

**CRIMINAL SALE OF A FIREARM
IN THE THIRD DEGREE
(Sells Firearm or Ammunition Device)
Penal Law § 265.11 (1)
(Committed on or after Apr. 15, 2013)
(Revised July 2016 and Dec 2022)¹**

The (*specify*) count is Criminal Sale of a Firearm in the Third Degree.

Under our law, a person is guilty of Criminal Sale of a Firearm in the Third Degree when that person is not authorized pursuant to law to possess a firearm and he or she knowingly² and unlawfully sells, exchanges, gives or disposes of a firearm [or large capacity ammunition feeding device] to another person.

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

¹ In July 2016, in light of *People v Parrilla*, 27 N.Y.3d 400 (2016), the charge was revised to better state the law with respect to the element of “knowingly.”

The December 2022 revision was for the purpose of incorporating a statutory change in the definition of “large capacity ammunition feeding device” per the L. 2022, ch. 209, effective July 6, 2022; and for incorporating a statutory change in the definition of “rifle” and “shotgun” per L. 2022, c. 371.

² . The word "knowingly" has been added to this definition to comport with statutory law (see Penal Law § § 15.00(2) and 15.05 [2]) and with case law. *People v Persce*, 204 NY 397, 402 (1912) ("the possession [of a slungshot] which is meant is a knowing and voluntary one"); *People v Saunders*, 85 NY2d 339, 341-42 (1995) ("'Possession,' as part of the forbidden act, includes the Penal Law definitional component of '[v]oluntary act,' which incorporates the attribute of awareness of the possession or control Thus, the corpus delicti of weapons possession . . . is the voluntary, aware act of the possession of a weapon"); *People v Ford*, 66 NY2d 428, 440 (1985) (the offense of possession of a loaded firearm requires that the possession be knowing).

FIREARM means any pistol or revolver.³

A person is NOT AUTHORIZED PURSUANT TO LAW TO POSSESS A FIREARM when that person has no legal right to possess a firearm.⁴ Under our law, with certain exceptions not applicable here, a person has no legal right to possess a firearm.⁵

A person KNOWINGLY sells, exchanges, gives, or disposes of a firearm [or large capacity ammunition feeding device] to another when that person is aware that he or she is doing so.⁶

³ Penal Law § 265.00 (3). The statutory definition of a “firearm” includes other weapons. If, therefore, a firearm, other than a pistol or revolver, is in issue, see “DEFINITION OF FIREARM AS OTHER THAN A PISTOL OR REVOLVER” in “Additional Charges” at the end of the Table of Contents for Penal Law article 265 crimes.

⁴ See Penal Law article 400.

⁵ In *People v. Tatis*, 170 A.D.3d 45 (1st Dept 2019), the Appellate Division reviewed NYC Administrative Code § 10-131(i)(3) that prohibits the possession of a pistol or revolver within the City by “any person not authorized to possess” same and held that the quoted language “constitutes an exception and not a proviso. Consequently, it was the People's burden to prove that the defendant was not authorized to possess a pistol or revolver within the City of New York.” Parallel language appears in the definition of the instant Penal Law crime. *Tatis*, however, distinguished Penal Law firearm crimes:

“The People point to Penal Law section 265.20, which is a catalogue of exemptions to various Penal Law weapon provisions, including one for ‘[p]ossession of a pistol or revolver by a person to whom a license therefor has been issued . . .’ (Penal Law § 265.20[a][3]). These exemptions must be raised by a defendant in the first instance before the prosecution is required to disprove them beyond a reasonable doubt. However, the People's reliance on Penal Law section 265.20 and such exemptions is unavailing as that section is distinguishable from the statute at issue in this case. Because the exemptions in Penal Law section 265.20 are found outside the particular Penal Law provisions to which they apply, interpreting them to require an initial showing by a defendant is consistent with the interpretive principles traditionally used to differentiate between exceptions and provisos. The same is not true in this case, where the exclusionary language is contained entirely within section 10-131(i)(3) itself and, under a plain reading, forms an element of the offense which the People were required to disprove” (citations omitted).

⁶ See Penal Law § 15.05 (2). For an expanded charge on the definition of “knowingly,” see Instructions of General Applicability, Culpable Mental States,

A person UNLAWFULLY sells, exchanges, gives or disposes of a firearm [or large capacity ammunition feeding device] when that person has no legal right to do so.⁷ Under our law, WITH CERTAIN EXCEPTIONS NOT APPLICABLE HERE, a person has no legal right to sell, exchange, give or dispose of a firearm [or large capacity ammunition feeding device] to another person.

DISPOSE OF means to dispose of, give, give away, lease, loan, keep for sale, offer, offer for sale, sell, transfer and otherwise dispose of.⁸

LARGE CAPACITY AMMUNITION FEEDING DEVICE a magazine, belt, drum, feed strip, or similar device, that has a capacity of, or that can be readily restored or converted to accept, more than ten rounds of ammunition.⁹

Knowingly.

⁷ See Penal Law article 400.

⁸ Penal Law § 265.00 (6)

⁹ See Penal Law § 265.00(23), as amended by L. 2022, ch. 209, effective July 6, 2022. As may be appropriate to include, the statutory definition of “large capacity feeding device” continues: “provided, however, that such term does not include an attached tubular device designed to accept, and capable of operating only with, .22 caliber rimfire ammunition or a feeding device that is a curio or relic. A feeding device that is a curio or relic is defined as a device that (i) was manufactured at least fifty years prior to the current date, (ii) is only capable of being used exclusively in a firearm, rifle, or shotgun that was manufactured at least fifty years prior to the current date, but not including replicas thereof, (iii) is possessed by an individual who is not prohibited by state or federal law from possessing a firearm and (iv) is registered with the division of state police pursuant to subdivision sixteen-a of section 400.00 of this chapter, except such feeding devices transferred into the state may be registered at any time, provided they are registered within thirty days of their transfer into the state. Notwithstanding paragraph (h) of subdivision twenty-two of this section, such feeding devices may be transferred provided that such transfer shall be subject to the provisions of section 400.03 of this chapter including the check required to be conducted pursuant to such section.”

[ADD IF ITEM IS A FIREARM:

Under this count, the firearm need not be loaded but it must be operable. To be operable, a firearm must be capable of discharging ammunition. A person in possession of a firearm is not required to know that the firearm was operable.^{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 (three / four) elements:

1. That on or about (date), in the county of (County), the defendant, (defendant's name) was not authorized pursuant to law to possess a firearm [or large capacity ammunition feeding device];
2. That the defendant sold, exchanged, gave, or disposed of a firearm [or large capacity ammunition feeding device] to another person; [and]
3. That the defendant did so knowingly AND unlawfully; [and]

[Add if item is a firearm:

4. That the firearm was 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.

¹⁰ 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, 341-342 [1995]; *People v Ansare*, 96 AD2d 96, 97 [4th Dept 1983]). In December 2022, the last sentence was substituted for: "The defendant is not required to know that the firearm was operable."

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.