

STOPPING JURIES FROM PLAYING THE GUESSING GAME WITH DEFENDANTS' SENTENCES: OKLAHOMA'S NEED FOR A 33% PAROLE INSTRUCTION

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I. INTRODUCTION

One night in 2010, out on the plains of Oklahoma, local police pulled over Mr. Smith.¹ A search of his car revealed a small bag of cocaine, the presence of which resulted in Mr. Smith's arrest on a possession-of-a-controlled-substance charge.² After a two-day trial, the jury found Mr. Smith guilty.³ During its sentencing deliberation, the jury sent a question to the court asking about the time Mr. Smith would have to serve before he would become eligible for parole.⁴ In response to the jury's question, the trial court, consistent with current Oklahoma law, answered that the jury had already received all the law it needed to reach a decision.⁵ The jury recommended an incredible 99-year prison sentence.⁶ A month later,

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1. *See* Information, State v. Smith, No. CF-2010-51 (Beckham Cnty. Dist. Ct. filed Feb. 24, 2010) (on file with author).

2. *Id.*

3. Summary Order, State v. Smith, No. CF-2010-51 (Beckham Cnty. Dist. Ct. filed June 9, 2011) (on file with author).

4. Jury Question, State v. Smith, No. CF-2010-51 (Beckham Cnty. Dist. Ct. filed June 10, 2011) (on file with author).

5. *Id.* ("My answer is: I have received your question. The law requires me to answer as follows: Such is not a matter for your consideration.")

6. Verdict (Second Stage), State v. Smith, No. CF-2010-51 (Beckham Cnty. Dist. Ct. filed June. 10, 2011). Since this had been Mr. Smith's third felony conviction, his sentence was enhanced, and the jury had the option to impose a sentence in the range of

the trial court affirmed the jury's recommendation and formally sentenced Mr. Smith.⁷

Mr. Smith's case, which seems all too common in Oklahoma, raises an interesting question about the degree to which a jury's sentence recommendation can be influenced by its understanding of (or lack thereof) current Oklahoma parole-eligibility law. Why does Oklahoma law require that Mr. Smith's jury be denied this parole information and forced to remain ignorant about the timing of Mr. Smith's parole eligibility? In an instance where a convicted felon would be required to serve 50% or 85% of the imposed sentence before the felon would be eligible for parole, a jury would receive a parole instruction containing this information.⁸ However, in an instance where a convicted felon, like Mr. Smith, would be required to serve 33% of his sentence before he would be eligible for parole, a jury would receive no instruction.⁹ The lack of a parole instruction in this instance forced Mr. Smith's jury to guess when he would be eligible for parole. Put simply, the jury's ignorance of the law, and its possible belief that Mr. Smith would be paroled at an earlier date, created the risk that his sentencing recommendation would be inflated. This Note challenges the Court of Criminal Appeals' refusal to authorize trial courts to give a 33% parole instruction and then argues that a 33% instruction is needed to prevent juries from playing guessing games with defendants' sentences.

II. UNDERSTANDING THE SENTENCING FRAMEWORK OF OKLAHOMA

A. *The Role of the Jury in Sentencing*

Oklahoma is one of six states where juries in criminal trials both convict felons and make sentencing recommendations.¹⁰ During the sentencing phase, a jury recommends "proper punishment" for a convicted defendant.¹¹ However, a trial court retains the authority to

20 years to life imprisonment. *See* OKLA. STAT. tit. 21, § 51.1(B) (OSCN through 2014 Leg. Sess.).

7. Sentencing Order, *State v. Smith*, No CF-2010-51 (Beckham Cnty. Dist. Ct. filed Aug. 5, 2011) (on file with author).

8. *See infra* Section III.C.

9. *Cox v. State*, 1971 OK CR 486, ¶ 16, 491 P.2d 357, 359; *see also* *Lacy v. State*, 2007 OK CR 20, ¶ 7, 171 P.3d 911, 914.

10. *See* Nancy J. King & Rosevelt L. Noble, *Felony Jury Sentencing in Practice: A Three-State Study*, 57 VAND. L. REV. 885, 886 (2004).

11. *See* VERNON'S OKLA. FORMS 2D, *Criminal*, in OKLAHOMA UNIFORM JURY

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actually sentence a defendant.¹² Yet, if trial judges are ultimately responsible for sentencing, why do juries make recommendations in the first place?

Judicial theorists have argued that jury participation in sentencing decisions leads to sentencing recommendations that further the retributive theory of punishment because they reflect community standards.¹³ If punishment seeks to have criminals repay society for their crimes, then the act of sentencing moves from a legal act to a moral one.¹⁴ The question then becomes who is in the best position to make this moral sentencing determination? Theorists argue that the jury is in the best position to make moral determinations because the jury can better express community moral judgment.¹⁵ In effect, the jury is able to “express the conscience of the community.”¹⁶ This expression is critically important because juries are “effective mechanism[s] for expressing the recent populist and retributive trends in criminal punishment.”¹⁷ Any discussion on what information is relevant for a jury to consider must be filtered through the need for juries to adequately express community norms.

B. The Parole Options for a Sentenced Felon in Oklahoma

In Oklahoma, there are three rules that govern when a convicted felon will be eligible for parole consideration: the 33% Rule,¹⁸ the 50% Rule,¹⁹ and the 85% Rule.²⁰ The 33% Rule is the default rule and it is applied broadly to any “crime committed on or after July 1, 1998,”

INSTRUCTIONS 10-13 (2012) (instructing the jury that “[i]f you find the defendant guilty, you shall then determine the proper punishment”).

12. OKLA. STAT. tit. 22, § 991a (OSCN through 2014 Leg. Sess.).

13. See Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951, 998–99 & n.174 (2003); see also Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 314 (2003) (arguing that jury sentencing remains the most effective form of sentencing as opposed to sentencing guidelines and judicial discretion).

14. See Hoffman, *supra* note 13, at 998.

15. See *id.* at 998–99.

16. Gilbert v. State, 1997 OK CR 71, ¶ 65, 951 P.2d 98, 116 (quoting Lowenfield v. Phelps, 484 U.S. 231, 238 (1988)).

17. Adriaan Lanni, Note, *Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?*, 108 YALE L.J. 1775, 1777 (1999).

18. OKLA. STAT. tit. 57, § 332.7(B) (OSCN through 2014 Leg. Sess.).

19. OKLA. STAT. tit. 22, § 1404(A); OKLA. STAT. tit. 63, § 2-401(F)(1).

20. OKLA. STAT. tit. 21, § 12.1; OKLA. STAT. tit. 63, § 2-401(F)(2).

unless it is superseded by another statutory provision.²¹ Under the 33% Rule, convicted defendants are not eligible for parole consideration until they have served one-third of the imposed sentence.²² On the opposite end of the parole-eligibility spectrum is the 85% Rule, which requires a convicted defendant to serve 85% of his sentence before becoming eligible for parole consideration.²³ However, unlike the 33% Rule, the 85% Rule is only applicable when a defendant has been convicted of specifically enumerated violent crimes.²⁴ In the middle is the 50% Rule, which is only used in very limited situations. The 50% Rule is found in both the Uniform Controlled Dangerous Substances Act²⁵ and the Oklahoma Racketeer-Influenced and Corrupt Organizations Act.²⁶ Thus, any felon who could be considered for parole will be governed by one of these three rules. With this basic understanding in place, it is now necessary to explore why the law allows a parole instruction in 50% and 85% crimes but not in 33% crimes.

