

Criminal Jury Instructions Committee

Minutes January 27, 2023

Attending:

Hon. Jennifer Green – Chair
James Baumann
Daniel Carrion
David Euchner (Proxy for Sarah Mayhew)
Jarom Harris
Robb Holmes
Alice Jones
Samantha Kluger
Todd Lawson
Jennifer Linn
Michael Minicozzi (Proxy for Karen Komrada)
Mikel Steinfeld
Shawn Steinberg
Hon Lacy Gard (Proxy for Elizabeth Bingert)

Absent:

Bruce Chalk
Ellen Dahl
Jillian Francis
Kush Govani
Comm. Steve McCarthy
Greta Vietor
William Wallace

Call to Order by Judge Green at 1:38 pm

1. Approval of meeting minutes from November 18, 2022
 - a. Mikel Steinfeld moves to approve, Dan Carrion seconds. **Motion passes unanimously.**
2. Proposed Revisions to Use of Deadly Physical Force – Karen Komrada (Minicozzi proxy)
 - a. Minicozzi says Komrada wishes to withdraw the motion
 - b.** It was seconded.
 - c. Discussion ensues regarding whether sponsor can withdraw bill without vote; consensus is that she can
 - d. Chair orders motion withdrawn
3. Proposed Revision to Standard 48—production of witnesses—James Baumann

- a. On agenda as # 4; taken out of order due to technical difficulties with Linn
- b. Baumann presents the motion
- c. Floor opened for discussion
 - i. Linn and Euchner note that this instruction is familiar; Euchner says that it is used routinely in Pima county
 - ii. Euchner discusses State v. Herrera, which was a case finding no error but applied a fundamental-error standard
 - iii. Discussion by Steinfeld about the context of the cases being cited
 - iv. Minicozzi reports that he uses this instruction in his trials a lot; it needs to be given with standards 2, 3, and 4, so he recommends a use note saying that it cannot be used without 2, 3, and 4 and that it should be read immediately after those instructions
 - v. Discussion from Euchner about instruction potentially lessening the burden of proof
 - vi. The chair asks whether it should be joined with Preliminary criminal 3 (evidence)
 - vii. Steinfeld says that it would pair well with Standard 9 (defendant need not produce evidence); Carrion says perhaps designating it as 9a or 9b
 - viii. Chair suggests standard 8; Steinberg agrees and points out that it is applicable to both sides and would be misplaced with instruction that Defendant need not testify
 - ix. Steinfeld recommends 8a-evidence to be considered and 8b-this instruction; should be broken out into two parts and either 8 or 9 is fine
 - x. Euchner points out that the only other ones broken up into a and b are ones where the instructions are alternatives for the court; Steinfeld recommends 8.1 instead, or 8.5
 - xi. Euchner recommends adding a second sentence, “However, if you have a reasonable doubt as to the defendant’s guilt because evidence may not have been produced, you must find the defendant not guilty”
 - 1. Lawson raises concern about how would jury know what wasn’t produced? Answer from Euchner—it might come up in testimony
 - 2. Lawson says that this would invite jurors to speculate
 - 3. Linn says that sometimes she brings out the fact that a particular victim can’t be there, etc., so she worries about the beyond a reasonable doubt part
 - 4. Minicozzi does not like the addition either because as is it is a two-sided instruction and now it’s being skewed defense; Euchner responds
 - 5. Lawson is concerned about inviting speculation as well
 - 6. Euchner invites proposed changes to his language
 - 7. Steinberg points out that this is already covered by the reasonable doubt instruction

8. Steinfeld is concerned about being able to add this without addressing the precluded evidence issue, and he thinks that the use note initially proposed related to the 2, 3 and 4 standards will take care of it; is concerned about preventing speculation
9. Euchner thinks this is unnecessary; discussion issues between Euchner and Steinfeld regarding whether the RD instruction is required

10. Motion

- a. **Lawson moves original text proposed; Steinberg seconds;**
 - i. **Steinfeld asks does this include the use note; yes it does;**
 - ii. **Moved again by Lawson and seconded Steinberg; chair asks is this going to be 8.1—still so moved and seconded**
- b. *Clarification: the motion is the amendment, with the use note saying to be given with 2, 3, and 4, and it to be listed as 8.1*

11. Chair calls for vote

- a. 12 yay
- b. 3 nay
- c. Motion carries

4. Proposed Revisions to 25.08—Resisting Arrest—James Baumann

- a. On agenda as # 5—taken out of order due to technical difficulties with Linn
- b. Proposal is presented by Baumann; discussion ensues
- c. Steinfeld proposes that this is already covered by instructions 38.81 and 38.88; he suggests that we modify the use existing use note for 25.08 to include the language Baumann seeks to use in brackets
- d. Alice points out 38.86 and 38.87 also apply (Jones corrected later—only 38.87 exists; there is no longer a 38.86)
- e. Euchner proposes that bracketed language would fit nicely after *Stroud* cite in the existing use note
- f. Baumann agrees that it would be sufficient to refer to the other RAJIs
- g. Discussion ensues regarding the drafting of the use note; Euchner proposes language in real time: “See Criminal Instructions 38.81, 38.87, and 38.88” in the current last sentence of the use note following the *Stroud* cite

h. Motion

- i. **To add the language in g above and remove red language in draft saying “use bracketed language above”**
- ii. **Moved by Euchner**
- iii. **Steinfeld seconds**
- iv. **Motion passes unanimously**

