

**CRIMINAL POSSESSION OF A WEAPON
IN THE SECOND DEGREE
(Possession of Loaded Firearm)
(In Home or Business with Prior Conviction)
Penal Law § 265.03 (3)
(Committed on or after Nov. 1, 2006)¹
(Revised Dec 2022 & 2023)²**

Note: In People v Jones, 22 NY3d 53, 59 (2013), although the possession took place in the defendant's home, the defendant had previously been convicted of a crime. Jones held that the exception for liability for the instant crime was inapplicable; "in our view defendant's previous conviction was not an 'element of the offense charged'. . .and so did not have to be alleged at all (see CPL 200.50 [7] [a])." Jones added: "No doubt in a more typical second degree possession case . . . where the alleged possession took place somewhere else—the inapplicability of the exception [for possession not in one's home or place of business] is an element of the offense, and either the indictment or a special information must allege the fact that makes it inapplicable. But where the defendant has a previous conviction, the exception never comes into play, its inapplicability is not an element of the offense, and the indictment need not allude to it." Jones did not address the procedure to be followed when the possession takes place in the home or place of business of the defendant and the defendant denies a prior conviction. But see People v Ramos, 202 AD3d 410, 411 [1st Dept 2022] ["The prior conviction was presented to the grand jury, and, in compliance with CPL 200.60, was alleged in the special information that was served with the indictment"] and compare People v Taylor, 207 AD3d 806, 810 [3d Dept 2022] ["Here, there is no dispute that the prosecutor erroneously instructed the grand jury that a prior criminal conviction was an element of criminal possession of a weapon in the second degree (see People v. Jones, 22 N.Y.3d at 59,. . .)].

¹ This offense was formerly Penal Law § 265.02 (4), a class D felony, which was repealed by L 2006, ch 742, § 1, eff.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

² The December 2022 revision was for the purpose of revising the instruction on the definition of "knowingly" to better state the applicable law. The December 2023 revision was for the purpose of adding the Note that follows the definition of the crime.

If the trial court determines that it is an issue for the jury to resolve and the denial therefore constitutes a "defense" to this degree of the crime, then, just before the section listing the elements, the charge should include the following paragraph:

"It is a defense to this crime that the defendant possessed the loaded firearm in his/her home [or place of business] and the defendant had not been previously convicted of a crime."

And then the following element should be added to the list of elements: "#. That, the defendant had been previously convicted of a crime."

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 knowingly³ possesses any loaded firearm.

Note: Penal Law § 30.00(2) specifies that a "juvenile offender" (14 or 15 years of age) "is criminally responsible for acts constituting . . . section 265.03 of [the Penal Law], where such machine gun or such firearm is possessed on school grounds, as that phrase is defined in [Penal Law § 200.00(14)]." ⁴ In turn, CPL 190.71

³ 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).

⁴ "School grounds" means (a) in or on or within any building, structure, athletic playing field, playground or land contained within the real property boundary line of a public or private elementary, parochial, intermediate, junior high,

authorizes a Grand Jury to indict the “juvenile offender” for a violation of Penal Law § 265.03 for the possession of a machine gun or firearm on school grounds. In accord therefore with those statutes, as held in People v Raul A., 215 AD3d 500 (1st Dept 2023), when a “juvenile offender” is indicted for possession of a machine gun or firearm in violation of Penal Law § 265.03: [1] the words “and the possession took place on school grounds” must be included in the indictment; [2] those words must be added to the definition of the crime set forth in this instruction; [3] the applicable part of the definition of “school grounds” (set forth in footnote) must be added in the definition section of this instruction; and [4] the element of possession on school grounds must be added to the list of elements the People must prove beyond a reasonable doubt.

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

A FIREARM means any pistol or revolver.⁵

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.] ⁶

POSSESS means to have physical possession or

vocational, or high school, or (b) any area accessible to the public located within one thousand feet of the real property boundary line comprising any such school or any parked automobile or other parked vehicle located within one thousand feet of the real property boundary line comprising any such school. For the purposes of this section an "area accessible to the public" shall mean sidewalks, streets, parking lots, parks, playgrounds, stores and restaurants. Penal Law § 220.00(14).

⁵ 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.

⁶ See Penal Law § 265.00 (15).

otherwise to exercise dominion or control over tangible property.⁷

A person KNOWINGLY possesses a firearm when that person is aware that he or she is in possession of an object that is firearm.⁸ That person need not know (that is, be aware of) the object's name or that it meets the definition of a firearm.⁹

Under our law, a firearm must be operable, that is, the firearm must be capable of discharging ammunition.¹⁰ A person

⁷ See 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 this chapter.

⁸ See Penal Law § 15.05(2). For an expanded instruction on the definition of "knowingly," see Instructions of General Applicability, Culpable Mental States, Knowingly.

⁹ See *People v Parrilla*, 27 N.Y.3d 400, 405 (2016) (when possession of a gravity knife was a crime, defendants were required to know that "they possessed a knife" but the People were not required "to prove that defendants knew that the knife in their possession met the statutory definition of a gravity knife"); *People v Hernandez*, 180 AD3d 1234, 1237 (3d Dept 2020) ("Contrary to defendant's contention, the court was not required to instruct the jury that the People were required to show that defendant was aware of the legal definition of a blackjack. The characteristics of the blackjack at issue—a lead core, surrounded by leather, which is flexible and used as a weapon—make 'the inherently dangerous nature of the prohibited object be readily apparent, so as to put [defendant] on clear notice that the object is potentially subject to government regulation or prohibition' Accordingly, the People did not have to prove that defendant was aware of the statutory definition of a blackjack"); *People v Steinmetz*, 177 AD3d 1292, 1293 (4th Dept 2019) ("The People were not required to establish that defendant knew the rifles met the statutory criteria of an assault weapon but, rather, only that he knowingly possessed the rifles"); *People v Abdullah*, 206 AD3d 1340, 1344 (3d Dept 2022) (knowing possession of a slungshot is required but a defendant need not know the dictionary definition of slungshot).

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

in possession of a firearm is not required to know that the firearm is operable or loaded.¹¹

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 (specify number) 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; and
3. That the firearm was loaded and operable [and]
- [4. That the defendant possessed the loaded firearm on school grounds.¹²]

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.

Dept 1983]). In December 2022, the last sentence was substituted for: “The defendant is not required to know that it is loaded or operable.”

¹¹ See footnote 10.

¹² See the Note at the end of the definition of the crime.