energy of the explosive in a fixed metallic cartridge to fire a single projectile through a rifled bore for each single pull of the trigger.

<sup>4</sup> N.J.S.A. 2C:39-1o.

<sup>5</sup> See Miller, New Jersey Practice, Criminal Law, § 535 at 41. Cf., State v. Gaines, 147 N.J. Super. 84, 95-96 (App. Div. 1975), aff'd o.b. sub nom. State v. Powers, 72 N.J. 396 (1977). Note, however, that the prohibited weapons statute contains a narrow exemption for military personnel acting under color of law, regulation or military orders and law enforcement officers acting in the performance of their duties. See N.J.S.A. 2C:39-3g.

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projectile, on (date of incident). The statute only requires that it be proven to be a rifle or shotgun in terms of its original design.<sup>6</sup>

The second element that the State must prove beyond a reasonable doubt is that defendant knowingly possessed (Exhibit S-\_\_\_\_) (the sawed-off shotgun) at the time and place alleged. Here, the State alleges that (set forth allegations).

A person acts knowingly with respect to the nature of his/her conduct or the attendant circumstances if he/she 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/she is aware that it is practically certain that the conduct will cause a result. “Knowing,” “with knowledge,” or 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/she had a certain state of mind when he/she 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/her acts and conduct and from all he/she said and did at the particular time and place and from all surrounding circumstances established by the evidence.

Thus, the person must know or be aware that he/she possessed the item, here, a sawed-off shotgun. However, the State is not required to prove that, at the time that he/she knowingly possessed the firearm at issue, defendant also knew that its overall length or barrel length was illegally short.<sup>7</sup>

Defendant’s possession cannot merely be a passing control that is 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/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.

When we speak of possession, we mean a conscious, knowing possession. The law recognizes two kinds of possession: actual possession and constructive possession.

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<sup>6</sup> See State v. Gantt, 101 N.J. 573, 589-90 (1986).

<sup>7</sup> State v. Smith, 197 N.J. 325 (2009).

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A person is in actual possession of a particular article or thing when he/she knows what it is: that is, he/she has knowledge of its character and knowingly has it on his/her person at a given time. 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 person does not physically have the property, but he/she is aware of the presence of the property and is able to and has the intention to exercise control over it.

A person who, although not in actual possession, has knowledge of its character, knowingly has both the power and the intention at a given time to exercise control over a thing, either directly or through another person or persons, is then in constructive possession of it.

The law recognizes that 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 possession of a thing, possession is joint; that is, if they knowingly share control over the article.<sup>8</sup>

If the State has proven both elements of this crime beyond a reasonable doubt, then you must find defendant guilty of possession of a sawed-off shotgun. On the other hand, if the State has failed to prove either element beyond a reasonable doubt, you must find him/her not guilty.

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<sup>8</sup> If the weapon was found in a vehicle, the jury should be instructed on the permissive inference of possession allowed by N.J.S.A. 2C:39-2a. See State v. Bolton, 230 N.J. Super. 476, 480-81 (App. Div. 1989) (construing the statutory presumption in N.J.S.A. 2C:39-2a to permit only an inference for the jury's consideration). See also N.J.R.E. 303 ("presumptions against the accused in criminal cases").