McKinney's Penal Law § 265.00

§ 265.00 Definitions

Effective: July 5, 2013
Currentness

As used in this article and in article four hundred, the following terms shall mean and include:

1. “Machine-gun” means a weapon of any description, irrespective of size, by whatever name known, loaded or unloaded, from which a number of shots or bullets may be rapidly or automatically discharged from a magazine with one continuous pull of the trigger and includes a sub-machine gun.

2. “Firearm silencer” means any instrument, attachment, weapon or appliance for causing the firing of any gun, revolver, pistol or other firearms to be silent, or intended to lessen or muffle the noise of the firing of any gun, revolver, pistol or other firearms.

3. “Firearm” means (a) any pistol or revolver; or (b) a shotgun having one or more barrels less than eighteen inches in length; or (c) a rifle having one or more barrels less than sixteen inches in length; or (d) any weapon made from a shotgun or rifle whether by alteration, modification, or otherwise if such weapon as altered, modified, or otherwise has an overall length of less than twenty-six inches; or (e) an assault weapon. For the purpose of this subdivision the length of the barrel on a shotgun or rifle shall be determined by measuring the distance between the muzzle and the face of the bolt, breech, or breechlock when closed and when the shotgun or rifle is cocked; the overall length of a weapon made from a shotgun or rifle is the distance between the extreme ends of the weapon measured along a line parallel to the center line of the bore. Firearm does not include an antique firearm.

4. “Switchblade knife” means any knife which has a blade which opens automatically by hand pressure applied to a button, spring or other device in the handle of the knife.

5. “Gravity knife” means any knife which has a blade which is released from the handle or sheath thereof by the force of gravity or the application of centrifugal force which, when released, is locked in place by means of a button, spring, lever or other device.

5-a. “Pilum ballistic knife” means any knife which has a blade which can be projected from the handle by hand pressure applied to a button, lever, spring or other device in the handle of the knife.

5-b. “Metal knuckle knife” means a weapon that, when closed, cannot function as a set of plastic knuckles or metal knuckles, nor as a knife and when open, can function as both a set of plastic knuckles or metal knuckles as well as a knife.

5-c. “Automatic knife” includes a stiletto, a switchblade knife, a gravity knife, a cane sword, a pilum ballistic knife, and a metal knuckle knife.

6. “Dispose of” means to dispose of, give, give away, lease, loan, keep for sale, offer, offer for sale, sell, transfer and otherwise dispose of.

7. “Deface” means to remove, deface, cover, alter or destroy the manufacturer's serial number or any other distinguishing number or identification mark.

8. “Gunsmith” means any person, firm, partnership, corporation or company who engages in the business of repairing, altering, assembling, manufacturing, cleaning, polishing, engraving or trueing, or who performs any mechanical operation on, any firearm, large capacity ammunition feeding device or machine-gun.

9. “Dealer in firearms” means any person, firm, partnership, corporation or company who engages in the business of purchasing, selling, keeping for sale, loaning, leasing, or in any manner disposing of, any assault weapon, large capacity ammunition feeding device, pistol or revolver.

10. “Licensing officer” means in the city of New York the police commissioner of that city; in the county of Nassau the commissioner of police of that county; in the county of Suffolk the sheriff of that county except in the towns of Babylon, Brookhaven, Huntington, Islip and Smithtown, the commissioner of police of that county; for the purposes of section 400.01 of this chapter the superintendent of state police; and elsewhere in the state a judge or justice of a court of record having his office in the county of issuance.

11. “Rifle” means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed metallic cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger.

12. “Shotgun” means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed shotgun shell to fire through a smooth bore either a number of ball shot or a single projectile for each single pull of the trigger.

13. “Cane Sword” means a cane or swagger stick having concealed within it a blade that may be used as a sword or stilletto.

14. [See also subd. 14 below] “Chuka stick” means any device designed primarily as a weapon, consisting of two or more lengths of a rigid material joined together by a thong, rope or chain in such a manner as to allow free movement of a portion of the device while held in the hand and capable of being rotated in such a manner as to inflict serious injury upon a person by striking or choking. These devices are also known as nunchakus and centrifugal force sticks.

14. [See also subd. 14 above] “Antique firearm” means:

Any unloaded muzzle loading pistol or revolver with a matchlock, flintlock, percussion cap, or similar type of ignition system, or a pistol or revolver which uses fixed cartridges which are no longer available in the ordinary channels of commercial trade.

15. “Loaded firearm” means any firearm loaded with ammunition 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.

15-a. “Electronic dart gun” means any device designed primarily as a weapon, the purpose of which is to momentarily stun, knock out or paralyze a person by passing an electrical shock to such person by means of a dart or projectile.

15-b. “Kung Fu star” means a disc-like object with sharpened points on the circumference thereof and is designed for use primarily as a weapon to be thrown.

15-c. “Electronic stun gun” means any device designed primarily as a weapon, the purpose of which is to stun, cause mental disorientation, knock out or paralyze a person by passing a high voltage electrical shock to such person.

16. “Certified not suitable to possess a self-defense spray device, a rifle or shotgun” means that the director or physician in charge of any hospital or institution for mental illness, public or private, has certified to the superintendent of state police or to any organized police department of a county, city, town or village of this state, that a person who has been judicially adjudicated incompetent, or who has been confined to such institution for mental illness pursuant to judicial authority, is not suitable to possess a self-defense spray device, as defined in section 265.20 of this article, or a rifle or shotgun.

17. “Serious offense” means (a) any of the following offenses defined in the former penal law as in force and effect immediately prior to September first, nineteen hundred sixty-seven: illegally using, carrying or possessing a pistol or other dangerous weapon; making or possessing burglar's instruments; buying or receiving stolen property; unlawful entry of a building; aiding escape from prison; that kind of disorderly conduct defined in subdivisions six and eight of section seven hundred twenty-two of such former penal law; violations of sections four hundred eighty-three, four hundred eighty-three-b, four hundred eighty-four-h and article one hundred six of such former penal law; that kind of criminal sexual act or rape which was designated as a misdemeanor; violation of section seventeen hundred forty-seven-d and seventeen hundred forty-seven-e of such former penal law; any violation of any provision of article thirty-three of the public health law relating to narcotic drugs which was defined as a misdemeanor by section seventeen hundred fifty-one-a of such former penal law, and any violation of any provision of article thirty-three-A of the public health law relating to depressant and stimulant drugs which was defined as a misdemeanor by section seventeen hundred forty-seven-b of such former penal law.

(b) [As amended by L.1999, c. 635, § 11. See, also, par. (b) below.] any of the following offenses defined in the penal law: illegally using, carrying or possessing a pistol or other dangerous weapon; possession of burglar's tools; criminal possession of stolen property in the third degree; escape in the third degree; jostling; fraudulent accosting; endangering the welfare of a child; the offenses defined in article two hundred thirty-five; issuing abortional articles; permitting prostitution; promoting prostitution in the third degree; stalking in the fourth degree; stalking in the third degree; the offenses defined in article one hundred thirty; the offenses defined in article two hundred twenty.

(b) [As amended by L.1999, c. 635, § 15. See, also, par. (b) above.] any of the following offenses defined in the penal law: illegally using, carrying or possessing a pistol or other dangerous weapon; possession of burglar's tools; criminal possession of stolen property in the third degree; escape in the third degree; jostling; fraudulent accosting; endangering the welfare of

a child; the offenses defined in article two hundred thirty-five; issuing abortional articles; permitting prostitution; promoting prostitution in the third degree; stalking in the third degree; stalking in the fourth degree; the offenses defined in article one hundred thirty; the offenses defined in article two hundred twenty.

18. “Armor piercing ammunition” means any ammunition capable of being used in pistols or revolvers containing a projectile or projectile core, or a projectile or projectile core for use in such ammunition, that is constructed entirely (excluding the presence of traces of other substances) from one or a combination of any of the following: tungsten alloys, steel, iron, brass, bronze, beryllium copper, or uranium.

19. “Duly authorized instructor” means (a) a duly commissioned officer of the United States army, navy, marine corps or coast guard, or of the national guard of the state of New York; or (b) a duly qualified adult citizen of the United States who has been granted a certificate as an instructor in small arms practice issued by the United States army, navy or marine corps, or by the adjutant general of this state, or by the national rifle association of America, a not-for-profit corporation duly organized under the laws of this state; or (c) by a person duly qualified and designated by the department of environmental conservation under paragraph d of subdivision six of section 11-0713 of the environmental conservation law as its agent in the giving of instruction and the making of certifications of qualification in responsible hunting practices.

20. “Disguised gun” means any weapon or device capable of being concealed on the person from which a shot can be discharged through the energy of an explosive and is designed and intended to appear to be something other than a gun.

21. “Semiautomatic” means any repeating rifle, shotgun or pistol, regardless of barrel or overall length, which utilizes a portion of the energy of a firing cartridge or shell to extract the fired cartridge case or spent shell and chamber the next round, and which requires a separate pull of the trigger to fire each cartridge or shell.

22. “Assault weapon” means

(a) a semiautomatic rifle that has an ability to accept a detachable magazine and has at least one of the following characteristics:

(i) a folding or telescoping stock;

(ii) a pistol grip that protrudes conspicuously beneath the action of the weapon;

(iii) a thumbhole stock;

(iv) a second handgrip or a protruding grip that can be held by the non-trigger hand;

(v) a bayonet mount;

(vi) a flash suppressor, muzzle break, muzzle compensator, or threaded barrel designed to accommodate a flash suppressor, muzzle break, or muzzle compensator;

(vii) a grenade launcher; or

(b) a semiautomatic shotgun that has at least one of the following characteristics:

(i) a folding or telescoping stock;

(ii) a thumbhole stock;

(iii) a second handgrip or a protruding grip that can be held by the non-trigger hand;

(iv) a fixed magazine capacity in excess of seven rounds;

(v) an ability to accept a detachable magazine; or

(c) a semiautomatic pistol that has an ability to accept a detachable magazine and has at least one of the following characteristics:

(i) a folding or telescoping stock;

(ii) a thumbhole stock;

(iii) a second handgrip or a protruding grip that can be held by the non-trigger hand;

(iv) capacity to accept an ammunition magazine that attaches to the pistol outside of the pistol grip;

(v) a threaded barrel capable of accepting a barrel extender, flash suppressor, forward handgrip, or silencer;

(vi) a shroud that is attached to, or partially or completely encircles, the barrel and that permits the shooter to hold the firearm with the non-trigger hand without being burned;

(vii) a manufactured weight of fifty ounces or more when the pistol is unloaded; or

(viii) a semiautomatic version of an automatic rifle, shotgun or firearm;

(d) a revolving cylinder shotgun;

(e) a semiautomatic rifle, a semiautomatic shotgun or a semiautomatic pistol or weapon defined in subparagraph (v) of paragraph (e) of subdivision twenty-two of section 265.00 of this chapter as added by chapter one hundred eighty-nine of the laws of two thousand and otherwise lawfully possessed pursuant to such chapter of the laws of two thousand prior to September fourteenth, nineteen hundred ninety-four;

(f) a semiautomatic rifle, a semiautomatic shotgun or a semiautomatic pistol or weapon defined in paragraph (a), (b) or (c) of this subdivision, possessed prior to the date of enactment of the chapter of the laws of two thousand thirteen which added this paragraph;

(g) provided, however, that such term does not include:

(i) any rifle, shotgun or pistol that (A) is manually operated by bolt, pump, lever or slide action; (B) has been rendered permanently inoperable; or (C) is an antique firearm as defined in 18 U.S.C. 921(a)(16);

(ii) a semiautomatic rifle that cannot accept a detachable magazine that holds more than five rounds of ammunition;

(iii) a semiautomatic shotgun that cannot hold more than five rounds of ammunition in a fixed or detachable magazine; or

(iv) a rifle, shotgun or pistol, or a replica or a duplicate thereof, specified in Appendix A to 18 U.S.C. 922 as such weapon was manufactured on October first, nineteen hundred ninety-three. The mere fact that a weapon is not listed in Appendix A shall not be construed to mean that such weapon is an assault weapon;

(v) any weapon validly registered pursuant to subdivision sixteen-a of section 400.00 of this chapter. Such weapons shall be subject to the provisions of paragraph (h) of this subdivision;

(vi) any firearm, rifle, or shotgun that was manufactured at least fifty years prior to the current date, but not including replicas thereof that is validly registered pursuant to subdivision sixteen-a of section 400.00 of this chapter;

(h) Any weapon defined in paragraph (e) or (f) of this subdivision and any large capacity ammunition feeding device that was legally possessed by an individual prior to the enactment of the chapter of the laws of two thousand thirteen which added this paragraph, may only be sold to, exchanged with or disposed of to a purchaser authorized to possess such weapons or to an individual or entity outside of the state provided that any such transfer to an individual or entity outside of the state must be reported to the entity wherein the weapon is registered within seventy-two hours of such transfer. An individual who transfers any such weapon or large capacity ammunition device to an individual inside New York state or without complying with the provisions of this paragraph shall be guilty of a class A misdemeanor unless such large capacity ammunition feeding device, the possession of which is made illegal by the chapter of the laws of two thousand thirteen which added this paragraph, is transferred within one year of the effective date of the chapter of the laws of two thousand thirteen which added this paragraph.

23. “Large capacity ammunition feeding device” means a magazine, belt, drum, feed strip, or similar device, that (a) has a capacity of, or that can be readily restored or converted to accept, more than ten rounds of ammunition, or (b) [Suspended and not effective, pursuant to L.2013, c. 57, pt. FF, § 4, eff. March 29, 2013, deemed eff. Jan. 15, 2013.] contains more than seven

rounds of ammunition, or (c) [Suspended and not effective, pursuant to L.2013, c. 57, pt. FF, § 4, eff. March 29, 2013, deemed eff. Jan. 15, 2013.] is obtained after the effective date of the chapter of the laws of two thousand thirteen which amended this subdivision and has a capacity of, or that can be readily restored or converted to accept, more than seven rounds of ammunition; provided, however, that such term does not include an attached tubular device designed to accept, and capable of operating only with, .22 caliber rimfire ammunition or a feeding device that is a curio or relic. A feeding device that is a curio or relic is defined as a device that (i) was manufactured at least fifty years prior to the current date, (ii) is only capable of being used exclusively in a firearm, rifle, or shotgun that was manufactured at least fifty years prior to the current date, but not including replicas thereof, (iii) is possessed by an individual who is not prohibited by state or federal law from possessing a firearm and (iv) is registered with the division of state police pursuant to subdivision sixteen-a of section 400.00 of this chapter, except such feeding devices transferred into the state may be registered at any time, provided they are registered within thirty days of their transfer into the state. Notwithstanding paragraph (h) of subdivision twenty-two of this section, such feeding devices may be transferred provided that such transfer shall be subject to the provisions of section 400.03 of this chapter including the check required to be conducted pursuant to such section.

24. “Seller of ammunition” means any person, firm, partnership, corporation or company who engages in the business of purchasing, selling or keeping ammunition.

