

**CRIMINAL POSSESSION OF A DANGEROUS WEAPON  
FIRST DEGREE  
(B Felony)  
(Possession of Explosive with  
Intent To Use Unlawfully)  
PENAL LAW 265.04(1)<sup>1</sup>  
(Committed on or after Sept. 1, 1974)**

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

Under our law, a person is guilty of Criminal Possession of a Dangerous Weapon in the First Degree when that person knowingly<sup>2</sup> possesses any explosive substance with intent to use the same unlawfully against the person or property of another.

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: "possess" "knowingly" and "intent."

POSSESS means to have physical possession or otherwise to exercise dominion or control over tangible property.<sup>3</sup>

A person KNOWINGLY possesses any explosive substance when that person is aware that he or she is in possession of such

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<sup>1</sup> Penal Law § 265.04 was divided into two subdivisions by the laws of 2005, c. 764, effective December 21, 2005; this provision became subdivision one; and, the name of the crime was amended to refer to possession of a "weapon" rather than a "dangerous weapon." The definition of the crime was not amended.

<sup>2</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).

<sup>3</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 chapter.

an explosive substance.<sup>4</sup>

INTENT means conscious objective or purpose.<sup>5</sup> Thus, a person acts with intent to use an explosive substance against the person or property of another when his or her conscious objective or purpose is to use an explosive substance against the person or property of another.

Under our law, the possession by any person of an explosive substance is presumptive evidence of possessing such explosive substance with intent to use the same unlawfully against the person or property of another if such person is not licensed or otherwise authorized to possess such substance.<sup>6</sup> What this means is that, if the People have proven beyond a reasonable doubt that the defendant knowingly possessed an explosive substance and that he/she was not licensed or otherwise authorized to possess it, then you may, but you are not required to, infer from those facts that the defendant possessed such explosive substance with the intent to use it unlawfully against the person or property of another.

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 three elements:

1. That on or about (date), in the county of (county), the defendant, (defendant's name) possessed an explosive substance;
2. That the defendant did so knowingly; and
3. That the defendant did so with the intent to use it

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<sup>4</sup>See Penal Law § 15.05(2).

<sup>5</sup>See Penal Law § 15.05(1).

<sup>6</sup>See Penal Law § 265.15(4).

unlawfully against the person or property of 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 Dangerous Weapon in the First 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 Dangerous Weapon in the First Degree as charged in the \_\_\_\_\_ count.