III. OKLAHOMA'S TURBULENT HISTORY WITH PAROLE INSTRUCTIONS

A. *Early Decisions Refused to Provide Any Parole Instruction*

In 1936, the Oklahoma Court of Criminal Appeals decided *Bean v. State*, which was Oklahoma's first decision on the appropriateness of a parole-eligibility instruction.²⁷ In that case, the court was specifically concerned with Jury Instruction No. 12, which read in part:

You are further instructed that if you find the defendant guilty of any offense in this case, it is your duty to fix his punishment, and in this connection, you are instructed that when a defendant

21. See OKLA. STAT. tit. 57, § 332.7(B).

22. *Id.*

23. OKLA. STAT. tit. 21, § 12.1.

24. *Id.*; *id.* § 13.1.

25. OKLA. STAT. tit. 63, § 2-401(F)(1).

26. OKLA. STAT. tit. 22, § 1404(A).

27. *Bean v. State*, 1936 OK CR 21, 54 P.2d 675, 678.

We have searched in vain to find where any court in the trial of a defendant has instructed the jury that when a defendant is convicted of a felony and receives a prison sentence as a punishment therefor he does not necessarily serve the entire term of punishment imposed, for the reason that the law makes a provision of commutation of time for good behavior.

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is convicted of a felony in the State of Oklahoma and receives a prison sentence as a punishment therefor, he does not necessarily serve the entire term of punishment imposed for the reason that the laws of this state make a provision of commutation of time for good behavior.²⁸

After reviewing the trial court's instruction, the appellate court held that Instruction No. 12 had been given in error.²⁹ To justify this holding, the court reasoned that the question of parole was "not germane to the question involved" with regard to the defendant's guilt or innocence, but rather it had "provide[d] for conditions subsequent to conviction" and under the authority of the state penal system.³⁰ These two rationales provided the foundation for rejecting parole instructions for the next 70 years.³¹

In 1964, the Oklahoma Court of Criminal Appeals expanded its ban on the parole eligibility instruction when it held in *French v. State* that "instructions must not invade the province of the jury, and *should not extend beyond a clear statement of the law applicable to the case,*" even when a jury specifically asks for clarification on an issue.³² In its decision, the court reviewed the following conversation between the trial judge and the jury foreman:

Court: Do you have a question, Mr. Foreman?

A: Yes, sir. We are in doubt of what life imprisonment is. Some say it means ten, fifteen or twenty years. That is what the hold-up is. We want to know.

Court: Gentlemen, life imprisonment means life imprisonment unless in the discretion of the Parole Board approved by the Governor of the State it is reduced by parole. A person is eligible for parole provided he meets all of the requirements and it is

28. *Id.* at 677 (internal quotation marks omitted).

29. *Id.* at 678.

30. *Id.* at 677–78.

31. *See, e.g.,* *Mayes v. State*, 1994 OK CR 44, ¶¶ 129–30, 887 P.2d 1288, 1316–17 (citing *Cosby v. State*, 1947 OK CR 131, 186 P.2d 844, 848–49).

32. *French v. State*, 1964 OK CR 125, ¶¶ 15–16, 397 P.2d 909, 912 (emphasis added) (citing *Shaffer v. State*, 1955 OK CR 57, 283 P.2d 578; *Brookshire v. State*, 1955 OK CR 72, 284 P.2d 752).

recommended by the Parole Board and approved by the Governor, at the end of fifteen years.³³

While the Court of Criminal Appeals criticized this oral instruction,³⁴ the dialogue grants a rare glimpse into how a jury might consider the probability of parole during its sentencing deliberation. Several principles can be extracted from this conversation.

First, the *French* jury considered parole during its deliberation despite the lack of any parole-eligibility instruction.³⁵ The jury seemed to instinctively know that parole would affect the ultimate sentence, thus it seemed to believe that parole was an appropriate factor to consider in its deliberation. Second, juries tend to be very concerned about how parole will affect sentencing. In the above conversation, the foreman told the court that the “hold-up” was based solely on the parole question, and it was only after the judge answered the question that the jury reached a sentencing decision.³⁶ Finally, the *French* jury was ignorant about how the parole law was to be applied in the case with which it was concerned; indeed, the jury was purely guessing at the meaning of life imprisonment: “Some say it means ten, fifteen or twenty years.”³⁷ This ignorance of the applicable parole law clearly led to confusion as was manifested by the wide disparity between each juror’s guess.³⁸ Such disparity can have a dramatic impact on any recommended sentence. Yet, despite this disparity, the Court of Criminal Appeals has refused to authorize a parole-eligibility instruction.³⁹

It is important to note that Oklahoma’s early refusal to provide for a parole-eligibility instruction was unique as many other states historically provided a parole-eligibility instruction to juries. For example, the Georgia Supreme Court approved a jury receiving information about the

33. *Id.* ¶ 13, 397 P.2d at 912.

34. *Id.* ¶ 19, 397 P.2d at 913.

The Court would again remind all trial judges to project themselves into the trial of a criminal case as little as possible. They should remember that any action they take or remark they may make as a judge, will carry greater weight with the jury than anything that is said or done by anyone else in the court room.

Id.

35. *See id.* ¶ 13, 397 P.2d at 912.

36. *Id.*

37. *Id.*

38. *See id.*

39. *See, e.g., id.* ¶ 15, 397 P.2d at 912.

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possibility of the Governor pardoning the defendant.⁴⁰ In 1931, the California Supreme Court allowed a prosecuting attorney to comment on a defendant's parole eligibility in closing argument,⁴¹ and it justified the parole comments by claiming that parole eligibility was "common knowledge."⁴² Yet, despite allowing juries to be informed about a defendant's parole options, most states, including Georgia,⁴³ Pennsylvania,⁴⁴ California,⁴⁵ and Kentucky,⁴⁶ have all moved away from allowing the jury to be informed about the possibility of parole. Georgia has even gone so far as to codify its ban on arguments to, or in front of, a jury regarding the possibility of parole.⁴⁷

*B. The National Truth-in-Sentencing Movement Renews
the Sentencing and Parole Debate*

Prior to the 1970s, most states had an "indeterminate sentencing" system, which gave judges and parole boards broad discretion to determine an appropriate criminal sentence.⁴⁸ By the early 1980s, critics of this discretionary system argued that it produced racially motivated sentencing disparity⁴⁹ and allowed courts and parole boards to be too lenient.⁵⁰ In response to these criticisms, the United States Congress passed the Violent Crime Control and Law Enforcement Act of 1994.⁵¹ This omnibus spending bill included a \$6.1 billion funding provision for crime prevention and a \$9.7 billion grant program for states to update

40. See *Strickland v. State*, 70 S.E.2d 710, 712 (1952) (listing eight cases in which the jury was able to receive information concerning a defendant's parole possibility).

