



Criminal Jury Instructions Committee

Meeting Minutes
December 8, 2023.

Attending:

Hon. Jennifer Green--Chair
Hon. Jeffrey Altieri
Hon. Jillian Francis
Hon. Lacey Gard
Ryan Alcorn
Jamal Allen
James Baumann
Carlos Daniel Carrion (proxy vote for Greg Benson)
David Euchner (proxy vote for Sasha Charls)
Kristian Garibay
Kevin Heade
Robb Holmes
Alice Jones
Samantha Kluger
Karen Komrada
Todd Lawson
Jennifer Linn
Sarah Mayhew
Michael Minicozzi
Shawn Steinberg
Mikel Steinfeld
Ilona Kukan

Absent:

Hon. Elizabeth Bingert
Hon. Steve McCarthy
Joseph Butner
Jarom Harris
Joshua Spears

Minutes

1. Judge Green called the meeting to order at 9:00 a.m.
2. Approval of minutes.
 - a. Committee discussed whether the proposed instruction for the maintenance of breath tests (Minutes item 14) had been tabled. Euchner and Carrion believed it had been tabled. Minutes will be corrected to reflect that the instruction was tabled.
 - b. Euchner also believed he voted against the proposed amendment to 32.12B--Child Sex Trafficking (Minutes item 7). Alcorn and Carrion recall Euchner had voted no. Minutes will be corrected to reflect Euchner voted no.

- c. With those two corrections, Euchner moved to approve the minutes and Carrion seconded. Unanimously approved as corrected (two abstentions).
3. Judge Green advised the committee that she and Komrada would be having a meeting to discuss possible instructions coming out of the Fentanyl and Toxic Evidence Task Force. Meeting will be on December 14, 2023, at 9:00 a.m. If anyone would like to join, email Judge Green and she will provide the zoom link.
4. Carrion (on behalf of Benson) moves to table Agenda items 3, 7, 8, and 9 (proposed revisions to 29.21.01; DUI 28-1381(A)(1)-1; New DUI--Field Sobriety Tests; and New DUI--Records of Periodic Maintenance of Breath Testing Machines respectively).
5. Komrada asks to table Agenda item 2 (proposed revision to 12.04--Aggravated Assault).
6. Proposed Revision to 23.11--Fraudulent Schemes and Practices
 - a. Lawson: The proposal addresses words that were left out of the instruction and corrects the title of the instruction.
 - b. Lawson moves to approve, Euchner seconds**
 - c. Discussion:
 - i. Linn proposed adding a parenthetical around “willful concealment.” Suggested this would help people find the instruction.
 - ii. Lawson noted willful concealment is part of the title, but the language is not in the text of the statute. Hypothesized the language may have been present in earlier statutory language but been removed. Also noted our courts have moved away from referencing willfulness. Euchner agreed our courts have moved away from willful because it is no longer a listed mens rea.
 - d. Vote: proposal unanimously approved.**
7. Proposed revision to 12.02--Threatening or Intimidating.
 - a. Euchner noted that the discussion here is also relevant to the next item, Proposed Revision to 23.08.02A--Making a Terrorist Threat.
 - b. Jones explained that after the United States Supreme Court’s decision in *Counterman v. Colorado*, 600 U.S. 66 (2023) there is concern about whether our instruction for Threatening and Intimidating is adequate. There must be a mens rea of recklessly. Jones believed the easiest way to do this would be to add in reckless above the line and include a use note that directs people to *Counterman*. Also proposes eliminating the use note regarding *In re Kyle M*.
 - c. Alcorn sees how the first part of the struck comment wouldn’t apply, but believed the second part is likely still acceptable. Jones agrees.
 - d. Euchner agrees *Counterman* controls for a First Amendment analysis, but also believes there’s a concern about rewriting statutes. Other cases have suggested a different mens rea is appropriate when the legislature does not include one. Asked

whether this was rewriting the statute. Jones does not believe it's rewriting the statute because the statute does not include a mens rea. This thus includes a higher mens rea.

