

Criminal Jury Instructions Committee

Minutes March 24, 2023

Attending:

Hon. Jennifer Green – Chair
Elizabeth Bingert
Daniel Carrion
Bruce Chalk
David Euchner
Jarom Harris
Robb Holmes
Alice Jones
Karen Komrada
Todd Lawson
Jennifer Linn
Michael Minicozzi
Mikel Steinfeld
Hon Lacy Gard

Absent:

James Baumann
Ellen Dahl
Jillian Francis
Kush Govani
Samantha Kluger
Comm. Steve McCarthy
Shawn Steinberg
Greta Vietor
William Wallace

1. Discussion about proxy votes begins at 1:31 p.m.
 - a. Jennifer Linn is proxy for: James Baumann, Ellen Dahl, and Shawn Steinberg.
 - b. Euchner says that he will object to any proxy that did not include the SBA form.
 - c. Linn voices concern that it is not fair to enforce the rule right when the meeting begins, Ilona agrees. Bingert agrees with Ilona and Linn and suggests that the Committee start enforcing the proxy form rule at the next meeting.
 - d. Discussion held about when the Committee started having proxies (same time as when the open meeting requirement began).
 - e. Euchner renews objection to Linn serving as proxy without the forms.
 - f. Green indicates that the meeting will not be delayed by the proxy issue.
 - g. Ilona notes that Dahl and Steinberg sent her emails before the meeting, Baumann did not.
 - h. Green mentions that if there is a close vote, Committee will discuss further.

- i. Ilona to send proxy form to everyone. (Note: this issue is also discussed in Minute Items 3, 4, and 5.)
2. Call to Order by Judge Green 1:38 p.m.
3. Review and approval of January 27th minutes.
 - a. Euchner moves to remove highlighted missed second on page 1 and proposes that we indicate that the motion was seconded. Green agrees. **No objection.** Euchner moves to delete the highlighted missed vote count and the minutes should reflect that the motion carries. **No objection.**
 - b. Ilona: Jarom Harris is proxy for Samantha Kluger. Communicated by email before meeting. Ilona notes receipt of proxy form from Dahl and Baumann (after meeting was called to order.
 - c. **Euchner moves to approve the changes. Linn seconds. Komrada and Bingert abstain. Motion passes unanimously.**
4. Comment to New Standard Instruction 8.1 from Maricopa County Office of Public Defense Services (to include all of the Maricopa County indigent defense agencies).
 - a. Euchner: Agrees with gist of the comment and that is why he suggested modification to the instruction at the last meeting. The “neither side” language lessens the State’s burden because it suggests to the jury that they may not need as much evidence as they feel they need. Would be okay if the instruction included another sentence that reminds the jury of State’s burden.
 - i. Proposes this 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.”
 - b. Minicozzi: He proposed the instruction, but the comment made him question his position. He read the cases again, agrees with Euchner that a second sentence is necessary. Would tweak Euchner’s suggestion a bit. [OPDS] Comment is well taken, but believes the instruction is important to have.
 - i. Proposes this sentence: “The state must produce sufficient evidence to prove the defendant’s guilt beyond a reasonable doubt as to every element of every charged offense.”
 - c. Discussion about whether this was ever an official RAJI in the past.
 - d. Chalk says that any addition to the instruction as written would be a comment on the evidence. Linn, Gard, and Bingert say that they would also object to a change and agree with Chalk.
 - e. Euchner expresses concern that the State Bar might reject the instruction if it does not have a second sentence. Chalk responds that the Committee shouldn’t focus on what ultimately happens, it matters what the Committee says. Chalk reiterates a dislike for any additional wording.

- f. Euchner suggests putting the issue to a vote to focus the discussion.
- g. Linn moves to adopt New Standard Instruction 8.1 as-is. Bingert seconds.**
- h. Euchner says second sentence is important because the Court will look at the instruction from the impact it had on a trial, not whether it is the correct language. From an appellate standpoint, hard to say what the impact would be on a jury.
- i. Has seen a lot of arguments from Pima County prosecutors (not Chalk) that teeter on the verge of undermining the burden of proof.
- i. Chalk raises the point that *Herrera* didn't object to the instruction, no error based on this jury instruction. It has gone before the courts before, and they haven't taken issue with it.
- j. Steinfeld says that there is a difference between whether there is fundamental error, abuse of discretion, and whether it is a proper jury instruction. There is no case that has mandated it. Agrees that technically this is the law but there is no call for this instruction.
- k. Chalk calls for a vote on the issue.
- l. Vote on whether to adopt New Standard Jury Instruction 8.1**
- Bingert: Yes
 - Linn: Yes (+3 proxy "Yes" votes for Dahl, Steinberg, and Baumann)
 - Chalk: Yes
 - Minicozzi: No
 - Steinfeld: No
 - Gard: No
 - Jones: No
 - Holmes: No
 - Mayhew: No
 - Carrion: No
 - Harris: Yes (+1 proxy "Yes" vote for Kluger)
 - Lawson: Yes
 - Komrada: Yes
- 10 "Yes" votes**
- 8 "No" votes**
- *If all proxy votes are counted**
- m. Green reviews rule on proxies.
- n. Linn proposes tabling the motion so that proxies can have an opportunity to vote. Highlights that the Committee has allowed proxy notification to Ilona by email in the past and it is not fair to change the standard without any notice.
- o. Euchner proposes taking the results of the vote with details, send it up to the Rules Committee and Board of Governors, and they can do what they will with that information.
- p. Linn and Euchner have heated discussion about proxies being allowed through email to Ilona in the past. Green interrupts discussion and calls meeting back to order.

- q. Green likes Euchner's proposal because it reflects where the Committee stands on the issue and that it was a close vote.
 - r. General consensus that the Committee should follow the rule to avoid having proxies taken away.
 - s. **Green summarizes vote totals as they will be communicated to the Rules Committee and BOG:**
 - i. **If all proxies are accepted the motion passes 10 to 8.**
 - ii. **If the only proxies that are accepted are the ones who filled out the form, there is a tie of 8 to 8.**
 - iii. **If none of the proxies are accepted, the motion fails 8 to 6.**
5. Proxy Policy Moving Forward
- a. The Chair is going to require compliance with the written proxy form prior to the call of the meeting and on the proxy form itself. **The proxy form must be signed and submitted to the Chair or Secretary prior to the Call to Order and sending an email without an attached proxy form is no longer acceptable.**
6. New Business
- a. Bingert mentions that the RAJI SBA Convention presentation received the President's Award for its upcoming panel discussion. Bingert thanks the members of the panel who will present in Tucson in June. Green thanks members of the panel.
7. Rules Committee Meeting
- a. After discussion, Komrada will appear before the Rules Committee on May 5, 2023 at 9:30 a.m. to represent the Committee regarding Proposed New Standard 8.1. Komrada can represent the Committee for all of the proposed changes. Ilona confirms that it is a virtual meeting.
8. Call to the Public
- a. None.
9. Adjournment
- a. Euchner moves to adjourn. Mayhew seconds. **Motion passes unanimously.**
 - b. Green adjourns meeting at 2:23 p.m.