

POSSESSION OF A CONTROLLED DANGEROUS SUBSTANCE
WITH INTENT TO DISTRIBUTE¹
(BATH SALTS)²
(N.J.S.A. 2C:35-5.3a)

Count _____ of the indictment charges the defendant as follows:

(Read Indictment)

The pertinent part of the statute on which this indictment is based reads as follows:

It is a crime for any person knowingly or purposely ... to possess or have under his control with intent to ... distribute [or dispense, or manufacture] substances containing **[insert appropriate bath salt chemical here, either: 4-methylmethcathinone (mephedrone, 4-MMC); 3,4-methylenedioxypyrovalerone (MDPV); 3,4-methylenedioxymethcathinone (methylone, MDMC), 4-methoxymethcathinone (methedrone, bk-PMMA, PMMC); 3-fluoromethcathinone (3-FMC); or 4-fluoromethcathinone (flephephone, 4-FMC)]**.³

In order for you to find defendant guilty of the charge, the State must prove the following elements beyond a reasonable doubt:

1. That S _____ in evidence contains **[insert appropriate CDS (bath salt) here]**;
2. That the defendant possessed, or had under his/her control, S _____ in evidence;
and
3. That the defendant, when he/she possessed or had under his/her control S _____ in evidence, had the intent to [distribute] [or dispense] [or manufacture] S _____ in evidence.⁴

The first element that the State must prove beyond a reasonable doubt is that S _____ contains **[insert appropriate CDS (bath salt) here]**.

In regard to the second element, the State alleges that defendant possessed, or had under

¹ This instruction is also to be used when possession with intent is for dispensing or manufacturing.

² N.J.S.A. 2C:35-5.3a grades this offense for sentencing purposes by the quantity of the CDS (bath salt) involved. Because the quantity of the CDS (bath salt) is an element of the offense, N.J.S.A. 2C:35-5.3a.b. and c. require that this element be determined by the jury. Accordingly, this charge may need to be supplemented to add this element. Please see the Supplemental model charge to Bath Salts Offenses concerning this required element of quantity.

³ If the issue of authorization is raised as an affirmative defense, see N.J.S.A. 2C:35-18.

⁴ Although the text of N.J.S.A. 2C:35-5.3a states that it is a crime for any person to “knowingly or purposely to manufacture, distribute or dispense, or to possess or have under his control with intent to manufacturer, distribute, or dispense” the enumerated substances, the Supreme Court Committee on Model Criminal Jury Charges notes that the definition of possession, N.J.S.A. 2C:2-1c, requires a knowing state of mind.

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his/her control, S _____ in evidence. To “possess” an item under the law, one must have a knowing, intentional control of that item accompanied by knowledge of its character. So, a person who possesses an item such as (_____ **IDENTIFY RELEVANT ITEM(S)**) must know or be aware that he/she possesses it/them, and he/she must know what it is that he/she possesses or controls (that it is _____). [**WHERE APPLICABLE**, charge: Possession cannot merely be a passing control, fleeting or uncertain in its nature.] In other words, to “possess” an item, one must knowingly procure or receive an item 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.

The State must prove beyond a reasonable doubt that a possessor acted knowingly in possessing the item. 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 the high probability of their existence. A person acts knowingly as to a result of his/her conduct if he/she is aware that it is practically certain that 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 inferences from conduct, words or acts. Therefore, it is not necessary for the State to produce witnesses to testify that a particular defendant stated, for example, that he/she acted with knowledge when he/she had control over a particular thing. It is within your power to find that proof of knowledge has been furnished beyond a reasonable doubt by inference which may arise from the nature of the acts and the surrounding circumstances.

A person may possess _____ (an item) even though it was not physically on his/her person at the time of the arrest, if he/she had in fact, at some time prior to his/her arrest, had control over it.

Possession means a conscious, knowing possession, either actual or constructive.

[CHARGE THE FOLLOWING PARAGRAPHS WHICH APPLY TO YOUR CASE]

ACTUAL POSSESSION

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A person is in actual possession of an item when he/she first, knows what it is: that is, he/she has knowledge of its character, and second, knowingly has it on his/her person at a given time.

CONSTRUCTIVE POSSESSION⁵

Possession may be constructive instead of actual. As I just stated, a person who, with knowledge of its character, knowingly has direct physical control over an item at a given time is in actual possession of it.

