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# Pennsylvania Conspiracy Law: The Basic Jurisprudence

Arthur A. Murphy\*

## I. Introduction

Pennsylvania judges, district attorneys and defense counsel have their work cut out to master and remain current on the law of criminal conspiracy. Many district attorneys routinely include allegations of conspiracy in an information whenever it is a possible charge, regardless of whether the defendant could be punished adequately if the charges were limited to his substantive crimes.<sup>1</sup> One consequence is that appellate courts have had to make pronouncements about conspiracy law in a great many decisions. Although their pronouncements are often limited to discussing the sufficiency of evidence, the Pennsylvania appellate courts are constantly adding to and refining a sophisticated body of conspiracy law.

This article will give a preview of a resource that may be helpful to judges and lawyers when dealing with conspiracy charges. The author recently drafted new versions of the conspiracy instruction series for the manual, *Pennsylvania Suggested Standard Criminal Jury Instructions*; the manual is produced by a subcommittee appointed by the Supreme Court.<sup>2</sup> If the subcommittee approves them, the revised instructions, together with extensive "subcommittee notes," will be published by the Pennsylvania Bar Institute in the next supplement to the manual. The purpose of this article is to

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1. In some other jurisdictions the prevailing practice is to charge a conspiracy only when it did not culminate in the object crime or when there is some special reason for prosecuting the criminal agreement itself. This was the Army's policy during the years when the author was a member of the Judge Advocate Generals Corp: the author tried hundreds of general court-martial cases as prosecutor, defense counsel or judge but does not remember ever trying a conspiracy count.

2. Criminal Instructions Subcommittee, Pennsylvania Supreme Court Committee on Proposed Standard Jury Instructions. The subcommittee has functioned since 1968; its manual has always been treated as an unofficial aid which is neither reviewed nor endorsed by the Supreme Court. The conspiracy instruction series, presently numbered 12.903A through D and 12.904, was last revised by the subcommittee in 1976.

make the basic charge and subcommittee note widely available before their formal publication. Because the material embodies an up-to-date primer on Pennsylvania conspiracy law, it may interest readers who never expect to be involved in a conspiracy trial.

There is plenty of time, and probably much room, for improving this instruction and subcommittee note before they are finally published. The author will be grateful for criticism and suggestions on how he might improve this work.

## II. The Proposed Basic Instruction

### A. *Some General Observations*

Conspiracy is a crime that is especially hard to reduce to a pattern jury instruction. Conspiracy law is so complex and the fact patterns of conspiracies so myriad that the jury charge should be custom-tailored for each case.<sup>3</sup> The proposed basic instruction and its subcommittee note are designed to help judges compose the sort of fundamental instructions, and deal with the kind of related matters that are the routine grist of conspiracy trials.

The proposed subcommittee note is meant to be a piece of practical scholarship. It identifies the statutory,<sup>4</sup> case law and other origins of the basic instruction, and explains how and when the instruction might be used or modified. It provides information and ideas for preparing and using additional or replacement instructions and for dealing with certain miscellaneous problems that are likely to arise in a conspiracy trial.

The discussion of the law in the subcommittee note adds up to a concise and quite comprehensive treatment of current Pennsylvania conspiracy law. In important areas where the application of the law is not obvious, or where the law itself is unsettled, the note seeks to identify the problem and to indicate possible answers.

### B. *Text of the Instruction and Subcommittee Note*

#### 12.903A (Crim) CONSPIRACY: BASIC INSTRUCTION

(1) The defendant is charged with conspiracy to commit (robbery) (\_\_\_\_\_).

[(2) In general terms, a conspiracy is an agreement between two or more persons to commit a crime. Their agreement constitutes

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3. W.W. Schwarzer, *Communicating with Juries: Problems and Remedies*, 63 CAL. L. REV. 731, 745-46 (1981).

4. The general conspiracy statute is Crimes Code § 903, 18 PA. CONS. STAT. ANN. § 903 (1983). The statute is reprinted in an appendix to this article.

the conspiracy: they have conspired even if they never do commit the agreed crime.]

[The form of the conspirators' agreement is not important. It may be an express, verbal agreement. Or it may be a largely unspoken, common understanding. If the conspirators know how each other thinks they may be able to communicate their agreement by their behavior without a lot of words. Their agreement does not have to cover the details of how the crime will be committed. Nor does it have to call for all of them to participate in actually committing the crime. They can agree that one of them will do the job. What is necessary is that the parties do agree — in other words, do come to a firm, common understanding — that a crime will be committed.]

