

**PERJURY IN THE THIRD DEGREE**  
**(by Inconsistent Statements)**  
**Penal Law §§ 210.05**  
**(Committed on or after Sept. 1, 1967)**

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

Under our law, a person is guilty of Perjury in the Third Degree when he or she swears falsely.

The following terms used in that definition has 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

*Select appropriate alternative(s):*

while giving testimony

*or*

under oath in a subscribed written instrument.<sup>1</sup>

INTENT means conscious objective or purpose. 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.<sup>2</sup>

[NOTE: *Add where appropriate*

TESTIMONY means an oral statement made under oath in a proceeding before any court, body, agency, public servant or other person authorized by law to conduct such proceeding and to administer the oath or cause it to be administered.<sup>3</sup> Under our law, (specify) is authorized by law to conduct a proceeding and to administer the oath or cause it to be administered.]

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<sup>1</sup> See Penal Law §210.00(5).

<sup>2</sup> See Penal Law §15.05(1).

<sup>3</sup> Penal Law §210.00(3).

The term OATH includes an affirmation and every other mode authorized by law of attesting to the truth of that which is stated. Under our law, (specify mode) is an authorized mode of attesting to the truth of that which is stated.<sup>4</sup>

*[NOTE: Add if one or both of the statements was made in a subscribed written instrument:*

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.<sup>5</sup> 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.<sup>6]</sup>

*[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;

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.<sup>7]</sup>

The falsity of a single sworn statement must be proven by evidence establishing that it is false. In this case, however, the People have presented two sworn statements which they

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<sup>4</sup> See Penal Law §210.00(1).

<sup>5</sup> See Penal Law §210.00(5).

<sup>6</sup> See Penal Law §15.05(1).

<sup>7</sup> See Penal Law 210.30.

contend are inconsistent to the degree that one of them is necessarily false.

Under our law, where a person has made two statements under oath which are inconsistent to the degree that one of them is necessarily false, and where the circumstances are such that each statement, if false, is perjurally so, the People need not establish specifically which of the two statements is the false one. Instead, the falsity of one or the other of the two statements may be established by proof or a showing of their irreconcilable inconsistency.<sup>8</sup>

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 elements:

1. That on or about (date),<sup>9</sup> in the County of (County), the defendant, (defendant's name), made a statement

*Select the appropriate alternative(s):*

while giving testimony [or].

under oath in a subscribed written instrument.

2. That on or about (date),<sup>10</sup> in the County of (County), the defendant, (defendant's name), made a second statement

*Select the appropriate alternative(s):*

while giving testimony [or].

under oath in a subscribed written instrument.

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<sup>8</sup> See Penal Law 210.20. This section also requires that “each statement was made within the jurisdiction of the state,” a requirement that is satisfied by proving that the statement was made in a particular county of the state.

<sup>9</sup> Penal Law § 210.20 requires that “each statement was made within the jurisdiction of this state and within the period of the statute of limitations for the crime charged . . .” If, in a highly unusual case, a factual issue arises as to whether a particular statement was made within the statute of limitations, the date on which the statement was made should be alleged as “on or about but before [the date the statute of limitations expired].”

<sup>10</sup> See footnote 9.

3. That the two statements are inconsistent to the degree that one of them is necessarily false, and

4. That the circumstances are such that the defendant must have made the false statement intentionally and not believing it to be true.

*[NOTE: If the affirmative defense below 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.

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.

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

If you find that the People have proven beyond a reasonable doubt each one 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.<sup>11</sup>

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

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<sup>11</sup> Penal Law 210.25.

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.

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.

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.