Constructive possession means possession in which the possessor does not physically have the item on his or her person but is aware that the item is present and is able to and has the intention to exercise control over it. So, someone who has knowledge of the character of an item and knowingly has both the power and the intention at a given time to exercise control over it, either directly or through another person or persons, is then in constructive possession of that item.

JOINT POSSESSION

Possession may be sole or joint. If one person alone has actual or constructive possession of an item, possession is sole. If two or more persons share actual or constructive knowing possession of an item, possession is joint.

In regard to the third element, the State must prove beyond a reasonable doubt that defendant possessed with the intent to [distribute] [or dispense] [or manufacture] S_____ in evidence.

"Distribute" means the transfer, actual, constructive or attempted,⁶ from one person to another of a controlled dangerous substance. It is not necessary that the drugs be transferred in exchange for payment or promise of payment of money or anything of value.⁷

[Charge the following when applicable: To "dispense" means to deliver a controlled

⁵ In State v. Spivey, 179 N.J. 229 (2004), the New Jersey Supreme Court affirmed a conviction under N.J.S.A. 2C:39-4.1(a), Possession of a Firearm While Committing Certain Drug Offenses. There, the Court noted that that statute suggests a temporal and spatial link between possession of the firearm and the drugs. The Court held: "The evidence must permit the jury to infer that the firearm was accessible for use in the commission of the [drug] crime." In the appropriate case, therefore, the possession charge may be supplemented by this language.

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).

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dangerous substance to an ultimate user or research subject by or pursuant to the lawful order of a practitioner, including the prescribing, administering, packaging, labeling, or compounding necessary to prepare the substance for that delivery.]

[Charge the following when applicable: To "manufacture" means the production, preparation, propagation, compounding, conversion or processing of a controlled dangerous substance, either directly or by extraction from substances or natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of the substance or labeling or re-labeling of its container, except that this term does not include the preparation of compounding of a controlled dangerous substance by an individual for his/her own use or the preparation, compounding, packaging, or labeling of a controlled dangerous substance: (1) by a practitioner as an incident to his/her administering or dispensing of a controlled dangerous substance in the course of his/her professional practice, or (2) by a practitioner (or under his/her supervision) for the purpose of, or as an incident to, research, teaching or chemical analysis and not for sale.⁸

In this regard the term "practitioner" means a physician, dentist, veterinarian, scientific investigator, laboratory worker, pharmacist, hospital worker or other person licensed, registered, or otherwise permitted to distribute, dispense, conduct research with respect to, or administer a controlled dangerous substance in the course of professional practice or research in this State.⁹]

[RESUME MAIN CHARGE]

"Intent" means a purpose to do something, a resolution to do a particular act or accomplish a certain thing. Intent is a state of mind, and it is very rare that intent is proven by witnesses who can testify that an accused said he/she had a certain intent when he/she engaged in a particular act. The intention may be gathered from a person's acts, conduct, from all the person said and did at the particular time and place, and from all of the surrounding circumstances.

You may consider any evidence as to the quantity, purity, and packaging¹⁰ of S _____ together with all the other evidence in the case to aid you in your determination of the element of intent to [distribute] [or dispense] [or manufacture.]

A person acts knowingly with respect to the nature of his/her conduct or the attendant

⁸ N.J.S.A. 2C:35-2.

⁹ N.J.S.A. 2C:35-2.

¹⁰ See State v. Perez, 218 N.J. Super. 478, 482-486 (App. Div. 1987).

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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.¹¹

A person acts purposely with respect to the nature of his/her conduct or a result thereof if it is his/her conscious object to engage in conduct of that nature or to cause such a result. A person acts purposely with respect to attendant circumstances if he/she is aware of the existence of such circumstances or he/she believes or hopes that they exist. "With purpose," "designed," "with design" or equivalent terms have the same meaning.¹²

Remember that when we speak of knowingly and purposely we are speaking of conditions of the mind that cannot be seen. It is not necessary for the State to prove the existence of such mental states by direct evidence such as a statement by the defendant that he/she had particular knowledge or a particular purpose. Knowledge and purpose as separate propositions of proof do not commonly exist. They 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.

To reiterate, the three elements of this offense that the State must prove beyond a reasonable doubt are:

1. That S_____ in evidence contains **[insert appropriate CDS (bath salt) here];**
2. That the defendant possessed, or had under his/her control, S_____ in evidence; and
3. That the defendant possessed with the intent to [distribute] [or dispense] [or manufacture] S_____ in evidence.

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

¹¹ N.J.S.A. 2C:2-2b(1).

¹² N.J.S.A. 2C:2-2b(2).