

**IMITATION CONTROLLED SUBSTANCES**  
**Public Health Law § 3383 (2)**  
**(Committed on or after Sept. 1, 1982)**

The \_\_\_\_\_ count is Imitation Controlled Substances.

Under our law, it is unlawful for any person to

*Select appropriate alternative(s):*

manufacture,

sell,

possess with intent to sell

an imitation controlled substance

[after having been convicted of the offense of Imitation Controlled Substance within the preceding five years.<sup>1</sup>]

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

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<sup>1</sup> If the defendant has within the previous five years been convicted of a violation of Public Health Law § 3383, a conviction of Imitation Controlled Substances is an E felony (See Public Health Law § 3383 [7]). Thus, an additional element of this crime when charged as an E felony is that the defendant has been previously convicted of a violation of Public Health Law § 3383. That element must be charged in a special information. If, upon such arraignment, the defendant admits the element, the court must not make any reference to it in the definition of the offense or in listing the elements of the offense. But if the defendant denies that element or remains mute, the court must add the element to the definition of the offense and the list of elements (see CPL 200.60; *People v Cooper*, 78 NY2d 476, 481-482 [1991]).

IMITATION CONTROLLED SUBSTANCE means a substance<sup>2</sup> that is not a controlled substance, which by dosage unit appearance, including color, shape and size, and by a representation, is represented to be a controlled substance. Evidence of representations that the substance is a controlled substance may include, but is not limited to, oral or written representations by the manufacturer or seller, as the case may be, about the substance with regard to:

1. its price, nature, use or effect as a controlled substance; or
2. its packaging in a manner normally used for illicit controlled substances<sup>7</sup> or
3. markings on the substance.<sup>3</sup>

[MANUFACTURE means the production, preparation, compounding, tableting, processing, encapsulating, packaging, repackaging, labeling or relabeling of an imitation controlled substance.]<sup>4</sup>

[SELL means to sell, exchange, give or dispose of to another, or offer or agree to do the same. Sell also includes an offer or agreement to sell even if actual delivery does not occur,

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<sup>2</sup> Here, the statute reads, "other than a drug for which a prescription is required pursuant to article one hundred thirty-seven of the education law." That language is omitted from the instruction because it will not usually be at issue whether the relevant substance falls under that exclusion. Should this language be at issue, Public Health Law § 3396 requires that "[i]n any civil, criminal or administrative action or proceeding brought for the enforcement of any provision of this article, it shall not be necessary to negate or disprove any exception, excuse, proviso or exemption contained in this article, and the burden of proof of any such exception, excuse, proviso, or exemption shall be upon the person claiming its benefit." Thus, if in issue, the exception must be charged to the jury with an instruction that the defendant bears the burden of proof of the exception by a preponderance of the evidence.

<sup>3</sup> Public Health Law § 3383 (1) (c).

<sup>4</sup> Public Health Law § 3383 (1) (a).

provided that, at the time of the offer or agreement, the person has the intent and ability to make the sale.]<sup>5</sup>

[POSSESS means to have physical possession or otherwise to exercise dominion or control over tangible property.]<sup>6</sup>

[INTENT means conscious objective or purpose. Thus, a person possesses (*specify*) with intent to sell it when his or her conscious objective or purpose is to sell the (*specify*).]<sup>7</sup>

It shall not be a defense to a prosecution under this section that the accused believed the imitation controlled substance to be a controlled substance.<sup>8</sup>

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

1. That on or about (*date*), in the county of (*County*), the defendant:

*Select appropriate alternative(s):*

manufactured

sold

possessed with intent to sell

a substance; and

2. That the substance was an imitation controlled substance; [and]

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<sup>5</sup> Public Health Law § 3302 (32); see *People v Samuels*, 90 NY2d 20 (2002) (discussing offer to sell in article 220 case).

<sup>6</sup> Penal Law § 10.00 (8). The Public Health Law does not define possession. If necessary, an expanded definition of "possession" is available in the section on Instructions of General Applicability under Possession.

<sup>7</sup> See Penal Law § 15.05 (1).

<sup>8</sup> Public Health Law § 3383 (6).

[3. That the defendant was convicted of the offense of Imitation Controlled Substances within the five years preceding (*specify date in element one*)<sup>9</sup>].

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.

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<sup>9</sup> See footnote one.