

**CRIMINAL POSSESSION OF A WEAPON  
SECOND DEGREE  
(C Felony)  
(Loaded Firearm)  
(with Intent to Use Unlawfully)  
PENAL LAW 265.03(1)(b)  
(Committed on or after Nov. 1, 1998<sup>1</sup>)  
(Revised June, 2006 and January, 2011<sup>2</sup>)**

The \_\_\_\_ count is Criminal Possession of a Weapon in the Second Degree.

Under our law, a person is guilty of Criminal Possession of a Weapon in the Second Degree when, with intent to use the same unlawfully against another, that person knowingly<sup>3</sup> possesses a loaded firearm.

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," "loaded firearm," "possess," "knowingly," and "intent".

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<sup>1</sup> By the laws of 2005, c. 764, this provision was renumbered without substantive change. By the laws of 2006, c. 742, effective November 1, 2006, this provision was repealed, and by the laws of 2006 c. 745, effective December 15, 2006, it was reenacted.

For crimes committed on or after September 1, 1974 and before November 1, 1998, the paragraph defining the crime should read: "Under our law, a person is guilty of Criminal Possession of a Weapon in the Second Degree when that person knowingly possesses a loaded firearm with intent to use the same unlawfully against another." Otherwise, the charge remains the same.

<sup>2</sup> The charge was revised in 2006 to accord with the case law cited in footnote six; and it was revised in 2011 to accord with the case law cited in footnote ten.

<sup>3</sup> The 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).

A FIREARM means any pistol or revolver.<sup>4</sup>

Under our law, the firearm must be operable, that is, the firearm must be capable of discharging ammunition.<sup>5</sup>

A LOADED FIREARM means any firearm loaded with ammunition which may be used to discharge such firearm [or any firearm which is possessed by one who, at the same time, possesses a quantity of ammunition which may be used to discharge such firearm.]<sup>6</sup>

POSSESS means to have physical possession or otherwise to exercise dominion or control over tangible property.<sup>7</sup>

A person KNOWINGLY possesses a firearm when that person is aware that he or she is in possession of a firearm.<sup>8</sup>

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<sup>4</sup> See Penal 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 article.

<sup>5</sup> Case 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).

<sup>6</sup> See Penal Law § 265.00(15). There is no requirement that the defendant knew the firearm was loaded at the time of possession. See *People v. Broomfield*, 275 A.D.2d 885 (4<sup>th</sup> Dept. 2000); *People v. Smith*, 270 A.D.2d 719 (3<sup>rd</sup> Dept. 2000); *People v. Toribio*, 216 A.D.2d 189 (1<sup>st</sup> Dept. 1995).

<sup>7</sup> See 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.

<sup>8</sup> See Penal Law § 15.05(2).

INTENT means conscious objective or purpose.<sup>9</sup> Thus, a person acts with intent to use a loaded firearm unlawfully against another when his or her conscious objective or purpose is to use that loaded firearm unlawfully against another.

*[Note: In cases where defendant is alleged to have used the loaded firearm, omit the period in the last sentence and add:*

“ , and, that intent, need only exist at the very moment that a person engages in an unlawful use of the firearm against another.<sup>10]</sup>

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 the firearm was loaded and operable; and
4. That the defendant possessed the loaded firearm with the intent to use it unlawfully against another.

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 Second 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 the Second Degree as charged in the \_\_\_\_\_ count.

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<sup>9</sup> See Penal Law § 15.05(1).

<sup>10</sup> See *People v. Muhammad*, 17 N.Y.3d 532 (2011). For a further enhanced charge on intent, particularly if the People rely on a statutory presumption of intent, see the appropriate instruction from the "Additional Charges" section at the end of this CJI article.