Chapter 6. Final Instructions: Elements of Offenses

Conspiracy (18 U.S.C. § 371)

6.18.371A Conspiracy To Commit An Offense Against The United States Basic Elements (18 U.S.C. § 371)

Count *(no.)* **of the indictment charges that on or about the___ day of _____, 2__, in the _____ District of _____,** *(name)* **agreed or conspired with one or more other persons to commit an offense***(s)* **against the United States, namely** *(describe the substantive offense(s))* **and that, to further the objective of the conspiracy, at least one member of the conspiracy committed at least one overt act,** *(*as *alleged in the indictment) (*as *I will describe to you)***.**

It is a federal crime for two or more persons to agree or conspire to commit any offense against the United States, even if they never actually achieve their objective. A conspiracy is a kind of criminal partnership.

In order for you to find *(name)* **guilty of conspiracy to commit an offense***(s)* **against the United States, you must find that the government proved beyond a reasonable doubt each of the following four (4) elements:**

First: That two or more persons agreed to commit an offense*(s)* **against the United States, as charged in the indictment.** *(I have explained the elements of the offense(s) already.) (I will explain the elements of the offense(s) to you shortly.)***;**

Second: That *(name)* **was a party to or member of that agreement;**

Third: That *(name)* **joined the agreement or conspiracy knowing of its objective***(s)* **to commit an offense***(s)* **against the United States and intending to**

join together with at least one other alleged conspirator to achieve *(that) (those)* **objective***(s)***;that is, that** *(name)* **and at least one other alleged conspirator shared a unity of purpose and the intent to achieve a common goal***(s)* **or objective***(s)***, to commit an offense***(s)* **against the United States; and**

Fourth: That at some time during the existence of the agreement or conspiracy, at least one of its members performed an overt act in order to further the objectives of the agreement.

I will explain each of these elements in more detail.

Comment

See Kevin F. O'Malley, Jay E. Grenig, & Hon. William C. Lee, 2 *Federal Jury Practice and Instructions* (5th ed. 2000) [hereinafter O'Malley et al] §§ 31.01 - 31.03. For variations in other Circuits, *see* First Circuit § 4.03; Fifth Circuit § 2.20; Sixth Circuit §§ 3.01A & 3.01B; Seventh Circuit § 5.08; Eighth Circuit § 5.06A; Ninth Circuit § 8.16.

The general federal conspiracy statute, 18 U.S.C. § 371, provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both. If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

The Third Circuit in *United States v. Rigas*, 605 F.3d 194, 203-12 (3d Cir. 2010), held that, under the double jeopardy clause prohibition of multiple prosecution for the "same offense," this statute creates only one offense – conspiracy. Thus, the statute does not establish conspiracy to commit any offense and conspiracy to defraud the United States as two separate offenses; agreeing to commit an offense or to defraud the United States are simply two alternative ways to commit the single § 371 offense.

This instruction is for conspiracies to commit an offense against the United States. Instruction 6.18.371B should be used when the indictment charges a conspiracy to defraud the United States.

The Third Circuit has used a variety of words to describe the elements of a section 371 conspiracy, but these different articulations state essentially the same elements. *Compare United States v. Rankin*, 870 F.2d 109, 113 (3d Cir. 1989); *United States v. Shoup*, 608 F.2d 950, 956 (3d Cir. 1979); *United States v. Dressel*, 625 Fed. Appx. 583, 590 (3d Cir. 2015) (non-precedential) (elements of conspiracy are (1) two or more persons agreed to commit offenses against the United States; (2) defendant was a party to or a member of that agreement; (3) defendant and at least one other alleged conspirator shared a unity of purpose and the intent to achieve a common goal or objective to commit an offense against the United States; and (4) at some time during the existence of the agreement or conspiracy, at least one of the members performed an overt act in order to further the objectives of the agreement, *citing Rankin and* 3d Cir. Crim. Model Jury Instructions § 6.18.371A) *with United States v. Uzzolino*, 651 F.2d 207, 214 (3d Cir. 1981); *United States v. Small*, 472 F.2d 818, 819 (3d Cir. 1971). Also *see, e.g., United States v. Bansal*, 663 F.3d 634, 669 (3d Cir. 2011) (in rejecting contention that trial judge improperly instructed on elements of conspiracy, Third Circuit stated, "[t]he District Court's conspiracy instruction . . . properly set forth the essential elements of conspiracy, which are: (1) a mutual agreement or understanding, (2) knowingly entered by the defendant, with (3) an intent to jointly commit a crime. *See* Third Circuit Model Jury Instruction 6.18.371A."); *United States v. Bailey*, 840 F.3d 99, 108 (3d Cir. 2016); United States v. John-Baptiste, 747 F.3d 186, 204-5 (3rd Cir. 2014); *United States v. Caraballo-Rodriguez*, 726 F.3d 418, 425 (3d Cir. 2013) and *United States v. Whiteford*, 676 F.3d 348, 357 (3rd Cir. 2012).

The elements and consequences of a conspiracy charge are defined in fair detail by the case law, because of the significant number of conspiracy prosecutions in the federal courts generally and within the Third Circuit more specifically. As a result, many aspects of conspiracy law need their own instruction, and we have addressed that need in the instructions that follow. In those instructions, alternative language is included to use depending on whether the conspiracy is to commit a federal offense or to defraud the United States.

Instructions on the Object Offense(s). In addition to instructing on the elements of conspiracy to commit an offense against the United States, the trial judge must also instruct on the elements of the substantive offense(s) that is (are) the object of the conspiracy. *See, e.g., United States v. Yasbin*, 159 F.2d 705 (3d Cir. 1947) ("An examination of the record in this case discloses that while the trial judge charged the jury as to the elements of the crime of conspiracy he did not instruct them as to the elements of the substantive offense involved in the conspiracy. Consequently the judgment of the conviction is reversed . . . ."). If the defendant is also charged with the substantive offense(s), the trial judge will already be explaining those elements in the instructions; if the substantive offense(s) is (are) not charged, the court must define the elements of the object offense(s) here.

Specific Federal Conspiracy Statutes. There are also specific federal statutes covering conspiracies to commit specific offenses. Some of these specific statutes do not require proof of an overt act. Indeed, the Third Circuit has noted that when "the language of the statute did not require an overt act. . . . The court should not infer such a requirement. *See Whitfield v. United States,* 543 U.S. 209, 213, 125 S.Ct. 687, 160 L.Ed.2d 611 (2005) ('[W]here Congress had

omitted from the relevant conspiracy provision any language expressly requiring an overt act, the Court would not read such a requirement in the statute.')." *United States v. Fullmer*, 584 F.3d 132, 160 n.13 (3d Cir. 2009) (conspiracy to violate the Animal Enterprise Protection Act). Also *see, e.g.,* 21 U.S.C. § 846 (conspiracy to commit federal drug offenses; no overt act required); 18 U.S.C. § 1962(d) (RICO conspiracy; no overt act required). Instructions on these specific conspiracy statutes are in Chapter 6 of these Model Instructions. *See* Instructions 6.18.1962D (RICO – Conspiracy; Elements of the Offense); 6.21.846B (Controlled Substances – Conspiracy to (*Distribute*) (*Possess with Intent to Manufacture/Distribute*) (*Manufacture*) (*Possess*)).

Criminal Responsibility for and Admissibility of Acts and Statements of Co-Conspirators. Conspiracy also has consequences with respect to criminal responsibility for substantive offenses, as well as the admissibility of acts and statements of co-conspirators. *See* Instructions 7.03 (Responsibility for Substantive Offenses Committed by Co-Conspirators (*Pinkerton* Liability), 7.04 (Withdrawal as a Defense to Substantive Offenses Committed by Co-Conspirators), and 6.18.371K (Acts and Statements of Co-Conspirators).

(Revised 11/2018)

6.18.371B Conspiracy "To Defraud the United States" – Basic Elements (18 U.S.C. § 371)

Count *(no.)* **of the indictment charges that on or about the___ day of _____, 2__, in the _____ District of _____,** *(name)* **agreed or conspired with one or more other persons to defraud the United States and that, to further the objective of the conspiracy, one member of the conspiracy committed at least one overt act,** *(*as *alleged in the indictment) (*as *I will describe to you)***.**

It is a federal crime for two or more persons to conspire or agree to defraud the United States or any of its agencies, even if they never actually achieve their objective. A conspiracy is a kind of criminal partnership.

In order for you to find *(name)* **guilty of conspiracy to defraud the United States, you must find that the government proved beyond a reasonable doubt each of the following four (4) elements:**

First: That two or more persons agreed "to defraud the United States," as charged in the indictment. "Defraud the United States," means to cheat the United States government or any of its agencies out of money or property. It also means to obstruct or interfere with one of the United States government's lawful functions, by deceit, craft, trickery, or dishonest means;

Second: That *(name)* **was a party to or member of that agreement;**

Third: That *(name)* **joined the agreement or conspiracy knowing of its objective to defraud the United States and intending to join together with at**

least one other conspirator to achieve that objective; that is, that *(name)* and at least one other alleged conspirator shared a unity of purpose and the intent to achieve a common goal*(s)* or objective*(s)*, to defraud the United States; and

Fourth: That at some time during the existence of the agreement or conspiracy, at least one of its members performed an overt act in order to further the objective of the agreement.

I will explain these elements in more detail.

Comment

This should be the first instruction on conspiracy when the charge is conspiracy to defraud the United States under 18 U.S.C. § 371. *See* the Comment to Instruction 6.18.371A.

In *United States v. McKee*, 506 F.3d 225, 241 (3rd Cir. 2007), the Third Circuit explained "to conspire to defraud the United States means primarily to cheat the government out of property or money, but also means to interfere with or obstruct the government by deceit, craft, trickery, or at least by means that are dishonest," quoting *Hammerschmidt v. United States,* 265 U.S. 182, 188, 44 S.Ct. 511, 68 L.Ed. 968 (1924). *See also United States v. Whiteford***,** 676 F.3d 348, 357 (3rd Cir. 2012). For cases discussing the broad interpretation of "defraud the United States" stated in this instruction, *see, e.g., Hass v. Henkel*, 216 U.S. 462, 479 (1910); *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924); *Glasser v. United States*, 315 U.S. 60, 66 (1942); *Bridges v. United States*, 346 U.S. 209, 221, n. 19 (1953). The Supreme Court held in *United States v. Tanner*, 483 U.S. 107, 129-30 (1987), however, that a conspiracy to defraud a third party that merely received financial assistance and some supervision from the United States was not itself a conspiracy "to defraud the United States." Except under unusual circumstances, *see Bridges v. United States*, 346 U.S. at 215-224, fraud is an essential element of the offense. *United States v. Vazquez*, 319 F.2d 381, 384 (3d Cir. 1963).

