

**CRIMINAL POSSESSION OF A WEAPON
IN THE SECOND DEGREE
(Loaded Firearm)
(with Intent to Use Unlawfully)
Penal Law § 265.03 (1) (b)
(Committed on or after Nov. 1, 1998)¹
(Revised June 2006; Jan. 2011; and July 2016)²**

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

Under our law, a person is guilty of Criminal Possession of a Weapon in the Second Degree when, with intent to use the same unlawfully against another, that person knowingly³ possesses a loaded firearm.

¹ By the Laws of 2005, chapter 764, this provision was renumbered without substantive change. By the Laws of 2006, chapter 742, effective November 1, 2006, this provision was repealed, and by the Laws of 2006, chapter 745, effective December 15, 2006, it was reenacted.

For crimes committed on or after September 1, 1974 and before November 1, 1998, the paragraph defining the crime should read: "Under our law, a person is guilty of Criminal Possession of a Weapon in the Second Degree when that person knowingly possesses a loaded firearm with intent to use the same unlawfully against another." Otherwise, the charge remains the same.

² The charge was revised in 2006 to accord with the case law cited in footnote six and it was revised in 2011 to accord with the case law cited in footnote ten. In July 2016, in light of *People v Parrilla*, 27 NY3d 400 (2016), the charge was revised to better state the law with respect to the element of "knowingly."

³ 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*, 27 NY3d 400 [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]).

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

A FIREARM means any pistol or revolver.⁴

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.]⁵

POSSESS means to have physical possession or otherwise to exercise dominion or control over tangible property.⁶

A person KNOWINGLY possesses a firearm when that person is aware that he or she is in possession of a firearm.⁷

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 in possession of a firearm, but the defendant is not required to know that the firearm was loaded or operable.⁸

⁴ Penal Law § 265.00 (3). That statutory definition of a “firearm” also includes a “sawed-off” rifle or shotgun, and an “assault weapon,” and excludes an “antique firearm.” If any one of those weapons is in issue, see the “Additional Charges” section at the end of the “table of contents” of the charges for this article for the appropriate charge.

⁵ Penal Law § 265.00 (15).

⁶ 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 article.

⁷ See Penal Law § 15.05 (2). For an expanded charge on the definition of “knowingly,” see Instructions of General Applicability, Culpable Mental States, Knowingly.

⁸ 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,

INTENT means conscious objective or purpose.⁹ Thus, a person acts with intent to use a loaded firearm unlawfully against another when his or her conscious objective or purpose is to use that loaded firearm unlawfully against another.

[Note: In cases where defendant is alleged to have used the loaded firearm, omit the period in the last sentence and add:

, and, that intent need only exist at the very moment that a person engages in an unlawful use of the firearm against another.^{10]}

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 four 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;
3. That the firearm was loaded and operable; and
4. That the defendant possessed the loaded firearm with the intent to use it unlawfully against 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.

341-342 [1995]; *People v Ansare*, 96 AD2d 96, 97 [4th Dept 1983]).

⁹ See Penal Law § 15.05 (1).

¹⁰ See *People v Muhammad*, 17 NY3d 532, 543 (2011). For a further enhanced charge on intent, particularly if the People rely on a statutory presumption of intent, see the appropriate instruction from the "Additional Charges" section at the end of this CJL article.

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.