41. *People v. La Verne*, 297 P. 561, 562 (Cal. 1931).

42. *Id.*

43. *Thompson v. State*, 47 S.E.2d 54, 56–57 (Ga. 1948).

44. *Commonwealth v. Johnson*, 81 A.2d 569, 573 (Pa. 1951).

45. *People v. Morse*, 388 P.2d 33, 40–41 (Cal. 1964).

46. *Broyles v. Commonwealth*, 267 S.W.2d 73, 76–77 (Ky. 1954).

47. GA. CODE ANN. § 17-8-76 (1997).

48. Michael Tonry, *Obsolescence and Immanence in Penal Theory and Policy*, 105 COLUM. L. REV. 1233, 1234 (2005).

49. See KATE STITH & JOSÉ A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* 33–35 (1998) (footnotes omitted).

50. See Dhammika Dharmapala, Nuno Garoupa & Joanna M. Shepherd, *Legislatures, Judges, and Parole Boards: The Allocation of Discretion Under Determinate Sentencing*, 62 FLA. L. REV. 1037, 1043 (2010) (noting that "critics blamed indeterminate sentencing for the period's dramatically increasing crime rates, asserting that sentences were too uncertain and too lenient" (citing Tonry, *supra* note 48, at 1247)).

51. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994).

dilapidated prisons facilities.⁵² To qualify for the federal grant, states were required to meet various criteria, which included enacting legislation mandating that defendants convicted of violent crimes would serve 85% of their imposed sentence before becoming eligible for parole consideration.⁵³

In response to the federal grant program, Oklahoma passed the Truth-in-Sentencing Act.⁵⁴ State officials in Oklahoma stated that the federal program was a key factor in implementing sentencing reform.⁵⁵ In a report to the General Accounting Office, Oklahoma officials disclosed that preliminary discussions focused on a requirement that inmates serve at least 75% of their imposed sentences prior to parole eligibility, but officials adjusted this requirement to an 85% requirement so that Oklahoma would qualify for the federal grant.⁵⁶ Because of this modification, Oklahoma received almost \$4 million under the federal Truth-in-Sentencing grant.⁵⁷

After the Oklahoma legislature enacted the Truth-in-Sentencing Act, felons convicted of certain enumerated violent crimes found their parole eligibility governed by the 85% Rule.⁵⁸ The list of enumerated violent crimes includes: first and second degree murder, first degree manslaughter, poisoning, assault with a deadly weapon, first degree robbery, first degree rape, first degree arson, first degree burglary, bombing, crimes against a child, forcible sodomy, child pornography, child prostitution, lewd molestation of a child, abuse of a vulnerable adult, aggravated trafficking, and aggravated battery upon any person defending another person from assault and battery.⁵⁹

Oklahoma's Truth-in-Sentencing Act, however, was incomplete because the law failed to require judges to instruct jurors about the new

52. *Violent Crime Control and Law Enforcement Act of 1994*, U.S. DEP'T OF JUSTICE (Oct. 24, 1994), <http://www.ncjrs.gov/txtfiles/billfs.txt>.

53. William J. Sabol et al., *The Influence of Truth-in-Sentencing Reforms on Changes in States' Sentencing Practices and Prison Populations*, NAT'L INST. JUST., Apr. 2002, at 2.

54. *Id.* at 23; see also H.B. 1213, 46th Leg., 1st Sess. (Okla. 1997), available at <http://www.oklegislature.gov/AdvancedSearchForm.aspx> (search under "1997 Regular Session" for "HB1213").

55. William J. Sabol et al., *supra* note 53, at 26.

56. U.S. GEN. ACCOUNTING OFFICE, TRUTH IN SENTENCING: AVAILABILITY OF FEDERAL GRANTS INFLUENCED LAWS IN SOME STATES 8 (1998).

57. *Id.* at 4.

58. OKLA. STAT. tit. 21, § 13.1 (OSCN through 2014 Leg. Sess.).

59. *Id.*

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parole-eligibility requirement.⁶⁰ Thus, the Court of Criminal Appeals was presented with a dilemma: how could a court provide accurate sentencing information when no statutory provision required that the information be shared with a jury?⁶¹

C. Recent Decisions Allow for Parole Instructions . . . Sometimes

In 2006, after almost 70 years of denying parole-eligibility instructions, the Court of Criminal Appeals took an opportunity to solve the dilemma in *Anderson v. State*. In *Anderson*, the court held that the jury should be instructed as to how long a defendant must be incarcerated before a defendant is to be eligible for parole consideration when the defendant is convicted of a crime governed by the 85% Rule.⁶² To support this holding, the court focused on two primary justifications. First, the 85% instruction was consistent with the intent of the legislature to “give jurors, and the general public, accurate information about sentencing” under the Oklahoma Truth-in-Sentencing Act.⁶³ Second, an 85% instruction was necessary to prevent the prejudicial effect that occurs when a jury “round[s] up” a defendant’s sentencing.⁶⁴

In *Logsdon v. State*, its most recent discussion about the use of a parole-eligibility instruction, the Court of Criminal Appeals held that the jury should have received a parole-eligibility instruction when the defendant was required to serve 50% of his imposed sentence before he was to become eligible for parole consideration.⁶⁵ In that case, the defendant was charged with racketeering in connection with “selling investment contracts for interests in cattle that did not exist.”⁶⁶ If a defendant is convicted under the racketeering statutes, the defendant is “not . . . eligible for a deferred sentence, probation, suspension, work furlough, or release from confinement on any other basis until the person

60. *Anderson v. State*, 2006 OK CR 6, ¶ 12, 130 P.3d 273, 278 (discussing *Sanders v. State*, 2002 OK CR 42, ¶ 16, 60 P.3d 1048, 1051).

61. *See id.* (“It is unfortunate that the Legislature enacted a truth-in-sentencing law designed to give the public reliable sentencing information, while neglecting to include a specific clause requiring judges to instruct jurors on the law and its effects.”).

62. *Id.* ¶ 24 & n.32, 130 P.3d at 282–83 & n.32 (referring the issue to the Oklahoma Uniform Jury Instruction Commission to create a jury instruction on the 85% Rule).