5. Proposed Revisions to Standard Instructions 45 and 47 – Jennifer Linn
 - a. On agenda as # 3; taken out of order due to technical difficulties
 - b. Linn presents proposal on 45; discussion ensues
 - i. Euchner points out that there was a lengthy discussion the previous week meeting when Linn was not present
 - ii. Euchner discusses the procedural differences between *Bigger* (PCR/change in law) and trial—the only thing *Bigger* holds is that *Perry* does not affect a change in the law in Arizona, and there is nothing in *Bigger* that says that a court should still deny jury instructions on identification when identification was an issue in the case
 - iii. Jones says that *Perry* itself says that there has to be state action, so this proposal is an accurate statement of what *Perry* says
 - iv. Euchner says that *Perry* is a suppression case—what is required to show that evidence must be suppressed, not a jury instruction case
 - v. Steinfeld agrees that *Perry* and *Bigger* seem to be dealing with suppression issues and not instruction issues; Euchner discusses *Nottingham*
 - vi. Steinfeld proposes that use comment should just cite *Desserault*
 - vii. Linn thinks that *Bigger* undid part of *Nottingham* and so this is necessary; Euchner responds that *Bigger* is a R32/change-in-the-law claim
 - viii. Steinfeld proposes just eliminating the use note, which would eliminate all of the problems with the wording of it; Euchner agrees
 - ix. Linn says that there are problems with judges not giving instructions that need to be given but she agrees that case law in use notes should be correct; Euchner again argues the limitations on *Bigger*
 - x. Chair and Steinfeld talk about putting *Perry* and *Bigger* into the source note; Euchner says this implies incorrect holding of *Bigger*
 - xi. Linn is fine moving to the source
 - xii. Euchner points out that these cases are not sources for the instructions
 - xiii. Jones suggests just referring judge to case law; Euchner is concerned about citing a case that suggests that the instruction does not have to be given
 - xiv. Steinfeld says dump the use note; Linn is ok with it
 - xv. Motion
 1. To dump use note
 2. Steinfeld moved
 3. Dan Carrion second
 4. Motion carries unanimously
 - c. Linn presents proposal on 47; discussion ensues
 - i. Euchner discusses *Parker*
 - ii. Steinfeld asks if there is anything incorrect with the use note; Linn thinks that it incorrectly describes *Parker*

- iii. Steinfeld thinks that *Parker* is limited to fundamental error, too; he is also concerned about the wording because it seems to be calculated to dissuade judges from giving the instruction
- iv. Discussion about why we have the comment in the first place; Euchner says that it is because of the confusion *Parker* causes
- v. **Motion to reject the proposal (Euchner); second (Carrion)**
 - 1. **Aye: 14**
 - 2. **Nay: 1**
- vi. Linn requests to return to discussion because her phone cut out; she wants to just eliminate the use note and the comment
 - 1. Euchner thinks it's needed because of *Parker* confusion
 - 2. **Motion**
 - a. **To strike use note (Linn moves)**
 - b. **Minicozzi seconds**
 - c. **Ayes: 5**
 - d. **Nay: 7**
- vii. **Baumann moves to strike use note and leave comment; Gard seconds**
 - 1. **Motion carries; use note will be struck.**
- viii. **Euchner moves to change 43 to 46 in the source note; Steinberg seconds; unanimously passes**

6. Proposed New Instruction—Abortion Gestational Age—Dan Carrion

- a. Carrion invites discussion of errors
- b. Jones says that there is a definition in the statute for probable gestational age but in another part of the statute determination of probable gestational age must be made according to standard medical practice in the medical community
- c. Euchner thinks that we don't need this at all because abortion prosecutions are unlikely; discussion ensues; Chair, Gard and Linn in favor of drafting a RAJI
- d. Discussion regarding definition of physician;
- e. **Carrion moves to correct osteopath to osteopathy and that this be number 36.03.02, so it would follow right after partial-birth abortion**
 - i. Euchner asks what is the mens rea? Strict liability? He says that last meeting we concluded that there has to be a mens rea
 - ii. Jones says that another statute says that the physician has to determine the probable gestational age; Carrion thinks that would suggest knowledge or awareness
 - iii. Consensus is that the mens rea is intentionally or knowingly because that applies to all of the statute; discussion ensues as to how to reorder the statute; physician may need to be its own element
 - iv. **Linn moves to table and Dan second; motion passes unanimously**

7. Other Business—Judge Green

- a. Todd Lawson noticed a problem with the table of contents in the PDF of the most recent RAJI; there are duplicates of some of the chapters bookmarked; bookmarks need to be fixed and Ilona will fix them
8. Call To the Public—no response
9. Next meeting date
 - a. March 24, 2023 at 1:30 pm
10. Adjournment
 - a. Euchner moves, multiple seconds. **Motion passes unanimously.**
 - b. Meeting adjourns at 3:22 p.m.