

POSSESSION OF AN ASSAULT FIREARM

N.J.S.A. 2C:39-5(f)

(For cases June 13, 2018 or after)

Defendant(s), _____, is/are charged in count _____ with unlawful possession of an assault firearm. The pertinent language of the statute reads as follows:

Any person who knowingly has in his possession an assault firearm is guilty of a crime...except if the assault firearm is licensed... registered... or rendered inoperable.

The crime with which the defendant in this case is charged contains three essential elements, all of which the State must prove beyond a reasonable doubt. They are:

1. S_____ is an assault firearm or (there was an assault firearm); (**choose appropriate**)
2. The defendant knowingly possessed the assault firearm; and
3. The assault firearm was not licensed, registered, or rendered inoperable.

A "firearm" is defined as 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 projectile 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....¹

An assault firearm includes the following firearms² [**Select appropriate**]: (1) Algimec AGM1 type; (2) Any shotgun with a revolving cylinder such as the "Street Sweeper" or "Striker 12"; (3) Armalite AR-180 type; (4) Australian Automatic Arms SAR; (5) Avtomat Kalashnikov type semi-automatic firearms; (6) Beretta AR-70 and BM59 semi-automatic firearms; (7) Bushmaster Assault Rifle; (8) Calico M-900 Assault carbine and M-900; (9) CETME G3; (10) Chartered Industries of Singapore SR-88 type; (11) Colt AR-15 and CAR-15 series; (12) Daewoo K-1, K-2, Max 1 and Max 2, AR 100 types; (13) Demro TAC-1 carbine type; (14) Encom MP-9 and MP-45 carbine types; (15) FAMAS MAS223 types; (16) FN-FAL, FN-LAR, or FN-FNC type semi-automatic firearms; (17) Franchi SPAS 12 and LAW 12 shotguns; (18) G3SA type; (19) Galil type Heckler and Koch HK91, HK93, HK94, MP5, PSG-1; (20) Intratec

¹ N.J.S.A. 2C:39-1(f).

² N.J.S.A. 2C:39-1(w)(1).

POSSESSION OF AN ASSAULT FIREARM

N.J.S.A. 2C:39-5(f)

TEC 9 and 22 semi-automatic firearms; (21) M1 carbine type; (22) M14S type; (23) MAC 10, MAC 11, MAC 11-9mm carbine type firearms; (24) PJK M-68 carbine type; (25) Plainfield Machine Company Carbine; (26) Ruger K-Mini-1 4/5F and Mini-1 4/5RF; (27) SIG AMT, SIG 550SP, SIG 551SP, SIG PE-57 types; (28) SKS with detachable magazine type; (29) Spectre Auto carbine type; (30) Springfield Armory BM59 and SAR-48 type; (31) Sterling MK-6, MK-7 and SAR types; (32) Steyr A.U.G. semi-automatic firearms; (33) USAS 12 semi-automatic type shotgun; (34) Uzi type semi-automatic firearms; (35) Valmet M62, M71S, M76, or M78 type semi-automatic firearms; or (36) Weaver Arm Nighthawk].

(Charge if applicable) A _____ is designated as an assault firearm.

(Charge if applicable) Any firearm manufactured under any designation which is substantially identical to any of the firearms listed in the statute is also an assault firearm. In this case, the State alleges that S_____ is substantially identical to _____ which is designated in the statute.³

(Charge if appropriate: On the other hand, the defendant maintains _____).

(Include any of the three following definitions of assault firearm if material to the case)

The term “substantial” means pertaining to the substance, matter, material or essence of a thing. The term “identical” means exactly the same. Hence, a firearm is substantially identical to another only if it is identical in all material, essential respects. A firearm is not substantially identical to a listed assault firearm unless it is identical except for differences which do not alter the essential nature of the firearm.⁴

The following are examples of manufacturer changes that do not alter the essential nature of the firearm: name or designation of the firearm; the color of the firearm; the material used to make the barrel or stock of the firearm; the material used to make a pistol grip; a modification of a pistol grip. This is not an exclusive list.

A semi-automatic firearm should be considered to be “substantially identical,” that is, identical in all material respects, to a named assault weapon if it meets the below listed criteria:

(Semi-automatic shotgun: Charge if applicable)

An assault firearm also means a semi-automatic shotgun with either a magazine capacity

³ N.J.S.A. 2C:39-1(w)(2).

