

**UNLAWFUL POSSESSION OF A MACHINE GUN**  
**(N.J.S.A. 2C:39-5a)**

Defendant(s) is charged in count \_\_\_\_\_ with unlawful possession of a machine gun. The statute upon which this count is based reads as follows:

Any person who knowingly has in his possession a machine gun or any instrument or device adaptable for use as a machine gun, without being licensed to do so is guilty of a crime.

In order to convict the defendant, the State must prove each of the following elements beyond a reasonable doubt:

1. S \_\_\_\_\_ is (a machine gun)(an instrument or device adaptable for use as a machine gun) **or** (There was a machine gun);
2. That the defendant knowingly possessed (a machine gun)(an instrument or device adaptable for use as a machine gun); and
3. That the defendant did not have a license to (possess)(carry) such a weapon.

The first element that the State must prove beyond a reasonable doubt is that S \_\_\_\_\_ (is a machine gun)(is an instrument or device adaptable for use as a machine gun) (OR) (that there was a machine gun.)

A “Machine gun” is defined as any firearm, mechanism or instrument not requiring that the trigger be pressed for each shot and having a reservoir, belt or other means of storing and carrying ammunition which can be loaded into the firearm, mechanism or instrument and fired therefrom.<sup>1</sup>

**(CHARGE IF APPROPRIATE)**

An instrument or device adaptable for use as a machine gun means an instrument or device which possesses or retains the characteristics of a machine gun as designed.

A device or instrument possesses or retains the characteristics of a machine gun unless the object is of innocuous design, or that the device or instrument has undergone such substantial

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

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alteration or mutilation that the instrument has completely and permanently lost the characteristics of a real machine gun.<sup>2</sup>

**(RESUMPTION OF MAIN CHARGE)**

The second element that the State must prove beyond a reasonable doubt is that the defendant knowingly possessed (a machine gun)(an instrument or device adaptable for use as a machine gun).

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 such 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 machine gun)(an instrument or device adaptable for use as a machine gun). The State is not required to prove that, at the time that he/she knowingly possessed the firearm, defendant also knew that it

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<sup>2</sup> See State v. Gantt, 101 N.J. 573, 590 (1986). There is no burden on the State to prove operability of a machine gun. See State v. Elrose, 277 N.J. Super. 548, 557 (App. Div. 1994). However, please note the State must prove beyond a reasonable doubt that the device or instrument was adaptable for use as a machine gun if that is the theory of the case. Any language to the contrary in Gantt has since been abrogated by Sixth Amendment jurisprudence. See generally Alleyne v. United States, \_\_\_ U.S. \_\_\_, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013).

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was (a machine gun)(an instrument or device adaptable for use as a machine gun).<sup>3</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.

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>4</sup>

The third element that the State must prove beyond a reasonable doubt is that the defendant did not have a license to (possess)(carry) a machine gun.<sup>5</sup> If you find that the defendant knowingly possessed the machine gun, and that there is no evidence that defendant

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<sup>3</sup> See State v. Smith, 197 N.J. 325, 338 (2009); State v. Pelleteri, 294 N.J. Super. 330, 333-334 (App. Div. 1996), certif. den. 148 N.J. 461 (1997).

<sup>4</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").

<sup>5</sup> N.J.S.A. 2C:58-5.

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had a valid license to (possess)(carry) a machine gun, then you may infer, if you think it appropriate to do so based upon the facts presented, that defendant had no such license.<sup>6</sup> Note, however, that as with all other elements, the State bears the burden of showing, beyond a reasonable doubt, the lack of a valid license and that you may draw the inference only if you feel it appropriate to do so under all the facts and circumstances.

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

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<sup>6</sup> See N.J.R.E. 803(c)(10) and State v. Ingram, 98 N.J. 489 (1985), regarding absence of a permit.