

The Agency Defense: Can the Legislature Help?

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INTRODUCTION

In 1978, the New York Court of Appeals, in a quartet of cases, explicitly recognized the agency defense as a defense to the crimes of criminal sale of a controlled substance and criminal possession of a controlled substance with intent to sell.¹ The Court of Appeals held in those cases that defendants who acted “solely as an agent of the buyer” could invoke the agency defense.² In those four cases, the Court of Appeals also attempted to provide lower courts with guidance on how to apply the agency defense.³ The Court of Appeals reasoned that the agency defense would prevent individuals who were not “tycoons of the trade” from being subjected to the “severe penalties” of New York’s drug laws.⁴

This Article will demonstrate that the time has arrived for the New York State Legislature to expressly define the agency defense in the Penal Law. Courts in New York are struggling to consistently apply the agency defense, and there are logical inconsistencies in how New York courts have interpreted the agency defense. Without the

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1. *People v. Roche*, 379 N.E.2d 208 (N.Y. 1978); *People v. Lam Lek Chong*, 379 N.E.2d 200 (N.Y. 1978); *People v. Sierra*, 379 N.E.2d 196 (N.Y. 1978); *People v. Argibay*, 379 N.E.2d 191 (N.Y. 1978).

2. *Lam Lek Chong*, 379 N.E.2d at 206. See also *Roche*, 379 N.E.2d at 211; *Sierra*, 379 N.E.2d at 198-99; *Argibay*, 379 N.E.2d at 194.

3. See *Roche*, 379 N.E.2d at 213-14; *Lam Lek Chong*, 379 N.E.2d at 207-08; *Sierra*, 379 N.E.2d at 199-200; *Argibay*, 379 N.E.2d at 195.

4. *Lam Lek Chong*, 379 N.E.2d at 206.

Legislature's intervention, the agency defense could be taken to extreme lengths by courts in New York. After allowing the courts to struggle by themselves for more than thirty years to develop the agency defense, the Legislature must get involved and provide the courts with long overdue guidance.

I. HISTORY OF THE AGENCY DEFENSE

The Court of Appeals first recognized the agency defense in 1963, in *People v. Lindsey*, when it adopted the New York Appellate Division for Second Department's opinion reversing the conviction of two defendants because they were agents of the buyers.⁵ The Court of Appeals was not the first court in the United States to recognize such a defense for a person charged with selling drugs. In 1954, the United States Court of Appeals for the Third Circuit, in *United States v. Sawyer*, first recognized the agency defense as a valid defense that could be asserted by a defendant charged with selling drugs.⁶ After *Sawyer*, federal courts permitted defendants prosecuted for selling drugs to assert the agency defense.⁷

However, in 1970, Congress prevented defendants prosecuted in federal court for selling drugs from asserting the agency defense by passing the Drug Abuse Prevention and Control Act.⁸ In that statute, Congress defined the term "deliver" as "the actual, constructive, or attempted transfer of a controlled substance or a listed chemical, whether or not there exists an agency relationship."⁹ In addition, that statute made a defendant who purchased drugs "on behalf of another and handed the drugs to that person, without receipt of any consideration for his or her efforts . . . guilty

5. *People v. Lindsey*, 189 N.E.2d 492 (N.Y. 1963), *aff'g* 228 N.Y.S.2d 427 (App. Div. 2d Dep't 1962).

6. 210 F.2d 169 (3d Cir. 1954); Scott W. Parker, Note, *An Argument for Preserving the Agency Defense as Applied to Prosecutions for Unlawful Sale, Delivery, and Possession of Drugs*, 66 FORDHAM L. REV. 2649, 2652-53 (1998).

7. See, e.g., *United States v. Winfield*, 341 F.2d 70, 71 (2d Cir. 1965); *Adams v. United States*, 220 F.2d 297, 298-99 (5th Cir. 1955).

8. Parker, *supra* note 6, at 2661-62.

9. Drug Abuse Prevention and Control Act, 21 U.S.C. § 802(8) (2006); see also Parker, *supra* note 6, at 2662.

of ‘delivery.’”¹⁰ The result of this legislation was that federal courts no longer permitted defendants accused of selling drugs to assert the agency defense.¹¹

