

OUJI-CR 1-5  
EXAMINATION BY THE COURT

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Alternate 2 (Death Penalty)

The defendant is charged with murder in the first degree. It will be the duty of the jury to determine whether the defendant is guilty or not guilty after considering the evidence and instructions of law presented in court.

If the jury finds beyond a reasonable doubt that the defendant is guilty of murder in the first degree, the jury will then have the duty to assess punishment. The punishment for murder in the first degree is death, imprisonment for life without parole or imprisonment for life.

You may not consider imposing the death penalty unless you find that one or more aggravating circumstances exist beyond a reasonable doubt. Aggravating circumstances are those which increase the defendant's guilt or enormity of the offense. You also may not consider imposing the death penalty unless you unanimously find that the aggravating circumstance or circumstances outweigh any mitigating circumstances which may be present. Mitigating circumstances are 1) circumstances that may extenuate or reduce the degree of moral culpability or blame, or 2) circumstances which in fairness, sympathy or mercy may lead you as

jurors individually or collectively to decide against imposing the death penalty. Even if you find that the aggravating circumstance(s) outweigh(s) the mitigating circumstance(s), you may impose a sentence of imprisonment for life with the possibility of parole or imprisonment for life without the possibility of parole.

If you find the defendant guilty of murder in the first degree, can you consider all three of these legal punishments—death, imprisonment for life without parole or imprisonment for life—and weigh the aggravating circumstance(s) against the mitigating circumstances to impose the one punishment warranted by the law and evidence?

[If the answer to the preceding question is negative]

If you found beyond a reasonable doubt that the defendant was guilty of murder in the first degree and if under the evidence, facts and circumstances of the case the law would permit you to consider a sentence of **death/(imprisonment for life without parole)/(imprisonment for life)**, are your reservations about the penalty of **death/(imprisonment for life without parole)/ (imprisonment for life)** so strong that regardless of the law, the facts and circumstances of the case, you would not consider the imposition of the penalty of death/(imprisonment for life without parole)/(imprisonment for life)?

[Required To Be Asked In All Death Penalty Cases ] - If you find beyond a

reasonable doubt that the defendant is guilty of murder in the first degree, will you automatically impose the penalty of death?

#### Notes on Use

Alternate 2 shall be given when the crime charged is murder in the first degree and the death penalty is sought. The Oklahoma Court of Criminal Appeals emphasized in *Hanson v. State*, 2003 OK CR 12, ¶ 6, 72 P.3d 40, 46-47, that "[t]his Court has repeatedly held that, if a defendant so requests, either he or the trial court must ask prospective jurors whether they would automatically impose a sentence of death." While the Committee acknowledges that *Morgan v. Illinois*, 504 U.S. 719 (1992) does not require the last question to be asked absent the request of defense counsel, the Committee believes that the interests of justice and judicial economy will be best served if the trial court asks this question in all death penalty cases.

#### Committee Comments

The punishments authorized in 21 O.S. 2001 § 701.9 are death, imprisonment of life without parole, and imprisonment for life.

The United States Supreme Court held in *Witherspoon v. Illinois*, 391 U.S. 510, 521-22 (1968), that the death penalty could not be carried out if it was imposed by a jury from which jurors had been excluded because they voiced general objection to the death penalty or conscientious or religious scruple to it. A juror may be challenged for cause, however, if that juror's views on capital punishment would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt*, 469 U.S. 412, 424 (1985), quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980). See also *Trice v. State*, 1993 OK CR 19, ¶ 8, 853 P.2d 203, 209 (applying this standard). A juror should not be excused for cause because he or she disagrees with the death penalty or even if imposing it would do violence to the juror's conscience. *Banks v. State*, 1985 OK CR 60, ¶ 10, 701 P.2d 418, 422 ("Violence done to one's conscience is not the point of the *Witherspoon* voir dire examination."). Instead, the trial court's concern should be "whether each jury member will consider the imposition of the death sentence, as one of the alternatives provided by state law, should the case be appropriate for that punishment." *Duvall v. State*, 1991 OK CR 64, ¶ 24, 825 P.2d 621, 630.

