

AGENCY ¹

After instructing the jury on the defined terms of the appropriate charged offense, add the following instruction on the defense of agency. Then, in listing the elements of the offense, add, as the final element, the following:

**“and,
#. That the defendant was not the agent of the buyer.”]**

In this case, with respect to this count [and count(s) (*specify*)], the defendant has raised the agency defense.

Under our law, a person is not guilty of selling a controlled substance [marihuana] [*or* of possessing a controlled substance (marihuana) with the intent to sell it] if he/she was acting as the agent of the buyer.

An agent of a buyer is a person whose sole concern in a drug transaction is not the selling of drugs but the purchasing or acquiring of drugs for another [*or* for another and himself/herself].²

By contrast, a person is not an agent of the buyer if such person participates in a drug transaction for the purpose of selling or aiding another to sell. [Nor is a person the agent of the buyer if he/she participates in the transaction for the purpose of independently brokering the sale between the buyer and the seller.]³

In order to determine whether the defendant in this case was an agent of the buyer, you must consider all the evidence relating to the circumstances surrounding the transaction, including the role the defendant played in it.⁴

Examples of factors that would support the agency defense include the following⁵:

1. That, prior to the transaction, the defendant and (specify name of buyer) were known to each other and had a relationship.

2. That (specify name of buyer), and not the defendant, first suggested the transaction.

3. That the defendant said nothing to promote the sale.

4. That the defendant did not receive any benefit for his/her participation in the alleged sale. Or, if the defendant received a benefit from (specify name of buyer), it was incidental, for example, in the nature of a share of the drug or a tip, as a token of appreciation, and not in consideration for selling.

5. That prior to the transaction, the (name of controlled substance [marihuana]) in question was controlled exclusively by a person other than the defendant.

[6. That the defendant had not at any other time engaged in the sale of a controlled substance [marihuana] (or, the possession of a controlled substance [marihuana] with the intent to sell it).⁶]

Examples of factors that would not support the agency defense include the following⁷:

1. That, prior to the transaction, the defendant and (specify name of buyer) were not known to each other and had no relationship.

2. That the defendant, and not (specify name of buyer), first suggested the transaction.

3. That the defendant touted the quality of the drug or otherwise promoted the sale.

4. That the defendant received a benefit for his/her participation in the transaction which was not merely a token of appreciation from (specify name of buyer).

5. That, prior to the transaction, there were indications that the defendant had some control over the drugs.

[6. That the defendant had at some other time engaged in the sale of a controlled substance [marihuana] (or, the possession of a controlled substance [marihuana] with the intent to sell it).⁸]

You may consider these and any other factors you believe to be relevant to determine whether the defendant acted solely as the agent of the buyer.

[I remind you that the agency defense relates only to this count (and count[s] [specify]). It does not relate to, and thus may not be considered, with respect to any other count.]

Finally, although the defendant has raised the agency defense, that does not shift the burden of proof. The People are required to prove beyond a reasonable doubt that the defendant was not an agent of (specify name of buyer).

1. This instruction applies when the charged offense is the sale, or possession with intent to sell, of a controlled substance or marihuana, and the defense is properly raised by the defendant. The defense does not apply to mere possession of a controlled substance or marihuana. *People v. Sierra*, 45 N.Y.2d 56 (1978). Nor does the agency defense apply to a charge of “criminal facilitation” [Penal Law article 115]. *People v Watson*, 20 N.Y.3d 182 (2012).

2. See *People v Ortiz*, 76 N.Y.2d 446, 448-49 (1990); *People v Feldman*, 50 N.Y.2d 500, 503 (1980).

3. See *People v Herring*, *supra*, 83 N.Y.2d 780, 783 (1994).

4. See *People v Herring*, *supra*, 83 N.Y.2d at 782; *People v Lam Lek Chong*, 45 N.Y.2d 64, 74-75 (1978); *People v Page*, 260 A.D.2d 153, 154 (1st Dept. 1999).

5. For cases discussing the factors that may be considered, see, e.g., *People v Herring*, *supra*, 83 N.Y.2d at 782-783; *People v Argibay*, 45 N.Y.2d 45, 53-54 (1978); *People v Lam Lek Chong*, *supra*, 45 N.Y.2d at 74-76; *People v Roche*, 45 N.Y.2d 78, 85 (1978); *People v Page*, *supra*, 260 A.D.2d at 154-56.

6. *People v. Lam Lek Chong*, *supra*, 45 N.Y.2d at 75.

7. See, e.g., cases cited in footnote 5.

8. *People v. Lam Lek Chong*, *supra*, 45 N.Y.2d at 75.