25. “Qualified retired New York or federal law enforcement officer” means an individual who is a retired police officer as police officer is defined in subdivision thirty-four of section 1.20 of the criminal procedure law, a retired peace officer as peace officer is defined in section 2.10 of the criminal procedure law or a retired federal law enforcement officer as federal law enforcement officer is defined in section 2.15 of the criminal procedure law, who: (a) separated from service in good standing from a public agency located in New York state in which such person served as either a police officer, peace officer or federal law enforcement officer; and (b) before such separation, was authorized by law to engage in or supervise the prevention, detection, investigation, or prosecution of, or the incarceration of any person for, any violation of law, and had statutory powers of arrest, pursuant to their official duties, under the criminal procedure law; and (c) (i) before such separation, served as either a police officer, peace officer or federal law enforcement officer for five years or more and at the time of separation, is such an officer; or (ii) separated from service with such agency, after completing any applicable probationary period of such service, due to a service-connected disability, as determined by such agency at or before the time of separation; and (d)(i) has not been found by a qualified medical professional employed by such agency to be unqualified for reasons relating to mental health; or (ii) has not entered into an agreement with such agency from which the individual is separating from service in which that individual acknowledges he or she is not qualified for reasons relating to mental health; and (e) is not otherwise prohibited by New York or federal law from possessing any firearm.

Credits

(L.1965, c. 1030. Amended L.1967, c. 791, § 46; L.1969, c. 123, § 1; L.1972, c. 588, § 1; L.1972, c. 605, § 1; L.1974, c. 179, § 1; L.1974, c. 462, § 1; L.1974, c. 986, §§ 1, 2; L.1974, c. 1041, § 1; L.1976, c. 217, § 1; L.1982, c. 492, § 1; L.1985, c. 61, § 1; L.1986, c. 328, § 2; L.1986, c. 646, § 1; L.1988, c. 264, § 1; L.1990, c. 264, § 1; L.1995, c. 219, § 2; L.1996, c. 354, § 2; L.1997, c. 446, § 2, eff. Aug. 25, 1997; L.1998, c. 378, § 1, eff. Nov. 1, 1998; L.1999, c. 210, § 1, eff. Nov. 1, 1999; L.1999, c. 635, §§ 11, 15, eff. Dec. 1, 1999; L.2000, c. 189, §§ 8 to 10, eff. Nov. 1, 2000; L.2003, c. 264, § 33, eff. Nov. 1, 2003; L.2007, c. 510, § 3, eff. Feb. 11, 2008; L.2008, c. 257, § 3, eff. Nov. 1, 2008; L.2010, c. 232, §§ 2, 3, eff. July 30, 2010; L.2013, c. 1, § 37, eff. Jan. 15, 2013; L.2013, c. 1, § 38; L.2013, c. 1, § 39, eff. March 16, 2013; L.2013, c. 98, § 1, eff. July 5, 2013.)

Editors' Notes

VALIDITY

<For validity of this section, see New York State Rifle and Pistol Ass'n, Inc. v. Cuomo, --- F.Supp.2d ----, 2013 WL 6909955 (W.D.N.Y. 2013)>

SUPPLEMENTARY PRACTICE COMMENTARY

by William C. Donnino

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Second Amendment

In *McDonald v. Chicago*, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010), the Supreme Court applied the Second Amendment to the states. Unfortunately, the Court provided no further guidance than it did in *District of Columbia v. Heller*, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008), on the application of the amendment.

"It is important to keep in mind that *Heller*, while striking down a law that prohibited the possession of handguns in the home, recognized that the right to keep and bear arms is not 'a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.' We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons and the mentally ill,' 'laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms. We repeat those assurances here." *McDonald v. Chicago*, 130 S.Ct. at 3047, *supra*.

Thus far, New York has upheld its statutory scheme which prohibits the possession of a firearm without an appropriate license. In *People v Hughes*, 22 N.Y.3d 44, 978 N.Y.S.2d 97, 978 N.Y.S.2d 97 (2013), the Court held that a conviction of "criminal possession of a weapon in the second degree" and "criminal possession of a weapon in the third degree," predicated on the defendant's having been previously convicted of a crime, did not violate the Second Amendment. *See People v. Perkins*, 62 A.D.3d 1160, 1161, 880 N.Y.S.2d 209 (3rd Dept. 2009) ("Unlike the statute at issue in *Heller*, Penal Law article 265 does not effect a complete ban on handguns and is, therefore, not a 'severe restriction' improperly infringing upon defendant's Second Amendment rights. Moreover, in our view, New York's licensing requirement remains an acceptable means of regulating the possession of firearms... and will not contravene *Heller* so long as it is not enforced in an arbitrary and capricious manner"); *People v. Hughes*, 83 A.D.2d 960, 921 N.Y.S.2d 300 (2nd Dept. 2011); *People v. Ferguson*, 21 Misc.3d 1120(A), 873 N.Y.S.2d 513 (Criminal Court, Queens County, 2008) ("... *Heller*, is distinguishable from the case at bar for several reasons. Firstly, at the time of his arrest, defendant was not in his home, but was in an airport. Secondly, the requirement that handguns be licensed in the State of New York is not tantamount to a total ban and, therefore, is not a 'severe restriction' as was the case in *Heller*. Lastly, the Court identified certain presumptively lawful regulatory measures which would survive a constitutional challenge including the carrying of firearms in 'sensitive places.' Licensing is an acceptable regulatory measure and an airport falls within the scope of a 'sensitive place.' ").

In an extensive opinion, including a detailed recitation of the history of New York's regulation of firearms, the Second Circuit Court of Appeals held that the Second Amendment was not violated by New York's statutory requirement that a person who wants to "have and carry concealed [a hand gun], without regard to employment or place of possession" must show that "proper cause" exists for the issuance of a license to do so [Penal Law § 400.00(2)(f)]. *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012).

Definitions

As part of the "NY SAFE Act" (NY Secure Ammunition and Firearms Enforcement Act) of 2013 [L. 2013, c. 1], the definitions of "assault weapon" [Penal Law § 265.00(22)] and "large capacity ammunition feeding device" [Penal Law § 265.00(23)] were amended, and a definition of "seller of ammunition" was added [Penal Law § 265.00(24)].

-Assault weapon

The definition of "assault weapon" [Penal Law § 265.00(22)] was substantially amended by the NY SAFE Act. A principal difference between the former and present definition is that the former definition required the requisite firearm to have two military style features, while the current definition requires only one. Thus, as the Governor explained: "Under the stricter definitions, semi-automatic pistols [*see* subdivision 22(c) and (f)] and rifles [*see* subdivision 22(a) and (f)] with detachable magazines and one military style feature will be considered assault

weapons. Semi-automatic shotguns [*see* subdivision 22(b) and (f)] with one military style feature will also be considered assault weapons." Governor's Press Release, "Governor Cuomo Signs NY Safe Act in Rochester," January 16, 2013. Also included as an assault weapon is a "revolving cylinder shotgun" [subdivision 22(d)].

Certain weapons are expressly exempted from the definition of assault weapon [*see* subdivision 22(g)].

Assault weapons defined in subdivision (22)(e) or (f), possessed before January 16, 2013, must be registered by April 15, 2014 [Penal Law § 400.00(16-a)]; except a weapon defined in subdivision (22)(g)(vi) "transferred into the state may be registered at any time, provided such weapons are registered within thirty days of their transfer into the state." Once having registered, the registrant must "recertify" every five years thereafter or suffer revocation of the registration [Penal Law § 400.00(16-a)].

Owners of a grandfathered assault weapon or large capacity ammunition feeding device may only transfer same to a purchaser authorized to possess same or to an individual or entity outside of the state [subdivision 22(h)]. Governor's Press Release, *supra*. An individual who transfers a grandfathered weapon or large capacity ammunition device to an individual inside New York State or without complying with the other provisions of the statute [subdivision 22(h)], shall, except for a large capacity ammunition device transferred within one year of the effective date of the NY SAFE Act, be guilty of a class A misdemeanor [subdivision 22(h)].

The government has established an internet site with responses to "frequently asked questions" (FAQ) in order "to help gun owners in New York understand and comply with the NY SAFE Act...." *See* NY SAFE Act FAQ, http://www.governor.ny.gov/2013/gun-reforms-faq. The answers to the FAQ include a listing of weapons which purport to be, or not to be, assault weapons.

-Large capacity ammunition feeding device

The **definition** of "large capacity ammunition feeding device" [Penal Law § 265.00(23)] (hereinafter "device") was amended by the NY SAFE Act. [L. 2013, c. 1, as amended by L. 2013, c. 57]. Prior to the amendment, the definition excluded a device manufactured after September 30, 1994. That limitation was repealed; thus those devices are included in the revised definition of a "device." According to the Legislative Memorandum, the reason for doing so was "because it was impossible to tell the difference between magazines manufactured before or after [September 30, 1994]."

Under the revised definition, a device is one that "(a) has a capacity of, or that can be readily restored or converted to accept, more than ten rounds of ammunition."

Alternate definitions in subdivisions (b) and (c) were also initially included in the NY SAFE Act. The import of those subdivisions was to have the definition of a device ultimately limited to one that had a capacity of seven rounds. But, after enactment, it was reported that the smallest manufactured device normally had a capacity of ten rounds. Kaplan and Hakim, "New York Governor Favors Easing Newly Passed Gun Law," New York Times, March 20, 2013 (http://www.nytimes.com/2013/03/21/nyregion/cuomo-seeks-to-ease-a-newly-pass ed-gun-restriction.html?_r=0). Thus, before subdivisions (b) and (c) took effect, the NY SAFE Act was itself amended to declare that "the effective date of the amendments adding paragraphs (b) and (c) to such subdivision shall be suspended and not effective." L. 2013, c. 57 § 4. There is no provision lifting the "suspension" and making the amendments effective on a future date. As a result, that unique Penal Law language of "suspended and not effective" would appear to have the practical effect of repealing the amendments of those subdivisions and was probably utilized for whatever advantage was gained in being able to say the provisions were suspended, rather than repealed. *See* Wiessner, "New York reviewing changes to recently passed gun law," Thomson Reuters News & Insight, March 20, 2013 at http://newsandinsight.thomsonreuters.com/Legal/

News/2013/03_-_March/New_York_reviewing_changes_to_recently_passed_gun_law/; and Smith, "Cuomo: We are early in the budget process; negotiations have been professional, collegial," Legislative Gazette, March 20, 2013 at http://%1fwww.legislativegazette.com/%1fArticles-Top-Stories-c-2013-03-20-83081.11%1f3122-Cuomo-We-are-early-in-the-budget-%1fprocessnegotiations-have-been-professional-%1fcollegial.html.

While the "repealed" amendments which created subdivision (b) did not include therein any portion of the law which existed before the amendment, subdivision (c) did. That portion of the existing law included in the subdivision (c) amendment which accordingly survived the "repealed" amendment was a proviso which states: "provided, however, that such term does not include an attached tubular device designed to accept, and capable of operating only with, .22 caliber rimfire ammunition."

The **crimes** for which the definition of a device is utilized include Penal Law §§ 265.00(22)(h), 265.02(8), 265.36, 265.37. The import of those statutes is as follows:

(1) A device that was legally possessed prior to the enactment date of the NY SAFE Act, January 15, 2013, may be transferred to a person authorized to possess same or to an individual or entity outside of New York, provided that such a transfer must be reported, within 72 hours, to the entity with whom the weapon is registered. A person who transfers a device to an individual inside New York state or without otherwise complying with the law's transfer requirements is guilty of a class A misdemeanor, unless the device, the possession of which is made illegal by the NY SAFE Act, is transferred before January 15, 2014. An **unlawful transfer of a device** is a class A misdemeanor [Penal Law § 265.00(22)(h)].

(2) Prior to, and after, the NY SAFE Act, a provision of the statute defining "**criminal possession of a weapon in the third degree**," makes it a class D felony when a "person possesses a large capacity ammunition feeding device" [Penal Law § 265.02(8)]. The NY SAFE ACT, however, amended that subdivision to specify that "[f]or purposes of this subdivision," a device shall "not" include either of the following two devices:

[i] a device lawfully possessed by such person before the effective date of chapter one of the laws of 2013 "which amended this subdivision" (January 15, 2013), that has a capacity of, or that can be readily restored or converted to accept more than seven but less than eleven rounds of ammunition." Parenthetically, this exclusion from liability for this felony became covered by the generic definition of a device when that definition was amended to specify that a device is one that "has a capacity of, or that can be readily restored or converted to accept, more than ten rounds of ammunition." [L. 2013, c. 57 § 4; Penal Law § 265.00(23)].

[ii] a device "that was manufactured before September [13, 1994], that has a capacity of, or that can be readily restored or converted to accept, more than ten rounds of ammunition." The exclusion from liability for this felony is in recognition that prior to the NY SAFE Act, it was lawful to possess a device manufactured before September 13, 1994. Notably, however, this exclusion from liability for this felony does not also require that the possessor lawfully possessed the device prior to the effective date of the NY SAFE Act.

(3) The NY SAFE Act added two non-felony offenses, apparently intending to include liability for a device subject to the exceptions to the felony, though arguably not completely fulfilling that intent.

The first added offense was "**unlawful possession of a large capacity ammunition feeding device**" [Penal Law § 265.36], a class A misdemeanor. The statute makes it "unlawful for a person to knowingly possess a large capacity ammunition feeding device manufactured before [September 13, 1994] and if such person lawfully possessed such large capacity feeding device before [January 15, 2013], that has a capacity of, or that can be readily restored or converted to accept, more than ten rounds of ammunition. "

The arguable paradoxical result, when comparing the felony [Penal Law § 265.02(8)] and this misdemeanor, is that a person with a device manufactured before September 13, 1994 is not liable for felonious possession, irrespective of whether he or she possessed it before January 15, 2013, and is only guilty of the misdemeanor if he or she initially had possession of the device prior to January 15, 2013.

An added safeguard for those who once lawfully possessed such device is a provision excluding from liability for this crime a person "who has a reasonable belief that such device ... may lawfully be possessed," and who, within 30 days of being notified by law enforcement or a licensing official that possession is unlawful, "surrenders or lawfully disposes of" the device. Once so notified, there reasonably exists a rebuttable presumption that the possessor knows that the device may not be lawfully possessed.

The second added offense was "**unlawful possession of certain ammunition feeding devices**" [Penal Law § 265.37]. This statute makes it "unlawful for a person to knowingly possess an ammunition feeding device where such device contains more than seven rounds of ammunition." L. 2013, c. 57.

Instead of placing the sentencing provisions applicable to this offense in the Penal Law articles dealing with sentences, the NY SAFE Act, unfortunately, as too many other statutes have done, further complicated the sentencing laws by setting forth the governing sentences for this offense in the statute defining the crime.

If the device is "possessed within the home of the possessor," a first offense is a violation, "subject to" a fine of $250; "each subsequent offense" is a class B misdemeanor, "subject to" a fine of $250 and a term of imprisonment "up to three months."

If the device is not possessed within the home of the possessor, a first offense is a class B misdemeanor, "subject to" a fine of $250 and a term of imprisonment "up to six months"; "each subsequent offense" is a class A misdemeanor. For the class A misdemeanor, no sentence is specified, and thus the normal sentence options will apply. For the specified sentences, it appears that the amount of the fine is the stated amount, there being no language indicating that the fine is "up to" the stated amount; on the other hand, the jail sentences utilize the "up to" language, making them discretionary within that range, which may therefore be from one day up to the stated period.

What is mysterious about this type of specified sentences, which are placed outside the sentencing statutes, is whether they exclude any other option in the sentencing statutes which would normally be included in the stated classification. While the penalty for the violation may be limited to the fine, it is, in particular, unclear whether the specification of a definite sentence ("up to three months" or "up to six months") allows for a split sentence of jail and probation or conditional discharge [*see* Penal Law § 60.01(2)(d), which permits a split sentence for a misdemeanor "[i]n any case where the court imposes a sentence of imprisonment not in excess of sixty days"], or an intermittent sentence of imprisonment [*see* Penal Law § 85.00(2) which ordinarily permits the intermittent sentence "for any offense that is not a felony"].