In addition to being willing to consider imposition of a death sentence, if warranted, a juror must also be willing to consider the alternative sentences of imprisonment for life without parole and imprisonment for life. The United

States Supreme Court held in *Morgan v. Illinois*, 504 U.S. 719, 735 (1992), that a trial court's refusal to inquire into whether a potential juror would automatically impose the death penalty upon conviction of a defendant was a violation of due process of law. *See also Ross v. Oklahoma*, 487 U.S. 81, 85 (1988) (juror who stated that he would vote to impose death automatically if the jury decided that the defendant was guilty should have been removed for cause). In *Hanson v. State*, 2003 OK CR 12, ¶¶ 6-8, 72 P.3d 40, 46-47, the Oklahoma Court of Criminal Appeals remanded for capital resentencing because the trial court did not allow defense counsel to ask whether any juror would automatically impose death.

Although Alternate 2 does not conform exactly to the language that the Court of Criminal Appeals recommended in *Duvall v. State, supra*, Alternate 2 is consistent with *Duvall's* holding. It also incorporates the requirement in *Morgan v. Illinois, supra*, that the trial judge should question the jurors about whether they would give appropriate consideration to life imprisonment as well as the death penalty. *Cf. Hammon v. State*, 1995 OK CR 33, ¶ 54, 898 P.2d 1287, 1300 ("A defendant on trial for his life must be permitted on voir dire to ascertain whether his prospective jurors function under the belief that upon conviction the death penalty should automatically be imposed.").

The Court of Criminal Appeals stated in *Eizember v. State*, 2007 OK CR 29, ¶ 64, n.10, --- P.3d ----, 2007 WL 2142304, that the trial judge should inform the jury of the process to be followed for determining the punishment and elicit a response to whether the jurors would be able to follow that process.

OUJI-CR 1-8  
OPENING INSTRUCTION

You have been selected and sworn as the jury to try the case of the State of Oklahoma against [**Name the Defendant(s)**]. The **defendant(s) is/are** charged with the **crime(s)** of [**Name the Crime Charged**] by an **information/indictment** filed by the State.

The information/indictment in this case is the formal method of accusing the **defendant(s)** of [**a**] **crime(s)**. The **information/indictment** is not evidence and the law is that you should not allow yourselves to be influenced against the **defendant(s)** by reason of the filing of the information/indictment.

The **defendant(s) has/have** pled not guilty. A plea of not guilty puts in issue each element of the crime with which the **defendant(s) is/are** charged. A plea of not guilty requires the State to prove each element of the crime beyond a reasonable doubt.

The **defendant(s) is/are** presumed innocent of the **crime(s)** and the presumption continues unless after consideration of all the evidence you are convinced of **his/her** guilt beyond a reasonable doubt. The State has the burden of presenting the evidence that establishes guilt beyond a reasonable doubt. The

defendant must be found not guilty unless the State produces evidence which convinces you beyond a reasonable doubt of each element of the **crime(s)**.

Evidence is the testimony received from the **witness(es)** under oath, agreements as to fact made by the attorneys, and the exhibits admitted into evidence during the trial.

It is your responsibility as jurors to determine the facts from the evidence, to follow the law as stated in the instructions from the judge, and to reach a verdict of not guilty or guilty based upon the evidence [**and to determine punishment if you should find the defendant(s) guilty**].

#### Notes on Use

The immediately preceding bracketed clause should be used only in a non-bifurcated trial.

It is your responsibility as jurors to determine the credibility of each witness and the weight to be given the testimony of the witness. In order to make this determination, you may properly consider the overall reaction of the witness while testifying; **his/her** frankness or lack of frankness; **his/her** interest and bias, if any; the means and opportunity the witness had to know the facts about which **he/she** testifies; and the reasonableness or unreasonableness of **his/her** testimony in light of all the evidence in the case. You are not required to believe the testimony of

any witness simply because **he/she** is under oath. You may believe or disbelieve all or part of the testimony of any witness. It is your duty to determine what testimony is worthy of belief and what testimony is not worthy of belief.