In New York, when the Court of Appeals established the agency defense, the court traced the history of the defense to cases “at the turn of the century” in which the “statutory scheme prohibited the sale or furnishing of liquor but did not prohibit the purchase.”¹² The Court of Appeals noted that the statute that criminalized the sale of liquor had been interpreted as not intending “to punish, as a seller, one who had simply purchased a bottle at the buyer’s request to accommodate him.”¹³ However, instead of citing “turn of the century” New York cases dealing with liquor sales as precedent, the Court of Appeals cited a 1910 case from the state of Ohio, *State v. Lynch*,¹⁴ and a New York case from 1961, *People v. McCrory*.¹⁵ *McCrory* was a liquor sale case, but it actually relied on two cases that dealt with the application of the agency defense in drug transactions.¹⁶ Those two cases, *People v. Buster* and *People v. Branch*, borrowed the notion of agency defense directly from *Sawyer*.¹⁷ Thus, the Court of Appeals did not trace the agency defense from the deep annals of New York criminal law. Rather, the Court of Appeals borrowed the defense from *Sawyer*, a federal court decision from the 1950s that

10. Parker, *supra* note 6, at 2662 (construing 21 U.S.C. § 841(a) (1994)).

11. *Id.* at 2662-63 n.81; see, e.g., United States v. Porter, 764 F.2d 1, 11-12 (1st Cir. 1985); United States v. Wigley, 627 F.2d 224, 226 (10th Cir. 1980); United States v. Pierce, 498 F.2d 712, 713 (D.C. Cir. 1974); United States v. Redwood, 492 F.2d 216, 216 (3d Cir. 1974); United States v. Pruitt, 487 F.2d 1241, 1245 (8th Cir. 1973); United States v. Masullo, 489 F.2d 217, 220-21 (2d Cir. 1973); United States v. Hernandez, 480 F.2d 1044, 1046 (9th Cir. 1973); United States v. Workopich, 479 F.2d 1142, 1147 (5th Cir. 1973).

12. *People v. Lam Lek Chong*, 379 N.E.2d 200, 205 (N.Y. 1978); see also Abraham Abramovsky, *The Agency Defense in New York Drug Prosecutions*, N.Y. L.J., Apr. 1, 1997, at 3.

13. *Lam Lek Chong*, 379 N.E.2d at 205.

14. 90 N.E. 935 (Ohio 1910).

15. 222 N.Y.S.2d 112 (Sup. Ct. 1961).

16. *Id.* at 114.

17. *People v. Branch*, N.Y.S.2d 535, 535 (App. Div. 4th Dep’t 1961); *People v. Buster*, 135 N.Y.S.2d 437, 438 (App. Div. 4th Dep’t 1955).

recognized the agency defense as a defense in drug transactions.¹⁸

II. WHAT IS THE AGENCY DEFENSE?

In New York, the agency defense is a claim by a defendant, charged with selling drugs or possessing drugs with intent to sell, that he acted "solely on behalf of the buyer,"¹⁹ and thus was a mere extension of the buyer in the drug sale.²⁰ The rationale behind the agency defense is that an agent of the buyer cannot be convicted for the crime of selling drugs.²¹ After all, the buyer's agent is "merely transferring to the recipient that which the recipient already owns or that to which he is entitled, there being no sale, exchange, gift or disposal of the drugs to the recipient."²²

The agency defense can be invoked only by defendants charged with the crimes of criminal sale of a controlled substance and criminal possession of a controlled substance with intent to sell.²³ The defense cannot be invoked by those charged with drug possession.²⁴ Furthermore, the agency defense is not an affirmative defense that the defense must prove by a preponderance of the evidence.²⁵ Rather, the agency defense must be disproven beyond a reasonable

18. The only New York case cited in both *Branch* and *Buster*, *People v. Pasquarello*, 123 N.Y.S.2d 98 (App. Div. 4th Dep't 1953), *aff'd*, 306 N.Y. 759 (1954), held that a buyer is not considered to be an accomplice of a seller under New York law. *Id.* at 100.

19. Abramovsky, *supra* note 12, at 3.

20. *People v. Sierra*, 379 N.E.2d 196, 198-99 (N.Y. 1978); *People v. Argibay*, 379 N.E.2d 191, 195 (N.Y. 1978).

21. *Branch*, 213 N.Y.S.2d at 535.

22. *Sierra*, 379 N.E.2d at 199 (citation omitted).

23. See *People v. Roche*, 379 N.E.2d 208 (N.Y. 1978); *People v. Lam Lek Chong*, 379 N.E.2d 200 (N.Y. 1978); *Sierra*, 379 N.E.2d 197; *Argibay*, 379 N.E.2d 191.

24. *Lam Lek Chong*, 379 N.E.2d at 206 ("The fact that the defendant was acting as a buyer is no defense to a possession charge when the Legislature has made buyers liable for the offense." (citation omitted)).