[Although the agreement itself is the essence of the conspiracy, a defendant cannot be convicted of conspiracy unless he or a fellow conspirator does something more — does an overt act in furtherance of the conspiracy. The overt act is an act by any conspirator which shows that the parties have a firm agreement and are not just thinking or talking about committing a crime. The overt act shows that the conspiracy has reached the action stage. If a conspirator actually commits or attempts to commit the agreed crime, that obviously would be an overt act in furtherance of the conspiracy. But a small act or step that is much more preliminary, and a lot less significant, can satisfy the overt act requirement.]

(3) The information alleges that the defendant conspired with certain other persons: (*list individuals by name or as "unknown person" who are alleged co-conspirators*).

(4) The information alleges that the crime of (robbery) (\_\_\_\_\_) was the object of the conspiracy. (*define crime here if not defined elsewhere*.)

(5) The information alleges that the following actions were overt acts: (\_\_\_\_\_).

(6) In order to find the defendant guilty of conspiracy to commit (robbery) (\_\_\_\_\_) you must be satisfied that the following three elements have all been proven beyond a reasonable doubt:

*First*, that the defendant agreed with the other persons (that one or more of them would engage in conduct which constitutes the crime of [robbery] [\_\_\_\_\_]) (that the defendant would aid the others in planning or committing the crime of [robbery] [\_\_\_\_\_]) (that *substance of conspirators' agreement*).

*Second*, that the defendant and the other persons intended to promote or facilitate the committing of the (robbery) (\_\_\_\_\_). In other words they shared the intention to bring about that crime or to make it easier to commit that crime; and

*Third*, that the defendant or the other persons did the acts that are alleged to have been overt acts and did them in furtherance of their conspiracy. (As a general rule, if conspirators have agreed to commit a crime, and after that, one of the conspirators does any act to carry out or advance their agreement, then he has done an overt act in furtherance of their conspiracy. The other conspirators do not have to participate in the act or even know about it. In a sense they are partners and like partners they are responsible for each other's actions.)

[(7) The information alleges that the defendant conspired with (several) (*specific number*) persons to commit (several) (*specific number*) crimes and that (several) (*specific number*) overt acts were done. So far as numbers are concerned, the minimum requirements for a conspiracy are an agreement between two people to commit one crime, and one overt act committed by one of them. Thus, you may find the defendant guilty if you are all satisfied that he conspired with at least one alleged co-conspirator to commit at least one alleged object crime and that he or that person did at least one alleged overt act in furtherance of the conspiracy. You must all agree on the same person, the same object crime and the same overt act.]

(8) The Commonwealth may prove a conspiracy by direct evidence or by circumstantial evidence. (People who conspire often do their conspiring secretly and try to cover up afterwards.) In many conspiracy trials, circumstantial evidence is the best or only evidence on the questions of whether there was an agreement, that is a common understanding, and whether the conspirators shared the intent to promote or facilitate committing the object crime. Thus, you may, if you think it proper, infer that there was a conspiracy from the relationship, conduct and acts of the defendant and his alleged co-conspirators and the circumstances surrounding their activities.

[(9) You cannot convict the defendant of conspiracy if the evidence merely leads you to suspect, or feel, or have a hunch that he was part of a conspiracy: you must be convinced beyond a reasonable doubt. (Speaking of the evidence, keep in mind that what one conspirator says or does can be considered against another conspirator if it is said or done during the life of, and in furtherance of, their con-

spiracy. Conspirators are like partners: they can be responsible for each other's words and acts.)]

## SUBCOMMITTEE NOTE

### 1. *Using this Instruction*

This instruction will be appropriate in many cases where a defendant is charged with conspiracy to commit a crime in violation of Crimes Code § 903. The instruction is worded for the trial of a single defendant charged with conspiring with other named or "unknown" persons. The instruction can be modified easily for a conspiracy to commit multiple crimes or for a joint trial of multiple defendants. In the latter situation, references in our instruction to "the defendant" should be changed to "the defendants," "each defendant" or "a defendant" to fit the context.