63. *Id.* ¶ 11, 130 P.3d at 278; *see also infra* Parts IV, V.

64. *Anderson*, 2006 OK CR 6, ¶ 23, 130 P.3d at 282 (internal quotation marks omitted).

65. *Logsdon v. State*, 2010 OK CR 7, ¶ 25, 231 P.3d 1156, 1166.

66. *Id.* ¶ 4, 231 P.3d at 1160.

has served *one-half* (1/2) of [his or her] sentence.”⁶⁷ The *Logsdon* court supported its decision to provide a parole instruction solely on prejudicial grounds.⁶⁸ The court reasoned that juries needed a 50% parole-eligibility instruction to ensure that sentencing recommendations would not be increased because of uninformed guesses about when the defendant might become eligible for parole consideration.⁶⁹

The *Logsdon* decision is critical to understand why a 33% parole-eligibility instruction is justified. First, *Logsdon* expands the use of a parole-eligibility instruction to crimes beyond those specifically listed as violent crimes in the Truth-in-Sentencing Act (*i.e.*, subject to the 85% Rule).⁷⁰ This expansion was important because any attempt by a court to limit the use of a parole-eligibility instruction to crimes governed by the 85% Rule would be inconsistent with *Logsdon*'s holding. Second, *Logsdon* recognizes that the prejudicial rounding-up effect, which results from juries making uneducated guesses about parole eligibility, is sufficient grounds in itself to justify a parole-eligibility instruction.⁷¹ Thus, if the rounding-up effect can be identified in sentences for crimes governed by the 33% Rule, then the rationale in *Logsdon* would justify a parole instruction.

IV. THE NEED FOR A 33% PAROLE INSTRUCTION

Had Mr. Smith possessed a weapon at the time of his arrest, the jury could have received a parole instruction. If Mr. Smith were to have put on his white collar and engaged in a fraudulent sale of securities, the jury would have received a parole instruction. Mr. Smith, however, did not fall into either of these categories, and as a result, Mr. Smith's jury remained ignorant about the applicable parole-eligibility laws. In other words, the Court of Criminal Appeals forced the jury to play a guessing game when it came to Mr. Smith's parole eligibility.

67. OKLA. STAT. tit. 22, § 1404(A) (OSCN through 2014 Leg. Sess.) (emphasis added).

68. See *Logsdon*, 2010 OK CR 7, ¶ 27, 231 P.3d at 1166–67.

69. *Id.* ¶ 25, 231 P.3d at 1166.

70. See *id.* ¶¶ 24–25, 231 P.3d at 1166.

71. See *id.* ¶ 27, 231 P.3d at 1166–67.

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A. Juries Inflate Defendants' Sentences When Left Ignorant About Parole Eligibility

In both *Anderson* and *Logsdon*, the Court of Criminal Appeals recognized that juries could “increase [a defendant’s] sentence based on an uninformed guess about . . . parole.”⁷² When making these guesses, a jury is more likely to believe that a defendant would become parole eligible at an earlier date than when the defendant actually would, and jurors often round up any sentence recommendation to account for this perceived parole disparity.⁷³ In effect, this rounding up creates a higher sentence recommendation than the jury actually believes the defendant should serve.⁷⁴ The Court of Criminal Appeals has repeatedly acknowledged this rounding-up effect⁷⁵ and has noted that “the vast experience of this Court in reviewing jury sentences—particularly in cases where a jury question about the impact of parole went unanswered—leaves us with the solid conviction that the rounding-up problem is real and that it often significantly impacts the length of a defendant’s sentence.”⁷⁶

The rounding-up phenomenon and a jury’s consideration of parole are not isolated only to Oklahoma. A study examined every capital-trial transcript in Georgia from 1973 to 1990 and found that juries asked the court to clarify the parole options available to defendants in 25% of all capital cases.⁷⁷ Additionally, two authors in a 1987 Law Review article quite accurately noted that, even when jurors do not verbally raise such questions, “parole is a factor in the jury’s deliberations.”⁷⁸ An Arkansas

72. *Id.* ¶ 25, 231 P.3d at 1166; *see also Anderson v. State*, 2006 OK CR 6, ¶ 23, 130 P.3d 273, 282.

73. *See Anderson*, 2006 OK CR 6, ¶ 23, 130 P.3d at 282.

74. *Roy v. State*, 2006 OK CR 47, ¶¶ 24–25, 152 P.3d 217, 225–26 (finding that the jury would have made a recommendation of life and not life without parole had the jury received instruction regarding the 85% rule); *Carter v. State*, 2006 OK CR 42, ¶ 7, 147 P.3d 243, 245 (finding that the failure to provide a parole instruction “prejudicially impacted the sentencing deliberations”).

75. *See, e.g., Carter*, 2006 OK CR 42, ¶ 6, 147 P.3d at 245 (quoting *Anderson*, 2006 OK CR 6, ¶ 23, 130 P.3d at 282 (internal quotation marks omitted)); *see also Roy*, 2006 OK CR 47, ¶ 24, 152 P.3d at 226.

76. *Roy*, 2006 OK CR 47, ¶ 24, 152 P.3d at 226.

77. J. Mark Lane, “*Is There Life Without Parole?*”: *A Capital Defendant’s Right to a Meaningful Alternative Sentence*, 26 LOY. L.A. L. REV. 327, 335–36 (1993).

78. Anthony Paduano & Clive A. Stafford Smith, *Deathly Errors: Juror Misperceptions Concerning Parole in the Imposition of the Death Penalty*, 18 COLUM. HUM. RTS. L. REV. 211, 237 n.91 (1987).

study discussed various differences between a bench and a jury trial, including the fact that “[j]ury sentencing states differ as to . . . whether or not the sentences that juries impose are subject to parole[] and what information jurors are permitted to learn about punishment options.”⁷⁹ The study ultimately concluded that “average jury trial sentences were significantly higher than average bench trial sentences,” which could support the conclusion that parole is a significant factor for jury sentencing.⁸⁰ Finally, in Texas, the Fifth Circuit Court of Appeals identified 15 Texas cases where jurors considered parole during their deliberations despite being admonished by the trial judge specifically not to make such a consideration.⁸¹ The Texas Court of Criminal Appeals even noted that both the “trial records and [their] own opinions reflect that often jurors cannot resist the temptation to discuss parole laws.”⁸²

B. A 33% Parole-Eligibility Instruction Prevents Juries from Rounding Up Defendants’ Sentences

How can a court ensure that a jury does not inflate a sentencing recommendation based on uneducated guesses of parole-eligibility law? The Oklahoma Court of Criminal Appeals seemed to provide the answer to this question in both *Anderson* and *Logsdon*. The court found that a parole-eligibility instruction would “avoid unfair prejudice to defendants resulting from jurors increasing sentences based on uninformed guesses about parole.”⁸³ In fact, the court in both *Roy* and *Carter*, considered the failure to provide for a parole instruction, when combined with other factors, to be reversible error.⁸⁴ If a parole-eligibility instruction prevents prejudice in cases under the 85% Rule and 50% Rule, it seems logical to conclude that a parole instruction would prevent prejudice in cases under the 33% Rule. Yet, despite this logical extension of case law, the court

79. King & Noble, *supra* note 10, at 891–92.

80. *Id.* at 939.