25. *Roche*, 379 N.E.2d at 213; see N.Y. PENAL LAW § 25.00(2) (McKinney 2009).

doubt by the prosecutor since it negates the sale element of the crime.²⁶

The determination of whether a defendant is actually an agent is a “factual question for the jury to resolve on the circumstances of the particular case.”²⁷ New York courts have provided a variety of factors to assist the jury in evaluating whether the defendant is an agent. For instance, the agent cannot assist the buyer “out of any independent desire or inclination to promote the transaction.”²⁸ “[T]he agent must have no direct interest in the contraband being sold.”²⁹ “If [the seller] is in fact interested in the outcome, either by ownership of the property or by an agency relationship with the seller, he fails, by definition, to be an agent for the purchaser.”³⁰ The jury is also encouraged to look at “the nature and extent of the relationship between the defendant and the buyer, whether it was the buyer or the defendant who suggested the purchase, whether the defendant has had other drug dealings with this or other buyers or sellers, and . . . whether the defendant profited or stood to profit from the transaction,”³¹ as well as whether the defendant touted the quality of the product or bargained over price.³² Ultimately, agency defense hinges on whether, given the evidence presented at trial, “the defendant can be said to have acted solely on behalf of the buyer such as to be a mere extension or instrumentality of the buyer.”³³

The Court of Appeals distinguished an agent from a middleman—a person “who acts as a broker between a seller and buyer, aiming to satisfy both, but largely for his own benefit . . .”³⁴ The middleman cannot invoke an agency defense because a middleman “is a trader in narcotics, a merchant. He may not be concerned with the particular

26. See *Roche*, 379 N.E.2d at 213.

27. *Lam Lek Chong*, 379 N.E.2d at 206 (citation omitted).

28. *Argibay*, 379 N.E.2d at 195.

29. *Roche*, 379 N.E.2d at 212.

30. *Id.* (citation omitted).

31. *Lam Lek Chong*, 379 N.E.2d at 207.

32. *Roche*, 379 N.E.2d at 212.

33. People v. Ortiz, 560 N.E.2d 162, 164 (N.Y. 1990).

34. People v. Argibay, 379 N.E.2d 191, 194 (N.Y. 1978).

needs of an individual drug purchaser except to the extent that satisfying those needs affects his illicit business.”³⁵

III. PROBLEMS WITH THE AGENCY DEFENSE

The problems with the agency defense stem from the fact that it is inconsistent with the actual definition of a drug sale in New York. Also, when the agency defense was recognized in New York, there does not seem to have been any consideration as to how it would coalesce with other elements that the prosecution had to prove in a drug sale case. Thus, the defense has become muddled and has not developed along with the legal jurisprudence regarding drug sales.

In 1967, New York’s drug laws were changed. Previously, the definition of a drug sale was limited to those “who shall peddle, *sell*, barter, or exchange [drugs].”³⁶ Then in 1967, the Legislature defined the term “sell” as “to sell, exchange, give or dispose of to another, or to offer or agree to do the same.”³⁷ A literal reading of the statute would mean that “any passing of drugs from one person to another would constitute a sale” under the statute.³⁸ The Legislature expanded the definition of drug sale because it determined that a drug seller who provides a drug addict with drugs “free of charge” is as criminally liable as one who gives the drug addict the drugs for a certain amount of money.³⁹ What bothered the Court of Appeals was that there were other cases that fell within the statutory definition of a drug sale in which it felt that a “seller” was not as liable as other drug sellers for selling drugs.⁴⁰ For example, if a person gave money to a friend to acquire drugs and the friend did so, the friend would be as liable under the definition of the term “sell” as a drug seller even though he is “simply a buyer who purchased the drugs on behalf of another.”⁴¹ The agency

35. *Id.*

36. *Tonis v. Bd. of Regents*, 67 N.E.2d 245, 247 (N.Y. 1946).

37. N.Y. PENAL LAW § 220.00(1) (McKinney 2008); *see also Lam Lek Chong*, 379 N.E.2d at 205-06.

38. *Lam Lek Chong*, 379 N.E.2d at 205.

39. *Id.*

40. *Id.*

41. *Id.*

defense was created to prevent that friend from being convicted of selling drugs.

