

11.5 Withdrawal from Conspiracy

Once a person becomes a member of a conspiracy, that person remains a member until that person withdraws from it. One may withdraw by doing acts which are inconsistent with the purpose of the conspiracy and by making reasonable efforts to tell the co-conspirators about those acts. You may consider any definite, positive step that shows that the conspirator is no longer a member of the conspiracy to be evidence of withdrawal.

If you find that the government has proved beyond a reasonable doubt each element of a conspiracy and that the defendant was a member of the conspiracy, the burden is on the defendant to prove by a preponderance of the evidence that [he] [she] withdrew from the conspiracy before the overt act—on which you all agreed—was committed by some member of the conspiracy. A preponderance of the evidence means that you must be persuaded that the things the defendant seeks to prove are more probably true than not true. This is a lesser burden of proof than the government’s burden to prove beyond a reasonable doubt each element of the conspiracy and that the defendant was a member of the conspiracy.

If you find that the defendant withdrew from the conspiracy, you must find the defendant not guilty of [*specify crime charged*].

Comment

This instruction has been modified to place the burden on the defendant to prove by a preponderance of the evidence his or her withdrawal from the conspiracy. The earlier version of the instruction placed the burden on the government to prove that the defendant did not withdraw from the conspiracy before the overt act was committed by some member of the conspiracy. In *Smith v. United States*, 568 U.S. 106 (2013), the Court held that “establishing individual withdrawal was a burden that rested firmly on the defendant regardless of when the purported withdrawal took place.” *Id.* at 110.

Use this instruction only when the conspiracy charged in the indictment requires proof of an overt act. If the statute of limitations is a defense to a conspiracy requiring proof of an overt act, the instruction should be modified to require the defendant to prove withdrawal before the limitations period begins. *Id.* at 107 (“A defendant who withdraws outside the relevant statute-of-limitations period has a complete defense to prosecution.”).

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