Finally, an exemption from liability for Penal Law sections 265.01, 265.02, 265.03, 265.04, 265.05, 265.10, 265.11, 265.12, 265.13, 265.15 and 270.05 was set forth for the "possession and use" at certain specified "indoor or outdoor" firing ranges of a "magazine, belt, feed strip or similar device" that contains more than seven rounds of ammunition, albeit in a device that does not have the capacity of more than ten rounds of ammunition [Penal Law § 265.20(7-f)].

-Seller of ammunition

"Seller of ammunition" includes anyone "who engages in the business of purchasing, selling or keeping ammunition." [Penal Law § 265.00(24)]. This definition is utilized in Penal Law § 400.03.

Elements of the Crimes

Knowing and voluntary possession

In *People v. Wood*, 58 A.D.3d 242, 869 N.Y.S.2d 401 (1st Dept. 2008), where the defendant was charged with the possession of a switchblade which was disguised as a cigarette lighter, the People were required to prove that "defendant knew that the object he possessed actually functioned as a weapon," *i.e.*, a knife; however, the People were not also required to prove that he knew it had the characteristics of a switchblade knife. *Wood's* view of the statute, therefore, is that a person is guilty of criminal possession of a switchblade when he or she knowingly possesses a knife, and the knife is a switchblade. It is unfortunate that the Court of Appeals denied leave to appeal in this case and similar cases because what constitutes the culpable mens rea for possessed weapons is poorly defined by the statutes and continues to generate significant litigation.

Possession Crimes

Criminal possession of an unloaded firearm

As explained in the main commentary, the possession of a loaded or unloaded assault weapon is a class D felony ["criminal possession of a weapon in the third degree," Penal law § 265.01(7)]. If the "assault weapon," is loaded, however, it is also a class C felony ["criminal possession of a weapon in the second degree," as explained in the next section, Penal Law § 265.03(3)].

As part of the "NY SAFE Act" (NY Secure Ammunition and Firearms Enforcement Act) of 2013 [L. 2013, c. 1], four crimes applicable to unloaded firearms were added, effective March 16, 2013.

(1) "**Criminal possession of a firearm**" [Penal Law § 265.01-b], added two separate crimes, each a class E felony. The first of the two crimes penalizes the possession of any operable firearm [Penal Law § 265.01-b(1)]; the crime is not restricted to a firearm which is "unloaded," albeit that will be its principal application. The purpose of the added crime was to raise the penalty from a class A misdemeanor, as it is classified in Penal Law § 265.01(1), to that of a class E felony. The class A misdemeanor offense, however, was not repealed. *See People v. Eboli*, 34 N.Y.2d 281, 287, 357 N.Y.S.2d 435, 313 N.E.2d 746 (1974); *People v. Discala*, 45 N.Y.2d 38, 43, 407 N.Y.S.2d 660, 379 N.E.2d 187 (1978).

The second of the two crimes is related to the NY SAFE Act's requirement that a firearm lawfully possessed prior to the effective date of the Act, which was not then subject to being registered, be "registered" [Penal Law § 400.00(16-a)]. Thus, the second provision of "criminal possession of a firearm" penalizes a person who "knowingly [defined in Penal Law § 15.05(2)] fails to register" [Penal Law § 265.01-b(2)] such "firearm."

(2) The NY SAFE Act repealed that provision of the statute, "criminal possession of a weapon in the fourth degree" [Penal Law § 265.01(3)], which penalized possession of a firearm, as well as a rifle or shotgun, on the property of an educational institution, and reenacted it as "**criminal possession of a weapon on school grounds**" [Penal Law § 265.01-a]. Again, the purpose was to elevate the crime's classification from a class A misdemeanor to a class E felony. With respect to a firearm, however, this section is redundant, given that "criminal possession of a firearm" [Penal Law § 265.01-b] makes the possession of any firearm in any location a class E felony.

(3) The NY SAFE Act added subdivision nine to Penal Law § 265.02, which defines "**criminal possession of a weapon in the third degree**" to make it a class D violent felony to possess an "unloaded" firearm and also commit a "drug trafficking felony" [defined in Penal Law § 10.00(21)] "as part of the same criminal transaction" [*see* CPL

40.00.10(2)]. A special sentence was prescribed for this crime. *See* Supplementary Practice Commentary to Penal Law § 60.00 under the heading "Class D felony other than drug felony."

The first element of the statute is expressly limited to the possession of an "unloaded" firearm.

The second element requires commission of one of the "drug trafficking" felonies listed in Penal Law § 10.00(21). Those felonies include: "use of a child to commit a controlled substance offense"; "criminal sale of a controlled substance" in the first, second, third, and fourth degrees; "criminal sale of a controlled substance in or near school grounds"; "unlawful manufacture of methamphetamine" in the first and second degrees; or "operating as a major trafficker. "

The third element requires that the possession of the unloaded firearm and the commission of a "drug trafficking felony" be part of the same "criminal transaction." The term "criminal transaction" is not expressly defined in this statute, nor is there a cross-reference in this statute to the definition of that term in CPL 40.10(2). The Court of Appeals, however, has found that the term, as defined in the CPL, is a "legislative term of art," and has accordingly utilized that definition to interpret a Penal Law statute which employs that term. *People v. Duggins*, 3 N.Y.3d 522, 533, 788 N.Y.S.2d 638, 821 N.E.2d 942 (2004). Whether that term, in whole or in part, will be utilized here remains for the courts to determine. In any event, while there may be factual scenarios which will strain the definition of "criminal transaction," the possession of an unloaded firearm during the course of a drug trafficking felony, such as during the course of the exchange of money and drugs in a criminal sale, will expose the actor to liability for this felony.

(4) The NY SAFE Act added subdivision ten to Penal Law § 265.02, which defines "**criminal possession of a weapon in the third degree**" to make it a class D violent felony to possess an "unloaded" firearm "and also" commit any "violent felony offense" [defined in Penal Law § 70.02] "as part of the same criminal transaction" [Penal Law § 265.02(10)].

Thus, the crimes defined in subdivisions nine and ten both require the possession of an unloaded firearm and also the commission of a certain felony as part of the same criminal transaction; for subdivision nine, the felony must be a "drug trafficking felony," and for subdivision ten, the felony must be a violent felony.

A special sentence was prescribed for the subdivision ten crime. *See* Supplementary Practice Commentary to Penal Law § 60.00 under the heading "Class D felony other than drug felony."

Criminal possession of a loaded firearm

In *People v Jones*, 22 N.Y.3d 53, 977 N.Y.S.2d 739, 999 N.E.2d 1184(2013), the Court made clear that the exception from liability for "criminal possession of a weapon in the second degree" [Penal Law § 265.03(3)] for the possession of a loaded firearm in one's "home or place of business" is inapplicable when the possessor was previously convicted of a crime. Accordingly, the Court added, the fact of the prior conviction is not an element of the crime, and the People did not have to plead it. *Jones* did not dictate the procedure a defendant should follow to assert that he was not previously convicted of a crime and thus exempt from liability for this crime when the possession took place in his "home or place of business." One method would be to permit the defendant to raise the issue as a defense to the charge.

In *People v Jones*, 22 N.Y.3d 53, 977 N.Y.S.2d 739, 999 N.E.2d 1184(2013), the Court made clear that the exception from liability for "criminal possession of a weapon in the second degree" [Penal Law § 265.03(3)] for the possession of a loaded firearm in one's "home or place of business" is inapplicable when the possessor was previously convicted of a crime. Accordingly, the Court added, the fact of the prior conviction is not an element

of the crime, and the People did not have to plead it. *Jones* did not dictate the procedure a defendant should follow to assert that he was not previously convicted of a crime and thus exempt from liability for this crime when the possession took place in his "home or place of business." One method would be to permit the defendant to raise the issue as a defense to the charge. Similarly, as explained in the commentary on the definition of an "assault weapon," a "firearm" is defined to include an "assault weapon." As a result, a prohibition on the possession of a loaded "assault weapon" is included in the definition of the crime of "criminal possession of a weapon in the second degree" [Penal Law § 265.03(3)]. The exception to that crime for a "firearm" possessed in one's "home or place of business," itself states that it applies "except as provided in subdivision one or seven of [Penal Law § 265.02]." Subdivision seven of Penal Law § 265.02 prohibits the possession of an "assault weapon." Thus, it would appear that the exclusion for possession of a loaded firearm in one's home or place of business does not apply to an assault weapon, and the possession of a loaded assault weapon in any location constitutes a violation of Penal Law § 265.02(3). *See People v Jones*, 22 N.Y.3d 53, supra.

As part of the "NY SAFE Act" (NY Secure Ammunition and Firearms Enforcement Act) of 2013 [L. 2013, c. 1,], the class C violent felony of "**aggravated criminal possession of a weapon**" [Penal Law § 265.19] was added, effective March 16, 2013. That felony criminalized the possession of a "loaded firearm" as prohibited by Penal Law § 265.03(3) "and also" the commission of a violent felony offense [defined in Penal Law § 70.02] or a drug trafficking felony [defined in Penal law § 10.00(21) "arising out of the same criminal transaction." A special sentence was prescribed for this crime. *See* Supplementary Practice Commentary to Penal Law § 60.00 under the heading "Class C felony other than drug felony."

This crime parallels the crimes added to Penal Law § 265.02(9) and (10), except that those crimes relate to the possession of an "unloaded" firearm. Thus, those crimes penalize, as a class D felony, the possession of an "unloaded" firearm and, as part of the same criminal transaction, commission of either a "drug trafficking felony" (subdivision nine) or a "violent felony offense" (subdivision ten).

The first element of "aggravated criminal possession of a weapon" [Penal Law § 265.19] requires the commission of "criminal possession of a weapon in the second degree" as set forth in subdivision three of Penal Law § 265.03, and is thereby expressly limited to the possession of a "loaded" firearm, except when the possession takes place in one's home or place of business, unless the possessor has a prior criminal conviction or the firearm was an "assault weapon."

The second element requires commission of one of the "violent" felonies listed in Penal Law § 70.02(1) or a "drug trafficking" felony listed in Penal Law § 10.00(21). The NY SAFE Act added the definition of "drug trafficking" felonies to include: "use of a child to commit a controlled substance offense"; "criminal sale of a controlled substance" in the first, second, third, and fourth degrees; "criminal sale of a controlled substance in or near school grounds"; "unlawful manufacture of methamphetamine" in the first and second degrees; or "operating as a major trafficker."

The third element requires that the possession of the loaded firearm and the commission of a "violent felony" or a "drug trafficking felony" be part of the same "criminal transaction." The term "criminal transaction" is not expressly defined in this statute, nor is there a cross-reference in this statute to the definition of that term in CPL 40.10(2). The Court of Appeals, however, has found that the term, as defined in the CPL, is a "legislative term of art," and has accordingly utilized that definition to interpret a Penal Law statute which employs that term. *People v. Duggins*, 3 N.Y.3d 522, 533, 788 N.Y.S.2d 638, 821 N.E.2d 942 (2004).

Criminal possession of explosives

As explained in the Practice Commentary in the main volume, the Penal Law does not contain a definition of the term "explosive." But, there is a definition of the term "explosives" in Labor Law § 451, and that definition was utilized in interpreting arson and "criminal possession of a weapon" provisions referring to explosives. *People v McCrawford*, 47 A.D.2d 318, 366 N.Y.S.2d 424 (1st Dept.1975). *McCrawford* based that determination on the content of that definition as it existed in 1970, given that the penal provision for possession of an explosive substance with intent to use same was added to the Penal Law at the same time as when a crime for the unauthorized possession of an explosive, as defined in Labor Law § 451, was added to the Labor Law. The same rationale would not necessarily exist as to the subsequent amendments of the Labor Law definition of "explosives," particularly the 2009 amendments which added "pyrotechnics and ... fireworks and dangerous fireworks as defined in [Penal Law § 270.00]." L. 2009, c. 57. In any event, the Court of Appeals is of the view that the "statutory terms--'incendiary', 'bomb' and 'explosive substance'--are susceptible of reasonable application in accordance with the common understanding of men. ..."*People v. Cruz*, 34 N.Y.2d 362, 357 N.Y.S.2d 709, 314 N.E.2d 39 (1974).

Criminal Possession of a rifle, shotgun or antique firearm

In 2011, the Legislature amended the crime of "criminal possession of a firearm in the fourth degree" [Penal Law § 265.01(4)] to include as a crime, the possession of an "antique firearm," "black powder rifle," "black powder shotgun," or any "muzzle-loading firearm," in addition to the possession of a "rifle" or "shotgun," provided the possessor has a prior conviction for a felony or "serious offense" [Penal Law § 265.00(17)]. L. 2011, c. 357.

According to the Legislative Memorandum on the companion bill (Assembly 8456), "[m]odern muzzle loading rifles are essentially a modern single shot rifle. They look and operate very much like a sporting rifle and allow accurate shots at distances up to 200 yards... [and] can be reloaded in seconds...."

As with other firearms, the prosecution would be required to prove that a firearm listed in this legislation is operable. *See People v Longshore*, 86 N.Y.2d 851, 633 N.Y.S.2d 475, 657 N.E.2d 496 (1995).

Of the four items added to this section, "antique firearm" was, prior to enactment of this legislation, separately defined [Penal Law § 265.00(14)]. That term was then utilized in the definition of "firearm" to specify that a "[f]irearm does not include an antique firearm" [Penal Law § 265.00(3)]. Thus, an "antique firearm" was, and is, exempt from the prohibitions on the possession of a "firearm." See Practice Commentary at Penal Law § 265.00]. That may explain its addition to this section.

However, an "antique firearm" is defined to mean any "unloaded" "muzzle loading pistol or revolver with a matchlock, flintlock, percussion cap, or similar type of ignition system, or a pistol or revolver which uses fixed cartridges which are no longer available in the ordinary channels of commercial trade" [Penal Law § 265.00(14)]. The first part of that definition refers to an "unloaded" muzzle loading pistol or revolver. Thus, such a weapon, if loaded, would not fit the definition of an "antique firearm." A loaded firearm which happened to be an antique, however, would then not be exempt from the definition of "firearm," and it would accordingly be subject to the provisions of this article which make the possession of a "firearm" illegal, irrespective of the requirements of this legislation.

As part of the "NY SAFE Act" (NY Secure Ammunition and Firearms Enforcement Act) of 2013 [L. 2013, c. 1,], the statute penalizing possession of a rifle, shotgun or firearm on the property of an educational institution, "criminal possession of a weapon in the fourth degree" [Penal Law § 265.01(3)], was repealed and reenacted as "criminal possession of a weapon on school grounds" [Penal Law § 265.01-a], effective March 16, 2013. The purpose was to elevate the crime's classification from a class A misdemeanor to a class E felony. With respect to a firearm, however, the reenacted section is redundant, given that "criminal possession of a firearm" [Penal Law § 265.01-b] makes the possession of any firearm in any location a class E felony.

Criminal possession of a large capacity ammunition feeding device

See Supplementary Practice Commentary at the end of Penal Law § 265.00 under the definition of "large capacity ammunition feeding device."

Criminal Purchase or Disposal of a Weapon

As part of the "NY SAFE Act" (NY Secure Ammunition and Firearms Enforcement Act) of 2013 [L. 2013, c. 1,], the statute defining the crime of "criminal purchase of a weapon" [Penal Law § 265.17] was, effective March 16, 2013, renamed "criminal purchase or disposal of a weapon," and the classification of the crime was elevated from a class A misdemeanor to a class D felony (emphasis added). Further, two amendments were made relating to the definition of the crimes incorporated under the umbrella of this crime.