The Court of Appeals held, in *People v. Lam Lek Chong*, that the agency defense applied under the new definition of a drug sale because there was “no indication that the Legislature intended to abandon the judicial construction [of the agency defense] which had been previously accepted throughout the State.”⁴² The Court of Appeals also pointed out that the agency defense was a way to give appropriate culpability to a person “under a statutory scheme which reserves the most severe penalties for the ‘tycoons of the trade.’”⁴³

The problem with the Court of Appeals’ statutory analysis of the drug-selling statute is that the Legislature defined the term “sell” in such a way that eliminated the agency defense. The agency defense existed in New York before 1967.⁴⁴ However, by including the terms “exchange, give or dispose of to another” in the definition of drug sale after 1967,⁴⁵ the Legislature appeared to have meant to eliminate the agency defense, or at least to broaden the scope of New York’s drug laws. Indeed, one of the judges who dissented in the quartet of cases that established the agency defense opposed the defense because he did not believe that the Legislature intended for its continued existence.⁴⁶ The definition of the term “sell” appears to have eliminated the agency defense given that it explicitly includes “any form of transfer of a controlled substance from one person to another.”⁴⁷

IV. THE LOWER COURTS’ STRUGGLE TO APPLY THE AGENCY DEFENSE

The New York Court of Appeals wanted to create an open-ended list of factors to determine whether a defendant

42. *Id.* at 206.

43. *Id.* (citation omitted).

44. See, e.g., *People v. Lindsey*, 228 N.Y.S.2d 427, 428 (App. Div. 2d Dep’t 1962), *aff’d*, 189 N.E.2d 492 (N.Y. 1963).

45. N.Y. PENAL LAW § 220.00(1) (McKinney 2008).

46. *People v. Roche*, 379 N.E.2d 208, 214-16 (N.Y. 1978) (Gabrielli, J., dissenting).

47. *People v. Starling*, 650 N.E.2d 387, 390 (N.Y. 1995) (citation omitted).

was an agent of the buyer.⁴⁸ The Court of Appeals recognized that there were many permutations of ways in which a drug transaction could actually occur.⁴⁹ However, one would expect courts to apply the agency defense in such a manner that similar facts result in similar outcomes. That has proven to be difficult in the case of the agency defense, since even the Court of Appeals has admitted that there are certain factors that might support or negate the agency defense depending on the circumstance. For example, the Court of Appeals has said that "receipt of any benefit, particularly a substantial reward promised in advance may be sufficient, as a matter of fact, to show that the defendant did not act solely to accommodate the buyer."⁵⁰ But, "receipt of some incidental benefit, does not necessarily or even ordinarily alter the relationship" between the defendant and the buyer.⁵¹

Lower courts have had difficulty interpreting what the Court of Appeals meant when it said that a person could be deemed an agent only when that person acted "solely as an agent of the buyer"⁵² and that the agent cannot assist the buyer "out of any independent desire or inclination to promote the transaction."⁵³ For example, a defendant's testimony that he helped an undercover officer obtain drugs because he was hoping to share drugs with that officer has resulted in two completely different outcomes.⁵⁴ The Fourth Department has stated, in *People v. Coleman*, that because the defendant helped the undercover officer get drugs out of a desire to smoke cocaine with the undercover officer, there was a reasonable view of the evidence that the defendant was an agent of the undercover officer.⁵⁵ The First Department has held to the contrary, in *People v. Lopez*, that the fact that the defendant was hoping to obtain some of the drugs given to the undercover officer for the

48. See *Lam Lek Chong*, 379 N.E.2d at 206-07.

49. See *id.* at 205.

50. *Id.* at 207.

51. *Id.*

52. *Id.* at 206.

53. *People v. Argibay*, 379 N.E.2d 191, 195 (N.Y. 1978).

54. Compare *People v. Coleman*, 728 N.Y.S.2d 603 (App. Div. 4th Dep't 2001), with *People v. Lopez*, 795 N.Y.S.2d 6 (App. Div. 1st Dep't 2005).

55. *Coleman*, 728 N.Y.S.2d at 604.

defendant's personal use gave the defendant an interest in the transaction and actually negated an agency defense.⁵⁶

Whether a person is an agent primarily hinges on whether that person acted "solely" for the buyers in purchasing drugs. However, courts agree that a defendant's desire to help an undercover officer purchase drugs out of a desire to have sex with the undercover officer supports the notion that the defendant was an agent of the undercover officer.⁵⁷ This is so, despite the fact that a defendant's testimony that he helped a female undercover officer obtain drugs in exchange for sex is quite clearly an "independent desire or inclination to promote the transaction."⁵⁸ Thus, it seems to be a mistaken application of the agency defense for courts to apply it to a defendant who claims to have acquired drugs for an undercover officer out of a desire to have sex with that officer.⁵⁹

56. *Lopez*, 795 N.Y.S.2d at 7 (denying the agency defense to a defendant who purchased crack for an undercover officer because she was "desperate" to get "high" and had acted as a go-between in drug transactions in exchange for drugs in the past); see *People v. Rojas*, 642 N.Y.S.2d 13, 14 (App. Div. 1st Dep't 1996) (holding the agency defense negated, *inter alia*, by the defendant's testimony that she asked for a "little" of the drugs the undercover officer received from the seller).

