

**CRIMINAL SALE OF A FIREARM
IN THE THIRD DEGREE
(Possesses Firearm with Intent to Sell)
Penal Law ' 265.11 (2)
(Committed on or after Nov. 1, 1999)
(Revised July 2016)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 possesses a firearm with the intent to sell it.

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

A 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

¹ 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.[@]

² 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*; *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]).

³ 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.

possess it.⁴ Under our law, with certain exceptions not applicable here, a person has no legal right to possess a 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

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 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).

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 as found in the "Additional Charges" section at the end of this chapter.

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.

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.^{8]}

A person UNLAWFULLY possesses a firearm when that person has no legal right to possess a firearm.⁹ Under our law, with certain exceptions not applicable here, a person has no legal right to possess a firearm.

INTENT means conscious objective or purpose. Thus, a person possesses a firearm with intent to sell it when his or her conscious objective or purpose is to sell the firearm.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) was not authorized pursuant to law to possess a firearm;
2. That the defendant knowingly and unlawfully possessed a firearm;

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 *Parrilla* at 405 [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]).

⁹ See Penal Law article 400.

¹⁰ See Penal Law ' 15.05 (1).

3. That the defendant possessed that firearm with the intent to sell it; and
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.

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.