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6.18.371C Conspiracy – Existence of an Agreement

The first element of the crime of conspiracy is the existence of an agreement. The government must prove beyond a reasonable doubt that two or more persons knowingly and intentionally arrived at a mutual understanding or agreement, either spoken or unspoken, to work together to achieve the overall objective of the conspiracy, *[to commit the offense(s) of (state offenses)] [to defraud the United States]***.**

The government does not have to prove the existence of a formal or written agreement, or an express oral agreement spelling out the details of the understanding. The government also does not have to prove that all the members of the conspiracy directly met, or discussed between themselves their unlawful objective*(s)***, or agreed to all the details, or agreed to what the means were by which the objective***(s)* **would be accomplished. The government is not even required to prove that all the people named in the indictment were, in fact, parties to the agreement, or that all members of the alleged conspiracy were named, or that all members of the conspiracy are even known. What the government must prove beyond a reasonable doubt is that two or more persons in some way or manner arrived at some type of agreement, mutual understanding, or meeting of the minds to try to accomplish a common and unlawful objective.**

You may consider both direct evidence and circumstantial evidence in deciding whether the government has proved beyond a reasonable doubt that an agreement or mutual understanding existed. You may find the existence of a

conspiracy based on reasonable inferences drawn from the actions and statements of the alleged members of the conspiracy, from the circumstances surrounding the scheme, and from evidence of related facts and circumstances which prove that the activities of the participants in a criminal venture could not have been carried out except as the result of a preconceived agreement, scheme, or understanding.

[The indictment charges a conspiracy to commit several federal crimes. The government does not have to prove that the alleged conspirators agreed to commit all of these crimes. The government, however, must prove that they agreed to commit at least one of the object crimes, and you must unanimously agree on which crime. You cannot find (name) guilty of conspiracy unless you unanimously agree that the same federal crime(s) was (were) the objective(s) of the conspiracy. It is not enough if some of you agree that one of the charged crimes was the objective of the conspiracy and others agree that a different crime was the objective of the conspiracy.]

Comment

See 2 O'Malley et al, supra, § 31.04. For variations in other Circuits, *see* Sixth Circuit § 3.02; Eighth Circuit § 5.06B.

Agreement is the essential element of conspiracy and the evil at which the crime of conspiracy is directed. *See, e.g., Iannelli v. United States*, 420 U.S. 770, 777 n. 10 (1975); *United States v. Kelly*, 892 F.2d 255, 258 (3d Cir. 1989). The government need not present direct evidence to prove the agreement and can prove it with circumstantial evidence. *United States v. Heatherly*, 985 F.3d 254 (3d. Cir. 2021); *United States v. Garner*, 915 F.3d 167, 170 (3d Cir. 2019); *United States v. John-Baptiste*, 747 F.3d 186, 203 (3d Cir. 2014); *United States v. Carabello-Rodriguez*, 726 F.3d. 418, 431 (3d Cir. 2013) (en banc); *United States v. Whiteford***,** 676 F.3d 348, 357 (3d Cir. 2012); *United States v. Fullmer*, 584 F.3d 132, 160 (3d Cir. 2009); *United States v. McKee,* 506 F.3d 225, 238 (3d Cir.2007). See also *United States v. Wheeler*, 742 Fed. Appx. 646, 658-9 (3d Cir. 2018) (non-precedential). Numerous Third Circuit cases have discussed what the government is and is not required to prove in order to establish the existence of an agreement. *See, e.g., United States v. Basroon*, 38 Fed. Appx. 772 (3d Cir.

2002); *United States v. Appelwhaite*, 195 F.3d 679 (3d Cir. 1999); *United States v. Messerlian*, 832 F.2d 778 (3d Cir. 1987); *United States v. Addonizio*, 449 F.2d 100 (3d Cir. 1971); *United States v. Frank*, 290 F.2d 195 (3d Cir. 1961); *United States v. Lester*, 282 F.2d 750 (3d Cir. 1960). *Also, see, e.g., United States v. Davis*, 458 Fed. Appx. 152 (3d Cir 2012.) (non-precedential) (Third Circuit held that there was insufficient evidence to support finding the existence of an agreement, citing *United States v. Tyson*, 653 F.3d 192 (3d Cir. 2011), quoting *United States v. Boria,* 592 F.3d 476 (3d Cir. 2010), and distinguishing *United States v. Smith*, 294 F.3d 473 (3d Cir.2002)).

If the indictment charges an agreement to commit several offenses, the bracketed final paragraph should be given.

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6.18.371D Conspiracy – Membership in the Agreement

If you find that a criminal agreement or conspiracy existed, then in order to find *(name)* **guilty of conspiracy you must also find that the government proved beyond a reasonable doubt that** *(name)* **knowingly and intentionally joined that agreement or conspiracy during its existence. The government must prove that** *(name)* **knew the goal***(s)* **or objective***(s)* **of the agreement or conspiracy and voluntarily joined it during its existence, intending to achieve the common goal***(s)* **or objective***(s)* **and to work together with the other alleged conspirators toward** *(that) (those)* **goal***(s)* **or objective***(s)***.**

The government need not prove that *(name)* **knew everything about the conspiracy or that** *(he) (she)* **knew everyone involved in it, or that** *(he) (she)* **was a member from the beginning. The government also does not have to prove that** *(name)* **played a major or substantial role in the conspiracy.**

You may consider both direct evidence and circumstantial evidence in deciding whether *(name)* **joined the conspiracy, knew of its criminal objective***(s)***, and intended to further the objective***(s)***. Evidence which shows that** *(name)* **only knew about the conspiracy, or only kept "bad company" by associating with members of the conspiracy, or was only present when it was discussed or when a crime was committed, is not sufficient to prove that** *(name)* **was a member of the conspiracy even if** *(name)* **approved of what was happening or did not object to it. Likewise, evidence showing that** *(name)* **may have done something that happened to**

help a conspiracy does not necessarily prove that *(he) (she)* joined the conspiracy. You may, however, consider this evidence, with all the other evidence, in deciding whether the government proved beyond a reasonable doubt that *(name)* joined the conspiracy.

Comment

See 2 O'Malley et al, supra, § 31.05. For variations in other Circuits, *see* Sixth Circuit § 3.03; Eighth Circuit § 5.06b.

Agreeing with others to accomplish the illegal object of the conspiracy is sufficient, even though the conspiracy is already underway, *United States v Graham*, 639 Fed. Appx 152 (3d Cir. 2016) (non-precedential).

Some cases have suggested that once the existence of a conspiracy is established, only "slight evidence" is needed to allow the jury to find that the defendant was a member. *See, e.g., United States v. Kates*, 508 F.2d 308, 310 n. 4 (3d Cir. 1975); *United States v. Weber*, 437 F.2d 327, 336 (3d Cir. 1970). This idea is not included in the instruction because of concern that it would dilute the government's burden of proving beyond a reasonable doubt that the defendant was a member of the conspiracy. Also *see United States v. Cooper*, 567 F.2d 252, 255 (3d Cir. 1977) ("One may not be convicted of conspiracy solely for keeping bad company.").

(Revised 12/2021)

6.18.371E Conspiracy – Mental States

In order to find *(name)* **guilty of conspiracy you must find that the government proved beyond a reasonable doubt that** *(name)* **joined the conspiracy knowing of its objective***(s)* **and intending to help further or achieve** *(that) (those)* **objective***(s)*. **That is, the government must prove: (1) that** *(name)* **knew of the objective***(s)* **or goal***(s)* **of the conspiracy, (2) that** *(name)* **joined the conspiracy intending to help further or achieve that** *(those)* **goal***(s)* **or objective***(s)*, **and (3) that** *(name)* **and at least one other alleged conspirator shared a unity of purpose toward** *(that) (those)* **objective***(s)* **or goal***(s)*.

You may consider both direct evidence and circumstantial evidence, including *(name)***'s words or conduct and other facts and circumstances, in deciding whether** *(name)* **had the required knowledge and intent.** *[For example, evidence that (name) derived some benefit from the conspiracy or had some stake in the achievement of the conspiracy's objective(s) might tend to show that (name) had the required intent or purpose that the conspiracy's objective(s) be achieved.]*

Comment

Neither O'Malley et al, supra, nor the other Circuits include a separate instruction on the required state of mind element for conspiracy. The trial judge may feel that it is not necessary to give this instruction, in addition to instructions on the Basic Elements (Instructions 6.18.371A and 6.18.371B), Existence of an Agreement (Instruction 6.18.371C), and Membership in the Agreement (Instruction 6.18.371D), all of which reference the mental state requirements.

Mental State Requirement for Conspiracy Defined. The government must prove that the defendant "knew of the agreement and intended both to join it and to accomplish its illegal objects." *United States v. McKee*, 506 F.3d 225, 241 (3rd Cir. 2007). In *United States v. Korey*, 472 F.3d 89 (3d Cir. 2007) (conspiracy to distribute a controlled substance under 18

U.S.C. § 846), the Third Circuit stated that, "'[o]ne of the requisite elements the government must show in a conspiracy case is that the alleged conspirators shared a "unity of purpose", the intent to achieve a common goal, and an agreement to work together toward the goal.' " 472 F.3d at 93 (quoting *United States v. Cartwright*, 359 F.3d 281, 286 (3d Cir. 2004), in turn quoting *United States v. Wexler*, 838 F.2d 88, 90-91 (3d Cir.1988)). In *Korey*, the court held that the trial judge erred by instructing the jury that it could convict if it found merely that the defendant agreed to accept cocaine in payment for killing the victim, without clearly instructing that the jury must find that the government proved a unity of purpose between defendant and his alleged conspirator.

