

2.15 Disposition of Charge Against Codefendant

For reasons that do not concern you, the case against codefendant [*name*] is no longer before you. Do not speculate why. This fact should not influence your verdict[s] with reference to the remaining defendant[s], and you must base your verdict[s] solely on the evidence against the remaining defendant[s].

Comment

Although it is not plain error to give a similar instruction when a codefendant dies after the jury begins to deliberate, it may be advisable under certain circumstances to give a “simple and honest” explanation to the jury as to why a codefendant is no longer in the case, particularly if the codefendant’s removal from the case occurred early in the trial. *United States v. Bussell*, 414 F.3d 1048, 1054 (9th Cir. 2005). The later in the trial that the codefendant is “removed,” the more likely it is that the jury could be influenced by a fact-specific disclosure, especially if the remaining defendant(s) had a close relationship with the withdrawn defendant. Therefore, a better approach at that stage may be simply to inform the jury that the codefendant is no longer a defendant in the case. *See United States v. Garrison*, 888 F.3d 1057, 1066 (9th Cir. 2018) (“In instances where defendants depart from a multi-defendant trial late in the trial . . . the best course may be simply to tell the jury that the defendant is no longer part of the case.”).

No reference should ordinarily be made in this situation to a plea of guilty by the codefendant. *See, e.g., United States v. Barrientos*, 758 F.2d 1152, 1159-60 (7th Cir. 1985) (stating that when codefendant becomes absent from trial for any reason, trial court should acknowledge codefendant’s absence to jury and instruct them on their duty to consider evidence of guilt or innocence as to remaining defendant without any reference to any implications of codefendant’s absence). *See also United States v. Carraway*, 108 F.3d 745, 755 (7th Cir. 1997); *United States v. Rapp*, 871 F.2d 957, 967-68 (11th Cir. 1989).

See also United States v. Candoli, 870 F.2d 496, 501-02 (9th Cir. 1989) (“flight” instruction on codefendant’s midtrial disappearance did not prejudice defendant when instruction did not require jury to consider codefendant’s absence as evidence of guilt and provided that evidence of codefendant’s flight was not admissible against defendant).

Revised June 2018