

**CRIMINAL SALE OF MARIHUANA  
FOURTH DEGREE  
Penal Law § 221.40  
(Committed on or after July 29, 1977)**

The (specify) count is Criminal Sale of Marihuana in the Fourth Degree.

Under our law, a person is guilty of Criminal Sale of Marihuana in the Fourth Degree when that person knowingly and unlawfully sells marihuana; except if the marihuana was contained in one or more preparations, compounds, mixtures, or substances of an aggregate weight of two grams or less, [or in one cigarette], and the sale was without consideration.<sup>1</sup>

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

SELL means to sell, exchange, give or dispose of to another [or to offer or agree to do the same].<sup>2</sup>

SELL WITHOUT CONSIDERATION means to give or dispose of to another [or to offer or agree to do the same] without receiving anything in return, and without an understanding or

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<sup>1</sup>The statute provides that "[a] person is guilty of criminal sale of marihuana in the fourth degree when he knowingly and unlawfully sells marihuana except as provided in section 221.35 of this article."

Penal Law § 221.35 provides that a person is guilty of criminal sale of marihuana in the fifth degree when that person knowingly and unlawfully sells, without consideration, one or more preparations, compounds, mixtures, or substances containing marihuana and the preparations, compounds, mixtures of substances are an aggregate weight of two grams or less; or one cigarette containing marihuana.

<sup>2</sup>See Penal Law § 220.00(1).

promise that anything would be received in return.<sup>3</sup>

A person KNOWINGLY sells marihuana when that person is aware that he or she is selling marihuana.<sup>4</sup>

A person UNLAWFULLY sells marihuana when that person has no legal right to sell it.<sup>5</sup> Under our law, with certain exceptions not applicable here, a person has no legal right to sell marihuana.

AGGREGATE WEIGHT refers to the weight of the substance which contains the marihuana, irrespective of the amount of the marihuana actually in the substance.<sup>6</sup>

In order for you to find the defendant guilty of this crime, the People are required to prove, from all the evidence in the case, beyond a reasonable doubt, each of the following three elements:

1. That on or about (date), in the county of (county), the defendant, (defendant's name), sold marihuana;
2. That the defendant did so knowingly and unlawfully; and
3. That the marihuana was not contained in one or more preparations, compounds, mixtures, or substances of an aggregate weight of two grams or less, [or was not contained in one cigarette], sold without consideration.

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<sup>3</sup>Cf. Penal Law § 220.00(1); 22 N.Y. Jur.2d, Contracts, §61, et seq. (Lawyers Coop. 1996).

<sup>4</sup>See Penal Law § 15.05(2).

<sup>5</sup> See *People v. Mendoza*, 81 N.Y.2d 963, 965 (1993).

<sup>6</sup> See *People v. Mendoza*, 81 N.Y.2d 963, 965 (1993).

If you find the People have proven beyond a reasonable doubt each of those elements, you must find the defendant guilty of this crime.

If you find the People have not proven beyond a reasonable doubt any one or more of those elements, you must find the defendant not guilty of this crime.