

MURDER SECOND DEGREE
(A-I Felony)
(Felony Murder)
PENAL LAW 125.25(3)
(Committed on or after Nov. 1, 1984)

The _____ count is Murder in the Second Degree.

Under our law, a person is guilty of Murder in the Second Degree when, in the course of and in furtherance of the commission or attempted commission of *(name of felony charged)* [or of immediate flight therefrom], that person [or another participant if there be any] causes the death of a person other than one of the participants.

[NOTE: Add if there are multiple participants in the underlying felony:

Under that law, when, in the course of and in furtherance of the commission (or attempted commission) of *(name of felony charged)* (or in immediate flight therefrom), a participant in the commission (or attempted commission) of that felony causes the death of a non-participant, all the participants--the one who caused the death as well as the other participants in the felony--are guilty of Murder in the Second Degree.]

One [Some] of the terms used in this definition has its [have their] own special meaning in our law. I will now give you the meaning of the following term[s]:¹ "*(name of felony)*" [and "immediate flight"].

(Add name and definition of felony)

[NOTE: Add where appropriate:

In determining whether a person is in IMMEDIATE FLIGHT from the commission or attempted commission of *(name of felony)*,

¹ If causation, "death," or "person" is in issue, see Additional Charges at the end of this article.

you may consider: (1) the distance, if any, between the location of the (name of felony) and the location where death was caused; (2) the interval of time, if any, between the commission (or attempted commission) of the (name of felony) and the causing of the death; (3) whether (police, security personnel, citizens) were in close pursuit at the time the death was caused; (4) whether such person possessed fruits of the (name of felony) at the time the death was caused; and (5) whether such person had reached a place of temporary safety before the death was caused.]²

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, both of the following two elements:

1. That on or about (date), in the county of (county), the defendant, (defendant's name), committed [or attempted to commit] (name of felony); and
2. That, in the course of and in furtherance of the commission [or attempted commission] of such (name of felony) [or of immediate flight therefrom], the defendant [or another participant in the commission (or attempted commission) of that felony] caused the death of (specify) and that (specify) was not a participant in that felony.

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

Therefore, if you find that the People have proven beyond a reasonable doubt both of those elements, you must find the defendant guilty of the crime of Murder in the Second Degree as charged in the _____ count.

²See *People v Gladman*, 41 NY2d 123, 129 (1976). The factors which are inapplicable to the case should be omitted in the charge to the jury.

On the other hand, if you find that the People have not proven beyond a reasonable doubt either one or both of those elements, you must find the defendant not guilty of the crime of Murder in the Second Degree as charged in the _____ count.]

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

If you find that the People have not proven beyond a reasonable doubt either one or both of those elements, you must find the defendant not guilty of Murder in the Second Degree as charged in the _____ count.

On the other hand, if you find that the People have proven beyond a reasonable doubt both of those elements, you must consider an affirmative defense the defendant has raised. Remember, if you have already found the defendant not guilty of Murder in the Second Degree as charged in this count, you will not consider the affirmative defense.

Under our law, it is an affirmative defense to Murder in the Second Degree as charged in this count that:

(1) The defendant did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and

(2) The defendant was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and

(3) The defendant had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and

(4) The defendant had no reasonable ground to believe that any other participant intended to engage in

conduct likely to result in death or serious physical injury.

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 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.

Therefore, 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 had proven beyond a reasonable doubt the elements of Murder in the Second Degree, you must find the defendant guilty of that crime as charge in the _____ count.

On the other hand, 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 Murder in the Second Degree as charged in the _____ count.]