It is my responsibility as the judge to insure the evidence is presented according to the law, to instruct you as to the law, and to rule on objections raised by the attorneys. No statement or ruling by me is intended to indicate any opinion concerning the facts or evidence.

It is the responsibility of the attorneys to present evidence, to examine and cross-examine witnesses, and to argue the evidence. No statement or argument of the attorneys is evidence.

From time to time during the trial, the attorneys may raise objections. When an objection is made, you should not speculate on the reason why it is made. When an objection is approved or sustained by me, you should not speculate on what might have occurred or what might have been said had the objection not been sustained.

Throughout the trial you should remain alert and attentive. Do not form or express an opinion on the case until it is submitted to you for your decision. Do not discuss this case among yourselves until that time. Do not discuss this case with anyone else or permit anyone else to discuss this case in your presence. Do

not talk to the attorneys, the **defendant(s)**, or the **witness(es)**. If anyone should attempt to discuss this case with you, report the incident to me or to the bailiff immediately. ~~Do not read, or view or listen to any news report of this trial.~~ Do not read newspaper reports or obtain information from the internet or any other source about this trial or the issues, parties or witnesses involved in this case, and do not watch or listen to television or radio reports about it. Do not attempt to visit the scene or investigate this case on your own. This case must be decided solely upon the evidence presented to you in this court, free from any outside influence.

At this point in the trial, the attorney for the State reads the **information/indictment**, the plea of the **defendant(s)**, and gives an opening statement. The attorney for the **defendant(s)** may give an opening statement after the attorney for the State, or may elect to reserve **his/her** opening statement until the conclusion of the evidence by the State. Opening statements are not evidence but serve as guides so that you may better understand and evaluate the evidence when it is presented.

Following the opening statements, witnesses are called to testify. Witnesses are sworn and then examined and cross-examined by the attorneys. Exhibits may also be introduced into evidence.

Approved 8/30/07

After the evidence is completed, I will instruct you on the law applicable to the case. The attorneys are then permitted closing arguments. Closing arguments are not evidence and are permitted for purposes of persuasion only.

When closing arguments are completed, the case will be submitted to you. You will then retire to consider your verdict.

The attorney for the State may now proceed.

OUJI-CR 4-6

ASSAULT AND BATTERY WITH A DEADLY WEAPON - ELEMENTS

No person may be convicted of assault and battery with a deadly weapon unless the State has proved beyond a reasonable doubt each element of the crime.

These elements are:

First, an assault and battery;

Second, upon another person; and

Third, with a deadly weapon;

Fourth, ~~with the intent to take a human life.~~

Notes on Use

If the victim was an unborn child, the court should also give OUJI-CR 4-57, *infra*, and, if appropriate, OUJI-CR 4-57A or 4-57B, or both.

Committee Comments

~~The Court of Criminal Appeals reversed a conviction for assault and battery with a deadly weapon in *Favro v. State*, 749 P.2d 127, on account of the trial court's failure to include the Fourth Element in its jury instructions. Before the amendment of 21 O.S. § 652 in 1992, an intent to take a human life was an element of assault and battery with a deadly weapon. This element was removed from the statute by the 1992 amendment. *Goree v. State*, 2007 OK CR 21, ¶¶ 3-5, 163 P.3d 583, 584-85.~~

OUJI-CR 4-57  
CRIMES AGAINST UNBORN CHILDREN -  
DEFINITION AND LIMITATIONS

A person/(human being) shall include an unborn child. An unborn child means an unborn offspring of human beings from the moment of conception, through pregnancy, and until live birth ~~including the human conceptus, zygote, morula, blastocyst, embryo and fetus.~~

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Statutory Authority: 21 O.S. Supp. ~~2005~~ 2007, §§ 652, 691(B), 713.

