

AFFIRMATIVE DEFENSE OF RENUNCIATION

(Published May 2024)

NOTE: If the affirmative defense of renunciation is applicable, omit the final two paragraphs of the instructions of the crime charged (i.e. the paragraphs informing the jury of what they must do if they find the elements proven or not proven), and insert the following:

If you find that the People have not proven beyond a reasonable doubt any one of those elements, you must find the defendant not guilty of (specify).

If you find that the People have proven beyond a reasonable doubt each of those elements, you must consider the defendant's affirmative defense of Renunciation.

Remember, if you already found the defendant not guilty, you will not consider this affirmative defense.

Under our law:

Select applicable affirmative defense of Renunciation from the following definitions of the affirmative defense of Renunciation set forth in Penal Law § 40.10.

Note: the following is subdivision (1) of Penal Law § 40.10¹

it is an affirmative defense that, under circumstances manifesting a voluntary and complete renunciation of his/her criminal purpose, the defendant withdrew from participation in such offense prior to the commission thereof and made a substantial effort to prevent the commission thereof.

¹ Subdivision (1) applies to "any prosecution for an offense, other than an attempt to commit a crime, in which the defendant's guilt depends upon his criminal liability for the conduct of another person pursuant to section 20.00."

Note: the following is subdivision (2) of Penal Law § 40.10²

it is an affirmative defense that, prior to the commission of the felony which the defendant facilitated, the defendant made a substantial effort to prevent the commission of such felony.

Note: the following is subdivision (3) of Penal Law § 40.10³

it is an affirmative defense that, under circumstances manifesting a voluntary and complete renunciation of his/her criminal purpose, the defendant avoided the commission of the crime attempted by abandoning his/her criminal effort and, if mere abandonment was insufficient to accomplish such avoidance, by taking further and affirmative steps which prevented the commission thereof.

Note: the following is subdivision (4) of Penal Law § 40.10⁴

it is an affirmative defense that, under circumstances manifesting a voluntary and complete renunciation of his/her criminal purpose, the defendant prevented the commission of such crime.

² Subdivision (2) applies to “any prosecution for criminal facilitation pursuant to article one hundred fifteen.”

³ Subdivision (3) applies to “any prosecution pursuant to section 110.00 for an attempt to commit a crime.”

⁴ Subdivision (4) applies to “any prosecution for criminal solicitation pursuant to article one hundred or for conspiracy pursuant to article one hundred five in which the crime solicited or the crime contemplated by the conspiracy was not in fact committed.”

Under our law, a renunciation is not "voluntary and complete":

Select appropriate alternative(s):

if it is motivated in whole or in part by a belief that circumstances exist which increase the probability of detection or apprehension of the defendant or another participant in the criminal enterprise, or which render more difficult the accomplishment of the criminal purpose, or

if it is motivated in whole or in part by a decision to postpone the criminal conduct until another time or to transfer the criminal effort to another victim or another but similar objective.⁵

Under our law, the defendant has the burden of proving an affirmative defense by a preponderance of the evidence.

A preponderance of the evidence means the greater part of the believable and reliable evidence, not in terms of the number of witnesses or the length of time taken to present the evidence, but in terms of its quality and the weight and convincing effect it has. For the affirmative defense to be proved by a preponderance of the evidence, the evidence that supports the affirmative defense must be of such convincing quality as to outweigh any evidence to the contrary.

In determining whether the defendant has proven the affirmative defense by a preponderance of the evidence, you may consider evidence introduced by the People or by the defendant.

If you find that the defendant has not proven the affirmative defense by a preponderance of the evidence, then, based upon your initial determination that the People had proven beyond a

⁵ Penal Law § 40.10(5).

reasonable doubt each of the elements of (specify the name of the offense), you must find the defendant guilty of (specify).

If you find that the defendant has proven the affirmative defense by a preponderance of the evidence, then you must find the defendant not guilty of (specify).