

**BURGLARY**  
**FIRST DEGREE**  
**(B felony)**  
**(Deadly Weapon or Explosives)**  
**PENAL LAW 140.30(1)**  
**(Committed on or after Sept. 1, 1981)**  
**(Revised January 2013)<sup>1</sup>**

The \_\_\_\_\_ count is Burglary in the First Degree.

Under our law, a person is guilty of Burglary in the First Degree when that person knowingly enters [remains]<sup>2</sup> unlawfully in a dwelling with the intent to commit a crime therein, and when, in effecting entry or while in the dwelling or in immediate flight therefrom, that person [or another participant in the crime] is armed with a deadly weapon [or explosives<sup>3</sup>].

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<sup>1</sup> 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).

<sup>2</sup> 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).

<sup>3</sup> 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 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”).

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: “dwelling” “unlawfully,” “knowingly,” “intent,” and “deadly weapon.”

A DWELLING is a building which is usually occupied by a person lodging therein at night.<sup>4</sup>

*[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.<sup>5]</sup>

*[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.<sup>6]</sup>

A person enters [remains] UNLAWFULLY in a dwelling when that person has no license or privilege to enter [remain] in that dwelling.<sup>7</sup> 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.<sup>8]</sup>

*[NOTE: Add, where appropriate:*

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<sup>4</sup> See Penal Law § 140.00(3).

<sup>5</sup> See Penal Law § 140.00(2).

<sup>6</sup> See Penal Law § 140.00(2).

<sup>7</sup> See Penal Law § 140.00(5).

<sup>8</sup> See footnote 1.

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.<sup>9]</sup>

*[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.<sup>10]</sup>

A person KNOWINGLY enters [remains] unlawfully in a dwelling when that person is aware that he or she is entering [remaining] in such dwelling without license or privilege to do so.<sup>11</sup>

INTENT means conscious objective or purpose.<sup>12</sup> Thus, a person has the intent to commit a crime in a dwelling when that person's conscious objective or purpose is to commit a crime in that dwelling.

*[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.<sup>13]</sup>

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

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<sup>9</sup> See Penal Law § 140.00(5).

<sup>10</sup> See Penal Law § 140.00(5).

<sup>11</sup> See Penal Law § 15.05(2).

<sup>12</sup> See Penal Law § 15.05(1).

<sup>13</sup> See footnote 1.

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

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

[or 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]

[or a gravity knife defined as any knife having a blade which is released from the handle or sheath thereof by the force of gravity or the application of centrifugal force which, when released, is locked in place by means of a button, spring, lever or other device]

[or 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]

[or a metal knuckle knife]

[or a dagger]

[or a billy]

[or a blackjack]

[or metal knuckles].<sup>14</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), unlawfully entered [remained] in a dwelling located at (specify):

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<sup>14</sup> See Penal Law § 10.00(12); Penal Law § 265.00(4) (switchblade knife); Penal Law § 265.00(5) (gravity knife); Penal Law § 265.00(5-a) (pilum ballistic knife); Penal Law § 265.00(5-b) (metal knuckle knife, added November 1, 1995).

2. That the defendant did so knowingly<sup>15</sup>;
3. That the defendant did so with the intent to commit a crime inside the dwelling<sup>16</sup>; and
4. That, in effecting entry or while in the dwelling or in immediate flight therefrom, the defendant [*or another participant in the crime*] was armed with a deadly weapon [*or explosives*].

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 Burglary 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 Burglary in the First Degree as charged in the \_\_\_ count.

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<sup>15</sup> “Knowingly” modifies “dwelling” for this crime because the requirement that the building be a dwelling follows and is modified by the mens rea term “knowingly.” See *People v. Ryan*, 82 N.Y.2d 497 (1993). Cf. *People v. Mitchell*, 77 N.Y.2d 624 (1991); *People v. Gonzalez*, 240 A.D.2d 255 (1<sup>st</sup> Dept. 1997); *People v. Wilson*, 245 A.D.2d 402 (2<sup>nd</sup> Dept. 1997); *People v. Davis*, 244 A.D.2d 1003, 1004 (4<sup>th</sup> Dept. 1997).

<sup>16</sup> 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.”**