Notes on Use

This instruction should be given along with OUJI-CR 4-4, 4-5, 4-6, 4-7, 4-8, ~~4-61, 4-64, 4-91, 4-92, 4-94, 4-95,~~ or 4-96A, or 4-105, *supra*, in cases where the victim was an unborn child. OUJI-CR 4-57A or 4-57B, *infra*, or both, should also be given, if appropriate.

Committee Comments

The constitutionality of fetal homicide statutes in other states has been upheld. See, e.g., *Commonwealth v. Bullock*, 913 A.2d 207, 214-16 (Pa. 2006); *State v. Holcomb*, 956 S.W.2d 286, 291-93 (Mo. Ct. App. 1997). For additional authority, see Alan S. Wasserstrom, Annotation, *Homicide Based on Killing of Unborn Child*, 64 A.L.R. 5<sup>TH</sup> 671 (1998).

OUJI-CR 4-57A  
LIMITATIONS ON **(INJURIES TO)/(DEATH OF)** UNBORN CHILD

No person shall be guilty of:

(murder in the first degree of)

(murder in the second degree of)

(manslaughter in the first degree of)

(manslaughter in the second degree of)

(shooting with intent to kill)

(use of a vehicle to facilitate the discharge of a **firearm/crossbow/weapon**  
in the conscious disregard for the safety of)

(assault and battery with a deadly weapon upon)

~~(willfully killing)~~

an unborn child if:

[The acts that caused the death of the unborn child were committed during a  
legal abortion to which the ~~child's mother~~ pregnant woman consented;]

**OR**

[The acts were committed pursuant to the usual and customary standards of  
medical practice during diagnostic testing or therapeutic treatment.]

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Statutory Authority: 21 O.S. Supp. ~~2005~~ 2007, §§ 652(D), 691(C), 713(B).

Notes on Use

The court should give the paragraphs in brackets if the issues are asserted as affirmative defenses and there is evidence to support them offered at the trial.

OUJI-CR 4-57B  
UNBORN CHILD HOMICIDE – CAUSATION

Under no circumstances shall the mother of the unborn child be convicted for causing the death of the unborn child unless the mother has committed a crime that caused the death of the unborn child.

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Statutory Authority: 21 O.S. Supp. ~~2005~~ 2007, §§ 652(E), 691(D), 713(C).

OUJI-CR 4-78  
DEATH PENALTY PROCEEDINGS -  
JURY'S DETERMINATION OF MITIGATING CIRCUMSTANCES

Mitigating circumstances are ~~those which, in fairness, sympathy, and mercy,~~

1) circumstances that may extenuate or reduce the degree of moral culpability or blame, or 2) circumstances which in fairness, sympathy or mercy may lead you as jurors individually or collectively to decide against imposing the death penalty.

The determination of what circumstances are mitigating is for you to resolve under the facts and circumstances of this case.

While all twelve jurors must unanimously agree that the State has established beyond a reasonable doubt the existence of at least one aggravating circumstance prior to consideration of the death penalty, unanimous agreement of jurors concerning mitigating circumstances is not required. In addition, mitigating circumstances do not have to be proved beyond a reasonable doubt in order for you to consider them.

Notes on Use

The last paragraph of this instruction addresses the concern noted in *Mills v. Maryland*, 486 U.S. 367, 373-84 (1988), that jurors in a death penalty case might mistakenly think that their instructions precluded them from considering any mitigating circumstance unless they unanimously agreed on its existence. Because the sentencing procedures in the *Mills* case differ from Oklahoma's, the Oklahoma Court of Criminal Appeals has consistently distinguished *Mills* and has ruled that the Oklahoma Uniform Jury Instructions could not reasonably be

interpreted to require unanimity regarding mitigating circumstances. *McGregor v. State*, 1994 OK CR 71, ¶ 41, 885 P.2d 1366, 1384 (Ok. Cr. 1994); *Bryson v. State*, 1994 OK CR 32, ¶ 61, 876 P.2d 240, 262 (Ok. Cr. 1994). Accordingly, the Court of Criminal Appeals held in *McGregor* and *Bryson*, as well as in other cases, that it is not error for the trial court to not instruct the jury that its findings regarding mitigating circumstances do not have to be unanimous. The Committee has concluded, however, that such an instruction would assist the jury in its deliberations.