If the information does not include allegations specifying the overt acts or if the proof tends to show overt acts which differ from those alleged, the court should require the district attorney to identify the overt acts on which he relies and word its instructions accordingly. *See Commonwealth v. Steele*, 408 Pa. Super. 128, 596 A.2d 225 (1991).

This instruction will require significant tailoring even for those cases to which it is essentially well-suited. Subdivision (2), which contains general principles of conspiracy law and is meant to be an introduction, should be modified to cover only principles that the jury needs to know. For example, an elaborate definition of the overt act requirement is unnecessary in a case where the conspirators actually went on to commit the object crime. In subdivision (6), the court should tailor the *First* element to the theory or theories under which the jury could find that the defendant was a party to the kind of agreement required for a conspiracy, taking into account the allegations, proof and the wording of Crimes Code § 903(a).

The jury should be instructed on its right to convict the defendant of conspiracy even if some of the allegations have not been proven. The court should do this whenever (i) the information alleges multiple co-conspirators, object crimes *or* overt acts and (ii) the evidence is such that the jury conceivably might find some but not all the allegations to be proven. Subdivision (7) is designed for a case where the information alleges more than one co-conspirator, object crime *and* overt act. A simpler charge can be used if the issue is limited to one element. For example, if the information merely alleges multiple overt acts the jury may be told:

The Commonwealth does not have to prove that all of the overt acts alleged were actually performed. It must, however, prove at least one of those acts. You cannot find the defendant guilty of conspiracy unless you all agree on one particular overt act and agree that it was done in furtherance of the conspiracy.

When charging on subdivision (7) or an alternative, the court might refer explicitly to some of the pertinent allegations of the information to make sure that the jury grasps the significance of the charge.

The court might also consider amending the information to conform to the proof or taking a special verdict in situations where the jury might find some but not all the allegations to be proved.

### *Joint Trials*

When two or more defendants are tried jointly for conspiracy, the court should make crystal clear that the jury is to determine guilt individually. The court might give the following or an equivalent instruction:

Remember, that although there are two defendants, each is entitled to have the question of his guilt determined individually and on the basis of the evidence that is admissible against him. (During the trial I told you that certain evidence could not be considered against all the defendants. Keep these limitations in mind. [*Limitations may be reiterated here.*])

When multiple defendants are on trial the court may want to tell the jury explicitly that its verdict on the conspiracy charge need not be the same for all defendants — it may convict all, some or none. There is one qualification: it is probably true, under Pennsylvania law, that when alleged co-conspirators are tried together, the jury should not return verdicts inconsistent with the principle that two people are required for a conspiracy. *But see* Crimes Code § 904. If the court agrees that this is the law, it might use a charge like the following whenever it foresees the possibility of a legally inconsistent verdict.

I'll point out a consequence of the fact that it takes a minimum of two people for a conspiracy. If you believe that the only person with whom one of the defendants conspired was another defendant, you cannot find the one guilty of conspiracy, if you find the other not guilty.

The law regarding inconsistent disposition of charges against co-conspirators is discussed below.

Crimes Code § 903(d)(2) contains some jurisdiction/venue, evidence and procedural rules for joint prosecutions. *See also Commonwealth v. Chester*, 526 Pa. 578, 587 A.2d 1367 (1991) (joint trials are advisable where conspiracy is charged; discusses antagonistic defenses as ground for severance).

### *Jurisdiction*

If there is a dispute about whether the court has subject matter jurisdiction over a conspiracy charge, e.g., whether the agreement was made or an overt act occurred within the county, the court should submit any factual issue to the jury, *see Commonwealth v. Moyers*, 391 Pa. Super. 262, 570 A.2d 1323 (1990); *Commonwealth v. Snowdy*, 603 A.2d 1044 (Pa. Super. 1992) (jurisdiction over conspiracy charge where defendant was outside Pennsylvania when he entered into and performed his part of the conspiratorial agreement).

### *Charging Beyond the Basic Instruction*

Our basic instruction does not come close to being an all-purpose or comprehensive charge on conspiracy: conspiracy law is too complex; the fact patterns of conspiracies are myriad. Conspiracies vary from a spur of the moment, combined street robbery by two inarticulate primitives to an enduring, sophisticated network of cunning drug importers and distributors. Our basic instruction may have to be greatly modified or entirely replaced in some cases. Some other possible charging language is suggested in Instructions 12.903B through F and 12.904A. The balance of this subcommittee note may be helpful in evaluating and using all of our instructions and in composing alternatives.

