

**CRIMINAL POSSESSION OF A WEAPON
IN THE THIRD DEGREE
(Possession of Defaced Weapon)
Penal Law § 265.02 (3)
(Committed on or after Dec. 21, 2005)¹
(Revised July 2016)²**

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 possesses a

Select appropriate weapon:

machine gun

firearm

rifle

shotgun

which has been defaced for the purpose of concealment or prevention of the detection of a crime or misrepresenting the identity of such (*specify*).³

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

¹ This charge was revised to substitute the word “possesses” for the words “has in his possession,” as required by a statutory amendment, effective December 21, 2005 (see L 2005, ch 764, § 2).

² In July 2016, in light of *People v Parrilla*, __NY3d__, 2016 NY Slip Op 03417 (2016), the charge was revised to better state the law with respect to the element of “knowingly.”

³ There is a separate crime, defined in Penal Law § 265.10 (6), making “[a]ny person who wilfully defaces any machine-gun, large capacity ammunition feeding device or firearm. . . guilty of a class D felony.” Pursuant to Penal Law § 265.15 (5), “[t]he possession by any person of a defaced machine-gun, firearm rifle or shotgun is presumptive evidence that such person defaced the same.”

[A MACHINE-GUN means a weapon of any description, irrespective of size, by whatever name known, loaded or unloaded, from which a number of shots or bullets may be rapidly or automatically discharged from a magazine with one continuous pull of the trigger and includes a sub-machine gun.⁴]

[A FIREARM means any pistol or revolver.⁵]

[A RIFLE means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade, to use the energy of the explosive in a fixed metallic cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger.⁶]

[A SHOTGUN means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade, to use the energy of the explosive in a fixed shotgun shell to fire through a smooth bore either a number of ball shot or a single projectile for each single pull of the trigger.⁷]

DEFACE means to remove, deface, cover, alter or destroy the manufacturer's serial number or any other distinguishing number or identification mark.⁸

⁴ Penal Law § 265.00 (1).

⁵ Penal Law § 265.00 (3). That statutory definition of a “firearm” also includes a “sawed-off” rifle or shotgun, and an “assault weapon,” and excludes an “antique firearm.” If any one of those weapons is in issue, see the “Additional Charges” section at the end of the “Table of Contents” of the charges for this article for the appropriate charge.

⁶ Penal Law § 265.00 (11).

⁷ Penal Law § 265.00 (12).

⁸ Penal Law § 265.00 (7).

POSSESS means to have physical possession or otherwise to the exercise of dominion or control over tangible property.⁹

A person KNOWINGLY possesses (*specify*) which has been defaced for the purpose of concealment or prevention of the detection of a crime or misrepresenting its identity when that person is aware that he or she is in possession of such (*specify*) which has been defaced for such purpose.¹⁰

Under this count, (*specify*) need not be loaded but it must be operable. To be operable, (*specify*) must be capable of discharging ammunition. The defendant is required to know that he or she is in possession of (*specify*) which has been defaced for

⁹ Penal Law § 10.00 (8). Where constructive possession is alleged, or where the People rely on a statutory presumption of possession, see the "Additional Charges" section at the end of the "Table of Contents" of the charges for this article for the appropriate charge.

¹⁰ See Penal Law § 15.05 (2). For an expanded charge on the definition of "knowingly," see Instructions of General Applicability, Culpable Mental States, Knowingly.

the purpose indicated¹¹, but the defendant is not required to know that it was operable.¹²

In order for you to find the defendant guilty of this crime, the People are required to prove, from all of 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 *(specify)* which had been defaced for the purpose of concealment or prevention of the detection of a crime or misrepresenting the identity of such *(specify)*;
2. That the defendant did so knowingly; and
3. That such *(specify)* was operable.

¹¹ See *Vigil v Rivera*, 2008 WL 1902687, *10 (ED NY Apr. 25, 2008, No. 07-CV-1720 [JFB]) (holding that “[a] person knowingly possesses a firearm which had been defaced for the purpose of concealment or prevention of the detection of a crime or misrepresenting its identity when that person is aware that he or she is in the possession of such firearm which has been defaced for such purpose,” citing, *inter alia*, *People v Velasquez*, 139 Misc 2d 822 (Sup Ct, NY County 1988). See also *People v Smith*, 32 AD3d 1318, 1320 (4th Dept 2006) (“Defendant is correct that, because County Court did not charge the presumption under Penal Law § 265.15 (5), the People were required to present evidence that defendant ‘knew the weapon had been defaced’ [*People v Free*, 233 AD2d 463, 463 (1996)]”). The Court of Appeals has not yet reviewed the “knowingly” requirement of the statute (*but see People v Parrilla*, __NY3d__, 2016 NY Slip Op 03417 [2016] [with respect to a gravity knife, the law requires a defendant's knowing possession of a knife, not knowledge that the knife meets the statutory definition of a gravity knife]).

¹² Case law has added “operability” of a firearm as an element of the crime (see *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 (see *People v Parrilla*, __NY3d__, 2016 NY Slip Op 03417 [2016] [“Defendants need only knowingly possess a firearm, they need not know that the firearm was loaded or operable”]; *People v Saunders*, 85 NY2d 339, 341-342 [1995]; *People v Ansare*, 96 AD2d 96, 97 [4th Dept 1983]).

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.