The Supreme Court noted in *United States v. United States Gypsum Co.*, 438 U.S. 422, 443 n. 20 (1978), that, "[i]n a conspiracy, two different types of intent are generally required – the basic intent to agree, which is necessary to establish the existence of the conspiracy, and the more traditional intent to effectuate the object of the conspiracy. *See* W. LaFave & A. Scott, Criminal Law 464- 465 (1972)." Also *see, e.g., United States v. McKee,* 506 F.3d 225, 241 (3rd Cir. 2007); *United States v. Shoup*, 608 F.2d 950, 956 n. 9 (3d Cir. 1979) (quoting *United States Gypsum*). Knowingly facilitating a conspiracy or the commission of the objective of a conspiracy is not enough alone to make one guilty of conspiracy. *United States v. Carlucci*, 288 F.2d 691 (3d Cir 1961); *United States v. Giuliano*, 263 F.2d 582, 583 (3d Cir. 1959) (a legitimate vendor's sale of supplies to conspirators was insufficient to convict the vendor of conspiracy). In *United States v. Carbo*, the Third Circuit noted that "conspiracy and aiding and abetting both require that the defendant specifically intend to further the substantive offense. . . ." 572 F.3d 112, 116 n. 2 (3d Cir. 2009) (citing *Salinas v. United States*, 522 U.S. 52, 65 (1997), and *United States v. Dixon,* 658 F.2d 181, 189 n.17 (3d Cir.1981)). However, specific intent or purpose may be inferred from knowledge if the inference is reasonable under the circumstances. *United States v. Caraballo-Rodriguez*, 726 F.3d 418, 425 (3d Cir. 2013); United States v. Cartwright, 359 F.3d 281, 291 (3d Cir.2004). *See also Ingram v. United States*, 360 U.S. 672, 680 (1959) ("What was said in *Direct Sales Co. v. United States* on behalf of a unanimous Court is of particular relevance here: 'Without the knowledge, the intent cannot exist. . . Furthermore, to establish the intent, the evidence of knowledge must be clear, not equivocal. . . .This, because charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning . . . a dragnet to draw in all substantive crimes," quoting *Direct Sales Co. v. United States*, 319 U.S. 703, 711 (1943).); *United States v. Falcone*, 311 U.S. 205 (1940); *People v. Lauria*, 251 Cal App.. 471, 59 Cal. Rptr. 628 (1967). *See also* United States v. Coleman, 811 F.2d 804, 808 (3d Cir.1987); *United States v Davis*, 458 Fed. Appx. 152, 161 (3rd Cir. 2012) (non-precedential). Courts have also observed that receiving a benefit from or having a stake in the object of a conspiracy is evidence of intent, but is not necessary to prove intent. *See, e.g., Direct Sales Co. v. United States*, 319 U.S. 703, 713 (1943); *United States v. Pedroni*, 45 Fed. Appx. 103, 108 (3d Cir. 2002) (not precedential); *United States v. Shoup*, 608 F.2d at 957.

In *United States v. Brodie*, 403 F. 3d 123, 147 (3d Cir. 2005), the Third Circuit also stated that, "the government, in proving a conspiracy under 18 U.S.C. § 371, was required to prove at least the degree of criminal intent necessary for the underlying substantive offense of violating the American Cuban embargo. *See United States v. Feola,* 420 U.S. 671, 686 . . ." The mental state required for the underlying offense in *Brodie* was specific intent, which "[i]n the

context of [that] offense ... demands that the government prove that a defendant had general knowledge of the law which forbade his actions and acted with the specific intent to circumvent that law." *Brodie*, 403 F.3d at 147

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6.18.371F Conspiracy – Overt Acts

With regard to the fourth element of conspiracy – overt acts – the government must prove beyond a reasonable doubt that during the existence of the conspiracy at least one member of the conspiracy performed at least one of the overt acts described in the indictment, for the purpose of furthering or helping to achieve the objective*(s)* of the conspiracy.

The indictment alleges certain overt acts. The government does not have to prove that all of these acts were committed or that any of these acts were themselves illegal. Also, the government does not have to prove that *(name)* personally committed any of the overt acts. The government must prove beyond a reasonable doubt that at least one member of the conspiracy committed at least one of the overt acts alleged in the indictment and committed it during the time that the conspiracy existed, for the purpose of furthering or helping to achieve the objective*(s)* of the conspiracy. You must unanimously agree on the overt act that was committed.

Comment

See 2 O'Malley et al, supra, § 31.07. For variations in other Circuits, *see* Sixth Circuit § 3.04; Eighth Circuit § 5.06D.

The overt acts must have been committed during the existence of the conspiracy. When the defense argues that this temporal connection has not been proved, the court should be careful to instruct that the overt act must have been committed during the conspiracy, not before its formation or after its termination.

A single overt act by any member of the conspiracy is sufficient to satisfy this element, *United States v. Nelson*, 852 F.2d 706, 713 (3d Cir. 1988); *United States v. Kapp*, 781 F.2d 1008, 1012 (3d Cir. 1986), as long as the act was committed to further the conspiracy and tended

towards that end. *See, e.g., United States v. Small*, 472 F.2d 818, 819 (3d Cir. 1972). The *Pinkerton* rule of co-conspirator responsibility applies to overt acts, as it does to substantive offenses. *See* Instruction 6.18.371K (Conspiracy - Acts and Statements of Co-Conspirators). Acts as innocent as writing a letter or talking on the telephone may constitute sufficient overt acts. *United States v. Nelson*, 852 F.2d at 706, 713. Also *see, e.g., United States v. Braverman*, 317 U.S. 49, 53 (1942); *United States v. Adamo*, 534 F.2d 31, 39 (3d Cir. 1976).

The government may satisfy the overt act element by proving "overt acts not listed in the indictment, so long as there is no prejudice to the defendants thereby." *United States v. Schurr*, 794 F.2d 903, 908 n. 4 (3d Cir. 1986); *United States v. Adamo*, 534 F.2d at 39 (slight differences in the dates of overt acts as proven compared to those alleged). The trial court need not identify the alleged overt acts in order to give a proper jury instruction. *See, e.g., United States v. Williams*, 591 Fed. Appx, 78 (3d Cir. 2014) (non-precedential); *United States v. Norris*, 419 Fed. Appx. 190, 194-95 (3d Cir. 2011) (non-precedential) (citing *United States v. Adamo*).

Failure to Act as Overt Act. A failure to act or an omission can be an overt act, where the co-conspirator who failed to act had a legal duty to perform the act and he or she omitted performance in order to further the achievement of the objectives of the conspiracy. *See, e.g., United States v. Curran*, 20 F.3d 560 (3d Cir. 1994) (conspiracy conviction vacated where jury misled into believing defendant acted unlawfully by omitting performance of an act that he was under no legal duty to perform). When the indictment alleges failure to act or omission as an overt act, Instruction 5.10 should be given.

Specific Federal Conspiracy Statutes That Do Not Require An Overt Act. Commission of an overt act is an element of an 18 U.S.C. § 371 conspiracy, but there are other, specific conspiracy statutes that do not require an overt act. Indeed, when a conspiracy statute is silent as to whether an overt act is required, there is no such requirement. *Whitfield v. United States*, 543 U.S. 209, 213 (2005); *United States v. Salahuddin*, 765 F.3d 329, 338 (3d Cir. 2014); *See also United States v. Fullmer*, 584 F.3d 132, 160 n.13 (3d Cir. 2009) (quoting *Whitfield v. United States*, 543 U.S. 209, 213 (2005). *See, e.g.,* 18 U.S.C. § 1349 (conspiracy to commit mail, wire, bank, health care, etc. fraud); 18 U.S.C. § 1951 (Conspiracy to commit Hobbs Act violation); 18 U.S.C. § 1962(d) (RICO conspiracy); 21 U.S.C. § 846 (conspiracy to commit controlled substance offenses); 18 U.S.C. § 1956(h) (conspiracy to commit money laundering).

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6.18.371G Conspiracy – Success Immaterial

The government is not required to prove that any of the members of the conspiracy were successful in achieving any or all of the objective*(s)* of the conspiracy. You may find *(name)* guilty of conspiracy if you find that the government proved beyond a reasonable doubt the elements I have explained, even if you find that the government did not prove that any of the conspirators actually *[committed any other offense against the United States] [defrauded the United States]***. Conspiracy is a criminal offense separate from the offense*(s)* that *(was) (were)* the objective*(s)* of the conspiracy; conspiracy is complete without the commission of** *(that) (those)* **offense*(s)*.**

Comment

See 2 O'Malley et al, supra, § 31.08. For variations in other Circuits, *see* Sixth Circuit § 3.13; Eighth Circuit § 5.06E.

"The crime of conspiracy is separate and distinct from the related substantive offense." *United States v. Watkins*, 339 F.3d 167, 178 (3d Cir. 2003). *See United States v. Uzzolino*, 651 F.2d 207 (3d Cir. 1981) (defendant acquitted of embezzlement but convicted of conspiracy to embezzle pension funds). Commission of the substantive offense that was the objective of the conspiracy is not a prerequisite to conviction of conspiracy. *United States v. Shoup*, 608 F.2d 950, 956 (3d Cir. 1979). Although there are no Third Circuit cases on this precise point, the same would be true for defrauding the United States; that is, a defendant can be convicted of conspiracy to defraud the United States even though the United States was not defrauded.

The Third Circuit has held that "the illegality of a conspiratorial agreement…does not depend on the conspirators' achieving their end; even the objective impossibility of attaining the goals of a conspiracy is irrelevant to the guilt of those who conspire. *See* United States v. Jannotti, 673 F.2d 578, 591 (3d Cir.1982) (en banc), *cert. denied,* 457 U.S. 1106, 102 S.Ct. 2906, 73 L.Ed.2d 1315 (1982)." *United States v. Olgin*, 745 F.2d 263, 273 (3d Cir. 1984). See also *United States v, Manzo*, 636 F.3d 56, 66 (3d Cir. 2011); *United States v. Hsu,* 155 F.3d 189, 203 (3d Cir. 1998); The Model Jury Instructions in the Sixth Circuit include the following instruction

§ 3.13 Impossibility of Success

One last point about conspiracy. It is no defense to a conspiracy charge that success was impossible because of circumstances that the defendants did not know about. This means that you may find the defendants guilty of conspiracy even if it was impossible for them to successfully complete the crime that they agreed to commit.