## *2. General*

When reading about conspiracy law and when composing instructions, one should keep in mind that the term “conspiracy” can have two meanings: (i) it can denote the conspiratorial agreement itself or (ii) it can denote the conspiratorial relationship (or enterprise) that results from that agreement. Crimes Code § 903 seems to equate “conspiracy” with the agreement (§ 903(a)) and uses “conspiratorial relationship” when speaking of the resulting relationship (§ 903(c)). Appellate judges and commentators sometimes make a distinction between the agreement and relationship. However, they often use the term “conspiracy” to refer to one or the other or to both. For example, typical formulations of the co-conspirator rule

speak of the "declarations and acts of a conspirator during and in furtherance of the conspiracy." See also *Commonwealth v. French*, 396 Pa. Super. 436, 578 A.2d 1292 (1990) (court speaks of a conspiratorial agreement as a criminal partnership). Although the trial judge ordinarily will not have to draw a distinction between the agreement and resulting conspiratorial relationship in his charge, he should be alert to possible risks of jury confusion from the two meanings of conspiracy.

#### *Cautionary and Limiting Instructions Regarding Evidence*

Certain cautionary and limiting instructions regarding testimony are frequently needed in a conspiracy trial. When evidence of an uncharged crime is admitted to prove identity, intent, common plan, scheme or design or some other fact relevant to a conspiracy charge, the court should give a proper limiting instruction. See Instruction 3.08; *Commonwealth v. Cullen*, 340 Pa. Super. 233, 489 A.2d 929 (1985). If a co-conspirator testifies against the defendant, a cautionary instruction like that used for accomplice testimony may be appropriate. See Instruction 4.01 and its subcommittee note; *Commonwealth v. Bricker*, 525 Pa. 362, 581 A.2d 147 (1990); *Commonwealth v. Diehl*, 402 Pa. Super. 12, 585 A.2d 1112 (1991). In a trial of multiple defendants, when testimony is allowed under the co-conspirator exception to the hearsay rule that is admissible against some, but not all, defendants, the court must give a limiting instruction to that effect.

The co-conspirator exception allows a hearsay declaration or act of one conspirator made to a third party, in the absence of his co-conspirator, to be admitted in evidence against the co-conspirator (as well as against himself if he is on trial) if it was made during, and in furtherance of, their conspiracy. When the court is ruling on admissibility, it determines whether the foundation facts, including the existence of a conspiracy, have been established. The court should not re-submit the question of whether the foundation exists to the jury. See *Commonwealth v. Chester*, 526 Pa. 578, 587 A.2d 1367 (1991). The parenthetical portion of subdivision (9) is inspired by *Chester's* apparent approval of telling the jurors enough about the co-conspirator rule to help them put the testimony into a proper context. For illuminating cases on the co-conspirator exception to the hearsay rule, see *Commonwealth v. Haag*, 522 Pa. 388, 562 A.2d 289 (1989) (conspiracy usually terminates when object crime is committed: subsequent concealment of evidence by one is not admissible against

others unless parties had agreed to coverup as part of their original agreement); *Commonwealth v. Pinkins*, 515 Pa. 418, 525 A.2d 1189 (1987); *Commonwealth v. Moyers, supra*, (extended discussion of the rule). For a comprehensive treatment, see L. PACKEL AND A.B. POULIN, PENNSYLVANIA EVIDENCE § 805.4 (1987 & Supp. 1991).

### *Inconsistent Disposition or Verdicts*

Historically Pennsylvania law has moved away from requiring consistency in the disposition of charges against the members of a conspiracy. While Pennsylvania law does require a minimum of two conspirators for a conspiracy, it clearly does not require that both be prosecuted or that the verdicts be consistent if they are tried separately. So far as justice and the appearance of justice are concerned, there are too many variable factors to insist on symmetry of disposition: for instance the different jurors and proof at two trials may lead to different verdicts. See *Commonwealth v. Byrd*, 490 Pa. 544, 417 A.2d 173 (1980); *Commonwealth v. Phillips*, 411 Pa. Super. 329, 601 A.2d 816 (1992) (co-conspirator of defendant had been acquitted before defendant's trial). Although *Byrd* and *Phillips* strongly suggest that logically consistent verdicts are required when conspirators are tried jointly, it is conceivable that our courts might not adhere to that principle, especially if confronted with a case where it is understandable why the jury might have been unduly merciful to the acquitted defendant. Our courts have not regarded consistency of verdicts to be of transcendent importance in other contexts. *Commonwealth v. Osellanie*, 408 Pa. Super. 472, 597 A.2d 180 (1991) (inconsistent verdicts on manslaughter and murder counts based on single homicide).

