

**CRIMINAL POSSESSION OF A WEAPON
IN THE THIRD DEGREE
(Possession of Firearm;
Prior Conviction)
Penal Law § 265.02 (5) (ii)
(Committed on or after July 2, 1981)
(Revised July 2016)¹**

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 knowingly² possesses a firearm and such possession did not take place in the person's home or place of business.³

¹ 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."

² The word "knowingly" has been added to this definition to comport with statutory law (see Penal Law § 15.05 [2]) and with case law (see *People v Parrilla*, __NY3d__, 2016 NY Slip Op 03417 [2016]; *People v Saunders*, 85 NY2d 339, 341-342 [1995]; *People v Ford*, 66 NY2d 428, 440 [1985]; *People v Marino*, 212 AD2d 735, 736 [2d Dept 1995]; *People v Cohen*, 57 AD2d 790, 791 [1st Dept 1977]).

³ An additional element of the crime is that the defendant

"has been previously convicted of (specify applicable crime) within the five years immediately preceding the commission of the offense."

That element must be charged in a special information, and after commencement of trial, the defendant must be arraigned on that special information. If, upon such arraignment, the defendant admits the element, the court must not make any reference to it in the definition of the offense or in listing the elements of the offense. But if the defendant denies the element or remains mute, the court must add the element to the definition of the offense and the list of elements. (see CPL 200.60; *People v Cooper*, 78 NY2d 476, 481-482 [1991]).

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

A FIREARM means any pistol or revolver.⁴

POSSESS means to have physical possession or otherwise to exercise dominion or control over tangible property.⁵

A person KNOWINGLY possesses a firearm when that person is aware that he or she is in possession of such a firearm.⁶

Under this count, the firearm need not be loaded but it must be operable. To be operable, a firearm must be capable of discharging ammunition. The defendant is required to know that he or she is in possession of a firearm, but the defendant is not required to know that the firearm was operable.⁷

⁴ 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.

⁵ 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 the charges for this article.

⁶ See Penal Law § 15.05 (2). For an expanded charge on the definition of “knowingly,” see Instructions of General Applicability, Culpable Mental States, Knowingly.

⁷ 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 in issue*: “HOME” has its ordinary meaning as a structure within which a person lives. “Home” also includes those areas around the home in which a person would reasonably be entitled to the privacy normally associated with a person’s home.

“Home” does not include any area around the home that is subject to unlimited public access, no matter how closely related a person may feel to that particular area as part of what that person calls “home,” or the extent to which a person uses the area as one would a part of his or her home.⁸]

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 four elements:

1. That on or about (date), in the county of (County), the defendant, (defendant's name) possessed a firearm;
2. That the defendant did so knowingly;
3. That such firearm was operable; and

⁸ See *People v Powell*, 54 NY2d 524, 530 (1981) (“[T]he common though unarticulated thread of all of the decisions above referred to is, as the Appellate Division suggests, whether the possessor of the weapon was entitled to ‘privacy, as one would have in his home’ in the area where he was apprehended with the weapon. The very antithesis of privacy is unlimited public access, no matter how closely related the possessor, as a subjective matter, may feel to the particular area as part of what he calls ‘home,’ or the extent to which he uses the area as one would a part of his home.”).

4. That such possession did not take place in the defendant's home or place of business.⁹

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.

⁹ If the defendant has admitted the prior conviction, the crime will consist of *only* the four elements listed above. If the defendant has denied the previous conviction or has remained mute, add as the fifth element:

"and 5. That the defendant had been convicted of (specify applicable crime) within the five years immediately preceding such possession."