

**CRIMINAL POSSESSION OF A WEAPON
IN THE THIRD DEGREE
(Possession of Bomb, Silencer, Etc.)
Penal Law ' 265.02(2)
(Committed on or after Sept. 1, 1974)**

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 knowingly¹ possesses any

Select appropriate alternative(s):

explosive [or]

incendiary bomb [or]

bombshell] [or]

firearm silencer] [or]

any firearm or weapon simulating a machine-gun and which is adaptable for such use].

The following term(s) used in that definition have a special meaning: ²

¹The 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).

² 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, ch. 57.) *But see Matter of Perry*, 232 AD2d 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 AD2d 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®).

[A FIREARM SILENCER means any instrument, attachment, weapon or appliance for causing the firing of any gun, revolver, pistol or other firearm to be silent, or intended to lessen or muffle the noise of the firing of any gun, revolver, pistol or other firearm.³]

[A MACHINE-GUN means a weapon of any description, irrespective of size, by whatever name known, loaded or unloaded, from which a number of shots or bullets may be rapidly or automatically discharged from a magazine with one continuous pull of the trigger and includes a sub-machine gun.⁴

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

A person KNOWINGLY possesses (specify) when that person is aware that he or she is in possession of such (specify).⁶

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, both of the following two elements:

1. That on or about (date), in the County of (County), the defendant, (defendant's name), possessed (specify); and
2. That the defendant did so knowingly.

If you find that the People have proven beyond a reasonable doubt both of those elements, you must find the defendant guilty of this crime.

³Penal Law ' 265.00(2).

⁴ Penal Law § 265.00(1).

⁵See 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.

⁶See Penal Law ' 15.05(2).

If you find that the People have not proven beyond a reasonable doubt either one or both of those elements, you must find the defendant not guilty of this crime.