### *Sources of the Basic Instruction and General References*

The basic instruction is derived from Crimes Code §§ 903(a), (c) and (e) and Pennsylvania case law. Section 903(a) defines criminal conspiracy in terms of intent and agreement. Although an overt act is not part of the definition, § 903(e) says that no person may be convicted of conspiracy unless an overt act is alleged and proved. For simplicity, subdivision (6) of our instruction includes the overt act requirement as one of the definitional elements of conspiracy.

Crimes Code § 903 is patterned on MODEL PENAL CODE § 5.03. The only significant difference in statutory language is in 903(e). The Model Penal Code permits conviction of conspiracy to commit a first or second degree felony without an overt act while Crimes Code

§ 903(e) does not. The commentary to the Model Penal Code is entitled to special consideration when interpreting section 903. *See Commonwealth v. Byrd, supra*. For text of commentary, see ALI, MODEL PENAL CODE AND COMMENTARIES § 5.03 (1985).

Another valuable general reference is W.R. LAFAVE AND A.W. SCOTT, JR., CRIMINAL LAW §§ 6.4-6.5 (2d ed. 1986).

### 3. *Agreement and Intent: Substantive Requirements; Proof by Circumstantial Evidence*

The draftsmen of the Model Penal Code meant to incorporate in their Section 5.03 a novel conception of conspiracy that the Pennsylvania courts have not espoused — the unilateral approach. *See* ALI, MODEL PENAL CODE AND COMMENTARIES § 5.03 2(b) (1985). A case which highlights the difference between the unilateral approach and the traditional bilateral approach is one in which the defendant and another individual “agreed” to commit a crime but the other (e.g. a police agent) was only feigning agreement and had no intention that the crime be committed. Under the unilateral approach the defendant is guilty of conspiracy. This approach focuses on the defendant: he agreed, he intended to commit the crime, he demonstrated his criminality and dangerousness. Under the bilateral approach the defendant is not guilty of conspiracy: there was no mutual, subjective agreement and shared criminal intent, no enhanced danger from a real combination of manpower.

The Pennsylvania appellate courts have always interpreted Crimes Code § 903, consistent with the bilateral approach, to require a mutual agreement between at least two persons who share the intent that an object crime be committed. *See, e.g., Commonwealth v. Derr*, 501 Pa. 446, 462 A.2d 2081 (1983); *Commonwealth v. Roux*, 465 Pa. 482, 350 A.2d 867 (1976) (a shared common understanding or agreement is the heart of every conspiracy); *Commonwealth v. Cruz Ortega*, 372 Pa. Super. 389, 539 A.2d 849 (1988) (agreement and shared criminal intent are required elements); *Commonwealth v. Anderson*, 265 Pa. Super. 494, 402 A.2d 546 (1979) (Crimes Code § 903 requires that Commonwealth prove guilt of at least two conspirators to convict one). Our instruction, subdivisions (1) and (6) in particular, embodies the case law’s requirement of mutual agreement and shared intent.

The “agreement” element of conspiracy is quite elastic. The second paragraph of our subdivision (2) defines the agreement element, substantively, as an agreement that can be formed by verbal

or nonverbal communication between the parties. Subdivision (8) says that the elements of agreement and shared criminal intent can be proven by circumstantial evidence. In fairly simple language, these portions of our instructions state the conspiracy doctrine found in a great many cases. For example, in *Commonwealth v. Dolfi*, 483 Pa. 266, 271, 396 A.2d 635, 640 (1979), the Supreme Court said:

Although a common understanding is at the heart of every conspiracy, it is generally difficult to prove an explicit or formal agreement. Therefore a conspiracy may be established by circumstantial evidence, i.e., the relations, conduct, or circumstances of the parties or overt acts on the part of co-conspirators.