Subdivision one, prior to the amendments, was directed at penalizing the "attempt" to purchase a firearm, rifle or shotgun by a person who knows he or she is prohibited by law from possessing same because of a disability which would render him or her ineligible to lawfully possess the firearm, rifle or shotgun. The amendment requires that the weapon be in fact purchased. Presumably, the intent was to have this statute penalize the consummated purchase as a felony, and to have the attempt statute [Penal Law § 110.00] govern the attempted purchase. *Cf. People v. Saunders*, 85 N.Y.2d 339, 624 N.Y.S.2d 568, 648 N.E.2d 1331 (1995).

Subdivision two was not amended, and is directed at the "purchase" of a firearm, rifle or shotgun, even by a person who is authorized to purchase same, when it is done for another person for whom it would be "unlawful" to possess the weapon for any reason.

Subdivision three was added by the NY SAFE ACT. It utilizes much of the language of subdivision one, but is an alternative to the concept expressed in subdivision two. Thus, subdivision three is directed at penalizing the person who "disposes of" a firearm, rifle or shotgun to a person he or she knows is "prohibited by law" from possessing same because of a disability which would render him or her ineligible to lawfully possess the firearm, rifle or shotgun in New York. "Dispose of" means "to dispose of, give, give away, lease, loan, keep for sale, offer, offer for sale, sell, transfer and otherwise dispose of" [Penal Law § 265.00(6)].

Notably, the person to whom the weapon is "disposed of" must be "prohibited by law" from possessing same for the reason specified in the statute; if the person is not so prohibited, perhaps because that person would be eligible for a license he or she does not possess, the disposing of such weapon to that person would not be a violation of subdivision three; but, if the weapon was purchased for that person it could be a violation of subdivision two.

PRACTICE COMMENTARY

by William C. Donnino

History

The early history of this article can be helpful in interpreting some provisions because this article was carried over from the former Penal Law to the instant Penal Law without substantive change. In 1963, as a result of years of study and the recommendations of the Joint Legislative Committee on Firearms and Ammunition, the provisions of the former Penal Law dealing with weapons were revised. L.1963, c. 136; former Penal Law §§ 1896-1904. The

current Penal Law, enacted in 1965 and effective September 1, 1967, carried forward, almost verbatim, the weapon provisions of the former Penal Law which had been added to that law in 1963.

The former Penal Law placed in one section the definitions of most of the substantive crimes [*see* former Penal Law § 1897, "Possession of weapons and dangerous instruments and appliances"]. The instant Penal Law initially carried those crimes forward verbatim in Penal Law former § 265.05. In 1974, the then-existing Penal Law § 265.05 was restructured by dividing the various crimes defined in that one section into five sections, currently Penal Law § 265.01 through Penal Law § 265.05, in a degree structure which was generally in accord with the structure of other Penal Law statutes. L.1974, c. 1041. For the most part, there was no substantive change, except first, for the addition of the "chuka stick" to the list of weapons that cannot be possessed [Penal Law § 265.01], and second, for the addition of a crime for the possession of a machine-gun or firearm with intent to use the same unlawfully against another [Penal Law § 265.03].

Some of the more significant amendments thereafter include the following:

In 1980, there were substantial additions and amendments to the Penal Law and Criminal Procedure Law with respect to firearms. With respect to this article, several new crimes were established ["criminal use of a firearm" (Penal Law §§ 265.08, 265.09); "criminal sale of a firearm" (Penal Law §§ 265.11, 265.12); "criminal possession of a weapon in the third degree" (Penal Law § 265.02(5))]. Other amendments were made to the statutes relating to sentences, plea bargaining, and licensing procedures for firearms. L.1980, cc. 233, 234.

In the early nineties, the crimes of "criminal sale of a firearm with the aid of a minor" [Penal Law § 265.14 (L.1991, c. 175)], and "criminal sale of a firearm to a minor" [Penal Law § 265.16 (L.1992, c. 600)] were added.

In 1998, the Legislature introduced the concept of the "disguised gun" [Penal Law § 265.00(20)], and set forth penalties for its possession. L.1998, c. 378.

Second Amendment

The Second Amendment to the Federal Constitution provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." In *District of Columbia v. Heller*, 554 U.S. ___, 128 S.Ct. 2783 (2008), the Supreme Court held that the District of Columbia's ban on the possession of a handgun in a person's home violates the Second Amendment to the Federal Constitution. The implications of *Heller* with respect to the type of firearm within the scope of the Second Amendment, the validity of other federal regulatory firearm laws, and whether the Second Amendment applies to the States, remain to be determined.

With respect to the type of firearm within the scope of the "Arms" included in the Second Amendment, *Heller* identified a handgun and otherwise expressed reservations on the inclusion of other firearms. The Court explained that the "Arms" included in the Second Amendment need to bear a relationship to the arms " 'in common use at the time' " of the amendment for the militia and other lawful purposes, such as self-defense. *Id.* at 2817. The "Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes...." *Id.* at 2816-2817. Thus, for example, firearms such as machine-guns, short-barreled shotguns [as held by *United States v. Miller*, 307 U.S. 174, 178, 59 S.Ct. 816, 83 L.Ed. 1206 (1939)], and "M16 rifles and the like" are excluded from Second Amendment coverage. *District of Columbia v. Heller*, 128 S.Ct. at 2816-2817.

With respect to regulatory laws, the Court expressly declined to provide an "exhaustive" list of "lawful regulatory measures," but the Court did explain that the Second Amendment does not interdict "prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as

schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 2816-2816, and n. 26. The Court also implied, from an analysis of cases which dealt with the application of the Second Amendment, that the Second Amendment does not interdict a prohibition on the carrying of a concealed firearm. *Id.* at 2816.

With respect to the application of the Second Amendment to the States, the Supreme Court has, prior to *Heller*, held that the Second Amendment does not apply to them. *United States v. Cruikshank*, 92 U.S. 542, 23 L.Ed. 588 (1875); *Presser v. Illinois*, 116 U.S. 252, 265, 6 S.Ct. 580, 29 L.Ed. 615 (1886); *Miller v. Texas*, 153 U.S. 535, 538, 14 S.Ct. 874, 38 L.Ed. 812 (1894). Whether the Second Amendment will be applied to the States by incorporation into the Due Process Clause of the Fourteenth Amendment under the current interpretation of that clause [*See, e.g., Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491] remains to be determined by the Supreme Court. *See District of Columbia v. Heller*, 128 S.Ct. at 2813, n. 23. Until then, the existing Supreme Court determination that the Second Amendment does not apply to the States "is the law of the land and we are bound by it." *Bach v. Pataki*, 408 F.3d 75, 86 (2nd Cir. 2005).

New York has a statute which parallels the Second Amendment. Civil Rights Law § 4 states: "A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms cannot be infringed". To date, that statute has not been interpreted to negate any of New York's statutory restrictions on the possession of firearms. *See Moore v. Gallup*, 267 A.D. 64, 45 N.Y.S.2d 63 (3rd Dept., 1943), *affirmed without opinion* 293 N.Y. 846, 59 N.E.2d 439 (1944), *but remittitur amended* 294 N.Y. 699, 60 N.E.2d 847 (1945), to add: "A question under the Federal Constitution was presented and necessarily passed upon. The appellant contended that [New York statutes relating to a license to carry a concealed pistol] were repugnant to the provisions of the Fourteenth Amendment to the Constitution of the United States. The appellant also contended that the construction accorded such provision of the Laws of the State of New York by the respondents herein and by the Court of this State in passing upon this case was in violation of said Fourteenth Amendment. This court held that the laws in question and the construction accorded the same herein were not repugnant to such constitutional provisions." *See also* General Construction Law § 101 ("The consolidated laws shall not be construed to amend, repeal or otherwise affect any provision of the penal law, ... unless expressly so stated.")

Definitions

The definitions in Penal Law § 265.00 describe the various types of weapons which are regulated by this article, as well as certain terms utilized in the article regulating the licensing of firearms [Penal Law article 400]. Some of those definitions are discussed here; others are discussed in the sections dealing with the crimes in which they are used.

Firearm; loaded firearm

A "firearm" is limited to: a *pistol*, *revolver*, the so-called "*sawed-off*" *shotgun or rifle*, and an "*assault weapon*" [Penal Law § 265.00(3)]. The vast array of rifles and shotguns are not included within that definition and thus are not "firearms" within the meaning of the legal definition of the term. A "rifle" and a "shotgun" are separately-defined terms [Penal Law § 265.00(11) & (12)].

The statutory definition of "firearm" does not require that the firearm be loaded. A separate term and definition are provided for a "loaded firearm" [Penal Law § 265.00(15)]. The possession of a "loaded firearm" includes the simultaneous possession of the firearm and its ammunition, irrespective of whether the ammunition is in the firearm.

The statutory definition of "firearm" also does not specify that the firearm need be operable. The definition of "loaded firearm" does require ammunition "which may be used to discharge" the firearm [Penal Law § 265.00(15)]. *Compare*

Penal Law § 265.00(1), defining a "machine-gun" to require that the weapon be one "from which a number of shots or bullets may be rapidly or automatically discharged ..."; and Penal Law § 10.00(12), defining a "deadly weapon" to mean a "loaded weapon from which a shot, readily capable of producing death or other serious physical injury, may be discharged. ..." *See also People v. Shaffer*, 66 N.Y.2d 663, 495 N.Y.S.2d 965, 486 N.E.2d 823 (1985). However, inherent to the common understanding of what constitutes a firearm and key to its danger is its operability. Hence, the courts have required proof of the firearm's operability, *i.e.*, that it is capable of discharging ammunition. *People v. Longshore*, 86 N.Y.2d 851, 633 N.Y.S.2d 475, 657 N.E.2d 496 (1995); *People v. Grillo*, 11 N.Y.2d 841, 227 N.Y.S.2d 668, 182 N.E.2d 278 (1962) (no opinion), *affirming* 15 A.D.2d 502, 222 N.Y.S.2d 630; *See People v. Cavines*, 70 N.Y.2d 882, 524 N.Y.S.2d 178, 518 N.E.2d 1170 (1987). Likewise, the ammunition of a loaded firearm must be "live," *i.e.*, capable of being discharged by the firearm. Penal Law § 265.00(15); *People v. Daniels*, 77 A.D.2d 745, 430 N.Y.S.2d 881 (3rd Dept., 1980); *People v. Thomas*, 70 A.D.2d 570, 417 N.Y.S.2d 66 (1st Dept., 1979).

A firearm that is found in a disassembled condition but is operable when assembled is an operable firearm without any further proof that the defendant was personally capable of rendering the disassembled firearm operable. *People v. Lugo*, 161 A.D.2d 122, 554 N.Y.S.2d 849 (1st Dept., 1990).

A "firearm" that is not operable may be the subject of a charge of attempted criminal possession of a weapon. *People v. Saunders*, 85 N.Y.2d 339, 624 N.Y.S.2d 568, 648 N.E.2d 1331 (1995). *See Matter of Lavar D.*, 90 N.Y.2d 963, 665 N.Y.S.2d 612, 688 N.E.2d 486 (1997).

Neither "**pistol**" nor "**revolver**" is defined by statute. They both, however, refer to a handgun. *See* Random House Webster's Unabridged Dictionary (1999) definition of "handgun" ("any firearm that can be held and fired with one hand; a revolver or a pistol"); definition of "pistol" ("a short firearm intended to be held and fired with one hand") and definition of "revolver" ("a handgun having a revolving chambered cylinder for holding a number of cartridges, which may be discharged in succession without reloading").

"Sawed-off" firearm was first defined solely as a firearm of a "size which may be concealed upon the person." That inherently imprecise definition proved inadequate. *See People v. Cortez*, 110 Misc.2d 652, 442 N.Y.S.2d 873 (Supreme Court, N.Y. County, 1981). The definition was amended in 1982 [L.1982, c. 492] and that definition appeared to require that the shotgun or rifle have a barrel "and" an overall length of the specified measurement in order to be classified as a sawed-off shotgun or rifle, and that a weapon made from a shotgun or rifle would be so classified only if its overall length was less than that specified in the definition. *People v. Santiago*, 133 Misc.2d 161, 506 N.Y.S.2d 136 (Supreme Court, N.Y. County, 1986). In the *Santiago* court's view, however, the Legislature intended that a shotgun or rifle, or a weapon made from either of them, should be classified as a "sawed-off" weapon depending upon the length of the barrel "or" overall length, and recommended clarifying legislation. *See also People v. Crivillaro*, 142 Misc.2d 527, 538 N.Y.S.2d 152 (Supreme Court, Bronx County, 1989). In 1988, the Legislature amended the definition to specify that a shotgun or rifle may be deemed a sawed-off weapon if the barrel length alone is less than the specified number of inches (18 for a shotgun, 16 for a rifle), and that any weapon made from a shotgun or rifle may be deemed a sawed-off weapon if the overall length is less than 26 inches [Penal Law § 265.00(3)(b), (c), and (d)]. L.1988, c. 264.

"**Assault weapon**" was added to the definition of "firearm" in 2000 [Penal Law § 265.00(3)] and separately defined [Penal Law § 265.00(22)]. L.2000, c. 189. The "assault weapon" definition is broken down into four definitions: one of a "semiautomatic rifle," one of a "semiautomatic shotgun," one of a "semiautomatic pistol," and one that simply lists by brand name and model number weapons that are included in the definition. The term "semiautomatic" is separately defined to include any repeating rifle, shotgun or pistol which, although requiring a separate pull of the trigger to fire each round, has the capacity to automatically load a cartridge and extract the spent shell [**Penal Law** § **265.00**(21)]. And, the "semiautomatic rifle" and "semiautomatic pistol" require at a minimum "an ability to accept a detachable magazine." **Penal Law** § **265.00**(22). In addition, each of those two definitions, and the definition of

"semiautomatic shotgun," list a series of characteristics and require that the weapon in question contain at least two of those characteristics. At the same time, there is a series of "provisos" by which a weapon that might otherwise be included in the definition of "assault weapon" is deemed excluded [**Penal Law** § **265.00**(22)(e)]. It should be noted that although those "provisos" exclude certain pistols, rifles and shotguns from the definition of "assault weapon," those weapons may yet be subject to other provisions of the weapons crimes in **Penal Law** article 265.

By amending the definition of "firearm" to include an "assault weapon," the "assault weapon" became the subject of several crimes: "criminal possession of a weapon" in the fourth degree [**Penal Law** § 265.01(1), (3)], third degree [**Penal Law** § 265.02(1), (3), (5)], and second degree [**Penal Law** § 265.03]; "criminal sale of a firearm" in the second degree [**Penal Law** § 265.12] and first degree [**Penal Law** § 265.13]; "criminal sale of a firearm" with the aid of a minor [**Penal Law** § 265.14] and to a minor [**Penal Law** § 265.16]; and a couple of crimes dealing with a defaced firearm ["manufacture, transport, disposition and defacement of weapons ..." in **Penal Law** § 265.10(3) and (6)].

In examining these "assault weapon" crimes, we should keep in mind that the definition of "firearm," which now includes an "assault weapon," has always included a "pistol." Thus, an "assault weapon" which is a semiautomatic pistol has long been included in the weapons statutes that prohibit possession of a firearm. Similarly, while the weapons statutes do not prohibit the possession in all circumstances of a rifle or shotgun, they do prohibit their possession in certain circumstances; thus, the possession of a "sawed-off" rifle and a "sawed-off" shotgun is prohibited; and there are certain people who are prohibited from possessing a rifle or shotgun or from possessing them at certain locations [*see* **Penal Law** § 265.01(3), (4), (6); **Penal Law** § 265.02(1) and (3)]. Thus, to the extent that such rifle or shotgun would also constitute an "assault weapon" under the current legislation, such possession was prohibited and continues to be prohibited independently of the statute prohibiting the possession of any "assault weapon."

