



## Criminal Jury Instructions Committee

Meeting Minutes  
March 8, 2024

### Attending:

Hon. Jennifer Green--Chair  
Hon. Jillian Francis  
Hon. Lacey Gard (*Proxy for Bingert*)  
Hon. Sarah Mayhew  
Ryan Alcorn  
Jennifer Linn (*Proxy for Baumann*)  
Kevin Heade  
Todd Lawson  
Sasha Charls  
Robb Holmes  
Karen Komrada (*Proxy for Steinberg & Minicozzi*)  
Joshua Spears  
Jamal Allen  
Joseph Butner  
Alice Jones  
David Euchner  
Greg Benson  
Carlos Daniel Carrion  
Jarom Harris  
Mikel Steinfeld  
Ilona Kukan

### Absent:

Hon. Jeffrey Altieri  
Hon. Elizabeth Bingert (*Proxy sent*)  
Hon. Steve McCarthy  
Kristian Garibay  
Samantha Kluger  
Michael Minicozzi (*Proxy sent*)  
Shawn Steinberg (*Proxy sent*)  
James Baumann (*Proxy sent*)

1. **Call to Order and Approval of December 8, 2023, Meeting Minutes**
  - a. Judge Green calls meeting to order at 2:30pm.
  - b. **Motion: Euchner moves to approve minutes, Carrion second**
  - c. **Approved unanimously.**
  
2. **Proposed Revision to 12.04--Aggravated Assault (Use Note)**
  - a. Komrada withdraws the proposal.

### 3. Proposed Revision to 35.51(5) Definition of “Exploitive Exhibition”

- a. Lawson briefly explained his proposed revision to exploitative exhibition. Has since received an email that some jurisdictions don’t accept *Dost*. However, citation to *Brock* is accurate.
- b. Heade asked if this might be something better below the line. Lawson concedes it might be appropriate to put below the line.
- c. Judge Francis would want to see the below line proposal. Judge Francis noted that this may be overstepping our role, which is to react to Arizona case law. Doesn’t know that Arizona has officially adopted this, so hesitates to add them in.
- d. Euchner agrees with Heade and Judge Francis. This is a circumstance where the appellate court was only reviewing for an abuse of discretion, and this may thus present landmines. The Massachusetts case *Brock* cites is a 3-judge panel with a vigorous dissent. Euchner also wants the instruction to use active voice.
- e. Lawson withdraws the proposal and will resubmit it at a future meeting as a below-line change.

### 4. Proposed Hazardous Materials Instruction

- a. Linn believes the instruction is self-explanatory and follows the rule. Komrada adds this is the identical instruction Judge Green and Komrada discussed during their meeting.
- b. Euchner asks if the Evidence Rule 611 source can be changed to Evidence Rule 611 comment.
- c. **Jennifer moves, Euchner seconds.**
- d. Discussion continues.
  - i. Heade asks a clarification question regarding the negative inference instruction. Heade had a concern about potential juror confusion. Linn explained this is about fentanyl and the clerks’ desire to not handle it. Heade asked if the inference is then consistent with the purposes of the committee. Linn noted that this is impacted by the judge’s ruling. Komrada agrees the committee’s role is to create instructions based on the status of the law. This is different because it is based on a change in the rules. Because the party that wanted to present hazardous material would be limited, it’s fair to ask the jury not to hold it against that party. Jones asks if the thought process may be that some people may come up with several reasons why it’s not being admitted, and the instruction is beneficial to tell the jury not to consider those reasons they may come up with. Heade sees the wisdom but wants to know if it’s creating the law. Linn believes it’s not creating the law. Euchner agrees that the source of the law is a rule, not a statute or constitutional provision. The rule is written for the lawyers; it’s not with a jury instruction attached to it.
  - ii. Alcorn notes a different issue. As written, the rule could apply to many other things, such as secured firearms. Linn points out that’s a problem with the rule. Alcorn asks what that means for this jury instruction. Linn