In *Commonwealth v. French*, *supra* the Superior Court said:

It is clear that essential to the crime of conspiracy is a common understanding and agreement that a crime will be committed . . . . It is equally plain that direct proof of such an agreement is rarely available, nor is it necessary. Thus "proof of a criminal partnership is almost invariably extracted from the circumstances that attend its activities" . . . . An agreement can be inferred from a variety of circumstances not limited to the relation between the parties, knowledge of and participation in the crime, and the circumstances and conduct of the parties surrounding the criminal episode. These factors may coalesce to establish a conspiratorial agreement beyond a reasonable doubt where one factor alone might fail.

The Superior Court said in *Commonwealth v. Savage*, 388 Pa. Super. 566, 572, 566 A.2d 272, 278 (1989);

While the Commonwealth is not required to prove a written or express agreement, a tacit agreement must be established by reasonable inferences arising from the facts and circumstances and not from mere suspicion or conjecture.

*See also Commonwealth v. Cruz Ortega, supra* (shared criminal intent may be proven by same circumstantial evidence that proves the agreement).

If the only evidence of agreement shows that the parties were somewhat tentative when "agreeing," or were rather vague about what they were "agreeing" on, there may be a question of whether the agreement element is met, especially if the conspirators never came close to committing the object crime. Similarly, even if an agreement is proven, if the only evidence of the defendant's role shows that he had little input while the agreement was being formed

and no part in the execution, there may be a problem of whether the defendant was a party to the conspiracy. *Quaere*, in such cases should the jury be given a more precise substantive law definition of what is meant by "agreement?" Or should the problem be dealt with as one of evidence? Is there enough evidence of "agreement" by and with the defendant to go to the jury? Should the jury infer "agreement" from such facts? The latter half of the second paragraph in subdivision (2) can be used to give the jury some guidance in this area and to head off possible jury misconceptions about the meaning of the agreement requirement.

The latter portion of subdivision (2)'s second paragraph is derived from Crimes Code § 903(a). See *Commonwealth v. Lawrence*, 497 Pa. 501, 442 A.2d 234 (1982) (after other gang members planned a killing, their leader assigned defendant the minor job of standing by to carry the murder weapon away; victim was killed and defendant did his job; defendant's conviction of conspiracy to murder affirmed); *Commonwealth v. Tate*, 485 Pa. 180, 401 A.2d 353 (1979) and *Commonwealth v. Brown*, 262 Pa. Super. 9, 396 A.2d 457 (1978) (en banc decision). In both *Tate* and *Brown* the defendant and others agreed in a general way that robberies would be committed. The defendant had a voice in selecting a target, but the other(s) actually robbed a different victim. Convictions of the defendants in both cases for conspiracy to rob were affirmed.

When two people were simultaneously involved in the same criminal activity, e.g., assaulting the same victim, there may be an issue of whether they were acting by agreement and are therefore guilty of conspiracy, or whether there was no agreement and therefore no conspiracy, although they are guilty of the substantive crime under principles of complicity or as independent actors. This kind of problem is discussed in the subcommittee note to Instruction 12.903B.

The total *mens rea*, i.e., the blameworthy mental state or culpability, which Crimes Code § 903(a)(1) and (2) requires for conspiracy is dispersed between the *First* and *Second* elements of subdivision (6) of our instruction. The parties must *agree* that some specified action will be taken with respect to the object crime, e.g., that they or one or more of them will engage in conduct which constitutes such crime. The parties must also share the *intent* to promote or facilitate commission of the object crime. The object crime will have its own *mens rea* requirements which may or may not include a requirement of "specific intent" and which may or may not

include some kind of *mens rea* as to the other elements. For analytical purposes every crime may be regarded as including an "act"/"conduct" element while certain crimes also include a "result" element, e.g., criminal homicide, or an "attending circumstances" element, e.g., burglary, statutory rape.