(Revised 11/2018)

6.18.371H Conspiracy – Single or Multiple Conspiracies

The indictment charges that *(name)* **and the other alleged co-conspirators were all members of one single conspiracy** *[to commit (state offense(s)] [to defraud the United States]*. *(Name)* **has argued that there were really two** *[or more]* **separate conspiracies** *[one between _____ to commit (state offense(s)), and another between _____ to commit (state offense(s))]*. **Whether a single conspiracy or multiple conspiracies exist is a question of fact that you must decide.**

In order to find *(name)* **guilty of the conspiracy charged in the indictment, you must find that the government proved beyond a reasonable doubt that** *(name)* **was a member of that conspiracy. If the government failed to prove that** *(name)* **was a member of the conspiracy charged in the indictment, then you must find** *(name)* **not guilty of conspiracy, even if you find that there were multiple conspiracies and that** *(name)* **was a member of a separate conspiracy other than the one charged. However, proof that** *(name)* **was a member of some other conspiracy would not prevent you from also finding** *(him) (her)* **guilty of the conspiracy charged in the indictment, if you find that the government proved beyond a reasonable doubt that** *(name)* **was a member of the conspiracy charged.**

In deciding whether there was one single conspiracy or more than one conspiracy, you should concentrate on the nature of the agreement proved by the evidence. To prove a single conspiracy, the government must prove beyond a reasonable doubt that each of the alleged members or conspirators agreed to

participate in what *(he) (she)* knew or should have known was a single group activity directed toward *(a)* common objective*(s)*. The government must prove that there was a single agreement on *(an)* overall objective*(s)*.

Multiple conspiracies are separate agreements operating independently of each other. However, a finding of a master conspiracy that includes other, sub-schemes does not constitute a finding of multiple, unrelated conspiracies. A single conspiracy may exist when there is a continuing core agreement that attracts different members at different times and which involves different sub-groups committing acts in furtherance of an overall objective.

In determining whether a series of events constitutes a single conspiracy or separate and unrelated conspiracies, you should consider whether there was a common goal among the alleged conspirators; whether there existed common or similar methods; whether and to what extent alleged participants overlapped in their various dealings; whether and to what extent the activities of the alleged conspirators were related and interdependent; how helpful each alleged coconspirator's contributions were to the goals of the others; and whether the scheme contemplated a continuing objective that would not be achieved without the ongoing cooperation of the conspirators.

A single conspiracy may exist even if all the members did not know each other, or never sat down together, or did not know what roles all the other members would play. A single conspiracy may exist even if different members joined at

different times, or the membership of the conspiracy changed over time. Similarly, there may be a single conspiracy even though there were different sub-groups operating in different places, or many acts or transactions committed over a long period of time. You may consider these things in deciding whether there was one single conspiracy or more than one conspiracy, but they are not necessarily controlling. What is controlling is whether the government has proved beyond a reasonable doubt that there was one overall agreement on *(a)* common objective*(s)*.

Comment

See 2 O'Malley et al, supra, § 31.09. For variations in other Circuits, *see* Fifth Circuit § 2.21; Sixth Circuit §§ 3.08 & 3.09; Eighth Circuit § 5.06G; Ninth Circuit § 8.17.

Variances. Defendants charged in an indictment alleging a single conspiracy often argue that the evidence actually proved multiple conspiracies and that they were a member of some conspiracy other than the one charged. Where a single conspiracy is alleged in the indictment, there may be a fatal variance if the evidence at trial proves only the existence of multiple, separate and independent conspiracies. *See, e.g., United States v. Kotteakos*, 328 U.S. 750, 757-58 (1946); *United States v. Kemp*, 500 F. 3d 257, 287 (3d Cir. 2007); *United States v. Perez*, 280 F.3d 318, 345-46 (3d Cir. 2002); *United States v. Kelly*, 892 F.2d 255, 258 (3d Cir.1989) (citing *United States v. Smith*, 789 F.2d 196, 200 (3d Cir. 1986)). In *United States v. Kemp*, 500 F. 3d 257, 287 (3d Cir. 2007) (holding that although there was a variance, the defendants failed to demonstrate prejudice), the Third Circuit acknowledged that, "'A conviction must be vacated when (1) there is a variance between the indictment and the proof presented at trial and (2) the variance prejudices a substantial right of the defendant.' *United States v. Kelly,* 892 F.2d [at] 258. . . . ." Also *see, e.g., United States v. Kotteakos*, 328 U.S. at 757-58; *United States v. Daraio*, 445 F.3d 253, 259-64 (3d Cir. 2006) (discussing the similarities and differences between a constructive amendment of an indictment and a variance). The Third Circuit in *Kemp* also noted that, "Our jurisprudence distinguishes between challenges to the sufficiency of the evidence, in which the appellant claims that the government failed to prove an essential element of conspiracy, and variance claims, in which the appellant argues that the government proved multiple conspiracies instead of the one charged in the indictment." 500 F.3d at 287 n.18.

Determining Whether Single Conspiracy or Multiple Conspiracies. In *United States v. Kelly*, 892 F.2d 255, 258 (3d Cir.1989), the Third Circuit discussed the analysis to use in determining a single rather than multiple, separate conspiracies:

> We will employ a three-step inquiry to determine whether a series of events constitutes a single conspiracy or separate and unrelated conspiracies. *United States v. DeVarona,* 872 F.2d 114 (5th Cir.1989). First, we examine whether there was a common goal among the conspirators. *DeVarona,* 872 F.2d at 118. Second, we look at the nature of the scheme to determine whether "the agreement contemplated bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators. *DeVarona,* 872, F.2d at 119 (*quoting United States v. Perez,* 489 F.2d 51, 62 (5th Cir.1973), *cert. denied,* 417 U.S. 945 (1974)). Third, we examine the extent to which the participants overlap in the various dealings. *DeVarona,* 872 F.2d at 118.

Also *see, United States v. Gandy,* 510 Fed. Appx. 161 (3d Cir. 2013) (non-precedential) (applying the *Kelly* factors in the context of a 21 U.S.C §846 drug conspiracy); *United States v. Kemp,* 500 F. 3d 257, 287 (3d Cir. 2007) (quoting *Kelly*) and *United States v. Rigas,* 605 F.3d 194, 213-217 (3d Cir. 2010) (applying the *Kelly* factors in the context of a double jeopardy claim).

The Third Circuit recognized in *United States v. Hoffecker*, 530 F.3d 137, 174 (3d Cir. 2008), that, "'[i]f a defendant asks for a charge on multiple conspiracies and there is sufficient evidence to support such an instruction, the failure to grant the request can be reversible error,' *United States v. Curran,* 20 F.3d 560, 572 (3d Cir.1994), but that principle is inapplicable here because the evidence did not support the instruction." The court held that, "[d]espite the complexity of the scheme in this case, the evidence could not support a conclusion that there had been a conspiracy other than the one charged. All of the business entities and divisions in labor existed to advance the single conspiracy. . . . Moreover, the District Court gave a clear instruction that the jury only could convict Hoffecker if it found that he knowingly and willingly joined the single charged conspiracy." 530 F.3d at 174. See also *United States v. Wheeler*, 742 Fed. Appx. 646, 663 (3d Cir. 2018) (non-precedential) (District Court properly refused to instruct on multiple conspiracies where there was insufficient evidence to support such an instruction.)

In *United States v. Kemp*, the Third Circuit held that the evidence failed to prove the single conspiracy charged in the indictment, agreeing with the defendants' argument "that the government charged a hub-and-spokes conspiracy but failed to prove the existence of a rim connecting the spokes." 500 F.3d at 287-88. The Court noted that this analysis was based on the seminal Supreme Court case *United States v. Kotteakos*, 328 U.S. 750, 754-55 (1946). In *Kotteakos*, the indictment charged one single conspiracy among the defendants, but the Supreme Court held that there was a fatal variance between the evidence and the indictment, because the evidence proved multiple, separate conspiracies (which the government had conceded), and the defendant was prejudiced by the variance (which the government did not concede). The evidence against the alleged co-conspirators was similar, showing that they had all transacted illegal business with the same person, but it also showed that the defendants had no relationship with or connection to each other except for their similar, but independent illegal business dealings with the same person. The Supreme Court concluded that the evidence showed "at least eight, and perhaps more, separate and independent groups, none of which had any connection with any other, though all dealt independently with Brown as their agent." The

Kotteakos Court used the "rim-less wheel" metaphor, explaining that the pattern shown was "that of separate spokes meeting at a common center [or hub]," but without the rim of the wheel to enclose the spokes and prove one overall conspiracy. 328 U.S. at 755.

The Supreme Court later observed in *Blumenthal v. United States*, 332 U.S. 539, 558 (1948), "Except for Brown, the common figure, no conspirator was interested in whether any loan except his own went through. And none aided in any way, by agreement or otherwise, in procuring another's loan. The conspiracies therefore were distinct and disconnected, not parts of a larger general scheme, both in the phase of agreement with Brown and also in the absence of any aid given to others as well as in specific object and result. There was no drawing of all together in a single, over-all, comprehensive plan." Also *see United States v. Kemp*, 500 F.3d at 288, (quoting *Blumenthal*). The Supreme Court in *Blumenthal* then distinguished *Kotteakos* and held that the evidence in the case before it did prove that all five defendants joined a single conspiracy. The Court in *Blumenthal* reasoned:

> We think that in the special circumstances of this case the two agreements were merely steps in the formation of the larger and ultimate [sic] more general conspiracy. . . . The scheme was in fact the same scheme; the salesmen knew or must have known that others unknown to them were sharing in so large a project; and it hardly can be sufficient to relieve them that they did not know, when they joined the scheme, who those people were or exactly the parts they were playing in carrying out the common design and object of all. By their separate agreements, if such they were, they became parties to the larger common plan, joined together by their knowledge of its essential features and broad scope, though not of its exact limits, and by their common single goal.
>
> The case therefore is very different from the facts admitted to exist in the *Kotteakos* case, [where] no two of those agreements were tied together as stages in the formation of a large all-inclusive combination, all directed to achieving a single unlawful end or result.