57. *People v. Mason*, 764 N.Y.S.2d 80, 81 (App. Div. 1st Dep't 2003) ("[T]he passes [defendant] made at the undercover officer do not establish that his motivation for assisting her in obtaining drugs was his desire to have sex with her."); *People v. Cromer*, 753 N.Y.S.2d 716, 716 (App. Div. 1st Dep't 2003) (rejecting the agency defense where there was no reason to conclude that the defendant's interaction with the undercover officer was "a romantic encounter"); *People v. Tucker*, 733 N.Y.S.2d 39, 41 (App. Div. 1st Dep't 2001) (holding that the agency defense was demonstrated, *inter alia*, by the defendant's testimony that he assisted the undercover officer in obtaining drugs out of a hope to "parlay" his interaction with the undercover officer into a sexual encounter); *People v. Metuxrakis*, 678 N.Y.S.2d 122, 123 (App. Div. 2d Dep't 1998) (finding the agency defense supported where the defendant testified that she was not a drug seller, but was a prostitute and obtained drugs for the undercover officer in order to exchange sex for money or drugs); *People v. Ortiz*, 558 N.Y.S.2d 22, 23 (App. Div. 1st Dep't 1990) ("[D]efendant was entitled to the [agency defense] jury instruction based upon his testimony that he did not know the seller, and that he was acting solely on behalf of the buyer, a 'pretty woman,' who ultimately proved to be an undercover police officer.").

58. *Argibay*, 379 N.E.2d at 195.

59. Professor Chiu points out that courts have difficulty applying the agency defense in cases "where steerers receive some kind of tip from the ultimate buyer" and in analyzing whether a defendant engages in "salesman-like

The only explanation for why courts have carved out this sex exception is that they have determined that the desire to help one obtain drugs in exchange for sex is analogous to a person doing a "favor" for a friend. The Court of Appeals has not resolved this issue and even passed on the question of whether the desire to help an undercover officer in hope of sex supports the notion of an agency defense.⁶⁰ The problem with this "sex exception" is that it has created a harbinger for defendants to testify, particularly where an undercover officer is a female, that the defendant helped the undercover obtain drugs out of a desire to have sex with the undercover officer.

People v. Spradley underscores the confusion surrounding the agency defense, especially when courts attempt to adhere to the "sex" exception.⁶¹ In *Spradley*, the defendant testified that she purchased crack cocaine from a drug dealer on behalf of an undercover officer.⁶² The defendant then delivered those drugs to the undercover officer in exchange for sex.⁶³ The Second Department reasoned that "the agency defense is still available if the defendant acts for himself or herself and for the buyer in making the purchase."⁶⁴ That statement, however, directly contradicts the principle that an agent is a person who acts "solely as an agent of the buyer."⁶⁵

Another problem is that similar facts have resulted in different outcomes under the agency defense doctrine. In two cases, defendants accompanied undercover police officers to locations where drugs were sold.⁶⁶ The undercover

behavior" rather than that of an agent. Elaine M. Chiu, *The Challenge of Motive in the Criminal Law*, 8 BUFF. CRIM. L. REV. 653, 713-14 (2005).

60. *People v. Job*, 664 N.E.2d 500, 500 (N.Y. 1996) (affirming trial court's jury instruction that an agency defense arises if the jury found that the agent acted solely on the buyer's behalf where the defendant testified that the undercover officer offered to "get her high" if she bought him crack, and that she kept two of four vials purchased expecting to exchange sex for them).

61. 670 N.Y.S.2d 882 (App. Div. 2d Dep't 1998).

62. *Id.* at 883.

63. *Id.*

64. *Id.* at 884.

65. *People v. Lam Lek Chong*, 379 N.E.2d 200, 206 (N.Y. 1978).

