

**Criminal Possession of Marihuana
in the Fifth Degree
(B Misdemeanor)
(Marihuana in a Public Place)
PENAL LAW 221.10 (1)
(Committed on or after July 29, 1977)**

The _____ count is Criminal Possession of Marihuana in the Fifth Degree.

Under our law, a person is guilty of Criminal Possession of Marihuana in the Fifth Degree when that person knowingly and unlawfully possesses marihuana in a public place, and such marihuana is burning or open to public view.

Some of the terms used in this definition have their own special meaning in our law. I will now give you the meaning of the following terms: "possess," "knowingly," "unlawfully," and "public place."

POSSESS means to have physical possession or otherwise to exercise dominion or control over tangible property.¹

A person KNOWINGLY possesses marihuana in a public place when that person is aware that he or she is in possession of marihuana in a public place.²

¹ See Penal Law § 10.00 (8). An expanded definition of possession, including constructive possession, may be found in the section on instructions of general applicability.

² See Penal Law § 15.05 (2).

A person UNLAWFULLY possesses marihuana when that person has no legal right to possess it.³ Under our law, with certain exceptions not applicable here, a person has no legal right to possess marihuana.

PUBLIC PLACE means a place to which the public or a substantial group of persons has access.⁴

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 elements:

1. That on or about (*date*), in the county of (*County*), the defendant, (*defendant's name*), possessed marihuana in a public place;
2. That the defendant did so knowingly and unlawfully; and

³ See Penal Law §§ 221.00 and 220.00 (2), and Public Health Law § 3304 and § 3396 (1).

⁴ Penal Law §§ 221.10 (1) defines "public place" by incorporating by reference the definition of that term in Penal Law § 240.00 (1). A portion of that definition is stated in the text. The remaining portion of the definition states: "and includes, but is not limited to, highways, transportation facilities, schools, places of amusement, parks, playgrounds, and hallways, lobbies and other portions of apartment houses and hotels not constituting rooms or apartments designed for actual residence." Also, in *People v Jackson*, 18 NY3d 738 (2012), the Court held that the inside of a car on a public highway is a public place. The trial court may accordingly include in the definition of "public place" all or any portion of the foregoing as may be appropriate to the case on trial.

3. That the marihuana was burning or open to public view.

Therefore, if you find that the People have proven beyond a reasonable doubt each of those elements, you must find the defendant guilty of the crime of Criminal Possession of Marihuana in the Fifth Degree as charged in the _____ count.

On the other hand, if you find that the People have not proven beyond a reasonable doubt any one or more of those elements, you must find the defendant not guilty of the crime of Criminal Possession of Marihuana in the Fifth Degree as charged in the _____ count.