332 U.S. at 557-59.

In *Kemp*, the Third Circuit observed with respect to *Blumenthal*, "the Court noted that all the conspirators 'knew of and joined in the overriding scheme' and 'sought a common end' . . ., so that 'the several agreements were essential and integral steps.'" 500 F.3d at 288, quoting *Blumenthal*, 332 U.S. at 559. *Kemp* continued, "The contrast between *Kotteakos* and *Blumenthal* helps us to determine whether an impermissible variance has occurred. As this Court has noted, the Government may not charge 'multiple unrelated conspiracies,' but it can charge a 'master conspiracy [with] more than one subsidiary scheme.' *United States v. Kenny,* 462 F.2d 1205, 1216 (3d Cir.1972); *see also United States v. Chandler,* 388 F.3d 796, 811 (11th Cir.2004) (stating that 'although each of these alleged spoke conspiracies had the same goal, there was no evidence that this was a *common* goal')." 500 F.3d at 288.

In holding that the evidence in *Kemp* failed to prove the single conspiracy charged in the indictment, the Third Circuit reasoned, "First, . . . the government failed to present evidence that they either knew or should have known about [other alleged co-conspirators'] activities. . . .

Nor is this the type of conspiracy that *must* have had other members; it would have been perfectly reasonable for [the defendants] to have believed that they were doing business with only Kemp and White. . . . This may be contrasted with *Blumenthal,* where . . . [t]he Court held that while 'each salesman aided in selling only his part,'. . . they could nevertheless form part of a single conspiracy, because they 'knew or must have known that others unknown to them were sharing in so large a project.' " . 500 F.3d at 288-89, quoting 332 U.S. at 541, 558-59. The court in *Kemp* concluded on this point that, "given the absence of any evidence to the contrary, . . . the government failed to prove that [defendants] were aware of the existence of the other spokes." . 500 F.3d at 289.

The *Kemp* court also reasoned, "Second, . . . [the defendants'] activities and those of the other spokes were neither interdependent nor mutually supportive. In evaluating interdependence, we consider how helpful one individual's contribution is to another's goals. . . . We reiterate that interdependence serves as 'evidence of an agreement,' that is, it helps establish whether the alleged coconspirators are 'all committed to the same set of objectives in a single conspiracy.'"500 F.3d at 289 (citations omitted). The court then observed that "Chain-shaped conspiracies present the classic examples of interdependence," 500 F.3d. at 289, and discussed several cases within and outside the Third Circuit as examples of this point. 500 F.3d at 289-90 (discussing *United States v. Perez*, 280 F.3d 318, 347 (3d Cir. 2002) ("two drug sellers and a drug smuggler were interdependent . . . because '[the dealers] depended on a scheme involving [the smuggler and the middleman].' "); *United States v. Kenny*, 462 F.2d 1205, 1217 (3d Cir 1972) ("[w]hile the scheme involved a diverse group of individuals, the evidence showed 'a determined group repeatedly cooperated to achieve a common purpose of self-enrichment by extracting kickbacks.'"); *United States v. Greenridge*, 495 F.3d 85 (3d Cir. 2007) ("finding a single conspiracy where depositors of stolen and altered checks 'did not represent independent customers, but were an integral part of this [pyramidal] "corporate" scheme' "); *United States v. Portela,* 167 F.3d 687, 697 (1st Cir.1999) (explaining that "a single conspiracy [exists] if the continued health of the trafficking and distribution network necessarily depends on the continued efforts of multiple suppliers"); *United States v. Evans,* 970 F.2d 663, 670 (10th Cir.1992) ("Interdependence is present when each alleged coconspirator ... depend[s] on the operation of each link in the chain to achieve the common goal.")). *See also United States v. Rodriguez,* 726 Fed. Appx. 136 (3d Cir. 2018) (non-precedential) (sufficient evidence to support single conspiracy since members shared a common goal and were dependent upon each other's continuous cooperation for the success of the undertaking); *United States v. Bush,* 741 Fed. Appx. 110, 119-120 (3d Cir. 2018) (non-precedential) (sufficient evidence to support single conspiracy in that the continuous cooperation of each of these members was critical to the conspiracy's success and members knew of their counterparts' roles and that they were part of a larger operation, even if they did not know their counterparts' names); *United States v. Gandy,* 510 Fed. Appx. 161 (3d Cir. 2013) (non-precedential) (sufficient evidence to support single conspiracy where accused shared common goal of distributing cocaine; the "agreement" contemplated uninterrupted distribution of cocaine for an extended period of time which could not have happened without the continuous cooperation of the conspirators; and there was extensive overlap in the conspirators' dealings.)

The Third Circuit in *Kemp* also discussed *United States v. Smith*, 82 F.3d 1261 (3d Cir.

1996), where the court "concluded that there was no interdependence between two kickback schemes because '[t]he co-conspirators in each state derived no benefit, financial or otherwise, from Smith's activities in the other state, nor was the success of the conspiracy in one state contingent on the success of the conspiracy in the other.' " 530 F.3d at 290, quoting 82 F.3d at 1271. In *Smith*, the Third Circuit had held that, for Double Jeopardy purposes, the evidence showed not one single conspiracy but multiple, separate conspiracies. *Compare United States v. Rigas*, 605 F.3d 194, 212-19 (3d Cir. 2010) (using the same analysis as it used in *Kemp* and *Smith*, but considering additional factors such as location, temporal overlap, overlap of personnel, overt acts, and the role played by the defendant, the Third Circuit held that a conspiracy to commit multiple fraud offenses, charged and tried in the Southern District of New York, was for double jeopardy, multiple prosecution purposes, the same offense as a conspiracy to defraud the United States which was charged in an indictment in the Middle District of Pennsylvania). The *Smith* court stated, "Following the law established in *Kotteakos* and *Blumenthal,* in numerous variance cases we have drawn a distinction between multiple and single conspiracies based upon the existence of a commitment to a single set of objectives." 789 F.2d at 1270 (citations omitted).

> The ultimate [question] is ... whether two groups of conspirators alleged by the government to have entered separate agreements are actually all committed to the same set of objectives in a single conspiracy. [Proof] of a single conspiracy will be made when the record reveals a degree of participant overlap, which together with other factors, permits an inference that members of each alleged conspiracy were aware of the activities and objectives of the other conspiracy and had some interest in the accomplishment of those objectives. When, as here, [the government] claims that there was a single hub and spoke conspiracy despite the presence of spoke conspirators who lacked knowledge of each other's activities, a factfinder will be unable to infer the existence of but one conspiracy in the absence of evidence that the activities of the spoke participants were, to some degree, interdependent or mutually supportive.

789 F.2d at 1271 (citations omitted). The Third Circuit also noted Justice Stevens' observation in *United States v. Broce,* that "the fact that there may be an ongoing, core conspiracy is not inconsistent with the prosecution of a member of that conspiracy for separate illegal agreements with others entered into in furtherance of the overall objective of the core conspiracy." 789 F.2d at 1272-73, citing 488 U.S. 563, 580-81 (Stevens, J., concurring). Also *see, e.g., United States v. Castro*, 776 F.2d 1118, 1124 n. 4 (3d Cir. 1985) (noting that, "[t]he 'wheel' conspiracy describes an arrangement of co-conspirators around a central figure, or 'hub,' who deals separately with peripheral figures, or 'spokes.' Each of the spokes is a member of the conspiracy even though they may not have any direct relations with one another. These peripherial [sic] members must have been aware of one another and have done something in furtherance of a single, illegal enterprise, however, or it is said that the conspiracy alleged lacks 'the rim of the wheel to enclose the spokes.'" Citing *Kotteakos* and *Blumenthal*).

In *United States v. Boyd*, 595 F.2d 120 (3d Cir. 1978), the Third Circuit explained:

> The gist of a criminal conspiracy, the agreement between co-conspirators, may continue

> over an extended period of time and involve numerous transactions. Parties may join the conspiracy after its inception, and may withdraw and terminate their relationship with the conspiracy prior to its completion. The fact that conspirators individually or in groups perform different tasks in pursuing the common goal does not, by itself, necessitate a finding of several distinct conspiracies. And even if a small group of co-conspirators are at the heart of an unlawful agreement, others who knowingly participate with the core members and others to achieve a common goal may be members of a single conspiracy.
>
> It follows from these basic principles that the government, without committing a variance between a single conspiracy charged in an indictment and its proof at trial, may establish the existence of a continuing core conspiracy which attracts different members at different times and which involves different sub-groups committing acts in furtherance of the overall plan.

595 F.2d at 123 (citations omitted). *See also United States v. Lee*, 359 F.3d 194, 207 (3d Cir. 2004), quoting *United States v. Kelly*, 892 F.2d 255, 258 (3d Cir. 1989), and *United States v. Smith*, 789 F.2d 196, 200 (3d Cir. 1986) ("[A] finding of a master conspiracy with subschemes does not constitute a finding of multiple, unrelated conspiracies."); *United States v. Salerno*, 485 F.2d 260, 262 (3d Cir. 1973) (defendants who provided counterfeit securities on only a few occasions to a core conspiracy which engaged in persistent securities fraud could be convicted of aiding and abetting the conspiracy).

Also *compare United States v. Hoffecker,* 530 F.3d at 174 (evidence did not show multiple conspiracies despite the complexity of the scheme, where all of the business entities and divisions in labor existed to advance the single conspiracy to dupe victims into investing in a particular company); *United States v. DiPasquale*, 740 F.2d 1282 (3d Cir. 1984) (single conspiracy to collect debts through extortion, although multiple extortionate acts committed by varying extortionists over extended period of time, where defendants pooled resources, shared a common space, and used stories of each other's actions to persuade later victims); *United States v. Lester*, 282 F.2d 750, 753 (3d Cir. 1960) (single conspiracy to transport stolen property in interstate commerce, where defendant agreed to buy stolen geophysical map with a kick back for successful wells after original conspirator stole it and then original conspirator stole additional maps; conspiracy "committed whether or not the parties comprehend its entire scope, whether they act separately or together, by the same or different means, known or unknown to some of them.") *with United States v. Camiel*, 689 F.2d 31 (3d Cir. 1982) (no single unitary patronage scheme involving successive chairs of a political party though both used same techniques to secure no-show jobs for party loyalists; reasonable to infer separate conspiracies defined by each chair's period in the position).