If one tries to combine or correlate the total *mens rea* requirements of conspiracy with the total *mens rea* requirements of particular object crimes (e.g., murder, statutory rape) one can run into substantive law and linguistic difficulties. For instance, must two adult males intend/know that their prospective victim is underage to be guilty of conspiracy to commit statutory rape? In most cases the court will not have to address this kind of *mens rea*-correlation problem in its charge. Our suggested instruction, including subdivisions (4) and (6), will give the jury sufficient guidance. If the object crime is not charged in a separate substantive count, the court should limit its definition in subdivision (4) to those aspects of the object crime which are relevant to a conspiracy and to the facts of the case. For example, if the charge were conspiracy to commit murder, a definition of murder limited to murder by intentional killing should suffice: conspiracy and third degree murder of the unintentional variety are antithetical.

For help in identifying and dealing with problems of correlating the *mens rea* requirements of conspiracy and the object crime, see ALI, MODEL PENAL CODE AND COMMENTARIES § 5.03 2(c) (1987) (definition of conspiracy: requirements of culpability).

#### 4. Overt Act

The subcommittee did not come across any Pennsylvania appellate decisions that discuss at length the substantive meaning of the overt act requirements: the decisions deal primarily with the adequacy of particular facts or the sufficiency of evidence to satisfy the requirement. The descriptions of the overt act in subdivision (2) and in the *third* element of subdivision (6) include a statement of the core requirement in language similar to Crimes Code § 903(e) — that the defendant or an alleged co-conspirator did the acts alleged to have been overt acts and did them in furtherance of their conspiracy. The descriptions in subdivisions (2) and (6) include some additional clarifying explanation that is consistent with the appellate cases, the July 1976 revision of Instruction 12.903C, and with the more extensive treatments of the subject in *Commonwealth v. Rivera*, 36 D & C.3d 193 (1983) (prisoner's effort to arrange a tele-

phone call was first overt act in escape conspiracy); ALI, MODEL PENAL CODE AND COMMENTARIES § 5.03 5 (1985); and W.R. LAFAVE AND A.W. SCOTT, JR., CRIMINAL LAW § 6.5(c) (2d ed. 1986).

For purposes of legal analysis, the act of agreeing is the "act"/"conduct" element of the crime of conspiracy. The "overt act" of Crimes Code § 903 is an additional act, proof of which is a safeguard against an improper conviction. The requirement calls for one of the conspirators to engage in some minimum, not very significant, amount of activity which is not part of the process of agreement and which manifests that the action stage of the conspiracy has begun. In some cases an omission should be able to satisfy the overt act requirement. For example, if parents agree to starve their baby, a deliberate failure to feed the baby several consecutive meals should satisfy the overt act requirement.

In jury instructions, the phrase "overt act in furtherance of a conspiracy" can best be defined as a whole, as we do in our instruction, without focusing on the individual words. The jury issues most likely to arise are whether a conspirator did the alleged act and, if so, whether he did it in furtherance of the conspiracy. A judge is not likely to be confronted with the issue of whether a given act is so trivial or unrevealing that, as a matter of law, it cannot constitute an overt act. *Quaere*, could the actions of a mugger who merely tenses his muscles or shifts his feet as a prospective victim walks by amount to an "overt act"?

The third element in subdivision (6) defines the "in furtherance" aspect of the overt act requirement as any act done by one of the conspirators to carry out or advance their agreement. In some cases the Court may want to state the converse:

A conspirator's act is not in furtherance of the conspiracy if it is done for his own personal reasons which are independent of the agreement.

The following are representative of the appellate decisions that describe or apply the overt act requirement: *Commonwealth v. Moyers, supra* (overt act must be "in furtherance of the conspiracy"; defendant's act of driving to locus of supplier is overt act in conspiracy to obtain cocaine); *Commonwealth v. Gordon*, 329 Pa. Super. 42, 477 A.2d 1342 (1984) (Commonwealth's proof of each of several acts that would facilitate entry into a building satisfies the overt act element of conspiracy to commit burglary); *Commonwealth v. Middleton*, 260 Pa. Super. 571, 394 A.2d 1293 (1978) (court's instruc-

tion that “conspiracy must go beyond the mere talking stage” and that certain specified actions, e.g., “saying it was a holdup,” were overt acts, adequately defines the overt act requirement).

### 5. *Other Issues and Other Instructions*

Our basic charge and this subcommittee note concentrate on the kind of instructions and related matters that are the routine grist of conspiracy trials. Instruction 12.903B contains guidance and more suggested jury instructions for dealing with circumstantial evidence of agreement and shared intent.

