

**STALKING IN THE SECOND DEGREE
(Weapon)
Penal Law § 120.55(1)
(Committed on or after Dec. 1, 1999) ¹
(Revised Dec. 6, 2003, May 5, 2009, and April 2018) ²**

The (*specify*) count is Stalking in the Second Degree.

Under our law a person is guilty of Stalking in the Second Degree when he or she with intent to harass, annoy or alarm a specific person, intentionally engages in a course of conduct directed at such person which is likely to cause such person to reasonably fear physical injury or serious physical injury, the commission of a sex offense against, or the kidnapping, unlawful imprisonment or death of such person or a member of such person's immediate family,

and in the course of and in furtherance of the commission of such offense:

displays, or possesses and threatens the use of:

Select appropriate weapon:

a firearm, pistol, revolver, rifle, shotgun, machine gun, electronic dart gun, electronic stun gun, cane sword, billy, blackjack, bludgeon, plastic

¹ This charge applies when the crime was committed on or after December 1, 1999, except as to the following weapon which was added to the definition of "deadly weapon" [Penal Law § 10.00(12)] after that date:

November 1, 2008, was the effective date of an amendment to that definition to add "plastic knuckles." L. 2008, ch. 257.

² The 2003 revision was to reflect the decision in *People v. Stuart*, 100 NY2d 412 (2003).

The 2008 revision was to add the term "plastic knuckles" to the amended definition of "deadly weapon" contained in PL § 10.00(12) (L. 2008, c.257, § 1, eff. Nov. 1, 2008).

The 2018 revision was to include the full definition of "deadly weapon" and the statutory and decisional law definitions of weapons included in that definition as set forth in footnote 10. And the definition of "dangerous instrument" was expanded.

knuckles, metal knuckles, chuka stick, sand bag, sandclub, slingshot, slungshot, shirken, "Kung Fu Star", dagger, dangerous knife, dirk, razor, stiletto, imitation pistol, dangerous instrument, deadly instrument or deadly weapon;

[or displays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm].

The following terms used in that definition have a special meaning:³

INTENT means conscious objective or purpose. Thus, a person acts with INTENT to harass, annoy or alarm a specific person when his

³ If in issue, the definition of the term or terms: "physical injury [Penal Law § 10.00(9)]," "serious physical injury [Penal Law § 10.00(10)]," "sex offense [Penal Law § 120.40(3)]," "kidnapping [Penal Law § 120.40(1)]," or "unlawful imprisonment [Penal Law § 120.40(2)]," may be charged.

Similarly, a definition of a number of the weapons set forth in the definition of this crime may be found in Penal Law § 265.00 and the applicable definition should be charged to the jury.

The definition of two of the more commonly charged weapons ("dangerous weapon," and "deadly weapon") which are not defined in Penal Law § 265.00 are set forth in this charge. And the definition of "deadly weapon" incorporates some of the weapons and their definition that are separately listed in the definition of this crime and thus if one of those weapons is in issue, its definition may be extracted from the definition of "deadly weapon" and charged to the jury.

There is no statutory definition of the term "course of conduct." *People v Dickson*, 82 AD3d1289, 1291 (3d Dept. 2011) held that it was not error to decline to define the term. *People v. Ubbink*, 120 AD3d 1574, 1575-76 (4th Dept. 2014), noted that "course of conduct" has been defined as "a series of acts 'evidencing a continuity of purpose'" (quoting *People v Payton*, 161 Misc2d 170, 174 (Crim Ct., Kings County, 1994)). See also *People v Murray*, 167 Misc2d 857 (Crim. Ct., N.Y. County, 1995); *People v Monroe*, 183 Misc2d 374 (Crim. Ct., N.Y. County, 2000). For an example of facts constituting a "course of conduct" see *People v Stuart*, 100 NY2d 412 (2003).