⁴ Attorney General Guidelines Regarding the “Substantially Identical” Provision in the State’s Assault Firearm Laws (Aug. 1996); Coalition of New Jersey Sportsmen, Inc. v. Whitman, 44 F. Supp. 2d

POSSESSION OF AN ASSAULT FIREARM

N.J.S.A. 2C:39-5(f)

exceeding six rounds, a pistol grip, or a folding stock.⁵ “Semi-automatic” means a firearm which fires a single projectile for each single pull of the trigger and is self-reloading or automatically chambers a round, cartridge, or bullet.⁶ A “pistol grip” means a well-defined handle, similar to that found on a handgun, that protrudes conspicuously beneath the action of the weapon, and which permits the shotgun to be held and fired with one hand.⁷

It includes a semi-automatic shotgun that has at least 2 of the following:

1. A folding or telescoping stock;
2. A pistol grip that protrudes conspicuously beneath the action of the weapon;
3. A fixed magazine capacity in excess of 5 rounds; and
4. An ability to accept a detachable magazine.

(Semi-automatic Rifle: Charge if applicable)

“Semi-automatic” mean a firearm which fires a single projectile for each single pull of the trigger and is self-reloading or automatically chambers a round, cartridge, or bullet.⁸

It includes a semi-automatic rifle that has the ability to accept a detachable magazine and has at least 2 of the following:

1. a folding or telescoping stock;
2. a pistol grip that protrudes conspicuously beneath the action of the weapon;
3. a bayonet mount;
4. a flash suppressor or threaded barrel designed to accommodate a flash suppressor;
and
5. a grenade launcher

An assault firearm also means a semi-automatic rifle with a fixed magazine capacity exceeding 10 rounds.⁹ The State must prove beyond a reasonable doubt that the alleged semi-automatic firearm did not have an attached tubular device capable of operating only with .22 caliber rimfire ammunition.¹⁰

666 D.N.J. (1999), aff'd 263 F. 3d 157 (3d Cir. 2001).

⁵ N.J.S.A. 2C:39-1(w)(3).

⁶ N.J.S.A. 2C:39-1(x).

⁷ N.J.S.A. 2C:39-1(z).

⁸ N.J.S.A. 2C:39-1(x).

⁹ N.J.S.A. 2C:39-1(w)(4) (Effective June 13, 2018). The magazine capacity was amended from 15 rounds to 10 rounds. L., 2018, c. 39.

¹⁰ N.J.S.A. 2C:39-1(w)(4).

POSSESSION OF AN ASSAULT FIREARM

N.J.S.A. 2C:39-5(f)

(Semi-automatic pistol: Charge if applicable)

A semi-automatic pistol that has an ability to accept a detachable magazine and has at least 2 of the following:

1. An ammunition magazine that attaches to the pistol outside of the pistol grip;
2. A threaded barrel capable of accepting a barrel extender, flash suppressor, forward handgrip, or silencer;
3. A shroud that is attached to, or partially or completely encircles, the barrel and that permits the shooter to hold the firearm with the non-trigger hand without being burned;
4. Manufactured weight of 50 ounces or more when the pistol is unloaded; and
5. A semi-automatic version of an automatic firearm.

An assault firearm also means a part or combination of parts designed or intended to convert a firearm into an assault firearm, or any combination of parts from which an assault firearm may be readily assembled if those parts are in the possession or under the control of the same person.¹¹

(CHARGE IF APPLICABLE FOR CASES - January 16, 2018 or after)

An assault firearm also means a firearm with a bump stock attached.¹² “Bump stock” means any device or instrument for a firearm that increases the rate of fire achievable with the firearm by using energy from the recoil of the firearm to generate a reciprocating action that facilitates repeated activation of the trigger.¹³

(RESUMPTION OF MAIN CHARGE)

The second element that the State must prove beyond a reasonable doubt is that the defendant knowingly possessed the assault firearm.

KNOWINGLY

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 circumstance 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. “Knowingly,” “with knowledge” or equivalent terms have the

¹¹ N.J.S.A. 2C:39-1(w)(5).

¹² N.J.S.A. 2C:39-1(w)(6). See L. 2017, c. 323.