- explains that's why she put in "insert drug". Also noted that Maricopa County has seen the issue come up with multiple trials.
- iii. Komrada said her understanding was that Judge Green was going to run this past defense bar to get input. Judge Green said she asked the criminal judges if any of them would interpret it beyond highly dangerous drugs, and no judge would.
  - iv. Heade provides a hypothetical situation. Defense is challenging whether the item is what it is. The court declares the substance or item hazardous. This then creates a problem. Linn believes Heade is overthinking the problem. Prosecutors would want to bring in the actual substance. Komrada also points out that just because something is in the RAJIs doesn't mean it's going to be given. If the defense is actually that a substance is not fentanyl, then the judge need not give this instruction. Komrada can also see this being an issue with DNA evidence.
  - v. Jones raises a concern with how this interacts with the standard instruction that the jury should not consider evidence that is not admitted. This may require some cross-referencing and interaction. Linn believes this is resolved by listing item numbers of the photographs. That limits the jury's attention to just the few items the clerk wouldn't accept.
  - vi. Judge Mayhew believes this at least needs a use not to indicate that the instruction should not be used if the dangerousness of the drug is in dispute. Linn disagrees because in a case where it's fentanyl it will have been tested by a lab. Komrada's disagreement with a use note is that we're then getting into more than what's written in the rule.
  - vii. Judge Green agrees there is a concern when the defense is that a substance is not fentanyl. If the judge gives the instruction, does the judge then comment on the evidence? Komrada thinks that no matter what the defense is, the clerk won't touch it. Judge Green points out though that the jury may read this as an indication that the substance is actually fentanyl. Judge Francis proposes changing the language to "alleged to be" or "claimed to be" hazardous. Linn points out that the whole reason for this is that the substance has been deemed hazardous. Judge Mayhew cautions that we must be careful because this could communicate to the jury that it is the substance. Linn says that we're just telling the jury the substance has been deemed hazardous. Judge Green proposes changing "has been declared" to "may be" hazardous. Linn notes that we are then changing the rule.
  - viii. Heade points out that the conversation illustrates the problems. The RAJIs need to apply all the time, but the conversation has fleshed out the notion that there may be times when the instruction would be problematic. Linn argues the jury needs to know that they're not getting evidence because of a ruling. Alcorn points out that the rule shifts the burden because it

requires the judge to make an evidentiary decision. Allen would submit that the decision is made earlier by the clerk's office.

- ix. Allen also agrees this would be broader than just fentanyl. For example, it would apply in a case where a person is accused of possessing a thousand pounds of fertilizer. Alcorn agrees, pointing out that even a knife could qualify. Lawson thinks the problem is the rule. In fraud, he doesn't bring in \$200,000. And prosecutors wouldn't bring explosives to court. The presence of those items wouldn't really benefit the jury.
- x. Judge Francis points out that the judge is the one ultimately making the determination, not the clerk. She points out that the knife example would be a good issue for appeal because it can present a question of fact. Not allowing the knife in could be problematic for the defense. But the instruction is just going to the jury. The committee can thus modify the instruction so it adequately communicates the idea.
- xi. Komrada recognizes that this then looks like the judge is commenting on the evidence. She proposes removing the first sentence of each proposed instruction and thus removing the reference to hazard. Judge Mayhew asks how that intersects with the instruction to not consider evidence not admitted. Euchner says that a picture and testimony would still count as evidence. Euchner agrees with Komrada's suggestion.
- xii. Judge Green proposes using a different instruction title to ensure there is no reference to hazardous material. Lawson proposes physical item not in court. Judge Mayhew proposes a use note that this is related to hazardous materials. She agrees with the proposal to refer to physical evidence rather than hazardous material. Linn points out that the committee is then expanding what this was meant to address. People will want to start using it for different things. She proposes keeping the title the same but including a use note that gives a different title.
- xiii. Alcorn wants to know how far this goes. Notes that packaging may be included. Komrada agrees, but notes that is no a problem for the committee.
- xiv. Heade appreciates this discussion and thinking about the inference instruction wonders if anyone in a homicide has asked for an inference instruction in homicide cases. Proposes changing the language to "you may not draw any inference from." Linn suggests people need to know why they're not getting exhibits.
- xv. Judge Mayhew thinks this may be a little tortured for something that might be related to a rule that needs a change. Suggests the committee consider holding off. Linn said the rule went into effect.

**e. Motion: Lawson proposes 4 changes to the first proposed instruction.**

- i. Proposed changes
  - 1. Remove the first sentence.