(Revised 11/2018)

6.18.371I Conspiracy – Duration

A conspiracy ends when the objectives of the conspiracy have been achieved or when all members of the conspiracy have withdrawn from it. However, a conspiracy may be a continuing conspiracy and if it is, it lasts until there is some affirmative showing that it has ended or that all its members have withdrawn. A conspiracy may be a continuing one if the agreement includes an understanding that the conspiracy will continue over time. Also, a conspiracy may have a continuing purpose or objective and, therefore, may be a continuing conspiracy.

Comment

For variations in other Circuits, *see* Sixth Circuit § 3.12.

This instruction ordinarily is not necessary in a conspiracy case. It should be given only where the facts present the possibility that a conspiracy terminated before events at issue in the case.

In *United States v. DiPasquale*, 740 F.2d 1282 (3d Cir. 1984), extortionate collections of claimed debts arising out of the conspirators' drug transactions demonstrated "a continuity of purpose and a continued performance of acts," and the lapse of a year's time between incidents was not sufficient to prove that the conspiracy had ended. 740 F.2d at 1290, citing *United States v. Steele*, 685 F. 2d 793, 801 (3d Cir.), *cert. denied,* 459 U.S. 908 (1982) (where the purpose of a conspiracy to bribe and defraud could not continue after the scheme was disclosed, the conspiracy terminated conclusively on the date when it was disclosed to officials with authority to order a prosecution) and *United States v. Mayes*, 512 F.2d 637, 642-43 (6th Cir.) (Sixth Circuit stated, "Nor does the fact that the conspiracy continued over a long period of time and contemplated the commission of many illegal acts transform the single conspiracy into several conspiracies.... A conspiracy is completed when the intended purpose of the conspiracy is accomplished. But where a conspiracy contemplates a continuity of purpose and continued performance of acts, it is presumed to exist until there has been an affirmative showing that it has terminated; and its members continue to be conspirators until there has been an affirmative showing that they have withdrawn." citations omitted.).

6.18.371J-1 Conspiracy – Withdrawal Before the Commission of an Overt Act as a Defense to Conspiracy

(Name) **has argued that** *(he) (she)* **is not guilty of the conspiracy charged in the indictment because** *(he) (she)* **withdrew from the conspiracy. If you find, based on the evidence, that** *(name)* **withdrew from the conspiracy before any conspirator committed any overt act, then you must find** *(name)* **not guilty of conspiracy.**

In order to withdraw from the conspiracy, *(name)* **must have taken some clear, definite and affirmative action to terminate** *(his) (her)* **participation, to abandon the illegal objective, and to disassociate** *(himself) (herself)* **from the agreement. Withdrawal requires proof that** *(name)* **changed** *(his) (her)* **intent about participating in the agreement. If the evidence only shows that** *(name)* **stopped activities in furtherance of the conspiracy, or stopped cooperating with the conspiracy, or merely was inactive for a period of time, that is not enough to find that** *(name)* **withdrew from the conspiracy.**

[As explained in the Comment, choose one of the following alternatives with respect to the burden of proof on withdrawal:

Alternative 1 [No burden of proof on defendant to prove withdrawal]:

It is the government's burden to prove beyond a reasonable doubt that (name) was a member of the conspiracy at the time when an overt act was committed. If, after considering all the evidence in this case, you have a reasonable doubt about whether (name) was a member of the conspiracy at the time when the alleged overt act was committed, you must find (name) not guilty of the conspiracy. However, even if you find

that (name) withdrew from the conspiracy at some point in time, you should still find (name) guilty of conspiracy if you find that the government proved beyond a reasonable doubt that all the elements of the conspiracy charged in the indictment, including the requirement of the commission of an overt act, occurred before (name) withdrew.

Alternative 2 [Burden of proof on defendant to prove withdrawal by a preponderance of the evidence]:

(Name) has the burden of proving by a preponderance of the evidence that [he] [she] withdrew from the conspiracy before the commission of the alleged overt act. Preponderance of the evidence is a lower standard than proof beyond a reasonable doubt. To prove something by a preponderance of the evidence means to prove that it is more likely true than not true. If you put the credible evidence that is favorable to (name) and the credible evidence that is favorable to the government on opposite sides of a scale, the scale would have to tip somewhat on (name's) side in order for you to find that (name) is not guilty because of withdrawal before the commission of the alleged overt act. However, if the scale tips in favor of the government, or if the credible evidence appears to be equally balanced, or if you cannot say on which side the credible evidence is heavier, then you must decide that (name) has not proved the defense of withdrawal before commission of the alleged overt act by a preponderance of the evidence. In making this determination, you should consider all of the evidence presented during the trial, regardless of who offered it. You should evaluate the evidence and its credibility according to the instructions I gave you earlier.

You should also remember that the fact that (name) raised this defense does not relieve the government of the burden of proving all the elements of the offense(s) charged beyond a reasonable doubt.]

Comment

See 2 O'Malley et al, supra, § 31.11. For variations in other Circuits, *see* Sixth Circuit §§ 3.11A, C; Seventh Circuit §§ 5.12, 5.13; Eighth Circuit § 5.06H; Ninth Circuit § 8.19.

Withdrawal Can Be a Defense in Different Ways:

(1) A defense to conspiracy if, although the jury finds that defendant joined the agreement with the required mental state, the evidence shows that the defendant withdrew before the commission of an overt act (this instruction); or

(2) A defense to conspiracy and to substantive offenses committed by other co-conspirators where, although the evidence proves that a conspiracy existed, the defendant joined the conspiracy with the required mental state, and an overt act was committed while defendant was a member, the evidence also proves that defendant withdrew and thereafter the statutes of limitation ran before the government obtained an indictment (*see* Instruction 6.18.371J-2 (Withdrawal as a Defense to Conspiracy Based on the Statute of Limitations)); or

(3) As a defense to substantive offenses committed by other co-conspirators, if the evidence proves that the defendant withdrew before the substantive offenses were committed *(see* Instruction 7.04 (Withdrawal as a Defense to Substantive Offense Committed by Co-Conspirators)).

See, e.g., United States v. Kushner, 305 F.3d 194, 198 (3d Cir. 2002); *United States v. Boone*, 279 F.3d 163, 192 (3d Cir. 2002); *United States v. Antar*, 53 F.3d 568, 582 (3d Cir. 1995); *United States v. Steele*, 685 F.2d 793, 803 (3d Cir. 1982); *United States v. Lowell*, 649 F.2d 950, 955 (3d Cir. 1981).

Burden of Proof. When the conspiracy charged does not require the government to prove an overt act this instruction would appear inappropriate. *See* Commentary to Third Circuit Model Instruction 6.18.371F (Conspiracy – Overt Acts) supra. As the Committee Commentary to Federal Judicial Center Instruction 63 reasoned "While case law on withdrawal is clear where an overt act is required (such as 18 U.S.C. § 371), there is little case law dealing with conspiracies where no overt act is required (such as 21 U.S.C. § 846). Since in the latter situation the crime is complete when the defendant joins a conspiracy, the concept of withdrawal would appear to be inapplicable" as a defense to the conspiracy offense. Of course, in such cases Instruction 6.18.371J-2 (Conspiracy – Withdrawal as a Defense to Conspiracy Based on the Statute of Limitations) and Instruction 7.04 (Withdrawal as a Defense to Substantive Offense Committed by Co-Conspirators) may be appropriate.

This instruction provides alternatives with respect to the burden of proof on withdrawal before the commission of an overt act.

Alternative 1 places the burden on the government to disprove withdrawal beyond a reasonable doubt; Alternative 2 puts the burden on the defendant to prove withdrawal by a preponderance of the evidence. These alternatives are provided because it is unclear how the Supreme Court would rule on the burden of proof where the defense is withdrawal before the commission of an overt act, as opposed to withdrawal as a statute of limitations defense.

Before the Supreme Court's decision in *Smith v. United States*, 568 U.S.106 (2013), this instruction stated, in accordance with Third Circuit case law, that the government had the burden of proof on withdrawal when the defense raised was withdrawal before the commission of an overt and also withdrawal as a defense based on the statute of limitations. *See, e.g., United States v. Antar*, 53 F.3d 568, 582 (3d Cir. 1995) (articulating a two-stage burden of proof for withdrawal as a statute of limitations defense, under which the defendant must come forward with evidence evincing a prima facie showing of withdrawal and then the burden shifts to the government to rebut the prima facie case, "either by impeaching the defendant's proof or by going forward with evidence of some conduct in furtherance of the conspiracy subsequent to the act of withdrawal"); *United States v. Jannotti*, 729 F.2d 213, 221 (3d Cir. 1984); *United States v. Steele*, 685 F.2d 793, 803-04 (3d Cir.1982) (reversing convictions because the government failed to produce evidence to rebut defendant's prima facie showing of withdrawal prior to the period of limitations); *United States v. Detelich*, 351 Fed. Appx. 616, 620 (3d Cir. 2009) (non-precedential).

However, in *Smith* (a case in which the offenses charged were conspiracy to distribute and possess with intent to distribute controlled substances under 21 U.S.C. § 846 and conspiracy to violate RICO under 18 U.S.C. § 1962(d)), the Supreme Court held that when the defendant asserts that he withdrew from the conspiracy and then the statute of limitations ran before his indictment, this is an affirmative defense to conspiracy that the defendant has the burden of proving. The Court reasoned that withdrawal as a statute of limitations defense does not negate an element of the charged conspiracy; it presupposes that the defendant committed the offense. Conspiracy is a continuing offense; withdrawal starts the running of the statute of limitations time clock, but the defendant remains guilty of the conspiracy before withdrawal. 568 U.S. at 110. The Court noted that, "Congress may choose to assign the Government the burden of proving nonexistence of withdrawal, even if it is not constitutionally required. It did not do so here." 568 U.S. at 112. The Court also acknowledged that "we have held that the Government must prove the time of the conspiracy offense if a statute-of-limitations defense is raised." 568 U.S. at 113, citing *Grunewald v. United States*, 353 U.S. 391, 396 (1957). Because the Court's reasoning applies to the offense of conspiracy generally and is not limited to the specific conspiracy offenses in that case, Instruction 6.18.371J-2 (Withdrawal as a Defense to Conspiracy Based on the Statute of Limitations) reflects the *Smith* decision by placing the burden of proving withdrawal as a statute of limitations defense on the defendant in an 18 U.S.C. § 371 conspiracy case.

