

**CRIMINAL POSSESSION OF A WEAPON
THIRD DEGREE
(D Felony)
(Possession of Firearm;
Prior Conviction)
PENAL LAW 265.02(5)(ii)
(Committed on or after July 2, 1981)**

The ____ count is Criminal Possession of a Weapon in the Third Degree.

Under our law, a person is guilty of Criminal Possession of a Weapon in the Third Degree when that person knowingly¹ possesses a firearm and such possession does not take place in the person's home² or place of business.³

Some of the terms used in this definition have their own special meaning in our law. I will now give you the meaning of the following terms: "firearm" "possess," and "knowingly."

¹The word "knowingly" has been added to this definition to comport with statutory law (Penal Law § 15.05(2)) and with case law. *People v. Ford*, 66 NY2d 428, 440 (1985); *People v. Marino*, 212 AD2d 735, 736 (2d Dept. 1995); *People v. Cohen*, 57 AD2d 790 (1st Dept. 1977).

²In a case involving a homeless shelter, the Court of Appeals held that a person's home "may extend to facilities shared by several persons not related to each other" but does not encompass a place "to which the public or a substantial group of persons has access." *People v. Powell*, 54 NY2d 524, 526 (1981).

³ An additional element of the crime is that the defendant

"has been previously convicted of a felony [or a class A misdemeanor], namely, within the five years immediately preceding the commission of the offense."

That element must be charged in a special information, and after commencement of trial, the defendant must be arraigned on that special information. If, upon such arraignment, the defendant admits the element, the court must not make any reference to it in the definition of the offense or in listing the elements of the offense. But if the defendant denies the element or remains mute, the court must add the element to the definition of the offense and the list of elements. CPL § 200.60. *See, People v. Cooper*, 78 NY2d 476 (1991).

A FIREARM means any pistol or revolver.⁴

POSSESS means to have physical possession or otherwise to exercise dominion or control over tangible property.⁵

A person KNOWINGLY possesses a firearm when that person is aware that he or she is in possession of such a firearm.⁶

Under this count, the firearm need not be loaded, but it must be operable. To be operable, a firearm must be capable of discharging ammunition.⁷

In order for you to find the defendant guilty of this crime, the People are required to prove, from all the evidence in the case, beyond a reasonable doubt, each of the following four elements:

1. That on or about (date), in the county of (county), the defendant, (defendant's name) possessed a firearm;
2. That the defendant did so knowingly;
3. That such firearm was operable; and
4. That such possession did not take place in the

⁴Penal Law § 265.00(3). If the firearm involved is other than a pistol or revolver, insert the appropriate definition from the "Additional Charges" section at the end of this chapter.

⁵See Penal Law § 10.00(8). Where constructive possession is alleged, or where the People rely on a statutory presumption of possession, insert the appropriate instruction from the "Additional Charges" section at the end of this article.

⁶See Penal Law § 15.05(2).

⁷Case law has added "operability" of the firearm as an element of the crime [*People v. Longshore*, 86 NY2d 851, 852 (1995), but has further held that there is no requirement that the possessor know the firearm was operable. *People v. Ansare*, 96 AD2d 96 (4th Dept. 1983). *Cf. People v. Saunders*, 85 NY2d 339, 341-42 (1995).

defendant's home or place of business.⁸

Therefore, if you find that the People have proven beyond a reasonable doubt each of those elements, you must find the defendant guilty of the crime of Criminal Possession of a Weapon in the Third Degree as charged in the _____ count.

On the other hand, if you find that the People have not proven beyond a reasonable doubt any one or more of those elements, you must find the defendant not guilty of the crime of Criminal Possession of a Weapon in the Third Degree as charged in the _____ count.

⁸If the defendant has admitted the prior conviction, the crime will consist of *only* the four elements listed above. If the defendant has denied the previous conviction or has remained mute, add as the fifth element:

"and 5. That the defendant had been convicted of (specify felony or previous offense that forms the basis of this element) within the five years immediately preceding such possession."