2. Change the last sentence to “you may not draw any inference based on the ...”
  3. Change the title to “Photograph admitted in lieu of physical exhibit.”
  4. Include a comment below the line: “This instruction is for use with hazardous materials. Cite to Supreme Court Rule 124 and Comment to Rule 611.”
- ii. Version written out and voted upon:

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### **Photograph admitted in lieu of physical exhibit**

In this case, the Court prohibited the [State/Defense] from bringing [exhibit #] into the courtroom and required photograph(s) be admitted instead of the item[s]. You may not draw any inference based upon the physical evidence not being produced in the courtroom or admitted into evidence.

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This instruction is for use with hazardous materials. Source: Ariz. R. Supreme Court 124; Ariz. R. Evid. 611 comment.

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#### **f. Linn seconds**

- i. Vote for the proposed edits to the first proposed instruction.**
- ii. Proposed edits pass with one Nay (Alcorn).**

#### **g. Move to the Second proposed change.**

- i. Lawson proposes we remove the first sentence.
- ii. Jones proposes “As part of your deliberations, you may view exhibit \_\_\_\_ in the courtroom, however ...”
- iii. Jones is also concerned about the title. Linn proposes “admitted evidence viewable in the courtroom”
- iv. Linn proposes: “In this case, evidence has been admitted that the rules of the court prohibit the jury from taking into the jury room. As part of your deliberations, you may view this evidence in the courtroom.”
- v. Judge Mayhew proposes limiting the instruction to just a single exhibit.
- vi. Allen notes that this may again be a comment because it is communicating that evidence is so dangerous that the jury can’t handle it or take it back with them. Heade says he appreciates the concern, but is a little less concerned because there’s also the instruction that the jury not consider the reasons for the rulings.
- vii. Judge Mayhew proposes a modification that assumes a photograph would’ve also been admitted. Upon clarification she proposed just telling the jury “As part of your deliberations you may ask to view exhibit \_\_\_\_ in the courtroom.” Linn points out that the jury gets the rest of the evidence

and will want to know why they don't get this evidence. Judge Mayhew notes that we don't have to tell the jury why. Judge Francis agrees. Judge Green agrees. Judge Green also notes that it will likely be clear to most of the folks anyway. The court need not call attention to the issue in an instruction.

**h. Motion: Judge Mayhew moves to amend the proposal as follows:**

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**Physical exhibit[s] available for viewing in the courtroom.**

As part of your deliberations you may ask to view exhibit[s] [insert number(s)] in the courtroom.

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This instruction is for use with hazardous materials. Source: Ariz. R. Supreme Court 124; Ariz. R. Evid. 611 comment.

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**i. Judge Francis seconds.**

**ii. Vote: Passes with 1 Nay (Alcorn).**

**i. Motion: Judge Mayhew moves to adopt both instructions as amended as two separate instructions (phrased as alternatives 48A and 48B). Euchner seconds.**

i. Lawson clarifies this will be at the end of the standards. Everyone agrees. Next number will be 56. Euchner proposes as 56A and 56B. Lawson points out we reserved 48 and 49. Will put at 48A and 48B.

**ii. Vote: Passes unanimously with one abstention (Alcorn).**

**5. Proposed revisions to 29.21.01 and DUI 28-1381(A)(1), as well as New DUI--Field Sobriety Tests and New DUI--Records of Periodic Maintenance of Breath Testing Machines.**

a. Benson withdraws the proposals associated with agenda items 5, 6, 7, & 8. No discussion. No objection. Withdrawn

**6. Other Business**

a. Jones notes that she and Euchner were supposed to propose a comment. They have not yet done that. They will do so in the next couple weeks.

b. Carrion gives an update with Judge Gard regarding the capital case instructions working group. Notes that the group's work may be done by the end of year. Judge Cattani (chair of that working group) wants to know if the proposed changes can be presented as a package. Heade points out that if there's going to be feedback, it should go back to the capital instructions working group so that group can make changes. The instructions should then proceed to the RAJI committee.

c. Next meeting dates: September 13 at 1:30pm; December 13 at 1:30pm.

- d. Euchner states there has been no progress on the subcommittee reviewing instructions. He asks that Steinfeld send a draft of the minutes when done. Judge Gard indicates it may be better to hold off on the capital instructions.

**7. Call to public**

- a. None want to be heard.

**8. Adjournment**

- a. **Motion: Euchner moves to adjourn. Komrada seconds.**
- b. **Vote: Passes unanimously.**
- c. **Adjourn 4:10pm.**