

**CRIMINAL POSSESSION OF A WEAPON  
IN THE SECOND DEGREE  
(Possession of Loaded Firearm Not in Home or Business)  
Penal Law § 265.03 (3)  
(Committed on or after Nov. 1, 2006)<sup>1</sup>  
(Revised Feb. 2016, July 2016, and Aug. 2018)<sup>2</sup>**

The (specify) count is Criminal Possession of a Weapon in the Second Degree.

Under our law, a person is guilty of Criminal Possession of a Weapon in the Second Degree when that person knowingly<sup>3</sup> possesses any loaded firearm and such possession did not take place in such person's home or place of business.

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

A FIREARM means any pistol or revolver.<sup>4</sup>

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<sup>1</sup> This offense was formerly Penal Law § 265.02 (4), a class D felony, which was repealed by L 2006, ch 742, § 1, eff.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.

<sup>2</sup> The February 2016 revision was for the purpose of adding a definition of “home” for cases in which it is in issue. See footnote 10.

The July 2016 revision was for the purpose, in light of *People v Parrilla*, 27 NY3d 400 (2016), to better state the law with respect to the element of “knowingly.”

The August 2018 revision was for the purpose of adding the Court of Appeals definition of “business.”

<sup>3</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 *People v Parrilla*, 27 NY3d 400 (2016); *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>4</sup> 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.

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].<sup>5</sup>

POSSESS means to have physical possession or otherwise to exercise dominion or control over tangible property.<sup>6</sup>

A person KNOWINGLY possesses a firearm when that person is aware that he or she is in possession of a firearm.<sup>7</sup>

Under this count, the firearm must be loaded and 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 loaded or operable.<sup>8</sup>

[*If in issue*: "HOME" has its ordinary meaning as a structure within which a person lives. "Home" also includes those areas around the home in which a person would reasonably be entitled to the privacy normally associated with a person's home. "Home"

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<sup>5</sup> Penal Law § 265.00 (15).

<sup>6</sup> 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 the charges for this article.

<sup>7</sup> See Penal Law § 15.05 (2). For an expanded charge on the definition of "knowingly," see Instructions of General Applicability, Culpable Mental States, Knowingly.

<sup>8</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*, 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).

does not include any area around the home that is subject to unlimited public access, no matter how closely related a person may feel to that particular area as part of what that person calls “home,” or the extent to which a person uses the area as one would a part of his or her home.<sup>9]</sup>

[*If in issue*: A place of business is a PERSON’S PLACE OF BUSINESS when that person has a greater interest in protection of the premises, principal control over the premises, and a strong tie to the continued safety and security of the establishment and the goods or services offered there. For example, when a person is a merchant, storekeeper, or principal operator of a business that place is that person’s place of business.<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 four 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, and
4. That such possession did not take place in the defendant’s home or place of business.

If you find the People have proven beyond a reasonable

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<sup>9</sup> See *People v Powell*, 54 NY2d 524, 530 (1981) (“[T]he common though unarticulated thread of all of the decisions above referred to is, as the Appellate Division suggests, whether the possessor of the weapon was entitled to ‘privacy, as one would have in his home’ in the area where he was apprehended with the weapon. The very antithesis of privacy is unlimited public access, no matter how closely related the possessor, as a subjective matter, may feel to the particular area as part of what he calls ‘home,’ or the extent to which he uses the area as one would a part of his home.”)

<sup>10</sup> *People v Wallace*, 31 NY3d 503 (2018).

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.