- e. Euchner suggested it might be helpful to include a statement below the line suggesting the mens rea is unsettled. Francis stated the committee should not comment on what is settled or not. Linn indicated she believed such a comment would go beyond what the committee does. Carrion disagreed with Linn, stating that after *Counterman* we don't know where we are. Euchner stated his belief that we are rewriting the statute, but doing nothing is a recipe for disaster. Linn states we should only do the minimum of what is required. Any further would be too far. Euchner agrees with this for any change above the line; only wants a note below the line. Steinfeld asked if adding "at least" into the *Counterman* comment would address Euchner's concerns.
- f. Alcorn believes everything above the line is good. Also believes the *Kyle M* comment may still be good law. The State may still need to prove that a reasonable person would take the comment as a threat. Linn would also leave in the *Kyle M* comment. Euchner is uncertain about what should be above the line. What he wants is a sentence that says the issue is not settled.
- g. Heade asked about the committee's role in saving a potentially unconstitutional statute. Believed it makes sense to eliminate the proposal and include a citation to *Counterman* below the line. Alcorn agrees maybe nothing should be done above the line. Francis and Gard agree with Heade. Jones supported making just a below-the-line change. Biggest concern is that folks need to be aware of *Counterman*.
- h. Steinfeld returned to Alcorn's comment that maybe we should not even remove the *Kyle M* comment. Francis agreed.
- i. Jones proposed to remove recklessly above the line. Lawson supported the proposal as written pointed out that there are other cases where this committee has added elements in light of cases. Linn agreed. Heade posed a question about whether *Counterman* saved an unconstitutional statute or announced a minimum mens rea that a statute must include. Jones explained the saving statute is meant to save potentially unconstitutional statutes. Steinfeld agreed the saving statute is for this purpose, but it was a question of who makes the decision about what the mens rea is. Steinfeld proposed that job is for our courts when analyzing the question with litigation. Gard agreed this should be for the courts to decide.
- j. Motion: Steinfeld moved to reject the above-the-line change but to add a missing space between "or" and "intimidated." Euchner second.**
 - i. Vote: Motion passes 18-4. Four opposed: Lawson, Linn, Baumann, Steinberg**
- k. Motion: Steinfeld moves to reject the proposed reference to recklessly below the line. Euchner seconds.**
 - i. Vote: Motion passes 19-3. Three opposed: Linn, Steinberg, Baumann**

- l. **Motion: Steinfeld moves to adopt the *Counterman* comment but delete the extra space after a period. Euchner seconds.**
 - i. **Vote: Motion passes unanimously.**
 - m. **Motion: Lawson moves to strike the first clause of the *In re Kyle M* comment. Linn second.**
 - i. Discussion: Euchner proposed moving some of the *Kyle M* discussion to a new comment section. Linn opposed adding a comment. Heade asked whether *Kyle M* has been overruled. Euchner indicated it is yellow-flagged for a different reason. Linn believes it had to do with true threat. Euchner agrees that if *Kyle M* is a problem, then distinguishing the case also may be. Alcorn noted there are other RAJIs that provide commentary. One even goes so far as to say it might be appropriate to do something else.
 - ii. **Vote (by roll call): Motion passes 14-7.**
 1. Aye: Komrada, Lawson, Euchner, Charls (through Euchner), Jones, Steinberg, Holmes, Allen, Gard, Mayhew, Carrion, Benson (through Carrion), Linn, Baumann
 2. Nay: Steinfeld, Heade, Francis, Altieri, Kluger, Minicozzi, Alcorn
 - n. Baumann asked whether it made sense to discuss recklessly more explicitly in the *Counterman* note. Euchner proposed the group consider that in the Spring if it comes up during possible comments.
 - o. Heade asked if the committee would add the savings statute into the use note. Euchner indicated he believed it would be appropriate to roll that in with any response to comments in the Spring. Carrion asked whether the committee should add a comment now so members would know the issue is being discussed. Euchner opined that members are sufficiently on notice that the committee is addressing the issue.
 - p. The Committee had discussion about whether adding a comment would be appropriate. The committee will continue this conversation in the Spring. Jones, Euchner, and Baumann will work together on a proposed comment and provide it to the committee before the next meeting.
8. Proposed Revision to 23.08.02.A--Making a Terrorist Threat
 - a. Euchner suggested to proceed piecemeal through the proposal, as with the prior agenda item.
 - b. **Motion: Euchner moved to reject any change above the line. Jones second**
 - i. **Vote: Passes 17-5. Five opposed: Lawson, Linn, Baumann, Steinberg, Komrada**
 - c. **Motion: Linn moved to adopt below-the-line modifications as write. Baumann seconded.**
 - i. **Discussion:** Euchner noted asymmetry problems that the Committee avoided in the prior agenda item.
 - ii. **Vote: Motion fails 2-20. Two in favor: Linn, Baumann**