In *Smith*, the Court did not address the situation in which withdrawal is raised as a defense to conspiracy because it is alleged to have occurred before the commission of an overt act. The Court had no occasion to discuss this situation, because the controlled substance and RICO conspiracies charged in that case do not include overt act elements, and the Court's reasoning does not necessarily apply to this defense. When the charged conspiracy includes an overt act element, as it would under 18 U.S.C. § 371, the government must prove beyond a reasonable doubt the elements of the offense as stated in Instruction 6.18.371A (Conspiracy To Commit An Offense Against The United States Basic Elements (18 U.S.C. § 371)), including the element that the defendant was a member of the conspiracy at the time when an overt act was committed. Thus, when withdrawal is raised as a defense to conspiracy because it is alleged to have occurred before the commission of an overt act, unlike the statute of limitations defense in *Smith*, withdrawal would seem to negate an element of the offense – the defendant's continued membership in the conspiracy at a critical time, when an overt act was committed. In that situation, the defense does not presuppose that the defendant committed the conspiracy offense for which the defendant would remain guilty before withdrawal; instead, the defendant asserts that the government failed to prove the existence of a conspiracy before withdrawal. See *Smith v. United States,* 568 U.S. at 110.

As a general matter, in order to sustain its burden of proving each element beyond a reasonable doubt, the government has the burden of disproving all properly raised "defenses" that would negate an element. *See, e.g., Dixon v. United States*, 126 S. Ct. 2437, 2441-43 (2006) (burden of proof on duress can be placed on defendant because duress does not negate an element of the offense); *Cheek v. United States*, 498 U.S. 192, 202 (1991) (the government's burden of proving actual knowledge of the pertinent legal duty component of the willfully element requires negating a defendant's claim of ignorance of the law or a claim that because of a misunderstanding of the law, he had a good-faith belief that he was not violating any of the provisions of the tax laws).

Nevertheless, because it is not clear from the *Smith* opinion how the Supreme Court might rule on the burden of proof where the defense is withdrawal before the commission of an overt act, this instruction provides alternatives regarding burden of proof.

Defendant's Prima Facie Showing Required to Give Instruction. This instruction should be given when the defendant makes a prima facie showing of withdrawal before the commission of an overt act. If the trial court is not satisfied that the defendant made a prima facie showing of withdrawal, the court need not give a withdrawal instruction. *See, e.g., United States v. Boone*, 279 F.3d at 192-93 (holding defendant did not make the prima facie showing required under *Antar* to warrant an instruction on withdrawal).

Withdrawal Standard. In *United States v. Antar*, 53 F.3d 568 (3d Cir. 1995), the Third Circuit held that the trial judge properly refused to dismiss charges of conspiracy and substantive offenses committed by co-conspirators because of the statutes of limitations, finding that the defendant failed to make out a prima facie case of withdrawal. Although *Antar* involved an 18 U.S.C. § 1962(d) RICO conspiracy, not a section 371 conspiracy, the Third Circuit noted that, "[i]n this regard, section 1962(d) long has been interpreted against the backdrop of traditional

conspiracy law and thus the same analysis applies both to the RICO and section 371 conspiracies." 53 F.3d at 582. With respect to the standard for withdrawal, the court stated:

> The Supreme Court long ago set forth a rigorous standard for demonstrating withdrawal. In 1912, in *Hyde v. United States,* 225 U.S. 347, 32 S.Ct. 793, 56 L.Ed. 1114 (1912), the Court explained:
>
> > Having joined in an unlawful scheme, having constituted agents for its performance, scheme and agency to be continuous until full fruition be secured, until he does some act *to disavow or defeat the purpose* he is in no situation to claim the delay of the law. As the offense has not been terminated or accomplished, he is still offending. And, we think, consciously offending, offending as certainly ... as at the first moment of his confederation, and continuously through every moment of its existence.... Until he does withdraw there is conscious offending....
>
> *Id.* at 369-70, 32 S.Ct. at 803 (emphasis added). Thus, we have held that "[m]ere cessation of activity in furtherance of an illegal conspiracy does not necessarily constitute withdrawal." *United States v. Steele,* 685 F.2d 793, 803 (3d Cir. 1982), *cert. denied,* 459 U.S. 908, 103 S.Ct. 213, 74 L. Ed.2d 170 (1982). Rather, "[t]he defendant must present evidence of some affirmative act of withdrawal on his part, *typically either a full confession to the authorities or communication to his co-conspirators that he has abandoned the enterprise and its goals.*" *Id.* at 803-04 (emphasis added); *see also United States v. Heckman,* 479 F.2d 726, 729 (3d Cir.1973). Of course, there is no single way withdrawal can be established; in large part whether a particular action constitutes withdrawal depends on context. Thus, the Supreme Court has cautioned against placing "confining blinders" on the jury's consideration of evidence of withdrawal and has held that "[a]ffirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators have generally been regarded as sufficient to establish withdrawal or abandonment." *United States v. United States Gypsum Co.,* 438 U.S. 422, 464-65, 98 S. Ct. 2864, 2887, 57 L. Ed.2d 854 (1978).

53 F.3d at 582. In *United States v. United States Gypsum Co.,* 438 U.S. 422, 463-64 (1978), the Supreme Court held it was error to instruct the jury that, "In order to find that a defendant abandoned or withdrew from a conspiracy ... you must find, from the evidence, that he or it took some affirmative action to disavow or defeat its purpose. Mere inaction would not be enough to demonstrate abandonment. To withdraw, a defendant *either must have affirmatively notified each other member of the conspiracy he will no longer participate in the undertaking so they understand they can no longer expect his participation or acquiescence, or he must make disclosures of the illegal scheme to law enforcement officials.*" The Court reasoned that, "The charge, fairly read, limited the jury's consideration to only two circumscribed and arguably impractical methods of demonstrating withdrawal from the conspiracy." 438 U.S. at 464.

6.18.371J-2 Conspiracy – Withdrawal as a Defense to Conspiracy Based on the Statute of Limitations

(Name) **has argued that** *(he) (she)* **is not guilty of the conspiracy charged in the indictment because** *(he) (she)* **withdrew from the conspiracy. If you find, based on the evidence, that** *(name)* **withdrew from the conspiracy before** *(date, X years before the government obtained the indictment charging the conspiracy)***, then you must find** *(name)* **not guilty of conspiracy.**

In order to withdraw from the conspiracy, *(name)* **must have taken some clear, definite and affirmative action to terminate** *(his) (her)* **participation, to abandon the illegal objective, and to disassociate** *(himself) (herself)* **from the agreement. Withdrawal requires proof that** *(name)* **changed** *(his) (her)* **intent about participating in the agreement. If the evidence only shows that** *(name)* **stopped activities in furtherance of the conspiracy, or stopped cooperating with the conspiracy, or merely was inactive for a period of time, that is not enough to find that** *(name)* **withdrew from the conspiracy.**

(Name) **has the burden of proving by a preponderance of the evidence that** *[he] [she]* **withdrew from the conspiracy before** *(date, X years before the government obtained the indictment charging the conspiracy)***. Preponderance of the evidence is a lower standard than proof beyond a reasonable doubt. To prove something by a preponderance of the evidence means to prove that it is more likely true than not true. If you put the credible evidence that is favorable to** *(name)* **and the credible evidence that is favorable to the government on opposite sides of a scale, the scale**

would have to tip somewhat on *(name's)* side in order for you to find that *(name)* is not guilty because of withdrawal before *(date)*. However, if the scale tips in favor of the government, or if the credible evidence appears to be equally balanced, or if you cannot say on which side the credible evidence is heavier, then you must decide that *(name)* has not proved the defense of withdrawal before *(date)* by a preponderance of the evidence. In making this determination, you should consider all of the evidence presented during the trial, regardless of who offered it. You should evaluate the evidence and its credibility according to the instructions I gave you earlier.

You should also remember that the fact that *(name)* raised this defense does not relieve the government of the burden of proving all the elements of the offense*(s)* charged beyond a reasonable doubt.

Comment

See 2 O'Malley et al, supra, § 31.11. For variations in other Circuits, *see* Sixth Circuit §§ 3.11A, C; Seventh Circuit §§ 5.12, 5.13; Eighth Circuit § 5.06H; Ninth Circuit § 8.19.

Defendant's Prima Facie Showing Required to Give Instruction. This instruction should be given when the defendant makes a *prima facie* showing of withdrawal after which the period of limitations ran. The Third Circuit has recognized that withdrawal from the conspiracy starts the running of the statute of limitations as to the withdrawing defendant. *See, e.g., United States v. Kushner*, 305 F. 3d 194, 198 (3d Cir. 2002), citing *United States v. Read,* 658 F.2d 1225, 1233 (7th Cir.1981) ("Withdrawal becomes a complete defense only when coupled with the defense of the statute of limitations."); *United States v. Antar*, 53 F.3d 568, 582 (3d Cir. 1995) ("However, if a defendant properly and adequately terminates his or her involvement with the conspiracy, he or she no longer can be held responsible for acts of his or her co-conspirators and the statute of limitations begins to run in his behalf."); *United States v. Lowell*, 649 F.2d 950, 958 (3d Cir. 1981) (Third Circuit approved the trial court's instruction that, "If this withdrawal occurs more than five years before the defendant was indicted, he may not be convicted of the conspiracy, even though he at one time was part of it. Unless, within five years of the day on

which he was indicted the defendant rejoined the conspiracy and participated in furtherance of it.")

If the trial court is not satisfied that the defendant made a prima facie showing of withdrawal, the court need not give a withdrawal instruction. *See, e.g., United States v. Boone*, 279 F.3d at 192-93 (holding defendant did not make the prima facie showing required under *Antar* to warrant an instruction on withdrawal).