POSSESSION OF AN ASSAULT FIREARM

N.J.S.A. 2C:39-5(f)

same meaning. A person acts knowingly with respect to his/her conduct if he/she is aware that his/her conduct is of that nature. You must determine whether the defendant was aware of the nature of his/her conduct in this case. Since knowledge is a state of mind and cannot be seen and can only be determined by inference from conduct, words or acts, it can rarely be proved directly. Therefore, it is not necessary that witnesses be produced by the State to testify that a defendant said he/she knowingly did something. His/Her knowledge may be gathered from his/her acts and his/her conduct, and from all the surrounding circumstances reflected in the evidence you have heard and seen in this case. That is, you must be convinced beyond a reasonable doubt that the defendant in this case was aware that he/she had S_____in his/her possession.

POSSESSION¹⁴

The word “possess” as used in criminal statutes signifies a knowing, intentional control of a designated thing, accompanied by a knowledge of its character. Thus, the person must know or be aware that he/she possesses the item, in this case S_____, and the person must know what it is that he/she possess or controls, in this case, that it is a firearm. The State need not prove that defendant knew it was an assault firearm.¹⁵

This 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 control if he/she chose to do so.

A person may possess S_____ even though it was not physically on his/her person at the time of the arrest, if the person had in fact, at some time prior to his/her arrest, had control over it.

¹³ N.J.S.A. 2C:39-1(ee).

¹⁴ Charge statutory inference in N.J.S.A. 2C:39-2, if applicable.

¹⁵ See State v. Pelleteri, 294 N.J. Super. 330, 333-34 (App. Div. 1996), where the Court held “that knowledge of the character of the weapon is not an element of the offense...the Legislature intended to proscribe knowing possession, as distinguished from knowledge of the illegal character of the article possessed...In that context, ‘[k]nowing possession is not to be confused with criminal intent or guilty knowledge.’” The trial judge in response to a question arising out of deliberations charged the jury “that defendant could be found guilty if he knowingly possessed the firearm (a semi-automatic rifle with a magazine capacity of seventeen cartridges) but was unaware that its fixed capacity exceeded fifteen rounds.” The case also involved the defenses of mistake of law and mistake of fact which were precluded by the trial judge. The Appellate Court found no error with the rulings of the trial court and affirmed the conviction.

POSSESSION OF AN ASSAULT FIREARM

N.J.S.A. 2C:39-5(f)

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

[CHARGE THOSE FOLLOWING PARAGRAPHS AS THEY APPLY TO YOUR CASE]

ACTUAL 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 second, knowingly has it on his/her person at a given time.

CONSTRUCTIVE POSSESSION

The law recognizes that possession may be constructive instead of actual. 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 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.

[MERE PRESENCE – Read if Appropriate¹⁶]

Defendant's mere presence at or near a place where [contraband] is/are discovered is not in itself, without more, proof beyond a reasonable doubt that defendant was in constructive possession of [that contraband]. It is, however, a circumstance to be considered with the other evidence in determining whether the State has proven possession of the [contraband] beyond a reasonable doubt.

Where defendant is one of the persons found in the area where [contraband] is/are discovered, you may not conclude, without more, that the State has proven beyond a reasonable doubt that he/she had possession of the [contraband] unless there are other circumstance(s) tending to permit such an inference to be drawn.¹⁷ Such evidence can include, but is not limited to [choose as appropriate]: placement and accessibility of the [contraband]; defendant's access to and connection with the place where the [contraband] was/were found; his/her proximity to the place where the [contraband] was/were found; his/her demeanor when confronted by police after

¹⁶ State v. Randolph, 228 N.J. 566, 590-93 (2017).

¹⁷ State v. Jackson, 326 N.J. Super. 276, 280 (App. Div. 1999); See State v. Brown, 80 N.J. 587,

POSSESSION OF AN ASSAULT FIREARM

N.J.S.A. 2C:39-5(f)

the [contraband] was/were found; whether defendant made any inculpatory statements after the [contraband] was/were found; whether defendant possessed other [contraband] on his/her person or property when the [contraband] was/were found; [any other evidence deemed part of the totality of circumstances].¹⁸

In summary, the State must prove more than defendant's mere presence at the time that the [contraband] was/were found. There must be other circumstance(s) tying defendant to the [contraband] in order for the State to prove constructive possession beyond a reasonable doubt.¹⁹

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.