81. King v. Lynaugh, 850 F.2d 1055, 1064 & n.26 (5th Cir. 1988) (Rubin, J., dissenting) (citations omitted).

82. Rose v. State, 752 S.W.2d 529, 536 (Tex. Crim. App. 1987) (en banc), *abrogated by* Karenev v. State, 281 S.W.3d 428, 433–34 (Tex. Crim. App. 2009).

83. Logsdon v. State, 2010 OK CR 7, ¶ 24, 231 P.3d 1156, 1166 (citing Anderson v. State, 2006 OK CR 6, ¶ 23, 130 P.3d 273, 282).

84. Carter v. State, 2006 OK CR 42, ¶ 7, 147 P.3d 243, 245; Roy v. State, 2006 OK CR 47, ¶ 26, 152 P.3d 217, 226 (holding that the combination of the court failing to instruct the jury about parole and the prosecutor’s improper closing arguments constituted a reversible error).

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has been reluctant to authorize a 33% parole-eligibility instruction.

V. ADDRESSING THE COMMON ARGUMENTS AGAINST A 33% PAROLE-ELIGIBILITY INSTRUCTION

While it appears that the Court of Criminal Appeals is moving toward a 33% parole-eligibility instruction, it is still necessary to understand the common arguments for why a court should refrain from expanding the use of a parole-eligibility instruction. The following part not only addresses the three most common arguments used against giving a parole-eligibility instruction but also points out the flaws in these arguments.

A. *The Separation of Powers Argument*

One of the most common arguments against a 33% parole-eligibility instruction is the Separation of Powers Doctrine,⁸⁵ which is based on the fact that the Oklahoma Constitution divides its government's power into three separate branches: the legislative, the executive, and the judicial.⁸⁶ While each branch cooperates with the other, each branch is also wholly separate and distinct from the other branches.⁸⁷ The Oklahoma Constitution accomplishes this separation by requiring each branch to refrain from exercising powers that would preempt another branch of government.⁸⁸ The purpose of this prohibition essentially is to prevent the concentration of power in any single branch⁸⁹ and protect individual

85. *See, e.g.*, *Bean v. State*, 1936 OK CR 21, 54 P.2d 675, 677–78 (finding that any parole instruction would concern conditions subsequent to the conviction and under the authority of the state penal system); *Mayes v. State*, 1994 OK CR 44, ¶¶ 128–30, 887 P.2d 1288, 1316–17 (noting that parole is a “discretionary procedure exercised by the executive branch”); *Anderson*, 2006 OK CR 6, ¶ 14, 130 P.3d at 279 (quoting *Mayes*, 1994 OK CR 44, ¶ 130, 887 P.2d at 1317).

86. OKLA. CONST. art. IV, § 1.

87. *Id.*

88. *Id.*; *see also* *Fields v. Driesel*, 1997 OK CR 33, ¶ 30, 941 P.2d 1000, 1007 (“[T]he doctrine of separation of powers prohibit[s] a court from exercising its inherent powers in a manner that would preempt an executive agency from exercising powers properly within its own sphere.” (citation omitted) (internal quotation marks omitted)).

89. THE FEDERALIST NO. 47, at 298 (James Madison) (Clinton Rossiter ed., First Signet Classic Printing 2003) (1961) (“No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty than [the Separation of Powers Doctrine]. . . . The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of

liberty.⁹⁰ The Kentucky Supreme Court explained this theory in relation to parole particularly well:

[I]t is the duty of the judiciary to obtain a conviction of those guilty of crime. But once that conviction has been obtained and the sentence imposed, it is the duty of other departments of government to enforce the sentence and to determine when and under what circumstances the prisoner will be eligible for release. Therefore, when the judiciary attempts to anticipate the rules of the legislative and executive departments relating to the parole of prisoners, and attempts, in effect, to circumvent those rules it infringes upon the prerogatives of other departments of government.⁹¹

Before claiming that a 33% parole-eligibility instruction violates the Separation of Powers Doctrine, it is necessary to determine what role each branch plays in the parole process.

1. The Legislative, Executive, and Judicial Roles in the Oklahoma Parole Process

One can find the respective role of each Oklahoma branch of government in the Oklahoma Constitution.⁹² First, the legislature has the “authority to prescribe a minimum mandatory period of confinement which must be served by a person prior to being eligible to be considered for parole.”⁹³ The legislature has delegated some of this authority to the Pardon and Parole Board so that the Board can develop policy and procedures for parole.⁹⁴

Second, within the executive department, the Governor and the

tyranny.”).

90. *Id.* at 299 (“[I]t may clearly be inferred that in saying ‘There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates,’ or, ‘if the power of judging be not separated from the legislative and executive powers’ he did not mean that these departments ought to have no *partial agency* in, or no *control* over, the acts of each other. His meaning, as his own words import . . . can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principle of a free constituted are subverted.”).

91. *Broyles v. Commonwealth*, 267 S.W.2d 73, 76 (Ky. 1954).

92. OKLA. CONST. art. VI, § 10.

93. *Id.*

94. OKLA. STAT. tit 57, § 332.7(F) (OSCN through 2014 Leg. Sess.).

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Pardon and Parole Board split decisions regarding parole.⁹⁵ The Pardon and Parole Board is a five-member panel charged with the duty to make an “impartial investigation and study” of parole applicants.⁹⁶ Recent decisions by the legislature may have dramatically changed the specific roles of the Pardon and Parole Board and the Governor.⁹⁷ Prior to the passage of Senate Joint Resolution 25, a parole applicant would only be granted parole after a two-stage investigation: the applicant had to receive a favorable recommendation from the Pardon and Parole Board before the Governor could consider granting a pardon or parole.⁹⁸ On November 6, 2012, the people of the State of Oklahoma voted on State Question No. 762, which granted the Pardon and Parole Board the “power and authority to grant parole for nonviolent offenses” without the need for the Governor’s approval.⁹⁹ The Resolution defines *nonviolent offenses* as those not required to serve 85% of the imposed sentence.¹⁰⁰

Finally, the judicial branch, like the other branches of government, also plays a vital role in the parole process. First, a court must render a felony conviction since the Pardon and Parole Board and Governor can only take action after a conviction has been given.¹⁰¹ If a court enters a sentence of death or life without parole, the Board is forbidden from making a recommendation for parole and the Governor is likewise forbidden from granting parole.¹⁰² The judicial branch also appoints two of the five members to the Pardon and Parole Board.¹⁰³

2. A 33% Parole Instruction Does Not Preempt the Legislative or Executive Departments

Considering each branch’s role in the parole process, does the court’s inclusion of a parole-eligibility instruction really infringe or preempt the other two branches’ power? For one, a 33% parole-eligibility instruction neither limits nor affects the ability of the legislature to set statutory

95. OKLA. CONST. art. VI, § 10.

96. *Id.*

97. S.J. Res. 25, 53rd Leg., 2d Reg. Sess. (Okla. 2012).

98. OKLA. CONST. art. VI, § 10 (amended 2012).

99. *Oklahoma State Questions for General Election*, OKLA. STATE ELECTION BD., at 2 (Nov. 6, 2012), <http://www.ok.gov/elections/documents/Oklahoma%20State%20Questions%202012.pdf>.

