

**CRIMINAL USE OF A FIREARM
IN THE SECOND DEGREE
(Possession of deadly weapon)
Penal Law § 265.08 (1)
(Committed on or after Aug. 12, 1980)
(Revised July 2016)¹**

The (specify) count is Criminal Use of a Firearm in the Second Degree.

Under our law, a person is guilty of Criminal Use of a Firearm in the Second Degree when that person commits any Class C violent felony offense and he or she knowingly² possesses a deadly weapon, if the weapon is a loaded weapon from which a shot, readily capable of producing death or other serious physical³ injury may be discharged.

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

A CLASS C VIOLENT FELONY OFFENSE includes (specify name of felony or felonies and definition).

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."

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).

³ "Deadly weapon" is defined in Penal Law § 10.00 (12). A portion of that definition is expressly incorporated in this section; except, that the instant statute refers to "serious injury," while the definition refers to "serious physical injury," the term used in this charge.

POSSESS means to have physical possession or otherwise to exercise dominion or control over tangible property.⁴

A person KNOWINGLY possesses a deadly weapon when that person is aware that he or she is in possession of a deadly weapon.⁵

Under this count, the deadly weapon must be loaded and capable of discharging a shot, readily capable of producing death or other serious physical injury. The person who possesses a deadly weapon is not required to know that it was loaded or that it was capable of discharging a shot.⁶

SERIOUS PHYSICAL INJURY means impairment of a person's physical condition which creates a substantial risk of death, or which causes death, or serious and protracted disfigurement, or protracted impairment of health or protracted loss or impairment of the function of any bodily organ.⁷

⁴ Penal Law § 10.00 (8). Where constructive possession is alleged, or where the People rely on a statutory presumption of possession, see the "Additional Charges" section at the end of the "table of contents" of the charges for this article for the appropriate charge.

⁵ See Penal Law § 15.05 (2). For an expanded charge on the definition of "knowingly," see Instructions of General Applicability, Culpable Mental States, Knowingly.

⁶ 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 it was loaded or that it was capable of discharging a shot."

⁷ Penal Law § 10.00 (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, the following element:

That on or about (date), in the County of (County), the defendant, (defendant's name), committed any Class C violent felony offense and knowingly possessed a deadly weapon that was a loaded weapon from which a shot, readily capable of producing death or other serious physical injury may be discharged.

If you find the People have proven that element beyond a reasonable doubt, you must find the defendant guilty of this crime.

If you find the People have not proven that element beyond a reasonable doubt, you must find the defendant not guilty of this crime.