#### Committee Comments

In *Harris v. State*, 2007 OK CR 28, ¶ 26, 164 P.3d 1103, 1114, 2007 WL 2052612, the Oklahoma Court of Criminal Appeals expressed concern that under the previous version of this Instruction “prosecutors could further argue that evidence of a defendant's history, characteristics or propensities should not be considered as mitigating simply because it does not go to his moral culpability or extenuate his guilt.” It suggested modifying this Instruction to “include both (a) that mitigating circumstances may extenuate or reduce the degree of moral conduct or blame, and separately, (b) that mitigating circumstances are those which in fairness, sympathy or mercy would lead jurors individually or collectively to decide against imposing the death penalty.” *Id.* at ¶ 27, 164 P.3d at 1114.

OUJI-CR 4-110  
KIDNAPPING - ELEMENTS

No person may be convicted of kidnapping unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, unlawful;

Second, **(forcible seizure and confinement)/inveiglement;**

Third, of another;

Fourth, with intent to **(confine secretly)/(send out of the State)/(sell as a slave)/(hold to service);**

Fifth, against the person's will

OR

Fifth, the victim was 12 years of age or less at the time of the offense.

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Statutory Authority: 21 O.S. 1994 Supp. 2007, § 741.

Committee Comments

The statutory language reads "without lawful authority," but the Commission has translated that language into the word "unlawful" in the first element. The Commission has decided that the words "without lawful authority" and "unlawful" are synonymous. The Commission has chosen to use the word "unlawful" in order to promote consistency of language among the various instructions. Moreover, the word "unlawful" is more concise. The definition of the word "unlawful" should encompass either of two concepts: (1) that the person who confines another lacks legal or domestic authority; or, (2) that the person

who confines another has used fraud to induce consent to the confinement. Either lack of authority or use of fraud makes the confinement unlawful. R. PERKINS, CRIMINAL LAW 182 (2d ed. 1969). See *Williams v. State*, 1953 OK CR 41 ~~96 Okl. Cr. 362~~, 255 P.2d 532 (1953), *overruled on other grounds*, *Parker v. State*, 1996 OK CR 19, ¶ 23, n.4, 917 P.2d 980, 986 n.4 (~~Okl. Cr. 1996~~).

The second element lists the two alternative activities prohibited by the kidnapping statute. An action is criminal under the kidnapping statute if the act is a forcible seizure and confinement, or inveiglement. The first alternative probably needs no explanation or illustration. The second alternative, inveiglement, is illustrated by *Ratcliff v. State*, 1955 OK CR 110, 289 P.2d 152 (~~Okl. Cr. 1954~~) (12-year-old girl enticed into a car by a man whom she thought to be a friend who would take her to a football game). See also *Williams, supra* (young boy enticed into a car by man who requested the youth's aid in locating a third person).

Even though a person unlawfully confines another, the crime of kidnapping has not been committed unless the accused has the specific mens rea of the crime. The gist of the offense created by section 741 is one of the four alternative mens rea requirements set forth by the statute. *Perry v. State*, 1993 OK CR 5, ¶ 13, 853 P.2d 198, 202 (~~Okl. Cr. 1993~~) (analyzing "hold to service" provision); *Jenkins v. State*, 1973 OK CR 165, 508 P.2d 660 (~~Okl. Cr. 1973~~); *Oglesby v. State*, 1966 OK CR 34, 411 P.2d 974 (~~Okl. Cr. 1966~~); *Vandiver v. State*, 1953 OK CR 130, ~~97 Okl. Cr. 217~~, 261 P.2d 617 (1953).

