**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]](#footnote-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 knowingly[[2]](#footnote-2) possesses a deadly weapon, if the weapon is a loaded weapon from which a shot, readily capable of producing death or other serious physical[[3]](#footnote-3) 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)*.

POSSESS means to have physical possession or otherwise to exercise dominion or control over tangible property.[[4]](#footnote-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]](#footnote-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]](#footnote-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]](#footnote-7)

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.

1. 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. [↑](#footnote-ref-1)
2. 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). [↑](#footnote-ref-2)
3. 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. [↑](#footnote-ref-3)
4. 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. [↑](#footnote-ref-4)
5. 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. [↑](#footnote-ref-5)
6. 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. [↑](#footnote-ref-6)
7. 7Penal Law 10.00 (10). [↑](#footnote-ref-7)