PATTERN CRIMINAL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT

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Prepared by
The Committee on Federal Criminal Jury Instructions
of the Seventh Circuit

5.13 CONSPIRACY – WITHDRAWAL

If you find that the government has proved all of the elements in Count[s] ___ of the indictment as to [the; a] defendant[s] [name] even though the crime[s] charged in [that; those] Count[s] were committed by others, you should then consider whether [he; they] withdrew from the conspiracy prior to the time [that; those] crime[s] [was; were] committed.

[The; A] defendant is not responsible for the crime[s] charged in Count ___, if, before the commission of [that; those] crime[s], he took some affirmative act in an attempt to defeat or disavow the goal[s] of the conspiracy, such as:

(a) [completely undermining his earlier acts in support of the commission of the crime so that these acts no longer could support or assist the commission of the crime], or

(b) [alerting the proper law enforcement authorities in time to give them the opportunity to stop the crime or crimes], or

(c) [performing an affirmative act that is inconsistent with the goal[s] of the conspiracy in a way that the co-conspirators are reasonably likely to know about it before they carry through with additional acts of the conspiracy], or

(d) [making a genuine effort to prevent the commission of the crime], or

(e) [communicating to each of his co-conspirators that he has abandoned the conspiracy and its goals].

Merely ceasing active participation in the conspiracy is not sufficient to evidence withdrawal.

[The; a] defendant has the burden of proving that it is more likely than not that he withdrew from the conspiracy.

Committee Comment

The present instruction should be given, when applicable, only when the court has given Instruction 5.11 or Instruction 5.12, the instructions that embody *Pinkerton*-based criminal responsibility. The present instruction applies only in the *Pinkerton* context, in other words, when the government seeks to impose criminal liability upon a defendant for a substantive offense committed by other members of the conspiracy of which the defendant is claimed to have been a member. See *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 463–65 (1978). The question of withdrawal as a defense to a charge of conspiracy is covered by Instructions 5.14(A) and 5.14(B).

In *U.S. Gypsum*, the Supreme Court held that an unnecessarily confining instruction on the issue of withdrawal from a conspiracy constituted reversible error. 438 U.S. at 463–65. Thus, when a defendant requests that specific actions introduced at trial which are inconsistent with the object of the conspiracy be included in the withdrawal instruction, the court should instruct the jury accordingly.

The Supreme Court held in *Smith v. United States*, 133 S. Ct. 714 (2013), that a defendant bears the burden of proving withdrawal from a conspiracy. This decision abrogated a line of Seventh Circuit cases, including *United States v. Morales*, 655 F.3d 608, 640 (7th Cir. 2011), *United States v. Starnes*, 14 F.3d 1207, 1210-11 (7th Cir. 1994), and *United States v. Read*, 658 F.2d 1225, 1236 (7th Cir. 1981).

With regard to subsection (e) of the instruction ("communicating to each of his/her co-conspirators that he/she has abandoned the conspiracy and its goals"), the Seventh Circuit has repeatedly announced in dicta this manner of demonstrating withdrawal from a conspiracy. See*, e.g., United States v. Vaughn*, 433 F.3d 917, 922 (7th Cir. 2006) ("Withdrawal requires an affirmative act to either defeat or disavow the purposes of the conspiracy, such as making a full confession to the authorities or communicating to co-conspirators that one has abandoned the enterprise.") (internal citation omitted); *United States v. Sax*, 39 F.3d 1380, 1386 (7th Cir. 1994) ("Withdrawal requires an affirmative act on the part of the conspirator; he must either make a full confession to the authorities, or communicate to each of his coconspirators that he abandoned the conspiracy and its goals."), citing *United States v. DePriest*, 6 F.3d 1201, 1206 (7th Cir. 1993). The Committee, however, has found no case defining or applying this section of the instruction.

5.14(A) CONSPIRACY – WITHDRAWAL – STATUTE OF LIMITATIONS – ELEMENTS

[The indictment charges the defendant[s] with; Count[s] ___ of the indictment charge[s] the defendant[s] with] conspiracy. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the [fill in number of elements] following elements beyond a reasonable doubt:

1. and

2. and

3.

If you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge].