66. Compare *People v. Santiago*, 614 N.Y.S.2d 400 (App. Div. 1st Dep't 1994), with *People v. Matos*, 506 N.Y.S.2d 225 (App. Div. 2d Dep't 1986).

officers in both cases handed money to the defendants, who then gave the money to the individuals who held the drug stash.⁶⁷ In *People v. Matos*, the Second Department held that under those facts the defendant was the undercover officer's agent.⁶⁸ In *People v. Santiago*, the First Department held that there was no reasonable view of the evidence that the defendant was an agent of the undercover officer.⁶⁹

Another example of a similar fact pattern resulting in two different outcomes is illustrated by *People v. Cierzniewski*⁷⁰ and *People v. Abdul-Aziz*.⁷¹ In both cases, the defendants led undercover officers to drug dealers.⁷² In *Cierzniewski*, the defendant told the undercover detective that the drug dealers could give the detective whatever drug he wanted and told him that the price of the drugs that the undercover detective requested was thirty dollars.⁷³ The undercover detective gave the money to the defendant, who counted the money and then gave it to one of the drug dealers.⁷⁴ The defendant and the undercover detective then walked back to where they had met.⁷⁵ In contrast, in *Abdul-Aziz*, the defendant led an undercover officer to drug dealers that were selling cocaine from an apartment.⁷⁶ The transaction was conducted by the drug dealers, not the defendant, and the defendant never negotiated or handled any of the cash or drugs.⁷⁷ The defendant remained behind for a little while after the undercover officer left, but he did

67. *Santiago*, 614 N.Y.S.2d at 400; *Matos*, 506 N.Y.S.2d at 226.

68. *Matos*, 506 N.Y.S.2d at 226. Notably, the First Department criticized *Matos* by commenting that it was "not entirely persuaded" that the facts of *Matos* made out an "agency defense as a matter of law." *People v. Fowler*, 546 N.Y.S.2d 97, 99 (App. Div. 1st Dep't 1989).

69. *Santiago*, 614 N.Y.S.2d at 400.

70. 529 N.Y.S.2d 886 (App. Div. 2d Dep't 1988).

71. 628 N.Y.S.2d 272 (App. Div. 1st Dep't 1995). See also Abramovsky, *supra* note 12, at 3, 6 (comparing the different results reached by the Appellate Division in *Cierzniewski* and *Abdul-Aziz*).

72. *Abdul-Aziz*, 628 N.Y.S.2d at 273; *Cierzniewski*, 529 N.Y.S.2d at 886.

73. *Cierzniewski*, 529 N.Y.S.2d at 886.

74. *Id.*

75. *Id.*

76. *Abdul-Aziz*, 628 N.Y.S.2d at 273.

77. *Id.*

not "linger long in the apartment."⁷⁸ It is clear that the defendant in *Abdul-Aziz* was less involved in the drug transaction than the defendant in *Cierzniewski* because Abdul-Aziz only introduced the officer to drug dealers, whereas Cierzniewski set the price and handed the money to the drug dealers.

Surprisingly, in *Cierzniewski*, the Second Department found that a reasonable view of the evidence could support an agency defense.⁷⁹ In contrast, in *Abdul-Aziz*, the First Department found that there was no evidence that would support instructing the jury about the agency defense.⁸⁰ The First Department commented that "[t]o the extent that the Second Department's ruling in [Cierzniewski] reaches a different result on analogous facts, we decline to follow it."⁸¹ Although *Cierzniewski* appears to be wrongly decided, it has been followed by the Second Department.⁸² The failure of the Court of Appeals to provide clear standards has thus resulted in erratic results.⁸³

V. THE EVOLUTION OF THE DEFINITION OF "DRUG SALE"

Another problem is that since 1978, the Court of Appeals has undermined the agency defense by conceding over the years that New York's drug sale laws are not directed only at the "tycoons" of the drug trade. The Court of Appeals' position on New York's drug sale definition has evolved to the point that the court now believes that the Legislature intentionally defined the term "sell" broadly.⁸⁴

78. *Id.*

79. *Cierzniewski*, 529 N.Y.S.2d at 887.

80. *Abdul-Aziz*, 628 N.Y.S.2d at 274.

81. *Id.*

82. See, e.g., *People v. Gun*, 580 N.Y.S.2d 38, 39 (App. Div. 2d Dep't 1992); *People v. Jenkins*, 550 N.Y.S.2d 736, 737 (App. Div. 2d Dep't 1990); *People v. Kirk*, 532 N.Y.S.2d 925, 926 (App. Div. 2d Dep't 1988).

83. See Chiu, *supra* note 59, at 715, 727-28 (arguing that inconsistent results emerge in agency defense cases because courts and jurors are encouraged to use "common sense" in applying the defense and because there is an "inherent falsity" in the principal-agent relationship); Abramovsky, *supra* note 12, at 6 (contending that the Court of Appeals must set "firm guidelines" in order to bring consistency to court rulings on the agency defense).

