

**POSSESSION OF A DEFACED FIREARM<sup>1</sup>**  
**(N.J.S.A. 2C:39-3d)**

Count \_\_\_\_\_ of the indictment charges defendant with possession of a defaced firearm.

**[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 firearm which has been defaced is guilty of a crime.”<sup>2</sup>

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

1. (That Exhibit S-\_\_\_\_ is a firearm) (that there was a firearm);
2. (That Exhibit S-\_\_\_\_ is defaced) (that the firearm was defaced); and
3. That defendant knowingly possessed (Exhibit S-\_\_\_\_) (the defaced firearm).

The first element that the State must prove beyond a reasonable doubt is that (Exhibit S-\_\_\_\_) (there was) a firearm. The term "firearm" means any handgun, 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.<sup>3</sup> The State is not required to prove that (Exhibit S-\_\_\_\_) (the firearm) was operable, *i.e.*, capable of firing a bullet or other projectile, on (date of incident). The statute only requires that (Exhibit S-\_\_\_\_) (the firearm) be proven to be a firearm in terms of its original design.<sup>4</sup>

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<sup>1</sup> N.J.S.A. 2C:39-3d 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> Note that the statute exempts possession of an "antique firearm" or an "antique handgun" that may be defaced. Where appropriate, the above instruction should be expanded to include the definition of "antique firearm" [N.J.S.A. 2C:39-1a] and/or "antique handgun" [N.J.S.A. 2C:39-1aa]. Also exempted from the prohibition on possession of a defaced firearm are 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.

<sup>3</sup> N.J.S.A. 2C:39-1f. The statutory definition also encompasses air guns, spring guns and other firearms which discharge a bullet or projectile smaller than three-eighths of an inch in diameter with force sufficient to cause injury.

<sup>4</sup> See State v. Gantt, 101 N.J. 573, 589-590 (1986); State v. Orlando, 269 N.J. Super. 116, 129 (App. Div. 1993), certif. denied, 136 N.J. 30 (1994). The only exception to this rule is a firearm that has been so mutilated or destroyed that it cannot be called a gun. State v. Gantt, supra, 101 N.J. at 589.

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The second element that the State must prove beyond a reasonable doubt is that (Exhibit S-\_\_\_ is) (the firearm was) defaced. The term “defaced” means that the name of the maker, model designation, manufacturer's serial number or any other distinguishing identification mark or number on the firearm has been removed, defaced, covered, altered or destroyed.<sup>5</sup>

The third element that the State must prove beyond a reasonable doubt is that defendant knowingly possessed the defaced firearm at the time and place alleged. Here, the State alleges (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 firearm. The State was not required to prove that, at the time that he/she knowingly possessed the firearm, defendant also knew that it was defaced.<sup>6</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>5</sup> N.J.S.A. 2C:39-1b.

<sup>6</sup> State v. Smith, 197 N.J. 325, 338 (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>7</sup>

If the State has proven each element of this crime beyond a reasonable doubt, then you must find defendant guilty of possession of a defaced firearm. On the other hand, if the State has failed to prove any element beyond a reasonable doubt, you must find him/her not guilty.

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<sup>7</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").