

**AGGRAVATED CRIMINAL POSSESSION OF A WEAPON**  
**Penal Law § 265.19**  
**(Committed on or after Mar. 16, 2013)**  
**(Revised July 2016)<sup>1</sup>**

The (specify) count is Aggravated Criminal Possession of a Weapon.

Under our law, a person is guilty of Aggravated Criminal Possession of a Weapon when that person knowingly<sup>2</sup> possesses any loaded firearm<sup>3</sup> and also commits (specify underlying violent or drug trafficking felony)<sup>4</sup> arising out of the same criminal transaction.<sup>5</sup> Such possession shall not constitute a violation of this law if such possession takes place in such person's home or place of business.

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<sup>1</sup> 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."

<sup>2</sup> 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]).

<sup>3</sup> The words "possesses any loaded firearm" are inserted to replace "commits the crime of criminal possession of a weapon in the second degree as defined in subdivision three of section 265.03 of this article."

<sup>4</sup> Here the statute reads as follows: "any violent felony offense as defined in subdivision one of section 70.02 of this chapter or a drug trafficking felony as defined in subdivision twenty-one of section 10.00 of this chapter."

<sup>5</sup> The term "criminal transaction" is not defined by this statute. There is a definition of that term in CPL 40.10 (2). Whether that definition, as set forth in that section in its subdivision (a) or (b), or both, applies here remains to be determined (see generally *People v Duggins*, 3 NY3d 522, 533 [2004]).

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

A FIREARM means any pistol or revolver.<sup>6</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>7</sup>

POSSESS means to have physical possession or otherwise to exercise dominion or control over tangible property.<sup>8</sup>

A person KNOWINGLY possesses a firearm when that person is aware that he or she is in possession of a firearm.<sup>9</sup>

Under this count, the firearm must be loaded and operable. To be operable, a firearm must be capable of discharging ammunition. The defendant is required to know that he or she is

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<sup>6</sup> Penal Law § 265.00 (3). The statutory definition of a “firearm” also includes certain types of shotguns or rifles, and an “assault weapon,” and excludes an “antique firearm.” If the firearm in issue is an applicable shotgun or rifle, or if it is in issue whether the firearm is an “antique firearm,” see the “Additional Charges” section at the end of the “table of contents” of the charges for this article for the appropriate charge.

<sup>7</sup> Penal Law § 265.00 (15). For an expanded charge on the definition of “knowingly,” see Instructions of General Applicability, Culpable Mental States, Knowingly.

<sup>8</sup> 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>9</sup> See Penal Law § 15.05 (2) and see footnotes five and six.

in possession of a firearm, but the defendant is not required to know that the firearm was loaded or operable.<sup>10</sup>

[*It 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.<sup>11</sup>]

(Specify name and definition of underlying crime)<sup>12</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 five elements:

1. That on or about (date), in the county of (County), the defendant, (defendant’s name), possessed a firearm;

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<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*, \_\_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]).

<sup>11</sup> 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.”)

<sup>12</sup> With respect to defining the underlying crime, if the underlying crime is a separate count within the indictment, reference to the crime or count is sufficient.

2. That the defendant did so knowingly;
3. That the firearm was loaded and operable;
4. That the defendant possessed such firearm in a place that was not the defendant's home or place of business; and
5. That the defendant also committed (specify violent or drug trafficking felony) arising out of the same criminal transaction.

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.