84. See *People v. Starling*, 650 N.E.2d 387, 390 (N.Y. 1995).

Indeed, the Court of Appeals has stated that a drug transaction “unaccompanied by compensation or any verbal representations indicating an offer or intent to sell does not remove the act . . . from the scope of the prohibited conduct and does not render it less culpable than a transfer”⁸⁵ involving an immediate economic benefit to the seller.⁸⁵ Courts in New York now recognize that the definition of the term “sell” does not necessarily involve “any consideration for the transfer of drugs to the buyer.”⁸⁶ For example, in *People v. Hughes*, the Second Department concluded that a drug sale occurred when an officer saw the defendant, who was in the front passenger seat of a car, pass a “shiny plastic object”—which turned out to contain fifteen bags of crack cocaine—to another passenger in the back seat.⁸⁷ Therefore, the underlying basis for why the agency defense was created in New York—to prevent those individuals who were not “tycoons of the drug trade” from being convicted of selling drugs—has been undermined. It makes no sense that the friend who helps out another by going to his drug dealer to get drugs is any different from the defendant who passes drugs to the person sitting next to him inside a car.

Another inconsistency with the defense is that juries are instructed on the agency defense despite the fact that a defendant is charged with selling drugs under an acting-in-concert theory.⁸⁸ There is no situation in which a defendant found to be acting-in-concert with a drug dealer could at the same time be found not guilty of a drug sale. In that

85. *Id.*

86. *People v. Herring*, 632 N.E.2d 1272, 1273 (N.Y. 1994).

87. 886 N.Y.S.2d 749, 750 (App. Div. 2d Dep’t 2009); *see also People v. Clinton*, 802 N.Y.S.2d 538, 539 (App. Div. 3d Dep’t 2005) (finding drug sale proven where evidence showed that “defendant provided a quantity of crack cocaine” to another); *People v. Casper*, 731 N.Y.S.2d 652, 652 (App. Div. 2d Dep’t 2001) (“The evidence was legally sufficient to establish that the defendant’s actions constituted the sale of a controlled substance. The defendant, knowing that undercover officers were looking to purchase drugs from him, showed the crack cocaine to the officers, and gave it to them.”); *People v. Leonidow*, 683 N.Y.S.2d 310, 311 (App. Div. 3d Dep’t 1998) (finding sale of marijuana where the defendant “gave or exchanged” a joint with another).

88. *See, e.g., People v. Andujar*, 910 N.Y.S.2d 909, 909 (App. Div. 1st Dep’t 2010); *People v. Carter*, 899 N.Y.S.2d 596, 597 (App. Div. 1st Dep’t 2010); *People v. Joshua*, 896 N.Y.S.2d 46, 46 (App. Div. 1st Dep’t 2010); *People v. Brown*, 684 N.Y.S.2d 780, 780 (App. Div. 1st Dep’t 1999); *People v. Montalvo*, 681 N.Y.S.2d 238, 238 (App. Div. 1st Dep’t 1998).

scenario, the defendant would always be found guilty since by definition, as an accomplice to another, the defendant did not act “solely” as an agent for the buyer. Indeed, the Court of Appeals made this exact point in *People v. Herring* when it said that by finding the defendant guilty under an acting-in-concert theory of engaging in a drug sale, the jury “necessarily precluded the possibility of agency.”⁸⁹

The table below illustrates how it is superfluous to issue the agency defense in a case where the prosecutor’s theory is that the defendant is guilty of selling drugs as an accomplice:

Accomplice Liability	Agency Defense	Result
The prosecutor proved beyond a reasonable doubt that the defendant was an accomplice.	The prosecutor proved beyond a reasonable doubt that the defendant was not an agent.	Guilty ⁹⁰
The prosecutor did not prove beyond a reasonable doubt that the defendant was an accomplice.	The prosecutor did not prove beyond a reasonable doubt that the defendant was not an agent.	Not guilty
The prosecutor proved beyond a reasonable doubt that the defendant was an accomplice.	The prosecutor did not prove beyond a reasonable doubt that the defendant was not an agent.	Not possible
The prosecutor did not prove beyond a reasonable doubt that the defendant was an accomplice.	The prosecutor proved beyond a reasonable doubt that the defendant was not an agent.	Not guilty

By instructing the jury on the agency defense, when a defendant is accused of selling drugs under an acting-in-concert theory, the courts are just confusing jurors by making them consider an irrelevant issue.

89. 632 N.E.2d at 1274.