In addition to including an "assault weapon" in the definitions of crimes that use the term "firearm," the legislation added some crimes which specifically name an "assault weapon." The first of the amended crimes was "criminal possession of a weapon in the third degree," a felony. It was amended to include a subdivision to prohibit the possession of an assault weapon [**Penal Law** § 265.02(7)], irrespective of whether it is loaded and irrespective of where the possession takes place. The second of the amended crimes was "manufacture, transport, disposition and defacement of weapons ..." [**Penal Law** § 265.10]. It was amended to forbid anyone to manufacture, transport, or dispose of any "assault weapon" [**Penal Law** § 265.10(1), (2) and (3) (first sentence)].

An **"antique firearm"** is expressly excluded from the definition of "firearm" [**Penal Law** § **265.00**(3)]. The "antique firearm" is separately defined, and most notably, requires that the antique be "unloaded" [**Penal Law** § **265.00**(14)]. *See People v. Wedgewood*, 106 A.D.2d 674, 483 N.Y.S.2d 440 (2nd Dept., 1984); *People v. Mott*, 112 Misc.2d 833; 447 N.Y.S.2d 632 (Supreme Court, N.Y. County, 1982). Initially, in lieu of exempting an "antique firearm" from the definition of a firearm, the Legislature provided for the issuance of a license to have, possess, collect and carry "antique pistols," as that term is defined in **Penal Law** § 400.00(2)(g). L.1973, c. 593. In 1974, however, the Legislature obviated the need for a license to possess an "antique firearm," as that term is defined in **Penal Law** § **265.00**(14), by excepting it from the definition of "firearm" and thereby effectively exempting it from the provisions of **Penal Law** article 265 which generally make the possession of a firearm, without a license, a crime. L.1974, c. 986. A license for an "antique pistol" would still be necessary if the intent is to possess a loaded "antique pistol," and, to the extent that an "antique pistol" is not also an "antique firearm," a license would be required for its lawful, unloaded possession.

Rifle or shotgun

A rifle and a shotgun, as those terms are defined [**Penal Law** § **265.00**(11) and (12)], are not included in the definition of "firearm." In addition to meeting the terms of the definition, a rifle or shotgun must also be operable, *i.e.*, capable of discharging ammunition. *People v. Longshore*, 86 N.Y.2d 851, 633 N.Y.S.2d 475, 657 N.E.2d 496 (1995).

Machine-gun

A "machine-gun," as that term is defined [**Penal Law** § **265.00**(1)] is not included in the definition of "firearm." And, unlike the definition of a firearm, rifle or shotgun, the requirement of operability of a machine-gun is subsumed in its definition, which requires that it be a weapon "from which a number of shots or bullets may be rapidly or automatically discharged" [**Penal Law** § **265.00**(1)].

Large capacity ammunition feeding device

As part of the 2000 laws which added an "assault weapon" to **Penal Law** article 265, the Legislature added the term, "large capacity ammunition feeding device," defined it, [**Penal Law** § **265.00**(23)], and made it a subject of various crimes.

The "large capacity ammunition feeding device" is a magazine or similar item that was manufactured after the date of the enactment of the federal law on the subject (September 13, 1994) and which has the capacity to accept more than ten rounds of ammunition. **Penal Law** § **265.00**(23). There is a proviso that exempts a "tubular device" which accepts only .22 caliber rimfire ammunition from the definition of a "large capacity ammunition feeding device" [**Penal Law** § **265.00**(23)].

The first of the amended crimes to include the "large capacity ammunition feeding device" was "criminal possession of a weapon in the third degree," a felony. It was amended to include a prohibition on the possession of a "large capacity ammunition feeding device" [**Penal Law** § 265.02(8)].

The second of the amended crimes was "manufacture, transport, disposition and defacement of weapons ..." [**Penal Law** § 265.10]. It was amended (1) to forbid anyone to manufacture, transport, or dispose of a "large capacity ammunition feeding device" [**Penal Law** § 265.10(1), (2) and (3) (first sentence)]; (2) to add a prohibition for the buying, receiving or disposing of a "large capacity ammunition feeding device" which has been defaced for a criminal purpose, which parallels the existing prohibition as it relates to a firearm [**Penal Law** § 265.10(3) (second sentence)]; and (3) to add a prohibition for "wilfully" defacing a "large capacity ammunition feeding device," which parallels the existing prohibition for wilfully defacing a firearm [**Penal Law** § 265.10(6)].

Third, "criminal sale of a firearm in the third degree" [**Penal Law** § 265.11] was also amended to add a "large capacity ammunition feeding device." As amended, the statute prohibits a person who is "not authorized" to possess a "firearm" from "unlawfully" selling or otherwise disposing of any firearm or "large capacity ammunition feeding device." By contrast, one of the amendments to the crime of "manufacture, transport, disposition and defacement of weapons ..." made it a crime to dispose of a "large capacity ammunition feeding device" [**Penal Law** § 265.10(3) (sentence one)], without also requiring that the actor not be authorized to possess a firearm. The term "dispose of" includes a disposition by sale [**Penal Law** § **265.00**(6)]. Thus, unless exempted by **Penal Law** § 265.20, a person who "disposes of" such device (and does so by a sale of the device) commits a crime, irrespective of whether that person is authorized or not authorized to possess a "firearm."

Gravity knife

The definition of “gravity knife” [**Penal Law** § **265.00**(5)] requires that the knife's blade lock in place automatically; thus, a “butterfly knife,” which requires manual locking is not a gravity knife. *People v. Zuniga*, 303 A.D.2d 773, 759 N.Y.S.2d 86 (2nd Dept., 2003). In prosecutions for possession of a “gravity knife,” the Appellate Divisions have held that the People are required to prove that the “gravity knife” is operable [*People v. Smith*, 309 A.D.2d 608, 765 N.Y.S.2d 777 (1st Dept., 2003); *People v. Perez*, 123 A.D.2d 721, 506 N.Y.S.2d 961 (2nd Dept., 1986)], and that the defendant knew that he or she possessed a knife, but not that he or she knew it was a “gravity knife.” *People v. Berrier*, 223 A.D.2d 456, 637 N.Y.S.2d 69 (1st Dept., 1996).

Pilum ballistic knife

The “pilum ballistic knife” definition [**Penal Law** § **265.00**(5-a)] was added in 1986. L.1986, c. 328. One advertisement for the knife described it as approximately nine-and-one-half inches long, with a four-and-a-half inch blade. When a button inside the knife handle is pushed, a powerful spring inside the handle can eject the blade, propelling it to a distance of up to 30 feet with considerable force.

Metal knuckle knife

In 1995, the Legislature added to the list of defined weapons the “metal knuckle knife” [**Penal Law** § **265.00**(5-b)], and then added that weapon to the list of items which constitute a deadly weapon [**Penal Law** § 10.00(12)], to the list of items the possession or manufacture of which is per se a crime [**Penal Law** §§ 265.01(1), 265.10(1)], and to the list of items whose presence in an automobile or in a stolen vehicle may give rise to a presumption of possession of that weapon by everyone in the automobile or stolen vehicle [**Penal Law** § 265.15]. L.1995, c. 219. A “metal knuckle knife” can function as both a set of metal knuckles (possession of which is also a per se crime) and a knife. In the words of the sponsor's Legislative Memorandum, the “possession and manufacture of weapons such as the metal knuckle knife serve only one purpose, ... to maim or take human life. Police searches of shops in the City of New York have discovered this particular weapon. ... In order to protect society, these weapons must be included within the definition of ‘deadly weapons’ found in the **Penal Law**.”

In 2008, the definition of “deadly weapon” [**Penal Law** § 10.00(12)] and “metal knuckle knife” was amended to include “plastic knuckles” because the Legislature determined that “plastic knuckles have just as much impact as the brass knuckles and are just as deadly.” Legislative Memorandum. L.2008, c. 257. Also, a number of statutes which prohibit the possession, manufacture and transportation of various deadly weapons were amended to include a prohibition on the possession of “plastic knuckles” [**Penal Law** §§ 265.01(1); 265.10(1) and (2).

Automatic knife

In 2007, legislation was passed to support and promote the establishment of a “cutlery and knife museum” in the Hudson Valley. L.2007, c. 510, effective February 11, 2008. As a result, the museum and its employees would need an exemption from the crime of possession of certain knives. Thus, the term “automatic knife” was created and defined to include a “stiletto, a switchblade knife, a gravity knife, a cane sword, a pilum ballistic knife, and a metal knuckle knife” [**Penal Law** § **265.00**(5-c)], and an exemption from criminal liability was provided for the possession or ownership of automatic knives by a cutlery and knife museum, established pursuant to Education Law § 216-c, or by any employee of the museum when acting in furtherance of the business of the museum [**Penal Law** § 265.20(d)].

Chuka stick

The "chuka stick" definition [**Penal Law** § **265.00**(14)] was added by L.1974, c. 179. In urging the Governor to approve the legislation, the sponsor of the bill wrote: "The chuka stick is an instrument that may be purchased or easily assembled from two pieces of wood and a piece of thong, cord or chain. With a minimum amount of practice, this instrument may be effectively used as a garrote, bludgeon, thrusting or striking device. The chuka stick is designed primarily as a weapon and has no purpose other than to maim or, in some instances, kill." Letter of Assemblyman Richard C. Ross to the Counsel to the Governor, Governor's Bill Jacket for the L.1974, c. 179.

Kung Fu star

In 1982, the possession of a "Kung Fu star" [**Penal Law** § **265.00**(15-b)] with intent to use it unlawfully against another was made a crime. L.1982, c. 840. In 1985, the manufacturing and transporting of a Kung Fu star was made a crime [**Penal Law** § 265.10]. L.1985, c. 61. In 1988, in recognition that Kung Fu stars may not be manufactured and, in the words of the Legislative Memorandum, that they "serve no legitimate purpose other than as a weapon," the statute was again amended to make the per se possession of a Kung Fu star a crime [**Penal Law** § 265.01(2)]. L.1988, c. 220.

Electronic dart gun

The "electronic dart gun" definition [**Penal Law** § **265.00**(15-a)] was added in 1976. L.1976, c. 217. In urging the Governor to approve the legislation, the sponsor of the bill wrote: "There are a number of these devices being manufactured, the most popular of which is called a 'Taser Public Defender.' It is designed to look like a flashlight which can shoot two barbed darts a distance of 15 to 18 feet and deliver a 50,000 volt jolt of electricity effective through an inch of clothing. While the effect of the charge is to stun, knock out or paralyze a person and is temporary, it causes great pain and may well be lethal to a person in poor health." Letter of Senator John D. Caemmerer to the Counsel to the Governor, Governor's Bill Jacket for the L.1976, c. 217.

Electronic stun gun

In 1990, the Legislature added the definition of an "electronic stun gun" [**Penal Law** § **265.00**(15-c)]. L.1990, c. 264. That definition is similar to the definition of an "electronic dart gun." **Penal Law** § **265.00**(15-a). A principal difference is that the "electronic dart gun" requires that the electrical shock be passed by means of a dart or projectile. The Governor, who recommended the legislation, indicated that the "availability and use" of a weapon "which passes a high voltage electrical shock to a person by means of direct contact or without resort to a projectile" poses the same threat as an electronic dart gun. 1990 Governor's Approval Memorandum 31. Accordingly, for both weapons, possession per se is a crime. **Penal Law** §§ 265.01(1); 265.02(1).

There is a difference of judicial opinion on whether, in a prosecution for possession of an "electronic stun gun," the People are required to prove that the defendant knew it was an "electronic stun gun." *Compare People v. Small*, 157 Misc.2d 673, 598 N.Y.S.2d 431 (Supreme Court, New York County, 1993); *People v. Voltaire*, 18 Misc.3d 408, 413 n. 1, 852 N.Y.S.2d 649 (N.Y.City Crim.Ct., Kings County, 2007).

Elements of the Crimes

Possession

Key, of course, to the most prosecuted crime defined by this article, "criminal possession of a weapon," is the meaning of possession. "Possess" means "to have physical possession or otherwise to exercise dominion or control over tangible property" [**Penal Law** § 10.00(8)]. Thus, by its definition, "possess" includes physical or constructive

possession of tangible property. *People v. Sierra*, 45 N.Y.2d 56, 407 N.Y.S.2d 669, 379 N.E.2d 196 (1978); *People v. Torres*, 68 N.Y.2d 677, 505 N.Y.S.2d 595, 496 N.E.2d 684 (1986).

A person has physical possession of property by holding it in his or her hand, or by carrying it in, or on, his or her body or person. *See* CJI 2d (NY) PL article 265, Additional Charges.

A person has constructive possession of property when that person exercises " 'dominion or control' over the property by a sufficient level of control over the area in which the contraband is found or over the person from whom the contraband is seized." *People v. Manini [Fuente]*, 79 N.Y.2d 561, 573, 584 N.Y.S.2d 282, 594 N.E.2d 563 (1992). *See* CJI 2d (NY) PL article 265, Additional Charges. *See People v. Bundy*, 90 N.Y.2d 918, 663 N.Y.S.2d 837, 686 N.E.2d 496 (1997) (constructive possession of drugs and weapons was proved where the apartment was an "obvious drug factory.").

Possession of tangible property may be by an individual or shared jointly by several persons. "Possession if joint is no less possession." *People v. Tirado*, 38 N.Y.2d 955, 956, 384 N.Y.S.2d 151, 348 N.E.2d 608 (1976); *People v. Watson*, 56 N.Y.2d 632, 450 N.Y.S.2d 784, 436 N.E.2d 190 (1982). In *Watson*, for example, the Court found ample evidence of possession to support the convictions of two defendants for criminal possession of a weapon. Both defendants admitted living in the apartment in which the weapon was found, both hung their clothes in the bedroom in which the weapon was found, and, as to one defendant, a photograph of him was found in the suitcase in which the weapon was located. *See also People v. Myers*, 265 A.D.2d 598, 697 N.Y.S.2d 178 (3rd Dept., 1999) (although the gun in the defendant's home may have belonged to an invited guest, defendant was guilty of possession because he "knew the gun was present in his home, did not make any attempts to turn it over to police and was solely responsible for concealing it in a backpack and then placing same in the location where it was ultimately discovered by police.")

Liability for possession of contraband may also be premised on a theory of accessorial liability [**Penal Law** § 20.00] when the defendant, although not in possession of contraband, is an accomplice of a person who is. *See People v. Day*, 11 A.D.3d 405, 783 N.Y.S.2d 41 (1st Dept., 2004); *People v. Falls*, 256 A.D.2d 243, 682 N.Y.S.2d 172 (1st Dept., 1998); *People v. Dean*, 200 A.D.2d 582, 606 N.Y.S.2d 290 (2nd Dept., 1994).

The criminal possession of a "per se" weapon may be a "continuing crime." Nonetheless, where a defendant had unlawfully possessed a weapon in two separate counties during a continuous six-day period, he could only be prosecuted once for that possession. *Matter of Johnson v. Morgenthau*, 69 N.Y.2d 148, 512 N.Y.S.2d 797, 505 N.E.2d 240 (1987). However, when the crime is defined as the possession of a weapon with an intent to use the same unlawfully against another, the crime is a continuing offense only during the period the defendant possesses the weapon intending to use it against a particular person; a subsequently-formed intent to use it against a different person results in the commission of two separate and distinct offenses. *People v. Okafore*, 72 N.Y.2d 81, 531 N.Y.S.2d 762, 527 N.E.2d 245 (1988).

