

**CRIMINAL POSSESSION OF A WEAPON  
IN THE SECOND DEGREE  
(Possession of Loaded Firearm)  
(In Home or Business with Prior Conviction<sup>1</sup>)  
Penal Law § 265.03 (3)  
(Committed on or after Nov. 1, 2006)<sup>2</sup>  
(Revised Dec 2022)<sup>3</sup>**

The (specify) count is Criminal Possession of a Weapon in the Second Degree.

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<sup>1</sup> In *People v Jones*, 22 NY3d 53, 59 (2013), the defendant was charged with the instant crime. Although the possession took place in the defendant's home, the defendant had previously been convicted of a crime. Thus, the Court held, the exception for liability for the instant crime, as set forth in the statute defining this crime, was inapplicable. The Court explained that "in our view defendant's previous conviction was not an 'element of the offense charged'. . .and so did not have to be alleged at all (see CPL 200.50 [7] [a])."

"No doubt," the Court added, "in a more typical second degree possession case . . . where the alleged possession took place somewhere else—the inapplicability of the exception [for possession not in one's home or place of business] is an element of the offense, and either the indictment or a special information must allege the fact that makes it inapplicable. But where the defendant has a previous conviction, the exception never comes into play, its inapplicability is not an element of the offense, and the indictment need not allude to it."

The Court did not address the procedure to be followed when the possession takes place in the home or place of business of the defendant and the defendant denies the prior conviction. While that procedure remains to be determined, if the determination is that it is an issue for the jury to resolve and the denial therefore constitutes a "defense" to this degree of the crime, then, just before the section listing the elements, the charge should include the following paragraph:

"It is a defense to this crime that the defendant has not been previously convicted of a crime."

And then the following element should be added to the list of elements:

"4. That the defendant had been previously convicted of a crime."

<sup>2</sup> This offense was formerly Penal Law § 265.02 (4), a class D felony, which was repealed by L 2006, ch 742, § 1, eff. Nov. 1, 2006, and reenacted in the same legislation as Penal Law § 265.03, a Class C felony.

<sup>3</sup> The December 2022 revision was for the purpose of revising the instruction on the definition of "knowingly" to better state the applicable law.

Under our law, a person is guilty of Criminal Possession of a Weapon in the Second Degree when that person knowingly<sup>4</sup> possesses any loaded firearm.

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

A FIREARM means any pistol or revolver.<sup>5</sup>

A LOADED FIREARM means any firearm loaded with ammunition which may be used to discharge such firearm [or, any firearm which is possessed by one who, at the same time, possesses a quantity of ammunition which may be used to discharge such firearm.]<sup>6</sup>

POSSESS means to have physical possession or otherwise to exercise dominion or control over tangible property.<sup>7</sup>

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<sup>3</sup>. The word "knowingly" has been added to this definition to comport with statutory law (see Penal Law § § 15.00(2) and 15.05 [2]) and with case law. *People v Persce*, 204 NY 397, 402 (1912) ("the possession [of a slungshot] which is meant is a knowing and voluntary one"); *People v Saunders*, 85 NY2d 339, 341-42 (1995) ("Possession,' as part of the forbidden act, includes the Penal Law definitional component of '[v]oluntary act,' which incorporates the attribute of awareness of the possession or control . . . . Thus, the corpus delicti of weapons possession . . . is the voluntary, aware act of the possession of a weapon"); *People v Ford*, 66 NY2d 428, 440 (1985) (the offense of possession of a loaded firearm requires that the possession be knowing).

<sup>4</sup> Penal Law § 265.00 (3). The statutory definition of a "firearm" includes other weapons. If, therefore, a firearm, other than a pistol or revolver, is in issue, see "DEFINITION OF FIREARM AS OTHER THAN A PISTOL OR REVOLVER" in "Additional Charges" at the end of the Table of Contents for Penal Law article 265 crimes.

<sup>6</sup> See Penal Law § 265.00 (15) and footnote 5.

<sup>7</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.

A person KNOWINGLY possesses a firearm when that person is aware that he or she is in possession of an object that is firearm.<sup>8</sup> That person need not know (that is, be aware of) the object's name or that it meets the definition of a firearm.<sup>9</sup>

Under our law, a firearm must be operable, that is, the firearm must be capable of discharging ammunition.<sup>10</sup> A person in possession of a firearm is not required to know that the firearm

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<sup>8</sup> See Penal Law § 15.05(2). For an expanded instruction on the definition of "knowingly," see Instructions of General Applicability, Culpable Mental States, Knowingly.

<sup>9</sup> See *People v Parrilla*, 27 N.Y.3d 400, 405 (2016) (when possession of a gravity knife was a crime, defendants were required to know that "they possessed a knife" but the People were not required "to prove that defendants knew that the knife in their possession met the statutory definition of a gravity knife"); *People v Hernandez*, 180 AD3d 1234, 1237 (3d Dept 2020) ("Contrary to defendant's contention, the court was not required to instruct the jury that the People were required to show that defendant was aware of the legal definition of a blackjack. The characteristics of the blackjack at issue—a lead core, surrounded by leather, which is flexible and used as a weapon—make 'the inherently dangerous nature of the prohibited object be readily apparent, so as to put [defendant] on clear notice that the object is potentially subject to government regulation or prohibition' . . . . Accordingly, the People did not have to prove that defendant was aware of the statutory definition of a blackjack"); *People v Steinmetz*, 177 AD3d 1292, 1293 (4th Dept 2019) ("The People were not required to establish that defendant knew the rifles met the statutory criteria of an assault weapon but, rather, only that he knowingly possessed the rifles"); *People v Abdullah*, 206 AD3d 1340, 1344 (3d Dept 2022) (knowing possession of a slungshot is required but a defendant need not know the dictionary definition of slungshot).

<sup>10</sup> 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*, 27 NY3d 400 [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]). In December 2022, the last sentence was substituted for: "The defendant is not required to know that it is loaded or operable."

is operable or loaded.<sup>11</sup>

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 a firearm;
2. That the defendant did so knowingly; and
3. That the firearm was loaded and operable.

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.

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<sup>11</sup> See footnote 10.