

BURGLARY IN THE SECOND DEGREE
(Deadly Weapon or Explosives)
Penal Law § 140.25(1)(a)
(Committed on or after Sept. 1, 1967)
(Revised January 2013 and May 2018)¹

The (*specify*) count is Burglary in the Second Degree.

Under our law, a person is guilty of Burglary in the Second Degree when that person knowingly enters [remains]² unlawfully in a building with the intent to commit a crime therein, and when, in effecting entry or while in the building or in immediate flight therefrom, that person [or another participant in the crime] is armed with a deadly weapon [or explosives³].

¹ The January, 2013, revision was for the purpose of expanding the definition of “unlawfully” and of “intent” when the burglary is premised on a violation of an order of protection in order to accord with the dictates of *People v Lewis*, 5 NY3d 546 (2005) and *People v Cajigas*, 19 NY3d 697 (2012).

The 2018 revision was for the purpose of including definitions of weapons set forth in decisional law (see footnote 13) and including two weapons added by the Legislature. November 1, 1995, was the effective date of an amendment to the definition of "deadly weapon" to add a "metal knuckle knife." L. 1995, ch. 219. November 1, 2008, was the effective date of an amendment to that definition to add "plastic knuckles." L. 2008, ch. 257. As to each of those weapons, this charge is applies on or after those effective dates.

² When the accusation is that the defendant entered lawfully upon the premises but remained unlawfully after license and privilege to be on the premises terminated, substitute the word “remains” for the word “enters” as indicated by the use of brackets. See *People v Gaines*, 74 NY2d 358 (1989).

³ In 1974, the Court of Appeals stated that “the statutory terms—‘incendiary’, ‘bomb’ and ‘explosive substance’ -- are susceptible of reasonable application in accordance with the common understanding of men.” *People v. Cruz*, 34 NY2d 362 (1974).

In 1975, the Appellate Division, First Department, opined that a 1970 definition of “explosive” in Labor Law § 451 applied to the Penal Law in the adjudication of that term in an arson statute. *People v McCrawford*, 47 AD2d 318 (1st Dept. 1975). (That Labor Law definition was amended after the *McCrawford* decision. L. 2009, c. 57.) *But see Matter of Perry*, 232 A.D.2d 225 (1st Dept., 1996) (in sustaining a Family Court petition for possession of an explosive, the Court cited *Cruz* for the proposition that the language of the

The following terms used in that definition have a special meaning:

[NOTE: Add, where appropriate:

In addition to its ordinary meaning, the term BUILDING includes any structure, vehicle or watercraft used for overnight lodging of persons, or used by persons for carrying on business therein, or used as an elementary or secondary school, or an inclosed motor truck, or an inclosed motor truck trailer.^{4]}

[NOTE: Add, where appropriate:

Where a building consists of two or more units separately secured or occupied, each unit shall be deemed both a separate building in itself and a part of the main building.^{5]}

A person enters [remains] UNLAWFULLY in a building when that person has no license or privilege to enter [remain] in that building.⁶ To have no license or privilege to enter [remain] means to have no right, permission or authority to do so.

[NOTE: Add, where appropriate:

A person who is subject to and knows of an order of protection directing him/her to stay away from a building which he/she knowingly enters, even by invitation or permission, UNLAWFULLY enters that building.^{7]}

petition "apprise[d] respondent of the conduct of which he stood accused, giving the term 'explosive' or 'incendiary' device, which is not specifically defined in the Penal Law, its everyday meaning.")

In 2001, the Appellate Division, Third Department, citing *Cruz*, stated that "the term 'explosive substance' retains its everyday common sense meaning since it is undefined in the Penal Law." *People v. Ward*, 282 A.D.2d 819 (3rd Dept., 2001). See also *People v. Getman*, 188 Misc.2d 809 (County Court, 2001) ("this court finds that the essence of the term 'explosive substance' is something which is capable of exploding and causing death or injury to person or property").

⁴ Penal Law § 140.00(2).

⁵ Penal Law § 140.00(2).

⁶ See Penal Law § 140.00(5).

⁷ See footnote 1.