Knowing and voluntary possession

The culpable mental state of "knowingly" with respect to conduct or to a circumstance described by a statute defining an offense, requires that a person be "aware" that his conduct is of such nature or that such circumstance exists [**Penal Law** § 15.05(2)].

Some of the statutes that make the possession of a weapon criminal expressly require a knowing culpable mental state, while others are silent on the subject of the culpable mental state. The difference in the way the statutes are written stems to some extent from the historical origins of this article. As indicated in the "History" section of this Commentary, the current **Penal Law** carried forward, almost verbatim, the weapons provisions of the former **Penal Law**. With rare exceptions, the former **Penal Law** statutes that made the possession of a weapon criminal did not

expressly state a culpable mental state [former **Penal Law** § 1897]; with rare exceptions, statutes added to the instant **Penal Law** that make the possession of a weapon criminal have included the culpable mental state of "knowingly."

However, whether stated or not, it has long been the rule for statutes that make possession of a weapon illegal that "the possession which is meant is a knowing and voluntary one." *People v. Persce*, 204 N.Y. 397, 402, 97 N.E. 877 (1912). **Penal Law** § 15.00(2) currently specifies that with respect to possession, a "voluntary act" -- a required actus reus of an offense -- "includes the possession of property if the actor was aware of his physical possession or control thereof for a sufficient period to have been able to terminate it." *See People v. Valentine*, 54 A.D.2d 568, 387 N.Y.S.2d 25 (2nd Dept., 1976) (the defendant's intoxication placed in issue whether the defendant's possession was voluntary). That definition of "voluntary act," coupled with the requirement that a "statute defining a crime, unless clearly indicating a legislative intent to impose strict liability, should be construed as defining a crime of mental culpability" [**Penal Law** § 15.15(2)], has reenforced the traditional view that for statutes that make possession of a weapon illegal, the possession must be knowing and voluntary. *See People v. Saunders*, 85 N.Y.2d 339, 624 N.Y.S.2d 568, 648 N.E.2d 1331 (1995); *People v. Ford*, 66 N.Y.2d 428, 440, 497 N.Y.S.2d 637, 488 N.E.2d 458 (1985); *People v. Cohen*, 57 A.D.2d 790, 791, 394 N.Y.S.2d 683 (1st Dept., 1977). CJI 2d (NY) PL article 265.

There are issues not yet settled by the Court of Appeals as to what, if anything, besides possession, the possessor must be aware of. *See, e.g.*, *People v. Toribio*, 216 A.D.2d 189, 629 N.Y.S.2d 210 (1st Dept., 1995) (knowledge that the gun was loaded was not required); *People v. Smith*, 32 A.D.3d 1318, 821 N.Y.S.2d 723 (4th Dept., 2006) (knowledge that a firearm was defaced was assumed to be required); *People v. Berrier*, 223 A.D.2d 456, 637 N.Y.S.2d 69 (1st Dept., 1996) (knowledge of possession of a knife was required, but not knowledge that the knife was specifically a "gravity knife"). In *People v. Ansare*, 96 A.D.2d 96, 468 N.Y.S.2d 269 (4th Dept., 1983), the Appellate Division held that knowledge of the operability of the firearm was not required, and the Court of Appeals in *Saunders*, 85 N.Y.2d at 342, arguably approved that holding.

Generally, "possession suffices to permit the inference that the possessor knows what he possesses, especially, but not exclusively, if it is in his hands, on his person, in his vehicle, or on his premises." *People v. Reisman*, 29 N.Y.2d 278, 285, 327 N.Y.S.2d 342, 348, 277 N.E.2d 396 (1971); *People v. Kirkpatrick*, 32 N.Y.2d 17, 23, 343 N.Y.S.2d 70, 75, 295 N.E.2d 753 (1973), *appeal dismissed for want of a substantial federal question* 414 U.S. 948, 94 S.Ct. 283, 38 L.Ed.2d 204.

Finally, on the facts of a given case, possession of the weapon may be "knowing" but not pursuant to a "voluntary act," *i.e.*, one could know, be aware, of the possession of an object (fulfilling the mens rea requirement), but not for a sufficient period to have been able to terminate possession (thus not fulfilling the actus reus element). In that instance, the possessor is not criminally liable for the possession of the weapon.

Presumptions of [knowing] possession

Penal Law § 265.15 sets forth a series of generally self-explanatory presumptions of possession.

The first three of the presumptions set forth in **Penal Law** § 265.15 (subd. 1 to 3) specify on their face a presumption of "possession," not a presumption of "knowing possession." However, to the extent the courts have required that the possession of a weapon be "knowing," those courts have held that it follows that the applicable presumption must be one of "knowing possession." *People v Sanchez*, 110 A.D.2d 665, 487 N.Y.S.2d 584 (2nd Dept., 1985) ("It follows that if a conviction for criminal possession of a weapon under **Penal Law** [former] § 265.02(4) [now **Penal Law** § 265.03(3)] requires, at the very least, knowing possession, **Penal Law** § 265.15(3) was intended to create a presumption of knowing possession."); *People v. Thompson*, 202 A.D.2d 337, 609 N.Y.S.2d 594 (1st Dept., 1994).

The presumptions are "permissive," and the jury must be so instructed. *People v. McKenzie*, 67 N.Y.2d 695, 499 N.Y.S.2d 923, 490 N.E.2d 842 (1986). "The statutory presumption establishes a prima facie case against the defendant which presumption he may, if he chooses, rebut by offering evidence. Generally, the presumption will remain in the case for the jury to weigh even if contrary proof is offered but may be nullified if the contrary evidence is strong enough to make the presumption incredible. So too, if no contrary proof is offered, the presumption is not conclusive, but may be rejected by the jury." *People v. Lemmons*, 40 N.Y.2d 505, 510, 387 N.Y.S.2d 97, 354 N.E.2d 836 (1976), *federal writ of habeas corpus denied sub. nom. Ulster County Ct. v. Allen*, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979).

The presumptions defined in subdivisions one, three and four have been held constitutional. *People v. Terra*, 303 N.Y. 332, 102 N.E.2d 576 (1951), *appeal dismissed for want of a substantive federal question*, 342 U.S. 938, 72 S.Ct. 561, 96 L.Ed. 698; *People v. Russo*, 303 N.Y. 673, 102 N.E.2d 834 (1951); *People v. Cruz*, 34 N.Y.2d 362, 357 N.Y.S.2d 709, 314 N.E.2d 39 (1974); *People v. Lemmons*, *supra*; *People v. McKenzie*, *supra*.

In *Lemmons*, the Court of Appeals sustained the application of the presumption in subdivision three to affirm the conviction of three men and one woman for possession of two handguns. The four were in a car which had been stopped for speeding. The two handguns were positioned crosswise in an open handbag on either the front floor or the front seat of the car on the passenger side, where the woman was sitting. The woman admitted that the handbag was hers. The Court held that the placement of a handgun in a container does not necessarily indicate that the owner of the container is in sole and exclusive possession of the handgun. Whether the owner of the container is the sole possessor of the weapon depends upon the access to the bag that others may have and whether the others have knowledge of its contents. Those issues are questions of fact for the jury. On the other hand, by its statutory definition, the presumption would not apply if the weapon were found "upon the person" of one of the occupants; *e.g.*, secreted under one person's shirt or under other items of clothing or in a pocket.

Defenses

Exemptions

The "criminal possession of a weapon" statutes specify that the possession of certain named weapons is either *per se* a crime [*e.g.*, **Penal Law** § 265.01(1)] or a crime under certain additional circumstances [*e.g.*, **Penal Law** § 265.03]. Nonetheless, a series of "exemptions" from criminal liability for such possession is provided in a separate statute [**Penal Law** § 265.20]. For a discussion of those exemptions, see Practice Commentary to **Penal Law** § 265.20. Those "exemptions" are in the nature of a defense; the defendant is required to raise the exemption before the government is required to disprove it beyond a reasonable doubt. *See People v. Kohut*, 30 N.Y.2d 183, 187, 331 N.Y.S.2d 416, 420, 282 N.E.2d 312 (1972) ("... when the exception is found outside the statute [which defines the offense], the exception generally is a matter for the defendant to raise in defense. ..."); *People v. Santana*, 7 N.Y.3d 234, 237, 818 N.Y.S.2d 842, 851 N.E.2d 1193 (2006).

Temporary and lawful possession

There is a concept of "innocent" possession of a weapon that has been labeled the "defense of temporary and lawful possession." It is a narrowly-drawn defense designed to protect those who did not seek to possess a weapon but find themselves in possession of a weapon by happenstance or by taking it from an assailant; then once in possession, they intend to immediately dispose of the firearm safely; they act in accord with that intent by maintaining possession for the briefest period of time necessary to dispose of the weapon safely; and finally, in that time period, they do not utilize the weapon in a dangerous manner or expose others to the dangers incident to the continued possession of the weapon. *See People v. La Pella*, 272 N.Y. 81, 4 N.E.2d 943 (1936) (the defense should have been charged where the defendant alleged he had found the weapon in a public toilet; he had put it in his pocket, intending to deliver it to

the police after keeping an appointment with his wife at a nearby street corner; and within 20 minutes of finding the firearm, had delivered it to a detective); *People v. Almodovar*, 62 N.Y.2d 126, 130, 476 N.Y.S.2d 95, 464 N.E.2d 463 (1984) (the defense was properly charged where the defendant claimed that he had taken the firearm from a person who attacked him); *People v. Williams*, 50 N.Y.2d 1043, 431 N.Y.S.2d 698, 409 N.E.2d 1372 (1980) (the defendant was not entitled to the defense where he found a firearm in the furniture of a friend, took it and secreted it in another place, retrieved it later and spun it playfully when it suddenly went off and hit another); *People v. Mascitti*, 67 N.Y.2d 1010, 503 N.Y.S.2d 324, 494 N.E.2d 455 (1986) (the defendant was not entitled to the defense where he picked up the lawfully-owned firearm of a friend and fired at a clock); *People v. Snyder*, 73 N.Y.2d 900, 539 N.Y.S.2d 285, 536 N.E.2d 614 (1989) (the defense was properly not charged where the defendants had wrestled the firearm from another, but made no effort to report same to the police who were nearby, and retained possession of the firearm in their home overnight); *People v. Banks*, 76 N.Y.2d 799, 559 N.Y.S.2d 959, 559 N.E.2d 653 (1990) (the defendant was not entitled to the defense where he allegedly took possession of the firearm by disarming an assailant, but retained possession with the alleged intent of transporting it from Manhattan "through the streets and on the subway" into Queens, where he proposed to throw it down a sewer).

The defense of temporary and lawful possession of a weapon does not permit a person to avoid criminal liability by claiming that the weapon was possessed for his or her protection. *People v. Almodovar*, *supra*. In fact, even when a person uses a weapon justifiably in self-defense, that person is not excused from any liability that may exist for the unlawful possession of that weapon. *People v. Pons*, 68 N.Y.2d 264, 508 N.Y.S.2d 403, 501 N.E.2d 11 (1986).

The defense of temporary and lawful possession should be distinguished from a defense based on the failure to perform a "voluntary act." **Penal Law** § 15.00(2) defines a "voluntary act" to mean "a bodily movement performed consciously as a result of effort or determination, and includes the possession of property if the actor was aware of his physical possession or control thereof for a sufficient period to have been able to terminate it." In the lack of a "voluntary act" defense, the defendant is not aware of the possession for a period of time sufficient to have been able to terminate the possession, and thus has not engaged in a "voluntary act" sufficient to warrant criminal liability for the possession. In the defense of temporary and lawful possession, the defendant is aware of his or her possession for a period of time sufficient to have terminated possession, but claims to have taken appropriate steps to terminate the possession during that period, thus making the possession lawful or excused.

Possession Crimes

Criminal possession of an unloaded firearm

As discussed in the "definitions" section, the statutory definition of "firearm" is limited to pistols, revolvers, "sawed-off" shotguns and rifles, and assault weapons, and it expressly excludes an "antique firearm."

The possession of an unloaded firearm, other than an assault weapon, is a class A misdemeanor ["criminal possession of a weapon in the fourth degree," **Penal Law** § 265.01(1)]. The possession of a loaded or unloaded assault weapon is a class D felony ["criminal possession of a weapon in the third degree," **Penal Law** § 265.01(7)].

The possession of an unloaded firearm which has been defaced for the purpose of concealing a crime or misrepresenting the identity of the firearm is a class D felony ["criminal possession of a weapon in the third degree," **Penal Law** § 265.02(3)].

The possession of three or more unloaded firearms is a class D felony ["criminal possession of a weapon in the third degree," **Penal Law** § 265.02(5)(i)].

The possession of an unloaded firearm by a person who was previously convicted of "any crime" is a class D non-violent felony ["criminal possession of a weapon in the third degree," **Penal Law** § 265.02(1)]. If the prior conviction was for a felony or a class A misdemeanor defined by the **Penal Law** which was committed within the five years immediately preceding the commission of the instant offense and such possession did not take place in the person's home or place of business, it is a class D "violent" felony ["criminal possession of a weapon in the third degree," **Penal Law** § 265.02(5)(ii)]. The rules regarding the reduction of a violent felony for a plea of guilty [CPL 220.10] and the authorized sentence for a plea of guilty to a violent felony [**Penal Law** articles 60 and 70] are different from those for a non-violent felony.

The possession of a firearm by a person not authorized to possess same with the intent to sell same constitutes "criminal sale of a firearm in the third degree," a class E felony [**Penal Law** § 265.11(2)]. There is a rebuttable presumption that the possession of five or more firearms is presumptive evidence that they are possessed with the intent to sell [**Penal Law** § 265.15(6)].

Finally, while a license to possess a pistol or revolver generally exempts a person from criminal liability for the possession of a firearm, the knowing possession of a firearm, even by a person licensed to possess it, in or upon the buildings or grounds of an educational institution or school bus without the written authorization of the educational institution constitutes a class A misdemeanor [**Penal Law** § 265.01(3) and **Penal Law** § 265.20(a)(3)].

Criminal possession of a loaded firearm

The possession of a loaded firearm is a violent felony, unless the firearm is possessed in the subject's "home or place of business." In that situation, the crime would be a misdemeanor if the possessor has not been previously convicted of a crime [**Penal Law** §§ 70.02(1)(b); 265.03(3), 265.01(1), 265.02(1) and *see also* 265.02(5)(ii)]. Prior to November 1, 2006, possession of a loaded firearm, not in one's home or place of business, was a class D violent felony in the "criminal possession of a weapon in the third degree" statute [**Penal Law** former § 265.02(4)]. Effective November 1, 2006, the Legislature transferred that crime to the statute defining "criminal possession of a weapon in the second degree" [**Penal Law** § 265.03(3)]. L.2006, c. 742. That elevated the crime from a class D violent felony to a class C violent felony, and thereby raised the authorized sentence from one which might not have included jail to one that mandates a determinate sentence of imprisonment of not less than three-and-a-half years. The same legislation repealed the crime of possession of a loaded firearm with the intent to use the same unlawfully against another, as it was defined in "criminal possession of a weapon in the second degree" [repealed **Penal Law** § 265.03(1)(b)]. That was an error. It had the effect of making the possession of a firearm in one's home or place of business with the intent to use it unlawfully against another a misdemeanor. But, within fifteen days of the effective date of the repeal, the error was cured by legislation which reenacted the repealed crime. L.2006, c. 745, effective December 15, 2006.

