

**CRIMINAL POSSESSION OF A WEAPON  
IN THE THIRD DEGREE  
(Possession of Bomb, Silencer, Etc.)  
Penal Law § 265.02(2)  
(Committed on or after Sept. 1, 1974)**

The (*specify*) 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 knowingly<sup>1</sup> possesses any explosive or incendiary bomb<sup>2</sup> [*or* bombshell] [*or* firearm silencer] [*or* any firearm or weapon simulating a machine-gun and which is adaptable for such use].

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<sup>1</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>2</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").

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

[A FIREARM SILENCER means any instrument, attachment, weapon or appliance for causing the firing of any gun, revolver, pistol or other firearm to be silent, or intended to lessen or muffle the noise of the firing of any gun, revolver, pistol or other firearm.<sup>3</sup>]

POSSESS means to have physical possession or otherwise to exercise dominion or control over tangible property.<sup>4</sup>

A person KNOWINGLY possesses (specify) when that person is aware that he or she is in possession of such (specify).<sup>5</sup>

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

1. That on or about (date), in the county of (county), the defendant, (defendant's name), possessed (specify); and
2. That the defendant did so knowingly.

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

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

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<sup>3</sup>See Penal Law § 265.00(2).

<sup>4</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.

<sup>5</sup>See Penal Law § 15.05(2).