

**CRIMINAL POSSESSION OF A WEAPON
IN THE SECOND DEGREE
(Possession of Loaded Firearm)
(In Home or Business with Prior Conviction¹)
Penal Law § 265.03 (3)
(Committed on or after Nov. 1, 2006)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

¹ In *People v Jones*, 22 NY3d 53 (2013), the defendant was charged with the instant crime. Although the possession took place in the defendant's home, the defendant had previously been convicted of a crime. Thus, the Court held, the exception for liability for the instant crime, as set forth in the statute defining this crime, was inapplicable. The Court explained that "...in our view defendant's previous conviction was not an "element of the offense charged"...and so did not have to be alleged at all (see CPL 200.50 [7] [a]).

"No doubt," the Court added, "in a more typical second degree possession case...where the alleged possession took place somewhere else—the inapplicability of the exception [for possession not in one's home or place of business] is an element of the offense, and either the indictment or a special information must allege the fact that makes it inapplicable. But where the defendant has a previous conviction, the exception never comes into play, its inapplicability is not an element of the offense, and the indictment need not allude to it."

The Court did not address the procedure to be followed when the possession takes place in the home or place of business of the defendant and the defendant denies the prior conviction. While that procedure remains to be determined, if the determination is that it is an issue for the jury to resolve and the denial therefore constitutes a "defense" to this degree of the crime, then, just before the section listing the elements, the charge should include the following paragraph:

"It is a defense to this crime that the defendant has not been previously convicted of a crime."

And then the following element should be added to the list of elements:

"4. That the defendant had been previously convicted of a crime."

² This offense was formerly Penal Law § 265.02 (4), a class D felony, which was repealed by L 2006, ch 742, § 1, eff. Nov. 1, 2006, and reenacted in the same legislation as Penal Law § 265.03, a Class C felony.

a Weapon in the Second Degree when that person knowingly³ possesses any loaded firearm.

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

A FIREARM means any pistol or revolver.⁴

Under our law, a firearm must be operable, that is, the firearm must be capable of discharging ammunition.⁵

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.]⁶

POSSESS means to have physical possession or otherwise

³ 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 A.D.2d 735, 736 (2d Dept 1995); *People v Cohen*, 57 AD2d 790 (1st Dept 1977).

⁴ Penal Law § 265.00 (3). If the firearm involved is other than a pistol or revolver, see the "Additional Charges" section of the article 265 charges and substitute the appropriate definition.

⁵ Case law has added "operability" of the firearm as an element of the crime [*People v Longshore*, 86 NY2d 851, 852 (1995)], but has further held that there is no requirement that the possessor know that the firearm was operable. *People v Ansare*, 96 AD2d 96 (4th Dept 1983). Cf. *People v Saunders*, 85 NY2d 339, 341-42 (1995).

⁶ See Penal Law § 265.00 (15). There is no requirement that the defendant knew the firearm was loaded at the time of possession. See *People v Broomfield*, 275 AD2d 885 (4th Dept 2000); *People v Smith*, 270 AD2d 719 (3d Dept 2000); *People v Toribio*, 216 AD2d 189 (1st Dept 1995).

to exercise dominion or control over tangible property.⁷

A person KNOWINGLY possesses a firearm when that person is aware that he or she is in possession of a firearm.⁸ THE DEFENDANT IS NOT REQUIRED TO KNOW THAT THE FIREARM WAS LOADED OR OPERABLE.⁹

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 three 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.

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.

⁷ 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.

⁸ See Penal Law § 15.05 (2) and see footnotes four and five.

⁹ See footnotes five and six.