The exception for possession in one's home or place of business, must be pleaded and disproved by the government. The defendant has no burden of coming forward with evidence that the requisite possession took place in his or her home or place of business. *People v. Rodriguez*, 68 N.Y.2d 674, 505 N.Y.S.2d 593, 496 N.E.2d 682 (1986), *reversing for reasons stated in the dissenting opinion at the Appellate Division*, 113 A.D.2d 337, 343-348; *People v. Ali*, 36 N.Y.2d 880, 882, 372 N.Y.S.2d 212, 334 N.E.2d 11 (1975). *See People v. Kohut*, 30 N.Y.2d 183, 187, 331 N.Y.S.2d 416, 420, 282 N.E.2d 312 (1972) ("If the defining statute contains an exception, the indictment must allege that the crime is not within the exception. But when the exception is found outside the statute, the exception generally is a matter for the defendant to raise in defense ..."). Compare *People v. Santana*, 7 N.Y.3d 234, 237, 818 N.Y.S.2d 842, 851 N.E.2d 1193 (2006). (The exception set forth in the definition of criminal contempt [**Penal Law** § 215.50(3)] constitutes "a proviso that the accused may raise in defense of the charge rather than an exception that must be pleaded by the People in the accusatory instrument.")

Albeit not necessary to the holding in *Rodriguez*, the Appellate Division opinion relied upon by the Court of Appeals argued that upon adoption of the instant **Penal Law** in 1965, the authors had differentiated between defenses and affirmative defenses, and classified each defense within the **Penal Law** as one or the other, and thus the failure to classify the exception in **Penal Law** § 265.02(4) as a defense made it an element of the crime. That historical premise is, however, somewhat flawed. When the authors of the instant **Penal Law** made that differentiation in 1965, they did not do so as to **Penal Law** article 265. As noted above in the history of this article, this is the one article drawn almost verbatim from the former **Penal Law**. The firearms article of the former **Penal Law** had been then recently amended after a major legislative study. For political reasons, to gain passage of the instant **Penal Law**, its authors made a conscious decision not to attempt to conform the provisions of this article to the innovations in mens rea and defenses introduced in other articles of the instant **Penal Law**.

A person's "home" may include an area in which the possessor of the weapon was entitled to "privacy, as one would have in his home." *People v. Powell*, 54 N.Y.2d 524, 530, 446 N.Y.S.2d 232, 430 N.E.2d 1285 (1981). Examples of a person's home, taken from *Powell* and cases cited with approval by *Powell* are as follows. The lobby of a men's shelter constituted the defendant's "home." *People v. Powell*, *supra*. The abode of a woman with whom the defendant had a strong social connection, where he ate many of his meals and often stayed overnight, albeit he had another abode, constituted the defendant's "home." *People v. Douglas*, 82 Misc.2d 971, 372 N.Y.S.2d 459 (Supreme Court, Kings County, 1975). The common hallway linking sleeping rooms of unrelated persons to the bathroom and other common facilities in the wing of the hotel in which they lived together, the hallway being separated by a locked door from the vestibule, elevator and stairwell and from the entrance to another wing of the same residency hotel, was part of the defendant's "home." *People v. Bargeman*, 92 Misc.2d 173, 399 N.Y.S.2d 393 (Supreme Court, N.Y. County, 1977).

The meaning of "such person's place of business" has not been definitively settled by the Court of Appeals. The Appellate Divisions have shied away from interpreting the term to extend to the place where a person simply works. Rather, concluding that the Legislature intended to mitigate punishment only when the possession was for the purpose of using such firearm "at such locale in defense of the possessor's person and property," they have limited the applicability of the defense accordingly. Thus, an employee who possessed a firearm at his place of work was held not to have possessed the firearm at his "place of business" because he had no responsibility for protecting the employer's property. *People v. Francis*, 45 A.D.2d 431, 434, 358 N.Y.S.2d 148 (2nd Dept., 1974), *affirmed on other grounds*, 38 N.Y.2d 150, 379 N.Y.S.2d 21, 341 N.E.2d 540 (1975); *People v. Fearon*, 58 A.D.2d 1041, 397 N.Y.S.2d 294 (4th Dept., 1977).

The possession of a loaded firearm with the intent to use the same unlawfully against another person is both a class A misdemeanor ["criminal possession of a weapon in the fourth degree," **Penal Law** § 265.01(2)] and a class C felony ["criminal possession of a weapon in the second degree," **Penal Law** § 265.03(1)(b)]. *See People v. Vaccaro*, 44 N.Y.2d 885, 407 N.Y.S.2d 631, 379 N.E.2d 159 (1978). *See also People v. Cavines*, 70 N.Y.2d 882, 524 N.Y.S.2d 178, 518 N.E.2d 1170 (1987) (the pointing and the pulling of the trigger of a loaded firearm, which then malfunctioned, could form the basis of a conviction of criminal possession of a weapon in the second degree); *People v. Bracey*, 41 N.Y.2d 296, 392 N.Y.S.2d 412, 360 N.E.2d 1094 (1977) (an example of an intent to use a firearm in the commission of a robbery).

A person who is not authorized to possess a firearm, but uses a firearm in self-defense, is still subject to criminal liability for possession of the firearm. *People v. Pons*, 68 N.Y.2d 264, 508 N.Y.S.2d 403, 501 N.E.2d 11 (1986). Further, criminal liability may extend to possession of the firearm with the intent to use it unlawfully if the jury finds that the firearm was possessed with an unlawful intent prior to the justified shooting. *People v. Bumbury*, 194 A.D.2d 735, 599 N.Y.S.2d 826 (2nd Dept., 1993). See CJI2d [NY] **Penal Law** article 265 "Additional Charges: Intent to Use Unlawfully and Justification" ("The defense of justification does not apply to this crime [of possession with intent] because that defense applies only to the use of force. You may, however, in determining whether or not the defendant had the intent required for this crime consider the following: The use of a firearm ... to engage in conduct that is

justifiable under the law is not unlawful. Thus, an intent to use a firearm ... against another justifiably is not an intent to use it unlawfully. ..."

Criminal possession of a rifle or shotgun

The **Penal Law** does not make it a crime per se for a citizen to possess a "rifle" or "shotgun" [defined in section **265.00**(11) and (12)]. But it is a crime per se for an alien to possess a "deadly weapon" [**Penal Law** § 265.01(5) and **Penal Law** § 265.02(1)], which generally includes a loaded rifle or shotgun [*see* **Penal Law** § 10.00(12)]. And, it is a crime for anyone to possess a "dangerous or deadly instrument or weapon" [*see* **Penal Law** § 10.00(12), (13)] with intent to use the same unlawfully against another [**Penal Law** § 265.01(2)].

It is a crime to possess a rifle or shotgun if one has a prior conviction of a felony or a "serious offense" [**Penal Law** § **265.00**(17) and **Penal Law** § 265.01(4)]; or to possess a rifle or shotgun after having, based on a mental illness, been "certified not suitable to possess a rifle or shotgun" [**Penal Law** § **265.00**(16) and **Penal Law** § 265.01(6)]; or to possess a rifle or shotgun in or upon the buildings or grounds of an educational institution without the written authorization of the educational institution [**Penal Law** § 265.01(3)]; or to possess a rifle or shotgun which has been defaced for the purpose of concealing a crime or misrepresenting the identity of the weapon [**Penal Law** § 265.02(3)].

The government is required to prove that a rifle or shotgun is operable, *i.e.*, capable of discharging ammunition. *People v. Longshore*, 86 N.Y.2d 851, 633 N.Y.S.2d 475, 657 N.E.2d 496 (1995).

The statute penalizing possession of a rifle, shotgun or firearm on the property of an educational institution, "criminal possession of a weapon in the fourth degree" [**Penal Law** § 265.01(3)] was first added in 1969 as part of a comprehensive legislative response to a student demonstration and seizure of a building at Cornell University during which some students possessed rifles and shotguns [L.1969, c. 341; **Penal Law** former § 265.05(10); repealed and re-enacted as **Penal Law** § 265.01(3) by L.1974, c. 1041]. In 2006, the Legislature amended that statute to prohibit the knowing possession of a rifle, shotgun, or firearm upon a "school bus" [**Penal Law** § 265.01(3)]. L.2006, c. 199. The definition of "school bus" is cross-referenced to the definition of a "school bus" in the Vehicle and Traffic Law [§ 142], and that definition is almost identical to the definition of a "school bus" which appears elsewhere in the **Penal Law** [§ 220.00(17)]. While the vehicle is defined in terms of its use to transport pupils, teachers and other persons acting in a supervisory capacity, it does not require that any such person be present in the "school bus" at the time of the possession of the weapon or that the bus be in use at the time of the possession. No particular reason for the legislation was offered other than that "[c]urrent provisions of the **Penal Law** do not specifically prohibit the possession of firearms on school buses." Legislative Memorandum. Possession of a firearm, without a license, in any location was a crime before and after the addition in **Penal Law** § 265.01(3) of the prohibition on possessing it on the property of an educational institution or school bus; notably, however, it is specially provided that possession of a "pistol or revolver" by a person to whom a license has been issued does not preclude a conviction for a violation of **Penal Law** § 265.01(3). **Penal Law** § 265.20(3).

Criminal possession of a machine-gun

A "machine-gun" in essence is capable of discharging a number of bullets automatically from a magazine with "one continuous pull" of the trigger [**Penal Law** § **265.00**(1)]. By contrast, once set to fire, a "semiautomatic" weapon is capable of discharging a bullet from a magazine with each pull of the trigger, without any additional action, such as the working of a bolt or lever.

By its definition, a machine-gun must be operable, *i.e.*, it is a weapon "from which a number of shots or bullets may be rapidly or automatically discharged ..." [**Penal Law** § **265.00**(1)].

The possession of a machine-gun, loaded or unloaded, is per se, a class D felony [**Penal Law** § 265.01(2); *see also* 265.02(3) (defaced machine-gun)].

The possession of a machine-gun with intent to use it unlawfully against another person is a class C felony [**Penal Law** § 265.03(1)(a)].

Criminal possession of explosives

The possession per se of any "explosive or incendiary bomb," or "bombshell" is a class D felony [**Penal Law** § 265.02(2)].

The possession of an "explosive substance" with intent to use the same unlawfully against another is a class B felony [**Penal Law** § 265.04].

The "statutory terms -- 'incendiary', 'bomb' and 'explosive substance' -- are susceptible of reasonable application in accordance with the common understanding of men. ..." *People v. Cruz*, 34 N.Y.2d 362, 357 N.Y.S.2d 709, 314 N.E.2d 39 (1974).

The reference to "explosive or incendiary bomb" was added to the statute in 1970. L.1970, c. 1012. In the early months of 1970, there was a series of terror bombings in New York City and elsewhere. At that time the law proscribed possession only of a "bomb or bombshell," and there was some concern whether those terms included such items as "Molotov cocktails." Thus, the law was amended in 1970 to include an "explosive or incendiary bomb." L.1970, c. 1012. In approving the amendment, the Governor wrote: "The threat posed to the lives and property of our citizens by the criminal use of incendiary and explosive devices must be eradicated. This measure will eliminate any uncertainty as to whether the possession of such weapons violates the **Penal Law**. The penalty provided under the bill reflects the gravity of the risk to society caused by the dastardly users of 'molotov cocktails' and other popular instruments of violence." Governor's Approval Memorandum, 1970 McKinney's Session Laws of New York, pp. 3145-46.

Also, in 1970 the licensing and enforcement provisions of the Labor Law (article 16) with respect to the possession and use of explosives were strengthened. L.1970, c. 1022. Notably, one of the amendments to Labor Law § 464 provided that "any person who possesses an explosive without being duly licensed or otherwise authorized to do so under the provisions of this article shall be guilty of a class D felony."

The **Penal Law** does not contain a definition of the term "explosive." There is a definition for the term "explosives" in Labor Law § 451, and that definition has been utilized in interpreting arson and criminal possession of a weapon provisions referring to explosives. *People v. McCrawford*, 47 A.D.2d 318, 366 N.Y.S.2d 424 (1st Dept., 1975).

Criminal possession of a disguised gun

In 1998, the Legislature introduced the concept of the "disguised gun," and set forth penalties for its possession. L.1998, c. 378. The Legislative Memorandum in support of the legislation explained its rationale as follows:

"A series of recent newspaper articles have highlighted the existence of a gun made in the form of a keychain that was uncovered by security in a foreign airport terminal. [*See* New York Times, May 10, 1998, 'Easy to Hide: the Mini-Gun.'] This easily concealable 'keychain gun' is one of a growing list of guns that are designed to appear to be something other than a gun. Other such guns include pen guns, belt buckle guns and cane guns. This bill recognizes that these guns serve no legitimate sporting or law enforcement purpose and should be banned. In addition, these disguised guns compromise

security at airports, courtrooms or other places that use metal detectors since, in their disguised form, many of these guns are permitted to be placed in baskets or other such containers that bypass the metal detector, thereby allowing the owner to pass through the machine undetected."

By definition, the "disguised gun" is "any weapon or device capable of being concealed on the person from which a shot can be discharged through the energy of an explosive and is designed and intended to appear to be something other than a gun" [**Penal Law** § **265.00**(20)]. That definition requires that the "disguised gun" be operable.

Although separately defined, a "disguised gun" should also qualify as a "firearm" [defined in **Penal Law** § **265.00**(3) to include "any pistol or revolver"], and thus be subject to the existing sanctions for the possession or sale of a firearm. That conclusion appears to be recognized by the legislation defining the "disguised gun" for the following reasons. The "disguised gun" legislation was in part designed to prohibit even the issuance of a license to possess a "disguised gun." That was accomplished by amending the statute that describes the authorized licenses for a firearm to exclude a "disguised gun" [**Penal Law** § 400.00(2)], and by specifying that the "terms ... 'pistol,' 'revolver,' and 'firearm' as used" in the section granting "exemptions" from penal sanctions for those licensed to carry such items "shall not include a disguised gun" [**Penal Law** § 265.20(16)]. That exclusion of a "disguised gun" from the definition of a pistol, revolver and firearm used in the exemption section of article 265, constitutes a recognition of its inclusion in the meaning of those terms in other sections of **Penal Law** article 265.

Further, the two crimes that were created to address possession of a "disguised gun" were not created out of a belief that the "disguised gun" was not included within the term "firearm." The two crimes were created to increase the penalty for possession of a "disguised gun" over the possession of a "firearm," as those penalties were defined in 1998.

Criminal possession of other weapons

Aside from a firearm, rifle, shotgun, or disguised firearm, the possession of a host of other weapons may be a crime. For some such weapons (*e.g.*, electronic dart or stun gun, gravity knife, switchblade knife, pilum ballistic knife, metal knuckle knife, cane sword, billy, blackjack, bludgeon, and plastic or metal knuckles) possession per se is a crime [**Penal Law** §§ 265.01(1), 265.02(1)]. For the remaining weapons (including any "dangerous or deadly instrument or weapon" [**Penal Law** § 10.00(12), (13)]), the possession must be with an intent to use the same unlawfully against another [**Penal Law** §§ 265.01(2), 265.02(1)]. *See, e.g.*, *People v. Holland*, 279 A.D.2d 645, 719 N.Y.S.2d 320 (3rd Dept., 2001) ("jury could reasonably and rationally conclude that the sword was a dangerous instrument" and "the manner in which defendant brandished the sword ... rationally supports the conclusion reached by the jury that defendant intended to use it in an unlawful manner").

