

**CRIMINAL POSSESSION OF A DANGEROUS WEAPON  
IN THE FIRST DEGREE  
(Possession of Explosive with  
Intent To Use Unlawfully)  
Penal Law § 265.04(1)<sup>1</sup>  
(Committed on or after Sept. 1, 1974)**

The (*specify*) count is Criminal Possession of a Dangerous Weapon in the First Degree.

Under our law, a person is guilty of Criminal Possession of a Dangerous Weapon in the First Degree when that person knowingly<sup>2</sup> possesses any explosive substance<sup>3</sup> with intent to use the same unlawfully against the person or property of another.

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<sup>1</sup> Penal Law § 265.04 was divided into two subdivisions by the laws of 2005, c. 764, effective December 21, 2005; this provision became subdivision one; and, the name of the crime was amended to refer to possession of a “weapon” rather than a “dangerous weapon.” The definition of the crime was not amended.

<sup>2</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>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”).

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

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

A person KNOWINGLY possesses any explosive substance when that person is aware that he or she is in possession of such an explosive substance.<sup>5</sup>

INTENT means conscious objective or purpose.<sup>6</sup> Thus, a person acts with intent to use an explosive substance against the person or property of another when his or her conscious objective or purpose is to use an explosive substance against the person or property of another.

Under our law, the possession by any person of an explosive substance is presumptive evidence of possessing such explosive substance with intent to use the same unlawfully against the person or property of another if such person is not licensed or otherwise authorized to possess such substance.<sup>7</sup> What this means is that, if the People have proven beyond a reasonable doubt that the defendant knowingly possessed an explosive substance and that he/she was not licensed or otherwise authorized to possess it, then you may, but you are not required to, infer from those facts that the defendant possessed such explosive substance with the intent to use it unlawfully against the person or property of another.

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 three elements:

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<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).

<sup>6</sup>See Penal Law § 15.05(1).

<sup>7</sup>See Penal Law § 265.15(4).

1. That on or about (date), in the county of (county), the defendant, (defendant's name) possessed an explosive substance;
2. That the defendant did so knowingly; and
3. That the defendant did so with the intent to use it unlawfully against the person or property of another.

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.