100. *Id.*

101. OKLA. CONST. art. VI, § 10.

102. *Id.*

103. *Id.*

limits for parole eligibility. Rather, a 33% parole-eligibility instruction actually serves to inform the jury of the legislature's determined-eligibility requirements—it would be a strange situation if the dissemination of this information alone was sufficient to trigger a Separation of Powers violation. But even if providing parole information were considered a Separation of Powers violation, any potential harm seems negated in light of the information juries receive under either an 85% or a 50% Rule case.

Furthermore, giving a parole-eligibility instruction does not infringe on the power of the executive branch (with regard to either the Pardon and Parole Board or the Governor) to investigate parole applications and make the ultimate determination of whether to grant parole. A parole-eligibility instruction only seeks to provide information concerning when a convicted felon will be eligible for parole;¹⁰⁴ the jury is not asked to make a determination about whether the Board will ultimately recommend parole or the Governor will actually grant it.¹⁰⁵ Instead, in a criminal trial, the judicial branch is trying to ensure that the defendant receives a fair trial and, in the event of a conviction, that such conviction was just by “avoid[ing] unfair prejudice to defendants resulting from jurors increasing sentences based on uninformed guesses about parole.”¹⁰⁶ Finally, the possible perception of infringement is diminished in light of the fact that courts already give 85% and 50% parole-eligibility instructions.

B. *The Speculation Argument*

Another common argument against providing a 33% parole-eligibility instruction is the theory that a jury and a court will end up speculating about when (and if) a convicted felon will be paroled.¹⁰⁷ Proponents claim that when a jury speculates as to how long a defendant will serve his conviction prior to parole, they do nothing more than look into the future like “soothsayers.”¹⁰⁸ “The mischief of forecasting how and when a prisoner will become eligible for parole, and whether the prisoner will actually be paroled, is a distraction which diverts jury

104. See *Anderson v. State*, 2006 OK CR 6, ¶ 16, 130 P.3d 273, 279.

105. *Id.*

106. *Logsdon v. State*, 2010 OK CR 7, ¶ 24, 231 P.3d 1156, 1166 (citing *Anderson*, 2006 OK CR 6, ¶ 23, 130 P.3d at 282).

107. See, e.g., *Mayes v. State*, 1994 OK CR 44, ¶ 130, 887 P.2d 1288, 1317.

108. See, e.g., *id.*

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deliberations from its central purpose of deciding what punishment jurors genuinely believe fair for a particular defendant.”¹⁰⁹ Such conjecture by a jury is considered a violation of due process.¹¹⁰

There are, however, some flaws with this argument. First, the argument mischaracterizes the information that a parole-eligibility instruction provides. A parole-eligibility instruction does not seek to inform the jury when a convicted felon will be *released* because any information about actual release truly is speculation.¹¹¹ Instead, the instruction only seeks to inform the jury when a felon would become *eligible* for parole consideration.¹¹² Eligibility is determined by the applicable statute and is nothing short of a purely mechanical calculation.¹¹³

The speculation argument also fails to recognize that 85% and 50% instructions are already provided to juries. The court has recognized that a balance has to be struck between providing a fair trial to both parties and providing the necessary information to juries,¹¹⁴ a balance that is best served when all “significant and appropriate information” about parole eligibility is given to a jury.¹¹⁵ By providing a parole-eligibility instruction, a court actually prevents a jury from speculating or guessing about when a defendant will become eligible for parole.¹¹⁶

C. The Legislative-Intent Argument

Yet another common justification for not providing a parole-eligibility instruction is a legislative-intent argument. The Oklahoma Court of Criminal Appeals stated in *Anderson* that the Oklahoma Truth-in-Sentencing Act was a part of a national movement to provide accurate information to the public about sentencing.¹¹⁷ The court explained that common sense dictates that courts need to stray from precedence when

109. Keith S. Hampton & Cynthia Lanning-Hampton, *The Parole Law Instruction and Jury Misconduct*, 24 TEX. TECH L. REV. 773, 785 (1993) (footnotes omitted).

110. *Id.*

111. *See Anderson*, 2006 OK CR 6, ¶ 16, 130 P.3d at 279.

112. *Id.*

113. *Id.*

114. *Id.* ¶ 19, 130 P.3d at 280 (quoting *Fishback v. Commonwealth*, 532 S.E.2d 629, 633 (Va. 2000)).

115. *Id.* ¶ 21, 130 P.3d at 281 (quoting *Fishback*, 532 S.E.2d at 633) (internal quotation marks omitted).

116. *Id.* ¶ 23, 130 P.3d at 282.

117. *Id.* ¶ 11, 130 P.3d at 278.

the legislature acts to create a “specialized area of law,” so that courts can stay consistent with the will of the legislature.¹¹⁸ Accordingly, the legislative-intent argument seems to claim that the court’s ban on a parole instruction should stand unless the legislature acts to create another special area of law specific to the 33% parole-eligibility instruction.¹¹⁹

This line of reasoning also has several flaws. First, the legislative-intent argument fails to recognize the impact of the *Logsdon* decision. As explained in this Note, *Logsdon* expanded the parole-eligibility instruction beyond just crimes enumerated in the Truth-in-Sentencing Act.¹²⁰ *Logsdon* also based its decision solely on the grounds of prejudice without any attempt to identify a specialized area of law.¹²¹ Thus it is arguable that the court has moved beyond this specialized-area-of-law requirement.

Additionally, the *Anderson* court erred in its interpretation of the legislative intent when it claimed that the Truth-in-Sentencing Act had been about providing the public with reliable information. On the contrary, the authors of the Truth-in-Sentencing Act claimed that the new law was intended to ensure that violent criminals spent more time in jail.¹²² Governor Keating stated that when “we truly separate the bad from the very, very bad, and throw away the key on the violent and repeat offender[s],” there would be a reduction in crime.¹²³ The court also failed to note the almost \$4 million incentive that Oklahoma received under the original enactment of the 1997 Truth-in-Sentencing Act.¹²⁴ Consequently, it seems that the Truth-in-Sentencing Act has nothing to do with actually providing truthful information to the jury and instead was enacted to increase incarceration rates and qualify for a federal grant.