The fifth element indicates that the actions of the accused must be against the will of the victim. A question is raised whether this fifth element is satisfied when the alleged victim went willingly with the accused because the accused inveigled the person to accompany him, although the person would not have gone willingly had he known of the inveiglement. The Commission has decided that, in these instances, the fifth element is satisfied by proof that the alleged victim would not have consented to accompany the accused if the victim had clearly known of the purposes intended by the accused.

There does not appear to be any requirement of asportation (i.e., carrying away) in section 741. See *Turner v. State*, 1990 OK CR 6, ¶ 13, 786 P.2d 1251, 1255 (~~Okl. Cr. 1990~~) (finding no requirement of asportation or transportation in § 745, the kidnapping for purposes of extortion statute).

OUJI-CR 8-33A  
DEFENSE OF INSANITY -  
EXPLANATION OF CONSEQUENCES OF VERDICT  
OF NOT GUILTY BY REASON OF INSANITY

If you decide that the defendant was insane at the time of the commission of the crime charged, the defendant shall not be released from confinement in a mental hospital until the court determines that the defendant is not at that time dangerous to the public peace and safety by being a risk of harm to **himself/herself** or others on account of a mental illness.

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Statutory Authority: 22 O.S. Supp. 2007, § 1161.

Notes on Use

This Instruction should be given when a defense of insanity has been raised.

Committee Comments

The Court of Criminal Appeals held in *Ullery v. State*, 1999 OK CR 36, ¶ 28, 988 P.2d 332, 346, that a jury instruction on the consequences of a verdict of not guilty by reason of insanity was not required. However, in an unpublished decision, *Fears v. State*, No. F-2004-1279 (July 7, 2006), the Court of Criminal Appeals has suggested that trial courts should use of an instruction explaining the consequences of a verdict of not guilty by reason of insanity. There is a risk that jurors might confuse a verdict of not guilty by reason of insanity with other not guilty verdicts and think that the defendant would go free if they returned a verdict of not guilty by reason of insanity. See *Lyles v. United States*, 254 F.2d 725, 728 (D.C. Cir. 1957), *overruled in part in Brawner v. United States*, 471 F.2d 969 (D.C. Cir. 1972). This Instruction ought to avoid both juror confusion and also unnecessary speculation by jurors during their deliberations.

OUJI-CR 9-33  
EVIDENCE - USE OF COCONSPIRATOR TESTIMONY

~~No person may be convicted on the testimony of a coconspirator unless the testimony of such a witness is corroborated by other evidence.~~

NO INSTRUCTION SHOULD BE GIVEN.

Committee Comments

In *Pink v. State*, 2004 OK CR 37, ¶ 28, 104 P.3d 584, 593, the Oklahoma Court of Criminal Appeals decided that the independent corroboration requirement for accomplice testimony does not apply to coconspirator testimony, and it directed that this instruction as well as OUJI-CR 9-35 through 9-39 were erroneous and should not be used. Independent corroboration is still required, however, if the alleged coconspirator's testimony was the testimony of an accomplice. For the instruction for corroboration of accomplice testimony, see OUJI-CR 9-32, *supra*. The Court also ruled that OUJI-CR 9-34 was unnecessary.

OUII-CR 9-34  
EVIDENCE - COCONSPIRATOR DEFINED

NO INSTRUCTION SHOULD BE GIVEN.

~~A "coconspirator" is one who enters into an unlawful agreement between two or more persons in order to accomplish some unlawful purpose, or to accomplish some lawful purpose by unlawful means.~~

OUJI-CR 2-22  
CONSPIRACY - DEFINITIONS

Conspirator – A "conspirator" is one who enters into an unlawful agreement between two or more persons in order to accomplish some unlawful purpose, or to accomplish some lawful purpose by unlawful means.

Cheat and Defraud - To induce a person to part with possession of property by reason of intentionally false representations, including any tricks, devices, artifices, or deceptions.

Reference: Black's Law Dictionary 215 (5th ed. 1979).

Maliciously - With a wish to vex, annoy, or injure another person.