With respect to "reasonable fear," the court in *Stuart* wrote: "the fear must be reasonable and not idiosyncratic; the harm (or likely harm) must be material."

or her conscious objective or purpose is to do so.⁴ And, a person INTENTIONALLY engages in a course of conduct directed at a specific person when his or her conscious objective or purpose is to do so.⁵

[IMMEDIATE FAMILY means the spouse, former spouse, parent, child, sibling, or any other person who regularly resides or has regularly resided in the household of a person.⁶]

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

[DANGEROUS INSTRUMENT means any instrument, article or substance, including a “vehicle”⁸ which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or other serious physical injury,⁹ that is, serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ.¹⁰ Under that definition, death or other serious physical injury need not, in fact, be caused.]

[DEADLY WEAPON means

Select appropriate alternative:

any loaded weapon from which a shot, readily capable of producing death or other serious physical injury, may be discharged.

a switchblade knife defined as any knife having a blade which opens automatically by hand pressure applied to a button, spring or other

⁴See Penal Law §15.05(1).

⁵See Penal Law §15.05(1).

⁶Penal Law §120.40(4).

⁷Penal Law §10.00(8). Where constructive possession is alleged, insert the appropriate instruction as found in the Additional Charges to Penal Law article 265.

⁸For a definition of “vehicle”, see Penal Law §10.00(14).

⁹Penal Law §10.00(13).

⁶ Penal Law § 10.00(10).

device in the handle of the knife.

a pilum ballistic knife defined as any knife having a blade which can be projected from the handle by hand pressure applied to a button, lever, spring or other device in the handle of the knife.

a metal knuckle knife, defined as a weapon that, when closed, cannot function as a set of plastic knuckles or metal knuckles, nor as a knife and when open, can function as both a set of plastic knuckles or metal knuckles as well as a knife.

metal knuckles, defined as a metal object with multiple holes, through which individual places his or her fingers so that a metal bar rests atop the individual's knuckles.

a billy, defined as a cylindrical or rounded, rigid, club or baton with a handle grip which, from its appearance and inherent characteristics, is designed to be used as a striking weapon and not for other lawful purposes.

a dagger

a blackjack

plastic knuckles.] ¹¹

[The element that the person "DISPLAY WHAT APPEARS TO BE A PISTOL, REVOLVER, RIFLE, SHOTGUN, MACHINE GUN OR OTHER FIREARM" does not require the People to prove that the object displayed was actually a firearm. What the People are required to prove is that the person consciously displayed, or manifested the presence of, something that could reasonably be perceived as a pistol,

¹⁰ Penal Law § 10.00(12) defines "deadly weapon." See Penal Law § 265.00 for the definitions of "switchblade knife," "gravity knife," "pilum ballistic knife" and "metal knuckle knife"; *People v. Aragon*, 28 N.Y.3d 125 (2016) (for the definition of "metal knuckles"); *People v. Ocasio*, 28 N.Y.3d 178 (2016) (for the definition of "billy").

There is no controlling statutory or decisional law definition of "plastic knuckles" albeit the legislative memorandum in support of adding that term equated it with "brass [metal] knuckles"; thus, for the definition of "plastic knuckles," a court may wish to consider using the definition of "metal knuckles," substituting "plastic object" for "metal object" and "plastic bar" for "metal bar."

revolver, rifle, shotgun, machine gun or other firearm and that the person to whom the item was displayed or manifested, perceived it as a pistol, revolver, rifle, shotgun, machine gun or other firearm. ¹²

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 four elements:

1. That on or about [and between] (date[s]), in the county of (county), the defendant (defendant's name) engaged in a course of conduct directed at (specify individual);
2. That the defendant did so intentionally and with intent to harass, alarm or annoy (specify); and
3. That the course of conduct was likely to cause (specify) to reasonably fear

Select appropriate alternative(s):

physical injury to, [or]

serious physical injury to, [or]

the commission of a sex offense against, [or]

the kidnapping of, [or]

the unlawful imprisonment of,[or]

death of

himself/herself [or a member of his/her immediate family].

4. That in the course of and in furtherance of the commission of the offense, the defendant:

[Select appropriate alternative:

displayed, or possessed and threatened the use of

¹²See *People v Lopez*, 73 NY2d 214 (1989); *People v Baskerville*, 60 NY2d 374 (1983).

(specify item(s) listed in Penal Law § 120.55(1)(i))

displayed what appeared to be a pistol, revolver, rifle, shotgun, machine-gun, or other firearm].

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.