Instruction 12.903C is concerned with the parties dimension of a particular conspiratorial agreement or relationship. When might a person be deemed by construction of law to conspire with someone who is involved in the same or related criminal scheme or activity but with whom he never has an actual agreement? How does a person join an already existing conspiracy or withdraw from one, and what is the effect of his joining or withdrawing?

Instruction 12.903D is pertinent when there is evidence tending to show two or more agreements with differences in parties, object crimes or overt acts. This kind of evidence may raise questions of whether there is a single large conspiracy or multiple separate conspiracies, and whether a defendant is guilty of the same conspiracy with which he is charged rather than some different conspiracy. These issues, as well as those dealt with by Instruction 12.903C, have to do with the scope of a conspiratorial agreement or relationship.

Instruction 12.903E includes rules for measuring the duration of a conspiracy, especially for determining when it comes to an end.

Instruction 12.903F covers the special defense of renunciation found in Crimes Code § 903(f) while the charge in 12.904A may be used in appropriate cases to tell the jury that a defendant cannot rely on the incapacity, irresponsibility or immunity of a co-conspirator as a defense.

It is not a defense to a conspiracy charge that it is factually impossible to commit the object crime. *See Commonwealth v. Timer*, 609 A.2d 572 (Pa. Super. 1992).

Instruction 8.306C deals with a conspirator's liability for a substantive crime, the object crime or some incidental crime, committed by a co-conspirator.

## APPENDIX

Crimes Code § 903, 18 PA. CONS. STAT. ANN. § 903 (1983):  
 § 903. Criminal conspiracy

(a) Definition of conspiracy.—A person is guilty of conspiracy with another person or persons to commit a crime if with the intent of promoting or facilitating its commission he:

(1) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or

(2) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

(b) Scope of conspiratorial relationship.—If a person guilty of conspiracy, as defined by subsection (1) of this section, knows that a person with whom he conspires to commit a crime has conspired with another person or persons to commit the same crime, he is guilty of conspiring with such other person or persons, to commit such crime whether or not he knows their identity.

(c) Conspiracy with multiple criminal objectives.—If a person conspires to commit a number of crimes, he is guilty of only one conspiracy so long as such multiple crimes are the object of the same agreement or continuous conspiratorial relationship.

(d) Joinder and venue in conspiracy prosecutions.—

(1) Subject to the provisions of paragraph (2) of this subsection, two or more persons charged with criminal conspiracy may be prosecuted jointly if:

(i) they are charged with conspiring with one another; or

(ii) the conspiracies alleged, whether they have the same or different parties, are so related that they constitute different aspects of a scheme of organized criminal conduct.

(2) In any joint prosecution under paragraph (1) of this subsection:

(i) no defendant shall be charged with a conspiracy in any county other than one in which he entered into such conspiracy or in which an overt act pursuant to such conspiracy was done by him or by a person with whom he conspired;

(ii) neither the liability of any defendant nor the admissibility against him or evidence of acts or declarations of another shall be enlarged by such joinder; and

(iii) the court shall order a severance or take a special verdict as to any defendant who so requests, if it deems it necessary or appro-

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priate to promote the fair determination of his guilt or innocence, and shall take any other proper measures to protect the fairness of the trial.

(e) Overt act.—No person may be convicted of conspiracy to commit a crime unless an overt act in pursuant of such conspiracy is alleged and proved to have been done by him or by a person with whom he conspired.

(f) Renunciation.—It is a defense that the actor, after conspiring to commit a crime, thwarted the success of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of his criminal intent.

(g) Duration of conspiracy.—For purposes of 42 Pa.C.S. § 5552(d) (relating to commission of offense):

(1) conspiracy is a continuing course of conduct which terminates when the crime or crimes which are its object are committed or the agreement that they be committed is abandoned by the defendant and by those with whom he conspired;

(2) such abandonment is presumed if neither the defendant nor any one with whom he conspired does any overt act in pursuance of the conspiracy during the applicable period of limitation; and

(3) if an individual abandons the agreement, the conspiracy is terminated as to him only if and when he advises those with whom he conspired of his abandonment or he informs the law enforcement authorities of the existence of the conspiracy and of his participation therein.

1972, Dec. 6, P.L. 1482, No. 334, § 1, effective June 6, 1973. As amended 1978, April 28, P.L. 202, No. 53, § 7(2), effective June 27, 1978.

