

**DURESS**  
**(N.J.S.A. 2C:2-9)**

In defense of the charge of \_\_\_\_\_, the defendant \_\_\_\_\_, contends (he/she) is not guilty because at the time of the offense (he/she) acted under duress. In other words, (he/she) was coerced to commit the offense due to the use of, or a threat to use, unlawful force against (him/her) or another person.

Our law provides in pertinent part:

"(I)t is an affirmative defense that an actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist."

Before conduct, which would otherwise be criminal, can be excused on the ground that such conduct was a direct result of force or threats of force upon the defendant or another, the evidence must indicate that the following conditions existed at the time:

- (1) There was use of, or threatened use of, unlawful force against the person of the defendant or another; and
- (2) The force, or threatened force, would be of such a type that a person of reasonable firmness in a similar situation would have been unable to resist.

This defense of duress is unavailable to the defendant if you find that (he/she) recklessly placed (himself/herself) in a situation in which it was probable that (he/she) would be subjected to duress.<sup>1</sup>

A person acts recklessly with respect to a material element of an offense when (he/she) consciously disregards a substantial and unjustifiable risk that the material element exists or will result from (his/her) conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to (him/her), its disregard

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<sup>1</sup> N.J.S.A. 2C:2-9 (b).

involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation.

"Unlawful force" means force including confinement, which is employed without the consent of the person against whom it is directed.<sup>2</sup>

In determining whether the defense of duress has been established, you should consider:

- (1) The factor of immediacy (that is, the force or threats posed a danger of present, imminent and impending harm to the defendant or to another) as well as the gravity of the harm or threatened harm;
- (2) The seriousness of the crime committed;
- (3) The identity of the person endangered (In other words, was it the defendant or another person who was allegedly endangered?);
- (4) The possibilities for escape or resistance and the opportunity for seeking official assistance, if realistic.<sup>3</sup> Remember, the standard utilized here is that which a person of reasonable firmness in the defendant's situation would have been unable to resist.

The State has the burden to prove beyond a reasonable doubt each element of the offense of \_\_\_\_\_. The State also has the burden to disprove, beyond a reasonable doubt, the defense of duress.

If you find the State has proven beyond a reasonable doubt each element of the offense charged and that the State has disproved beyond a reasonable doubt the defense of duress, you must find the defendant guilty.

If, however, you determine that the State has failed to prove beyond a reasonable doubt one or more of the elements of \_\_\_\_\_, or has failed to disprove the defense of duress, you must find the defendant not guilty.

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<sup>2</sup> N.J.S.A. 2C:3-11 (a).

<sup>3</sup> State v. Toscano, 74 N.J. 421, 442 (1977).

**Note 1:**                N.J.S.A. 2C:2-9 (b) provides that in the prosecution for murder, the defense of duress is only available to reduce the degree of the crime to manslaughter.

**Note 2:**                This defense is unavailable if the defendant was criminally negligent in placing (himself/herself) in such a situation, whenever criminal negligence suffices to establish culpability for the substantive offense charged. N.J.S.A. 2C:2-9 (b)

**Note 3:**                The State has the burden of disproving the affirmative defense of duress. State v. Galiyano, 178 N.J. Super. 293 (App. Div. 1981). This holding is consistent with N.J.S.A. 2C:1-13b which provides that the State must disprove an affirmative defense unless another statute requires otherwise. Neither N.J.S.A. 2C:2-9, nor any other statute, requires the defendant to prove such a defense. But note the Supreme Court decision of State v. Toscano, 74 N.J. 421 (1977) which places upon the defendant the burden of persuasion on the issue of duress in that (he/she) must establish the defense by a preponderance of the evidence in order to win an acquittal.