

PERJURY IN THE SECOND DEGREE
Penal Law § 210.10
(Committed on or after Sept. 1, 1967)
Revised June 2020 ¹

The (specify) count is Perjury in the Second Degree.

Under our law, a person is guilty of Perjury in the Second Degree when that person swears falsely and when his or her false statement is made in a subscribed written instrument for which an oath is required by law, and is made with intent to mislead a public servant in the performance of his or her official functions, and is material to the action, proceeding or matter involved.

Under our law, a false swearing in a subscribed written instrument is not deemed complete until the instrument is delivered by its subscriber, or by someone acting in his or her behalf, to another person with intent that it be uttered or published as true.²

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

A person **SWEARS FALSELY** when that person intentionally makes a false statement which he or she does not believe to be true under oath in a subscribed written instrument.³

INTENT means conscious objective or purpose.⁴ Thus, a person intentionally makes a false statement which he or she does not believe to be true when that person's conscious objective or purpose is to do so.

¹ The June 2020 revision was for the purpose of deleting the instruction for “inconsistent statements” because separate instructions were added for that form of perjury; other conforming revisions were also made.

² See Penal Law §210.00(5).

³ See Penal Law §210.00(5).

⁴ See Penal Law §15.05(1).

A person delivers a subscribed written instrument to another with intent that it be uttered or published as true when his or her conscious objective or purpose is that the instrument be uttered or published as true.

And a person makes a false statement with intent to mislead a public servant in the performance of his or her official functions when that person's conscious objective or purpose is to have that false statement mislead a public servant in the performance of his or her official functions.

PUBLIC SERVANT means any public officer or employee of the state or of any political subdivision thereof or of any governmental instrumentality within the state, or any person exercising the functions of any such public officer or employee. The term public servant includes a person who has been elected or designated to become a public servant.⁵

The term OATH includes an affirmation and every other mode authorized by law of attesting to the truth of that which is stated.⁶ Under our law, (specify mode) is an authorized mode of attesting to the truth of that which is stated.

NOTE: Add If the term “oath required by law” is not in issue:

Under our law, a (specify) is a written instrument for which an oath is required by law.]

NOTE: Add If the term “oath required by law” is in issue:

A subscribed written instrument is one for which an OATH IS REQUIRED BY LAW when, absent an oath or swearing thereto, it does not or would not, according to statute or appropriate regulatory provisions, have legal efficacy in a court of law or before any public or governmental body, agency or public servant to whom it is or might be submitted.⁷

⁵ See Penal Law §10.00(15).

⁶ Penal Law §210.00(1).

⁷ See Penal Law §210.00(4).

[NOTE: Add if one or more witnesses testify to the falsity of a statement: In any prosecution for perjury, falsity of a statement may not be established by the uncorroborated testimony of a single witness.⁸ What that means is that the falsity of the defendant's statement may not be established by the testimony of a single witness even if that testimony is found to be believable. There must be some additional evidence, independent of that single witness, tending to prove that the defendant's statement was false.⁹]

A false statement is MATERIAL to an action, proceeding or matter when it reflects on the matter under consideration during the action or proceeding in which it is made, or tends to support and give credit to the witness in respect to a main fact in issue.¹⁰

⁸ See Penal Law §210.50. The corroboration requirement does not apply to a perjury prosecution based upon proof of falsity that is entirely circumstantial [*People v. Rosner*, 67 N.Y.2d 290, 295 (1986); *People v. Doody*, 172 N.Y. 165, 168 (1902)]; instead the CJI2d Circumstantial Evidence-Entire Case charge should be given. Nor does the corroboration rule apply when the perjury prosecution is based upon non-testimonial evidence, such as a “duly authenticated tape recording” of the conversation allegedly lied about [*People v. Lee*, 34 N.Y.2d 884, 885 (1974)], or when the prosecution based upon inconsistent statements..

⁹ See *People v. Sabella*, 35 N.Y.2d 158 (1974) *overruled in part on other grounds* *People v. Brown*, 40 N.Y.2d 381 (1976); *People v. Stanard*, 42 N.Y.2d 74 (1977); *People v. Rosner*, 67 N.Y.2d 290 (1986).

¹⁰ See e.g. *People v. Stanard*, 42 N.Y.2d 74, 80 (1977). Depending on the facts of the case, it may be appropriate to adapt the language of materiality utilized by the Court of Appeals in the context of a Grand Jury proceeding; namely, that a false statement is material if it has “the natural effect or tendency to impede, influence or dissuade” the public servant in the performance of his or her official functions in an action, proceeding or matter involved. *People v. Davis*, 53 N.Y.2d 164, 171 (1981). See also *People v Perino*, 19 NY3d 85, 89 (2012) quoting *People v. Davis*, 53 N.Y.2d at 170–171 (1981): “To be material, the statement need not prove directly the fact in issue; it is sufficient if it is ‘circumstantially material or tends to support and give credit to the witness in respect to the main fact’ ... Thus a statement that ‘reflect[s] on the matter under consideration’ ... even if only as to the witness’ credibility ... is material for purposes of supporting a perjury charge.”

[NOTE; Add where appropriate:

Under our law, it is no defense to a prosecution for perjury that:

the defendant was not competent to make the false statement alleged; *or*

the defendant mistakenly believed the false statement to be immaterial; *or*

the oath was administered or taken in an irregular manner or that the authority or jurisdiction of the attesting officer who administered the oath was defective, if such defect was excusable under any statute or rule of law.^{11]}

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, the following four elements:

1. That on or about (date), in the County of (County), the defendant, (defendant's name), intentionally made a false statement which he/she did not believe to be true;

2. That the defendant did so under oath in a subscribed written instrument for which an oath was required by law;

3. That the defendant did so with intent to mislead a public servant in the performance of his/her official functions; and

4. That the false statement was material to the action, proceeding or matter involved.

[NOTE: If the affirmative defense does not apply, conclude as follows:

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

¹¹ See Penal Law § 210.30.

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.

[NOTE: If the affirmative defense applies, continue as follows:

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.

If you find that the People have proven beyond a reasonable doubt each of those elements, you must consider an affirmative defense the defendant has raised. Remember, if you have already found the defendant not guilty of Perjury in the Third Degree, you will not consider the affirmative defense.

Under our law, in any prosecution for perjury, it is an affirmative defense that the defendant retracted his or her false statement in the course of the proceeding in which it was made before such false statement substantially affected the proceeding and before it became manifest that its falsity was or would be exposed.¹²

Under our law, the defendant has the burden of proving an affirmative defense by a preponderance of the evidence.

In determining whether the defendant has proven the affirmative defense by a preponderance of the evidence, you may consider evidence introduced by the People or by the defendant.

A preponderance of the evidence means the greater part of the believable and reliable evidence, not in terms of the number of witnesses or the length of time taken to present the evidence, but in terms of its quality and the weight and convincing effect it has. For the affirmative defense to be

¹² See, Penal Law §210.25.

proved by a preponderance of the evidence, the evidence that supports the affirmative defense must be of such convincing quality as to outweigh any evidence to the contrary.

If you find that the defendant has not proven the affirmative defense by a preponderance of the evidence, then, based upon your initial determination that the People have proven beyond a reasonable doubt each of the elements of Perjury in the Third Degree, you must find the defendant guilty of that crime.

If you find that the defendant has proven the affirmative defense by a preponderance of the evidence, then you must find the defendant not guilty of Perjury in the Third Degree.]