118. *Id.* ¶ 13, 130 P.3d at 278.

119. *See id.*

120. *Logsdon v. State*, 2010 OK CR 7, ¶¶ 23–25, 231 P.3d 1156, 1166 (including a parole instruction for a racketeering charge).

121. *Id.* ¶ 27, 231 P.3d at 1166–67.

122. Anthony Thornton, *Truth in Sentencing: ‘Savior’ or ‘Judas’?*, SUNDAY OKLAHOMAN, Mar. 14, 1993, at 1-A.

123. Paul English, *Keating Backs Sentencing Law Rewrite: Act Seeks Longer Prison Terms*, DAILY OKLAHOMAN, Jan. 31, 1998, at 1.

124. Mick Hinton, *Lawmakers Weigh Revisions in Truth-in-Sentencing Law*, DAILY OKLAHOMAN, Mar. 23, 1999, at 9.

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VI. DRAFTING A 33% PAROLE INSTRUCTION

The final part of this Note addresses the Court of Criminal Appeals' concern over what a proposed 33% instruction would look like,¹²⁵ explores the requirements for a model instruction, examines parole instructions used by other states, and concludes by providing a sample instruction.

A. Oklahoma's Requirements for a Jury Instruction

The Oklahoma Legislature has delegated to the judiciary the authority to draft model jury instructions because it wisely recognizes that courts are in a unique position to draft jury instructions.¹²⁶ Both the Oklahoma Supreme Court and the Oklahoma Court of Criminal Appeals have the power to draft model jury instructions for use in Oklahoma.¹²⁷ When drafting instructions, the courts have two key requirements. First, an instruction must accurately inform the jury about the law.¹²⁸ Second, an instruction should assist the jury in reaching a correct conclusion.¹²⁹ These two requirements must always be kept in mind when discussing the adequacy or inadequacy of any proposed instruction.

B. Examining Other Parole Instructions

A review of other jurisdictions' parole instructions can provide helpful insight in drafting a proposed 33% instruction.

1. The Arkansas Instruction

In Arkansas, the following parole instruction is provided to the jury:

In your deliberations on the sentence to be imposed, you may consider the possibility of the transfer of _____ (defendant) from the Department of Correction to the Department of

125. See, e.g., *Skinner v. State*, 2009 OK CR 19, ¶ 41, 210 P.3d 840, 855 (stating that the defendant "has neglected to suggest, both in the trial court and here on appeal, how the desired instruction . . . would even be worded").

126. OKLA. STAT. tit 12, § 577.1 (OSCN through 2014 Leg. Sess.).

127. *Id.*

128. *Mosley v. Truckstops Corp. of Am.*, 1993 OK 79, ¶ 18, 891 P.2d 577, 584 (footnotes omitted).

129. *Id.* (footnotes omitted).

Community Correction. After he serves 1/3 of any term of imprisonment to which you may sentence him, he will be eligible for transfer from the Department of Correction to the Department of Community Correction. If transfer is granted, he will be released from prison and placed under post-prison supervision. The term of imprisonment may be reduced further, up to 1/6 of any period you impose, if he earns the maximum amount of meritorious good time during his imprisonment.

Meritorious good time is time-credit awarded for good behavior or for certain achievements while an inmate is confined in a Department of Correction or Community Correction facility, or in a jail while awaiting transfer to one of those facilities. An inmate may be awarded up to one day for every day served. Accrual of meritorious good time does not reduce the length of sentence but does decrease the time the defendant is required to be imprisoned before he becomes eligible for transfer to community supervision, under which the remainder of his sentence will be served.¹³⁰

While the Arkansas instruction seems to mirror Oklahoma law when it comes to the 33% Rule,¹³¹ there are drawbacks to using this instruction. First, the instruction is confusing because it focuses a jury's attention on the transfer of an inmate from the Department of Correction to the Department of Community Correction. In other words, a jury is required to connect a transfer to the Department of Community Correction with the traditional notion of parole. Such a connection is probably quite difficult considering the instruction's failure to even mention the term "parole." The instruction also fails to tell a jury how to use the information in its deliberation. In short, this instruction allows the jury to continue to speculate about whether parole will be granted.

2. The Texas Instruction

Texas has drafted an instruction addressing the flaws contained in the Arkansas instruction. The Texas instruction provides:

130. 1 ARK. SUPREME COURT COMM. ON CRIMINAL JURY INSTRUCTIONS, ARKANSAS MODEL JURY INSTRUCTIONS—CRIMINAL 9401 (2012).

131. *Compare id.*, with OKLA. STAT. tit. 57, § 332.7(B) (OSCN through 2014 Leg. Sess.).

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Under the law applicable in this case, the Defendant, if sentenced to a term of imprisonment, may earn time off the sentence imposed through the award of good conduct time. Prison authorities may award good conduct time to a prisoner who exhibits good behavior, diligence in carrying out prison work assignments, and attempts at rehabilitation. If a prisoner engages in misconduct, prison authorities may also take away all or part of any good conduct time earned by the prisoner.

It is also possible that the length of time for which the Defendant will be imprisoned might be reduced by the award of parole.

Under the law applicable in this case, if the Defendant is sentenced to a term of imprisonment, (he/she) will not become eligible for parole until the actual time served plus any good time earned equals one-fourth of the sentence imposed. Eligibility for parole does not guarantee that parole will be granted.

It cannot be accurately predicted how the parole law and good conduct time might be applied to this Defendant if (he/she) is sentenced to a term of imprisonment because the application of these laws will depend on decisions made by prison and parole authorities.

You may consider the existence of the parole law and good conduct time. However, you are not to consider the extent to which good conduct time may be awarded to or forfeited by this particular Defendant. You are not to consider the manner in which the parole law may be applied to this particular Defendant. Such matters come within the exclusive jurisdiction of the Pardon and Parole Division of the Texas Department of Criminal Justice and the Governor of Texas.¹³²

The Texas instruction, unlike the Arkansas instruction, seeks to inform a jury on how parole information should and should not be used. Specifically, a jury can “consider the existence of the parole law,” which minimizes any uneducated guesses and the rounding up of a sentence.¹³³ But the jury is also instructed not to consider how parole law might

132. 1 ELIZABETH BERRY & GEORGE GALLAGHER, TEXAS CRIMINAL JURY CHARGES § 4:290 (2012).