Possession of ammunition

The possession of two kinds of ammunition is proscribed. The possession of a bullet "containing an explosive substance designed to detonate upon impact" was made a per se crime in 1981 [**Penal Law** § 265.01(7)]. This amendment was prompted by the use of such ammunition in the attempt to assassinate President Ronald Reagan. In urging the Governor to approve the legislation, the sponsor in the Assembly wrote: "The dangers in this ammunition arise owing to an explosive charge imbedded in the bullet (projectile) itself. This explosive is designed to detonate on impact with the target. In the case of Press Secretary James Brady one of the bullets apparently detonated upon entering his brain. During this horrible incident surgeons had to excise unexploded slugs from the bodies of victims, time bombs that can go off during surgery, potentially destroying successful treatment and causing injury to the surgeons. * * * The ammunition has no legitimate sports purpose. ..." Assemblyman Joseph Ferris's letter to Governor Hugh L. Carey, Bill Jacket L.1981, c. 807.

The possession of "armor piercing ammunition" [defined in section **265**.**00**(18)] with intent to use the same unlawfully against another was made a crime in 1986 [**Penal Law** § 265.01(8)]. Notably, although there appears to be no legitimate use for armor piercing ammunition by a private citizen, simple possession, unlike the exploding bullet, is not prohibited. In the absence of a prohibition on simple possession, little may have been gained by the addition of this crime. The requisite intent will most often be evident in situations where the possessor is chargeable with a more serious crime.

Criminal Use of a Firearm

"Criminal use of a firearm" [**Penal Law** §§ 265.08, 265.09] was added as part of the 1980 gun control legislation. L.1980, cc. 233, 234. It makes the commission of certain crimes with a firearm an "armed felony" [defined in CPL 1.20(41)]. A charge of an "armed felony" may affect the potential scope of plea-bargaining and sentencing. The definition of "armed felony" includes a violent felony offense which has as an "element" of the crime the possession or display of a gun. Thus, for example, rape, even if committed with the use of a firearm, is not an armed felony because the possession or display of a firearm is not an express "element" of that crime. The creation of the "criminal use of a firearm" crimes established an "armed felony" which could also be charged in such a situation. For a discussion of the enhanced sentences provided for **Penal Law** § 265.09, see Practice Commentary to that section.

Criminal Sale Crimes

Criminal sale of a firearm

"Criminal sale of a firearm" was initially added as part of the 1980 gun control legislation (L.1980, cc. 233, 234). In 1991, the crimes of criminal sale of a firearm in the first and second degrees [**Penal Law** §§ 265.11, 265.12] were downgraded to criminal sale of a firearm in the second and third degrees, respectively, and a new "criminal sale of a firearm in the first degree" [**Penal Law** § 265.13] was added. L.1991, c. 496.

Criminal sale of a firearm in the third degree [**Penal Law** § 265.11] covers a person who is "not authorized to possess" a firearm but who nevertheless "unlawfully" either sells, exchanges, gives or disposes of a firearm (or large capacity ammunition feeding device) to another, or possesses the firearm with the intent to sell it.

(Prior to a 1995 amendment, criminal sale of a firearm in the third degree also required that the buyer be a person who was not authorized pursuant to law to possess a firearm. That requirement frustrated the use of undercover police officers to buy a firearm from a person who was not authorized to possess and sell that firearm. Hence, in 1995, criminal sale of a firearm in the third degree was amended to repeal that requirement. L.1995, c. 310. 1995 Governor's Approval Memorandum 28.)

A person is "not authorized to possess" a firearm "when that person has no legal right to possess a firearm." CJI2d [NY] **Penal Law** § 265.11(1). See **Penal Law** article 400.

Similarly, a person sells, exchanges, gives or disposes of a firearm unlawfully "when that person has no legal right to do so." CJI2d [NY] **Penal Law** § 265.11(1). See **Penal Law** article 400.

The term "sell" is not here defined to include "exchanges, gives or disposes of...." Rather, the statute list each as an alternative: "sells exchanges, gives or disposes of a firearm ..." In that context, the term "sell" arguably has its ordinary meaning and thus includes consideration. If so, the possession with an "intent" to "sell" crime does not include an intent to exchange, give or dispose of without consideration. But, it is a crime if the firearm is in fact exchanged, given or disposed of to another without consideration. "Dispose of" is broadly defined to include "give, ... lease-loan, offer, ... transfer and otherwise dispose of." **Penal Law** § **265**.**00**(6).

Criminal sale of a firearm in the second and first degree [**Penal Law** §§ 265.12, 265.13] deal with the sale of multiple firearms which is discussed in the next section.

Sale or possession of multiple firearms

In 2005, statutes were amended or created to increase the penalties for the possession and the sale of multiple firearms, irrespective of whether they were loaded. L.2005, c. 764.

At the time of the 2005 legislation, "criminal possession of a weapon in the third degree" prohibited the possession of 20 or more firearms, irrespective of whether they were loaded; the 2005 legislation reduced that threshold number of firearms from 20 to 3. The higher-degree crimes of "criminal possession of a weapon" were amended to proscribe possession of 5 or more firearms for the second-degree crime [**Penal Law** § 265.03(2)] and 10 or more firearms for the first-degree [**Penal Law** § 265.04(2)].

The statutes defining "criminal sale of a firearm" in the second and first degree prohibit the sale of a specified number of firearms. In 2005, each statute was amended to reduce the threshold number of such firearms: a reduction from 10 to 5 firearms for the second-degree crime, and from 20 to 10 firearms for the first-degree crime [**Penal Law** §§ 265.12(1), 265.13(1)]. L.2005, c. 764. See also L.1991, c. 496.

The 2005 legislation also sought to modify *People v. Brown*, 99 N.Y.2d 488, 758 N.Y.S.2d 602, 788 N.E.2d 1030 (2003). *Brown* held that the People are not permitted to aggregate in one count the number of guns sold by the defendant in multiple, separate sale transactions. The 2005 legislation amended the sale statutes to add a crime for the sale "in a period of not more than one year" of a "total" of 5 or more firearms for the second-degree crime [**Penal Law** § 265.12(2)], and 10 or more firearms for the first-degree crime [**Penal Law** § 265.13(2)].

"Criminal sale of a firearm in the third degree" [**Penal Law** § 265.11], dealing with the sale of, or possession with intent to sell, a single firearm, was designated a violent felony to conform to the designation of the other sale crimes [**Penal Law** § 70.02(1)]. This designation changed the authorized sentence for this crime by requiring a determinate sentence of imprisonment authorized for a Class D violent felony offense or a definite sentence of one year, unless mitigation is found pursuant to **Penal Law** § 70.02(2)(b) and (c).

Criminal sale of a firearm with the aid of a minor

In 1991, the crime of "criminal sale of a firearm with the aid of a minor" [**Penal Law** § 265.14] was added. L.1991, c. 175. The intent of the statute is to hold specially liable an adult (*i.e.*, a person "over" the age of eighteen) who uses a minor (*i.e.*, a person "under" sixteen years of age) to unlawfully sell or otherwise dispose of a firearm. *See* Legislative Memorandum, 1991 McKinney's Session Laws A-266.

For an adult to be guilty of the consummated crime, the parties must in fact be the age specified; the minor must be the person who unlawfully sells or otherwise disposes of an operable firearm; the unlawful disposition of the firearm must be "in violation of this article"; and the adult, "acting with the mental culpability required for the commission [of the crime]," must solicit, request, command, importune or intentionally aid the minor to commit the crime. The latter requirement is taken from the accessorial liability statute. **Penal Law** § 20.00.

The requirement that the unlawful sale of the firearm be "in violation of this article" should refer to the commission of the crimes of criminal sale of a firearm [**Penal Law** §§ 265.11, 265.12, 265.13, 265.16; *see also* **Penal Law** § 265.10(3) (disposal of a defaced firearm)].

Criminal sale of a firearm to a minor

In 1992, the Legislature added another crime involving the sale of a firearm. The crime, "criminal sale of a firearm to a minor" [**Penal Law** § 265.16] was created for the purpose of raising the classification and thus the penalty for the sale of a firearm to a person who is or "reasonably appears to be" less than 19 years old. L.1992, c. 600. The language used in the statute to define the crime is patterned on the statute defining criminal sale of a firearm in the third degree.

According to the Legislative Memorandum in support of the legislation: "The large number of handguns entering schools is interfering with education and making these institutions unsafe for those who work and study in them. Furthermore, there have been several recent incidents where young people have used handguns and killed schoolmates and others during arguments. ... By making the penalty for illegally transferring guns to the young higher, there will be a strong disincentive for those who illegally sell handguns from selling to minors."

Criminal Purchase of a Weapon

In 2000, as part of a series of laws designed to control more effectively the possession, sale and use of firearms, the crime of "criminal purchase of a weapon" was added. L.2000, c.189 § 14-a. **Penal Law** § 265.17. The statute addresses two issues.

First, under existing law, if a person is prohibited from possessing a weapon, the attempt to purchase it may, depending on the circumstances, constitute one of the crimes of attempted criminal possession of a weapon. *See People v. Saunders*, 85 N.Y.2d 339, 624 N.Y.S.2d 568, 648 N.E.2d 1331 (1995) (holding that there exists a crime of attempt to commit the crime of criminal possession of a weapon). Perhaps to make it unequivocally clear and easier to prosecute, the instant statute was created to make it a crime for a person who is prohibited by law from possessing a "firearm, rifle or shotgun" to attempt to purchase same. If the buyer is successful in purchasing the weapon and taking possession, he or she may be guilty of a crime based on that possession.

Second, as state and federal laws increasingly restrict those who can purchase a firearm, unauthorized purchasers have turned to intermediaries to buy such weapons for them. Accordingly, the instant statute seeks to prevent that by making it a crime for a person who may himself or herself be legally entitled to possess a firearm, rifle or shotgun, to buy one for, or on behalf of, or for the use of a person who the buyer knows is not lawfully entitled to possess the weapon.

CROSS REFERENCES

Definitions,--

- Dangerous weapon, see **Penal Law** § 10.00.
- Deadly weapon, see **Penal Law** § 10.00.
- Person, see **Penal Law** § 10.00.

Householder, license to have and possess pistol or revolver in dwelling, see **Penal Law** § 400.00.
Licensing and other provisions relating to firearms, see **Penal Law** § 400.00 et seq.
Merchant or storekeeper, license to have and possess in place of business, see **Penal Law** § 400.00.
Noxious material, possession, prohibition, see **Penal Law** § 270.05.

LAW REVIEW AND JOURNAL COMMENTARIES

1998-99 survey of New York **law**: **Penal law**. Kenneth V. Byrne, 50 Syracuse L.Rev. 817 (2000).

Relevant Notes of Decisions (14)

View all 104

Notes of Decisions listed below contain your search terms.

Construction and application

Penal Law's concepts of "deadly weapon" and "loaded firearm" do not overlap and were intended to serve discrete function. People v. Wilson (4 Dept. 1998) 252 A.D.2d 241, 684 N.Y.S.2d 718. Assault And Battery 56

Purpose

Statutory amendment which defined firearm in part as a sawed-off shotgun less than 26 inches long [McKinney's **Penal Law** § **265.00**, subd. 3] was designed primarily to eliminate the confusion regarding the concealability of sawed-off shotguns, thereby simplifying adjudication of prosecutions for their possession. People v. Ahern, 1985, 65 N.Y.2d 802, 493 N.Y.S.2d 117, 482 N.E.2d 913. Weapons 112(5); Weapons 164

Retroactive application

Statutory amendment which defined firearm in part as a sawed-off shotgun less than 26 inches long [McKinney's **Penal Law** § **265.00**, subd. 3] did not apply retroactively to defendant who, before its enactment, was tried and sentenced to imprisonment for criminal possession of weapon in third degree. People v. Ahern, 1985, 65 N.Y.2d 802, 493 N.Y.S.2d 117, 482 N.E.2d 913. Weapons 112(5); Weapons 164

Firearms, generally

Weapon at issue in defendant's prosecution for criminal possession of weapon was a firearm within meaning of **Penal Law** statute, and thus defense counsel's failure to raise issue did not deprive defendant of effective assistance. People v. Marquez (1 Dept. 2008) 55 A.D.3d 412, 866 N.Y.S.2d 114, leave to appeal denied 12 N.Y.3d 760, 876 N.Y.S.2d 711, 904 N.E.2d 848. Criminal Law 1910

Machine-guns

A gun, which was minus a saddle piece and saddle type drum, without which no more than one shot could be fired therefrom at a time, was not a "machine gun" within **Penal Law** 1909 § 1897. People v. Woods, 1952, 202 Misc. 562, 114 N.Y.S.2d 611.

Pistols

A pistol, about the size and appearance of an ordinary fountain pen, and capable of discharging cartridges which would travel a distance of eight hundred or nine hundred feet, constitutes a "pistol, revolver, or other firearm," within the meaning of **Penal Law** 1909 § 1897. People v. Anderson (1 Dept. 1932) 236 A.D. 586, 260 N.Y.S. 329.

An air pistol is not a "firearm" within the meaning of **Penal Law** 1909 § 1897. People v. Schmidt (1 Dept. 1927) 221 A.D. 77, 222 N.Y.S. 647.

A Very pistol, designed to fire warning flares, was a "firearm" within **Penal Law** 1909 § 1897 [now this section]. People, on Complaint of Altomari v. Evergood, 1947, 74 N.Y.S.2d 12. Weapons 112(2)

Revolvers

The remnant of what was once an automatic revolver, which was totally and permanently unfit for use as a revolver, was not a "firearm", within subd. 4 of **Penal Law** 1909 § 1897. People v. Boitano, 1940, 18 N.Y.S.2d 644. Weapons 112(6); Weapons 170

A revolver with a broken spring that connected revolving cartridge chamber with the trigger was a "firearm" within meaning of **Penal Law** 1909 § 1897, where broken spring did not totally impair use of revolver or the hammer being operated by manual manipulation, and there was nothing about the revolver otherwise that prevented its operation and use as a firearm or as a dangerous weapon. People v. Tardibuono, 1940, 174 Misc. 305, 20 N.Y.S.2d 633. Weapons 112(6); Weapons 164

Martial arts weapons

Martial arts practitioner, who had standing to seek declaratory judgment that certain provisions of the New York State **Penal Law** that prohibited the in-home possession of "nunchaku" were unconstitutional, lacked standing to sue the Attorney General or Governor because he had no reasonable fear of prosecution by those officials. Maloney v. Cuomo, 2007, 470 F.Supp.2d 205, affirmed 554 F.3d 56, vacated 130 S.Ct. 3541, 177 L.Ed.2d 1119, on remand 390 Fed.Appx. 29, 2010 WL 3199686. Constitutional Law 699

Martial arts practitioner, who had already been arrested once under the allegedly unconstitutional statute, and intended to continue using nunchaku in his martial arts training, satisfied actual or justiciable controversy requirement for declaratory judgment, and thus had standing to seek declaratory judgment that certain provisions of the New York State **Penal Law** that prohibited the in-home possession of "nunchaku" were unconstitutional. Maloney v. Cuomo, 2007, 470 F.Supp.2d 205, affirmed

554 F.3d 56, vacated 130 S.Ct. 3541, 177 L.Ed.2d 1119, on remand 390 Fed.Appx. 29, 2010 WL 3199686. Declaratory Judgment 124.1; Declaratory Judgment 300

Operability of weapon

If a weapon is mechanically defective or incapable of being fired without repair or reconstruction, it is inoperable and as a matter of law it is not a "weapon" within the meaning of the **Penal Law**. People v. Simmons, 1984, 125 Misc.2d 118, 479 N.Y.S.2d 135. Weapons 112(6)

A municipality may not lawfully display knives designated as illegal to possess under the **Penal Law** unless they are disabled in such a manner as to bring them outside the scope of the applicable **Penal Law** definition. Op.Atty.Gen. (Inf.) 2004-2.

McKinney's **Penal Law** § **265.00**, NY PENAL § **265.00**
Current through L.2014, chapters 1 to 504, 506 to 508, 510 to 523, 525 to 533.

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