If, on the other hand, you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty [of that charge], unless you also find that the defendant has proved that it is more likely than not that he withdrew from the conspiracy more than five years before the return of the indictment in this case. A defendant who has so proved should be found not guilty.

Committee Comment

This instruction should be followed immediately by Instruction 5.14(B).

The Supreme Court held in *Smith v. United States*, 133 S. Ct. 714 (2013), that a defendant bears the burden of proving withdrawal from a conspiracy. This decision abrogated a line of Seventh Circuit cases, including *United States v. Morales*, 655 F.3d 608, 640 (7th Cir. 2011), *United States v. Starnes*, 14 F.3d 1207, 1210-11 (7th Cir. 1994), and *United States v. Read*, 658 F.2d 1225, 1236 (7th Cir. 1981).

5.14(B) CONSPIRACY – WITHDRAWAL – STATUTE OF LIMITATIONS -- DEFINITION

[The] defendant[s] [name[s]] cannot be found guilty of the conspiracy charge if [he; they] withdrew from the conspiracy more than five years before the indictment was returned. The indictment in this case was returned on [date of indictment]. Thus, the [defendant[s] [name[s]] must prove that it is more likely than not that [he; they] withdrew from the conspiracy prior to [date five years prior to date of indictment].

In order to withdraw, [the; a] defendant must have taken some affirmative act in an attempt to defeat or disavow the goal[s] of the conspiracy, such as:

(a) [completely undermining his earlier acts in support of the commission of the crime so that these acts no longer could support or assist the commission of the crime], or

(b) [alerting the proper law enforcement authorities in time to give them the opportunity to stop the crime or crimes], or

(c) [performing an affirmative act that is inconsistent with the goal[s] of the conspiracy in a way that the co-conspirators are reasonably likely to know about it before they carry through with additional acts of the conspiracy], or

(d] [making a genuine effort to prevent the commission of the crime], or

(e) [communicating to each of his co-conspirators that he has abandoned the conspiracy and its goals].

Merely ceasing active participation in the conspiracy is not sufficient to evidence withdrawal.

Committee Comment

This instruction should be used in conjunction with Instruction 5.14(A).

Withdrawal as a defense to conspiracy. Withdrawal from a conspiracy is only effective prospectively; it is not a defense to a conspiracy count directed at the period prior to withdrawal. *United States v. Dallas*, 229 F.3d 105, 110–11 (7th Cir. 2000). On the other hand, withdrawal from a conspiracy outside the statute of limitations is a defense because it negates an element of the offense; namely, membership in the conspiracy within the statute of limitations. *United States v. Read*, 658 F.2d 1225 (7th Cir. 1981).

What constitutes withdrawal from a conspiracy. Simply ceasing to participate in a conspiracy, even for an extended period or periods of time, is insufficient to constitute withdrawal from the conspiracy. Rather, withdrawal requires an affirmative act to defeat or disavow the criminal aim of the conspiracy. *United States v. Julian*, 427 F.3d 471 (7th Cir. 2005).

Factors to be considered. In *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 463–65 (1978), the Supreme Court held that an instruction unnecessarily limiting the type of actions that may constitute withdrawal from a conspiracy is reversible error. Thus, this instruction should be tailored to the specific actions introduced by the defendant at trial that are inconsistent with the object of the conspiracy. With regard to subsection (e) of the instruction ("communicating to each of his/her co-conspirators that he/she has abandoned the conspiracy and its goals"), the Seventh Circuit has repeatedly endorsed in *dicta* this manner of demonstrating withdrawal from a conspiracy. See*, e.g., United States v. Vaughn*, 433 F.3d 917, 922 (7th Cir. 2006) ("Withdrawal requires an affirmative act to either defeat or disavow the purposes of the conspiracy, such as making a full confession to the authorities or communicating to co-conspirators that one has abandoned the enterprise.") (internal citation omitted); *United States v. Sax*, 39 F.3d 1380, 1386 (7th Cir. 1994) ("Withdrawal requires an affirmative act on the part of the conspirator; he must either make a full confession to the authorities, or communicate to each of his coconspirators that he abandoned the conspiracy and its goals."), citing *United States v. DePriest*, 6 F.3d 1201, 1206 (7th Cir. 1993). The Committee, however, has found no case defining or applying this section of the instruction.