133. *Id.*

actually be applied.¹³⁴ The Texas instruction seeks to guide a jury around the speculation and Separation of Powers concerns by reminding a jury that it “cannot be accurately predicted how the parole law” will be applied because that decision comes within the exclusive jurisdiction of the executive branch.¹³⁵ The main drawback of the Texas instruction is its length.¹³⁶ Oklahoma, on the other hand, takes a more focused approach in its parole instructions.

3. Oklahoma’s Current Parole Instructions

While Oklahoma does not currently give a 33% parole-eligibility instruction, an examination of the two 85% instructions can give some hints on how to draft a 33% parole-eligibility instruction. The first instruction provides:

A person convicted of [Specify Crime in 21 O.S. Supp. 2005, § 13.1] shall be required to serve not less than eighty-five percent (85%) of the sentence imposed before becoming eligible for consideration for parole and shall not be eligible for any credits that will reduce the length of imprisonment to less than eighty-five percent (85%) of the sentence imposed.¹³⁷

Additionally, if the crime has the option of life imprisonment, the following instruction will be given:

A person convicted of [Specify Crime in 21 O.S. Supp. 2005, § 13.1] shall be required to serve not less than eighty-five percent (85%) of the sentence imposed before becoming eligible for consideration for parole and shall not be eligible for any credits that will reduce the length of imprisonment to less than eighty-five percent (85%) of the sentence imposed.

If a person is sentenced to life imprisonment, the calculation of eligibility for parole is based upon a term of forty-five (45) years, so that a person would be eligible for consideration for

134. *Id.*

135. *Id.*

136. It seems that everything is bigger in Texas.

137. VERNON’S OKLAHOMA FORMS 2D, *supra* note 11, 10-13A.

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parole after thirty eight (38) years and three (3) months.¹³⁸

Focusing on form, both of these instructions are distinctly short when compared to the Arkansas and Texas instructions. Thus, it seems reasonable that any proposed parole-eligibility instruction should mimic these related instructions as much as possible.

C. Proposed Instruction

Keeping Arkansas, Texas, and Oklahoma instructions in mind, if Oklahoma were to enact a 33% parole-eligibility instruction, I believe it should read as follows:

The Defendant may have (his or her) length of imprisonment reduced by the award of parole.

The Defendant will be required to serve thirty-three percent (33%) of the sentence imposed before becoming eligible for parole consideration. Eligibility for parole consideration does not guarantee that the Defendant will be granted parole.

You may consider the existence of the parole law in your deliberation, but you are not to consider the extent to which the parole law may be applied to the Defendant. Such matters come within the exclusive jurisdiction of the Pardon and Parole Board and the Governor of the State of Oklahoma.

With this proposed instruction in hand, it is necessary to ensure that it could pass the two requirements for a model instruction.

1. The Proposed 33% Instruction Is an Accurate Statement of Oklahoma Law

In evaluating a proposed instruction, the first hurdle is to ensure that the instruction is an accurate statement of the law.¹³⁹ To test the soundness of the law, each paragraph of the proposed instruction should be examined independently.

138. *Id.* 10-13B.

139. *Mosley v. Truckstops Corp. of Am.*, 1993 OK 79, ¶ 18, 891 P.2d 577, 584.

The Defendant may have (his or her) length of imprisonment reduced by the award of parole.

The first paragraph is intended to be introductory in nature and to place a jury on notice about the information to follow. This paragraph also makes a general statement on how parole could reduce the time that a defendant actually spends incarcerated. It is important to note that this paragraph uses the permissive term “may,” which helps lay the foundation that it is impossible for a jury to know if parole will actually be granted in the case with which it is concerned.¹⁴⁰

The Defendant will be required to serve thirty-three percent (33%) of the sentence imposed before becoming eligible for parole consideration. Eligibility for parole consideration does not guarantee that the Defendant will be granted parole.

The second paragraph seeks to instruct a jury about the 33% Rule.¹⁴¹ The second sentence of this paragraph focuses a jury on parole eligibility. This focus reminds a jury that the instruction only speaks to when an individual *may* be considered for parole consideration.¹⁴²

You may consider the existence of the parole law in your deliberation, but you are not to consider the extent to which the parole law may be applied to the Defendant. Such matters come within the exclusive jurisdiction of the Pardon and Parole Board and the Governor of the State of Oklahoma.

The final paragraph addresses the speculation and the Separation of Powers concerns.¹⁴³ It addresses the speculation argument by directing the jury on how to use the parole information, as well as instructing it not to consider how parole law will be applied in the case before it. Then, the instruction addresses the Separation of Powers argument by reminding the jury that any parole determination is solely within the authority of the executive branch.¹⁴⁴

140. See *Mayes v. State*, 1994 OK CR 44, ¶ 130, 887 P.2d 1288, 1317; see also *Anderson v. State*, 2006 OK CR 6, ¶ 16, 130 P.3d 273, 279.

141. OKLA. STAT. tit. 57, § 332.7(B) (OSCN through 2014 Leg. Sess.).

142. See *Anderson*, 2006 OK CR 6, ¶ 16, 130 P.3d at 279.

143. See *supra* Parts V.A–B.

144. OKLA. CONST. art. VI, § 10.

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2. The Proposed 33% Parole Instruction Will Assist Juries in Sentencing

The second requirement for a proper jury instruction is that it must assist a jury in coming to the correct decision.¹⁴⁵ As was addressed by this Note, the key concern is that jurors are playing a guessing game when it comes to parole, which results in the prejudicial rounding up of defendants' sentences. When a jury is given a parole instruction, a juror no longer needs to engage in a parole guessing game. As a result, courts can be confident that any sentence recommended by a jury is an accurate reflection of the time it wants a defendant to serve, and a jury can return a sentencing recommendation that truly reflects the conscience of the community. Here, the proposed 33% parole-eligibility instruction meets the two requirements of a model instruction.

VII. CONCLUSION

Mr. Smith is currently serving a 99-year sentence, a sentence that was undeniably the product of a guessing game about his parole eligibility. If Mr. Smith's crime had been governed by the 85% or 50% Rule, the jury would have received a parole instruction. But because Mr. Smith's crime was governed by the 33% Rule, the jury remained ignorant. This continued delineation of when a parole-eligibility instruction will or will not be given is no longer justified in light of the prejudicial rounding-up effect that has been previously acknowledged by Oklahoma courts. Antiquated concerns over speculation, Separation of Powers, and legislative-intent arguments are no longer palpable when compared with the reality of a jury guessing about a defendant's parole eligibility. It is time for Oklahoma to take the final step and provide defendants a 33% parole-eligibility instruction. Only by providing an instruction can courts have confidence that defendants' sentences accurately reflect societal norms and steadfastly prevent juries from playing guessing games with defendants' sentences.

145. Mosley v. Truckstops Corp. of Am., 1993 OK 79, ¶ 18, 891 P.2d 577, 584.