

**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 June 2013 and July 2016)<sup>1</sup>**

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 knowingly<sup>2</sup> 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:

A FIREARM means any pistol or revolver.<sup>3</sup>

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<sup>1</sup> Effective April 15, 2013, the definition of A large capacity ammunition feeding device<sup>@</sup> was amended and this charge accordingly revised. For a charge of the sale of that device on or after November 1, 2000 and before April 15, 2013, substitute the following definition for a A large capacity ammunition feeding device<sup>@</sup>: LARGE CAPACITY AMMUNITION FEEDING DEVICE means a magazine, belt, drum, feed strip, or similar device, manufactured after September 13, 1994, that has a capacity of, or that can be readily restored or converted to accept, more than ten rounds of ammunition.

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 A knowingly<sup>@</sup>.

<sup>2</sup> 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 *Parrilla*, 27 N.Y.3d 400; *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]).

<sup>3</sup> Penal Law ' 265.00 (3). That statutory definition of a A firearm<sup>@</sup> also

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

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.<sup>6</sup>

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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.

<sup>4</sup> See Penal Law article 400.

<sup>5</sup> In *People v. Tatis*, 170 A.D.3d 45 (1<sup>st</sup> 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 possession 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).

<sup>6</sup> See Penal Law § 15.05 (2). For an expanded charge on the definition of

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.<sup>7</sup> 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.<sup>8</sup>

[LARGE CAPACITY AMMUNITION FEEDING DEVICE means 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.<sup>9</sup>]

[ADD IF ITEM IS A FIREARM:]

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"knowingly," see Instructions of General Applicability, Culpable Mental States, Knowingly.

<sup>6</sup> See Penal Law article 400.

<sup>8</sup> Penal Law ' 265.00 (6)

<sup>9</sup> See Penal Law ' 265.00 (23). The definition of A large capacity ammunition feeding device, contains a proviso which, if applicable, reads: A 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.

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. 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 operable.<sup>10]</sup>

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.

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<sup>9</sup> 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*, \_\_NY3d\_\_, 2016 NY Slip Op 03417 [2016] [ADefendants 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]).

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.