[NOTE: Add, where appropriate:

A person who, regardless of his or her intent, enters [remains] in or upon premises which are at the time open to the public does so with license and privilege unless he or she defies a lawful order not to enter [remain], personally communicated to him or her by the owner of such premises or other authorized person.^{8]}

[NOTE: Add, where appropriate:

A license or privilege to enter [remain] in a building which is only partly open to the public is not a license or privilege to enter [remain], in that part of the building which is not open to the public.^{9]}

A person KNOWINGLY enters [remains] unlawfully in a building when that person is aware that he or she is entering [remaining] in such building without license or privilege to do so.^{10]}

INTENT means conscious objective or purpose.¹¹ Thus, a person has the intent to commit a crime in a building when that person's conscious objective or purpose is to commit a crime in that building.

[NOTE: Add, where appropriate:

It is not enough that a person, who is subject to and knows of an order of protection prohibiting entry into a dwelling, intended to violate the order by entering the building. That person must have intended to violate some other provision of the order or to commit a separate crime therein.^{12]}

The crime of burglary is separate and distinct from any crime which a person may commit within the building. The crime of burglary is complete when a person knowingly enters [remains]

⁸ See Penal Law § 140.00(5).

⁹ See Penal Law § 140.00(5).

¹⁰ See Penal Law § 15.05(2).

¹¹ See Penal Law § 15.05(1).

¹² See footnote 1.

in a building unlawfully and does so with the intent to commit a crime in the building, regardless of whether that person ever commits, or even attempts to commit, any crime in the building.

[DEADLY WEAPON means:

Select appropriate alternative:

any loaded weapon from which a shot, readily capable of producing death or other serious physical injury, may be discharged.

a switchblade knife defined as any knife having a blade which opens automatically by hand pressure applied to a button, spring or other device in the handle of the knife.

a pilum ballistic knife defined as any knife having a blade which can be projected from the handle by hand pressure applied to a button, lever, spring or other device in the handle of the knife.

a metal knuckle knife, defined as a weapon that, when closed, cannot function as a set of plastic knuckles or metal knuckles, nor as a knife and when open, can function as both a set of plastic knuckles or metal knuckles as well as a knife.

metal knuckles, defined as a metal object with multiple holes, through which individual places his or her fingers so that a metal bar rests atop the individual's knuckles.

a billy, defined as a cylindrical or rounded, rigid, club or baton with a handle grip which, from its appearance and inherent characteristics, is designed to be used as a striking weapon and not for other lawful purposes.

a dagger.

a blackjack.

plastic knuckles.]¹³

¹³ Penal Law § 10.00(12) defines "deadly weapon." See Penal Law § 265.00 for the definitions of "switchblade knife," "gravity knife," "pilum ballistic knife" and "metal knuckle knife"; *People v. Aragon*, 28 N.Y.3d 125 (2016) (for the definition of "metal knuckles"); *People v. Ocasio*, 28 N.Y.3d 178 (2016) (for the definition of "billy").

There is no controlling statutory or decisional law definition of "plastic

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), unlawfully entered [remained] in a building located at (specify);
2. That the defendant did so knowingly;
3. That the defendant did so with the intent to commit a crime inside the building;¹⁴ and
4. That, in effecting entry or while in the building or in immediate flight therefrom, the defendant [or another participant in the crime] was armed with a deadly weapon [or explosives].

If you find the People have proven beyond a reasonable doubt each of those elements, you must find the defendant guilty of this crime.

If you find the People have not proven beyond a reasonable doubt any one or more of those elements, you must find the defendant not guilty of this crime.

knuckles" albeit the legislative memorandum in support of adding that term equated it with "brass [metal] knuckles"; thus, for the definition of "plastic knuckles," a court may wish to consider using the definition of "metal knuckles," substituting "plastic object" for "metal object" and "plastic bar" for "metal bar."

¹⁴ If, in the indictment or bill of particulars, the People allege that the defendant intended a specific crime, that crime must be specified [*People v Barnes*, 50 NY2d 375, 379 n 3 (1980)] and the third element should then be:

“3. That the defendant did so with the intent to commit the crime of (specify) inside the building.”