References: State v. McCray, 1918 OK CR 186, 15 Okl. Cr. 316, 176 P. 418, 15 Okl. Cr. 316 (1919); 21 O.S. 1991 2001, § 95.

Treason - Levying war against the State, or adhering to its enemies, giving them aid and comfort.

Reference: Okla. Const. art. 2, § 16.

Committee Comments

The law in Oklahoma relative to the issue of withdrawal from an illegal agreement as a defense to a charge of conspiracy is sparse. The Commission has found only one case which addresses the issue. *Blaylock v. State*, 1979 OK CR 75, 598 P.2d 251 (Okl. Cr. 1979).

The traditional view is harsh and inflexible: since the offense of conspiracy is consummated with the combination in order to effectuate an illicit

goal, no subsequent act of withdrawal can exonerate the conspirator of his crime. W. LaFare & A. Scott, *Criminal Law* § 62, at 487 (1972). However, since Oklahoma has enacted a statutory overt act requirement, 21 O.S. ~~1994~~ 2001, § 423, there is support for the argument that the defendant is not punishable as a member of a conspiracy if he withdraws prior to the commission of the overt act by any member of the combination. As a practical matter, the defense is of little utility, since most unlawful combinations will be accompanied by overt acts, precluding the possibility for effective withdrawal.

The Model Penal Code recognizes withdrawal as an affirmative defense to a conspiracy charge, but requires that the putative conspirator must have "thwarted the success of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose." Model Penal Code § 5.03(6). The underlying premise for this stringent mandate is dual: (1) the defendant should be exonerated from criminal liability if a subsequent withdrawal is effected; but, (2) only where defendant assures by his conduct that the objective of the illicit agreement will not be further pursued, despite his withdrawal. Model Penal Code § 5.03, Comment (Tent. Draft No. 10, 1960).

Since the claim of effective withdrawal is a defense, the onus of producing evidence sufficient to raise that defense remains on the defendant, unless the evidence of the prosecution has raised the issue. **If the defendant fails to adduce any evidence that tends to prove an effective withdrawal from the conspiracy, or if the defendant's evidence is insufficient as a matter of law, the issue of withdrawal is not presented and no instruction should be given.** If the defendant presents sufficient evidence to raise the defense of withdrawal, or if the defense is raised by the evidence of the prosecution, an instruction **must be given** in order to apprise the jurors of the defendant's theory of the case.

Once the defense of withdrawal is properly raised, the burden of proving the nonexistence of the defense should rest on the State. No instructions concerning the defendant's burden to come forward with evidence, or the question whether the defendant has presented sufficient evidence to warrant an instruction, are included because these matters pertain to questions of law and of trial procedure, both of which are beyond the legitimate concern of the jurors.

OUJI-CR 9-35  
EVIDENCE - CORROBORATIVE EVIDENCE NEEDED FOR  
COCONSPIRATOR TESTIMONY

NO INSTRUCTION SHOULD BE GIVEN.

~~Evidence corroborative of the testimony of a coconspirator need not directly connect the defendant with the unlawful agreement. It is sufficient if it tends to connect the defendant with the agreement. This corroborating evidence, however, must show more than the mere fact of the making of an unlawful agreement or the circumstances or terms thereof. Such evidence need not be direct, but may be entirely circumstantial.~~

~~It is not essential that the corroborating evidence, if any, cover every material point testified to by the coconspirator, or be sufficient, standing alone, to establish the fact that an unlawful agreement was made. It is sufficient corroboration if you, in your discretion, find from the evidence, beyond a reasonable doubt, that the testimony of the coconspirator is corroborated as to some material fact or facts by independent evidence tending to connect the defendant with the unlawful agreement. If the testimony of a coconspirator is so corroborated, you shall give his/her testimony such weight and credit as you find it is entitled to receive.~~

OUJI-CR 9-36  
EVIDENCE - DETERMINATION OF  
COCONSPIRATOR STATUS BY JURY

NO INSTRUCTION SHOULD BE GIVEN.