The third element that the State must prove beyond a reasonable doubt is that the assault firearm was not licensed, registered or rendered inoperable.²⁰

[Charge appropriate section]

An assault firearm is "licensed" when the possessor obtains a valid license to possess and carry the assault firearm.²¹

An assault firearm is "registered":

- 1) When the owner of an assault firearm purchased on or before May 1, 1990 properly registered the assault firearm as one that is legitimate for target shooting purposes before May 30, 1991.²²
- 2) When the owner of a firearm with a fixed magazine capacity holding up to 15 rounds which is incapable of being modified to accommodate 10 or less rounds purchased on or before June 13, 2018 properly registered the firearm on or before June 13, 2019.
- 3) When the owner of a firearm which only accepts a detachable magazine with a

593 (1979) and State v. Sapp, 71 N.J. 476 (1976), rev'g on dissent 144 N.J. Super. 455, 460 (1975).

¹⁸ State v. Randolph, 228 N.J. at 590-93, citing State v. Palacio, 111 N.J. 543, 549-54 (1988) and State v. Shipp, 216 N.J. Super. 662, 664-66 (App. Div. 1987). See Palacio, Shipp, and State v. Montesano, 298 N.J. Super. 597, 615 (App. Div. 1997), certif. denied 150 N.J. 27 (1997), for circumstances more specifically related to presence in or near an automobile in which drugs are found.

¹⁹ State v. Whyte, 265 N.J. Super. 518, 523 (App. Div. 1992), aff'd o.b. 133 N.J. 481 (1993); Jackson, 326 N.J. Super. at 280.

²⁰ There is no burden on the State to prove operability of the assault firearm. State v. Elrose, 277 N.J. Super. 548, 557 (App. Div. 1994).

²¹ N.J.S.A. 2C:58-5.

POSSESSION OF AN ASSAULT FIREARM

N.J.S.A. 2C:39-5(f)

capacity of up to 15 rounds which is incapable of being modified to accommodate 10 or less rounds purchased on or before June 13, 2018 properly registered the firearm on or before June 13, 2019.²³

An assault firearm is “rendered inoperable” when:

1. The firearm is altered in such a manner that it cannot be immediately fired;
2. The owner or possessor of the firearm does not possess or have control over the parts necessary to make the firearm operable; and
3. The owner of the firearm filed a valid certification prior to May 30, 1991 indicating the date on which the firearm was rendered inoperable.²⁴

If the defendant alleges that the assault firearm was lawfully possessed and/or rendered inoperable during the time frame of August 8, 2013 to February 5, 2014, the State must disprove that defense beyond a reasonable doubt.²⁵

[Resume Main Charge]

If you find that the defendant knowingly possessed the assault firearm, and that there is no evidence that the defendant had a valid license to possess and carry such a firearm or that the defendant legally registered it or rendered it inoperable by filing a valid certification of inoperability, then you may infer, if you think it appropriate to do so based upon the facts presented, that defendant had no such license and that the defendant did not legally register the firearm or render it inoperable.²⁶ 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 registration and that the firearm was not rendered inoperable. You may apply the inference only if you feel it appropriate to do so under all the facts and circumstances.

If you have found that the State has proven each of the elements beyond a reasonable doubt, then you must find the defendant guilty.

If you have found that the State has failed to prove any of the elements beyond a

²² N.J.S.A. 2C:58-12.

²³ L., 2018, c. 39 contains an amnesty provision, codified at N.J.S.A. 2C:39-19. A similar-worded amnesty provision was interpreted in State v. Harper, 229 N.J. 228 (2017). In that case, the Court held that the defendant must give timely notice he intends to rely upon an amnesty defense, and if properly raised, the State bears the burden to disprove the defense by a reasonable doubt. Id. at 241-42.

²⁴ See State v. Elrose, 277 N.J. Super. at 557 and N.J.S.A. 2C:58-13.

²⁵ See Section 2(a) of L., 2013, c. 117.

²⁶ N.J.S.A. 2C:39-2(b).

POSSESSION OF AN ASSAULT FIREARM

N.J.S.A. 2C:39-5(f)

reasonable doubt, then you must find the defendant not guilty.