Withdrawal Standard. The standard for withdrawal is discussed in the comment to Instruction 6.18.371J-1.

Burden of Proof. Before the Supreme Court's decision in *Smith v. United States*, 568 U.S.106 (2013), this instruction stated, in accordance with Third Circuit case law, that the government had the burden of proof on withdrawal when the defense raised was withdrawal before the commission of an overt and also withdrawal as a defense based on the statute of limitations. *See, e.g., United States v. Antar*, 53 F.3d 568, 582 (3d Cir. 1995); *United States v. Jannotti*, 729 F.2d 213, 221 (3d Cir. 1984); *United States v. Steele*, 685 F.2d 793, 803-04 (3d Cir.1982); *United States v. Detelich*, 351 Fed. Appx. 616, 620 (3d Cir. 2009) (non-precedential).

However, in *Smith* (a case in which the offenses charged were conspiracy to distribute and possess with intent to distribute controlled substances under 21 U.S.C. § 846 and conspiracy to violate RICO under 18 U.S.C. § 1962(d)), the Supreme Court held that when the defendant asserts that he withdrew from the conspiracy and then the statute of limitations ran before his indictment, this is an affirmative defense to conspiracy that the defendant has the burden of proving. Accordingly, the Court affirmed the district court's instruction that "'[o]nce the government has proven that a defendant was a member of a conspiracy, the burden is on the defendant to prove withdrawal from a conspiracy by a preponderance of the evidence.'" 133 S. Ct. at 718. Because the Court's reasoning in *Smith* applies to the offense of conspiracy generally and is not limited to the specific conspiracy offenses charged in that case (*see* discussion in the Comment to Instruction 6.18.371J-1 (Conspiracy – Withdrawal Before the Commission of an Overt Act as a Defense to Conspiracy)), this instruction was revised to place the burden of proving withdrawal as a statute of limitations defense on the defendant in an 18 U.S.C. 371 conspiracy case.

(Revised 11/2018)

6.18.371K Conspiracy – Acts and Statements of Co-Conspirators

Evidence has been admitted in this case that certain persons, who are alleged to be co-conspirators of *(name)***, did or said certain things. The acts or statements of any member of a conspiracy are treated as the acts or statements of all the members of the conspiracy, if these acts or statements were performed or spoken during the existence of the conspiracy and to further the objectives of the conspiracy.**

Therefore, you may consider as evidence against *(name)* **any acts done or statements made by any members of the conspiracy, during the existence of and to further the objectives of the conspiracy. You may consider these acts and statements even if they were done and made in** *(name)***'s absence and without** *(his) (her)* **knowledge. As with all the evidence presented in this case, it is for you to decide whether you believe this evidence and how much weight to give it.**

[*Acts done or statements made by an alleged co-conspirator before (name) joined the alleged conspiracy may also be considered by you as evidence against (name). However, acts done or statements made before the alleged conspiracy began or after it ended may only be considered by you as evidence against the person who performed that act or made that statement.*]

Comment

See 2 O'Malley et al, supra, § 31.06; Sand et al, supra, 19-9; Sixth Circuit § 3.14; Eighth Circuit § 5.06I.

Trial Court's Determination of the Prerequisites for Admissibility. Federal Rule of

Evidence 801 provides: "(d) (Statements which are not hearsay) A statement is not hearsay if– (2) Admission by party-opponent. The statement is offered against a party and is ... (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." Fed. R. Evid. 801(d)(2)(E). In accordance with Federal Rule of Evidence 104(a) ("The court must decide any preliminary question about whether …. evidence is admissible."), the Supreme Court held in *Bourjaily v. United States,* 483 U.S. 171, 175 (1987), that the trial judge, not the jury, decides whether the prerequisites for admissibility of co-conspirator statements are satisfied, and the judge must be able to find these requirements by a preponderance of the evidence. Thus, in *United States v. McGlory*, 968 F.2d 309, 333 (3d Cir. 1992), the Third Circuit stated with respect to co-conspirator statements, "Four requirements must be met before statements can be admitted under this exception. It must appear: (1) that a conspiracy existed; (2) the declarant and the party against whom the statement is offered were members of the conspiracy; (3) the statement was made in the course of the conspiracy; and (4) the statement was made in furtherance of the conspiracy. The district court must be able to find these requirements by a preponderance of the evidence. *Bourjaily v. United States*...." Also *see, e.g., United States v. Kemp*, 500 F.3d 257, 298 (3d Cir. 2007).

Rule 801(d)(2) also provides that, "The statement must be considered but does not by itself establish …or the existence of the conspiracy or participation in it under (E)." Fed. R. Evid. 801(d)(2). Also, *see, e.g., Bourjaily v. United States,* 483 U.S. at 181 (where the Supreme Court stated, before this language was added to Rule 801(d)(2), "It is sufficient for today to hold that a court, in making a preliminary factual determination under Rule 801(d)(2)(E), may examine the hearsay statements sought to be admitted. As we have held in other cases concerning admissibility determinations, 'the judge should receive the evidence and give it such weight as his judgment and experience counsel.' *United States v. Matlock,* 415 U.S. [164], at 175 [1974].").

The court need not instruct regarding each prerequisite of admissibility of a co-conspirator statement, after the court has deemed such a statement admissible. The Third Circuit explained:

> [W]e have never "condemned" the practice of giving jury instructions on the admissibility of co-conspirator's statements against individual defendants. In *Continental Group*, we suggested in dicta that jury instructions concerning the factual foundation required for application of the co-conspirator exception to the hearsay rule are best omitted, as they give the jury the "opportunity to second-guess the court's decision to admit coconspirator declarations." 603 F.2d at 459. We observed, however, that such instructions could not give rise to reversible error because, if anything, they inure to the benefit of the defendant. *Id.*

United States v. Pungitore, 910 F.2d 1084, 1147 (3d Cir. 1990), quoting *United States v. Continental Group*, 603 F.2d 444, 459 (3d Cir. 1979). The model instruction provides some explanation to the jury of the permitted use of co-conspirator statements without providing unnecessary explication of the basis of admissibility.

In *United States v. Jannotti*, 729 F.2d 213, 221 (3d Cir. 1984), the Third Circuit noted, "The Supreme Court has held that 'the declarations and acts of the various members, even though made or done prior to the adherence of some to the conspiracy, become admissible against all as declarations or acts of co-conspirators in aid of the conspiracy.' *United States v. United States Gypsum Co.,* 333 U.S. 364, 393, 68 S.Ct. 525, 541, 92 L.Ed. 746 (1948). *See also United States v. Lester,* 282 F.2d 750, 753 (3d Cir.1960); *Lefco v. United States,* 74 F.2d 66, 68 (3d Cir.1934)."

Admissibility Unaffected by *Crawford v. Washington*. The admissibility of co-conspirator statements appears to be unaffected by the Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct.1354 (2004) (holding that testimonial, out-of-court statements are inadmissible under the Confrontation Clause, unless the declarant is unavailable to testify at trial and the defendant had an opportunity to cross-examine the declarant). Although *Crawford* did not precisely define "testimonial" statements, it recognized that where, "[a] witness makes a formal statement to government officers [it] bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Crawford,* 541 U.S. at 51, 124 S.Ct. at 1364. The Court also noted that "[m]ost of the hearsay exception covered statements that by their nature were not testimonial – for example, business records or statements in furtherance of a conspiracy." *Id.* at 56.

In *United States v. Hendricks*, 395 F.3d 173 (3d Cir. 2005), the Third Circuit held that conversations between co-conspirators that were intercepted by law enforcement through authorized Title III wiretaps and co-conspirator statements in conversations recorded by a confidential informant were not testimonial statements. 395 F.3d at 180-84, citing, *cf. United States v. Robinson,* 367 F.3d 278, 292 n. 20 (5th Cir. 2004); *United States v. Reyes,* 362 F.3d 536, 541 n. 4 (8th Cir. 2004); *People v. Cook,* 815 N.E.2d 879, 893 (Ill. App. 2004). The Third Circuit noted, "Indeed, the *Crawford* Court referenced *Bourjaily* as an example of a case in which nontestimonial statements were correctly admitted against the defendant despite the lack of a prior opportunity for cross-examination. *See Crawford,* 541 U.S. at 58, 124 S.Ct. at 1368 (citing *Bourjaily,* 483 U.S. at 181-84, 107 S.Ct. 2775)." 395 F.3d at 183. *Bourjaily* had upheld the admissibility of admissions made unwittingly by a purported coconspirator to an informant. 483 U.S. at 181-184. It is rare that a testimonial co-conspirator statement (*e.g.,* a statement knowingly made by a co-conspirator to the authorities, describing criminal activity) would be admissible, except where the object of the conspiracy is to obstruct justice by making false statements to law enforcement. *See United States v. Stewart*, 433 F.3d 273, 293 (2d Cir. 2006) ("[W]hen the object of a conspiracy is to obstruct justice, mislead law enforcement officers, or commit similar offenses by making false statements to investigating officers, truthful statements made to such officers designed to lend credence to the false statements and hence advance the conspiracy are not rendered inadmissible by the Confrontation Clause.").

Acts or Statements Outside the Presence of the Defendant. O'Malley includes the following language in its instruction on "Acts and Declarations of Co-Conspirators:" "Since these acts may have been performed and these statements may have been made outside the presence of Defendant and even done or said without the defendant's knowledge, these acts or statements should be examined with particular care by you before considering them against the

defendant who did not do the particular act or make the particular statement." O'Malley § 31.06. There are no Third Circuit decisions that discuss the need for this additional admonition, which is contrary to the general rule that a co-conspirator is responsible for the acts of his confederates. *See United States v. Pecora*, 798 F.2d 614, 628-29 (3d Cir. 1986) (statement is admissible regardless of whether the defendant who is being spoken about is a party to the conversation, and regardless of whether the declarant is on trial). The general rule of admission rests on the theory that when a person joins a conspiracy, his co-conspirators become his agents and each is responsible for the acts and statements of the others. The rationale of the hearsay exception "is the common sense appreciation that a person who has authorized another to speak or to act to some joint end will be held responsible for what is later said or done by his agent, whether in his presence or not." *United States v. Trowery*, 542 F.2d 623, 626 (3d Cir. 1976).

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