~~As to the witness, [Name of Witness], you are instructed that you are to determine whether or not he/she is a coconspirator to the crime of which the defendant here stands charged. If you determine that he/she is a coconspirator, you cannot convict the defendant upon the testimony of said witness, unless you find that such testimony is corroborated as provided in these instructions.~~

OUJI-CR 9-37  
EVIDENCE - NECESSITY OF CORROBORATION WHEN  
COURT DETERMINES WITNESS IS A COCONSPIRATOR

NO INSTRUCTION SHOULD BE GIVEN.

~~You are instructed that the witness, [Name of Witness], is what is termed in law as a coconspirator to the crime of which the defendant stands charged. For that reason, you cannot convict the defendant upon the testimony of such witness unless you find that his/her testimony is corroborated as required in these instructions.~~

OUJI-CR 9-38  
EVIDENCE - WHEN CORROBORATION  
BY COCONSPIRATOR IS INSUFFICIENT

NO INSTRUCTION SHOULD BE GIVEN.

~~One coconspirator cannot corroborate the testimony of another  
coconspirator so as to authorize conviction on the testimony of two or more co-  
conspirators alone.~~

OUJI-CR 9-39  
EVIDENCE - DETERMINING WHEN CORROBORATION  
BY COCONSPIRATOR IS SUFFICIENT

NO INSTRUCTION SHOULD BE GIVEN.

~~In determining the question as to whether or not the testimony of a coconspirator has been corroborated, you may eliminate his/her testimony entirely and then examine all of the remaining testimony, evidence, facts, and circumstances, and ascertain from such examination whether there is any evidence tending to show the making of an unlawful agreement and tending to connect the defendant to that agreement. If there is, then the testimony of the coconspirator is corroborated.~~

~~Committee Comments~~

~~Although little authority supports the necessity for corroboration of testimony of a coconspirator, the Commission has discerned little logic in distinguishing the testimony of an accomplice from that of a coconspirator in this regard.~~

OUJI-CR 9-47  
EVIDENCE - REFUSAL TO TAKE BLOOD ALCOHOL TEST

Evidence has been introduced of the defendant's refusal to take a test to determine the blood alcohol level in **his/her** body at the time of **his/her** arrest. You must first determine whether this refusal is evidence of guilt.

To find that the defendant's refusal to take the blood alcohol test is evidence of guilt, you must find beyond a reasonable doubt that:

First, the defendant refused the test,

Second, with a consciousness of guilt,

Third, in order to avoid arrest or conviction for the crime with which **he/she** is now charged.

[Note: If the defendant has offered evidence explaining the refusal, give the following: The defendant has offered evidence explaining **his/her** refusal to take the blood alcohol test. You must consider this explanation in determining whether the defendant's refusal is evidence of guilt.]

If after a consideration of all the evidence on this issue, you find beyond a reasonable doubt that the defendant refused the blood alcohol test with a consciousness of guilt in order to avoid arrest or conviction, then the defendant's refusal to take the blood alcohol test is a circumstance which you may consider

with all the other evidence in this case in determining the question of the defendant's guilt. However, if you have a reasonable doubt that the defendant refused the blood alcohol test with a consciousness of guilt in order to avoid arrest or conviction, then the defendant's refusal to take the blood alcohol test is not a circumstance for you to consider.

#### Notes on Use

This limiting Instruction should be used if evidence of the defendant's refusal to take a blood alcohol test is admitted. This Instruction is required in order to maintain consistency with the flight instruction and to avoid shifting the burden of proof to the defendant. *Harris v. State*, 1989 OK CR 15, ¶¶ 8-9, 773 P.2d 1273, 1277-78 (Lumpkin, J., specially concurring).

#### Committee Comments

The Court of Criminal Appeals held in *Harris v. State*, 1989 OK CR 15, ¶ 7, 773 P.2d 1273, 1274, that the admission of evidence of refusal to take a blood alcohol test in a prosecution for driving under the influence of alcohol did not violate either the United States or Oklahoma Constitutions.