90. See *People v. Thomas*, 613 N.Y.S.2d 442, 442-43 (App. Div. 3d Dep’t 1994).

VI. THE AGENCY DEFENSE TAKEN TO THE EXTREME

An illustration of how courts struggle to comprehend the agency defense occurred when the First Department asked the Court of Appeals to consider whether there should be an “exception” in agency defense cases when courts instruct the jury on a lesser-included charge.⁹¹ The “exception” that the First Department wanted the Court of Appeals to consider was whether, whenever the agency defense is charged to the jury, the court should also submit a lesser-included simple possession charge.⁹² The First Department stated that question was “a matter best left to the Court of Appeals.”⁹³ However, this exception would have been an inexplicable extension of the agency defense, given that, as the Court of Appeals pointed out, there are many cases when a defendant invokes the agency defense, but does not actually possess drugs.⁹⁴ Also, it is shocking that the First Department said that the Court of Appeals was “best” able to answer that question.⁹⁵ The Legislature, which sets the laws and policies of the state, is clearly in the best position to answer that question.

CONCLUSION

The agency defense was firmly placed into New York law in 1978 in the quartet of cases that each recognized the defense and explained to the lower courts how to apply it. This Article highlights that lower courts struggle to apply the agency defense in a consistent manner and disagree on how to apply the defense. And, courts have evolved the way that they interpret New York’s drug sale statutes by changing from a narrow interpretation of drug sale to a literal reading of the statute. However, courts have failed to incorporate their new interpretation of New York’s drug sale laws to the application of the agency defense.

Underscoring the necessity for the Legislature to become involved in explicitly defining the agency defense is

91. *People v. Davis*, 863 N.Y.S.2d 212, 215 (App. Div. 1st Dep’t 2008).

92. *Id.*

93. *Id.*

94. *People v. Davis*, 923 N.E.2d 1095, 1097 (N.Y. 2009).

95. *Davis*, 863 N.Y.S.2d at 215.

the fact that in *People v. Davis* the Court of Appeals considered whether, as a principle, every time the agency defense was submitted to the jury the court should also submit a lesser-included drug possession charge to the jury.⁹⁶ Although it was rejected, this would have been a ludicrous extension of the agency defense because there are times when a defendant claims to be an agent of the buyer, but never handles drugs.

The agency defense “survives and thrives” in New York because it serves as a “convenient political compromise for juries, judges, and legislators.”⁹⁷ After all, the Legislature does not have to accept responsibility for those defendants who are acquitted because of the agency defense since it did not create the defense that allowed the defendants out of prison. The courts benefit because, as shown above regarding defendants who testify that they helped an undercover officer obtain drugs so that they could get some of those drugs,⁹⁸ the agency defense provides the courts with flexibility in determining that defendant’s culpability. And juries benefit, because if they feel that the undercover officer preyed upon a defendant to get drugs, they can always acquit by invoking the agency defense.

Yet, it is still shocking that the New York Legislature has never formally authorized the agency defense by making it a statutory defense. After all, it has reduced penalties for drug offenders through sentencing reforms and has even allowed those sentenced under old drug laws for selling drugs to be resentenced in accordance with new drug laws.⁹⁹ Thus, even though the Court of Appeals might at one point have believed that the Legislature would not be sympathetic toward drug dealers,¹⁰⁰ the New York

96. *Davis*, 923 N.E.2d at 1095-96.

97. Chiu, *supra* note 59, at 660.

98. See *supra* text accompanying notes 53-57.

99. N.Y. CRIM. PROC. LAW § 440.46 (McKinney 2005); see Drug Law Reform Act of 2005, 2005 N.Y. Sess. Laws 1581 (McKinney); Drug Law Reform Act of 2004, 2004 N.Y. Sess. Laws 1462 (McKinney).

100. Parker, *supra* note 6, at 2658 (“These courts may have also considered it highly improbable that state legislatures would take an initiative to officially incorporate the agency defense into their drug statutes. Such an action would probably be unpopular with voters, who would likely perceive it as being too lenient on criminals. Indeed, as one commentator observed, ‘What legislator wants to appear soft on crime by decreasing penalties for offenses involving

Legislature has proven that it is willing to be sympathetic toward those caught up in the drug trade; and yet, it has not recognized the agency defense.

The agency defense needs to be expressly defined in New York's Penal Law. Because they were not involved in the development of the agency defense, lower courts have looked toward the Court of Appeals for help. As is clear from this Article, the Court of Appeals has not effectively provided that guidance. Given the more than thirty years of jurisprudence regarding the agency defense, the development of judicial interpretation of the definition of "drug sale," and the evolution of legislative policies dealing with the drug trade in New York, the Legislature is in a position to provide courts with guidance by providing a clear statutory definition of the agency defense.

violence or drugs?" (quoting Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CAL. L. REV. 61, 123 (1993))).