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1 **(In court with jury at 9:10 a.m. All parties present.)**

2 THE CLERK: Case on trial, your Honor. All
3 parties are present, all jurors are present.

4 THE COURT: Thank you.

5 Good morning, ladies and gentlemen of the jury
6 and Mr. Alternate. Now that you are assembled, before
7 I ask you to retire to the deliberation room, I'll
8 simply ask my usual question as to whether any of the
9 jurors have had any difficulty following any of my
10 instructions regarding not discussing the case or doing
11 any personal research of investigation. And so you may
12 raise your hand and I'll see you privately, or you may
13 tell the court officer.

14 Seeing no hands, you will resume your
15 deliberations. So please retire to the jury room.

16 **(Jury exits to resume deliberations at 9:11 a.m.)**

17 THE COURT: Court is in recess.

18 **(Recess at 9:12 a.m.)**

19 **(In court without jury at 12:42 p.m.)**

20 (G for I.D., admitted; Question from
21 Deliberating Jury.)

22 THE CLERK: Good afternoon, your Honor.

23 Case on trial. The parties are present, the
24 jurors are not present.

25 Counsel has seen the question. It has been

1 marked G for Identification.

2 THE COURT: Okay. And counsel, I assume, have
3 seen the question?

4 MS. TAGLIARENI: Yes.

5 THE COURT: So the question is, "What is the
6 definition/difference between consent and compliance?"
7 So it's sort of a two-part question. It asks for a
8 definition or a distinction.

9 First of all, I'm not aware of the word
10 'compliance' or 'comply' having been used in any
11 fashion in the charge. To just double check, I did a
12 word search, and it's not in there. So that raises an
13 issue.

14 Any thoughts or suggestions?

15 MS. TAGLIARENI: I think, if anything, you
16 should just reinstruct them on consent. I mean,
17 like you said, 'compliance' is nowhere, I don't
18 know where they're getting that word from. So
19 there's nothing that you can instruct them about
20 that word.

21 THE COURT: Mr. Zalkind.

22 MR. ZALKIND: I think 'compliance' is
23 evidence of consent. And they're not asking for
24 re-instruction on consent. You already gave the
25 question you asked on consent.

1 We looked through your charge and we
2 didn't see anything about compliance. I mean, I
3 didn't use a words search on it, a search on it.

4 THE COURT: And I think we all agree that
5 'compliance' or 'comply' was not in any part of
6 the charge.

7 I hesitate to introduce it into legal
8 instructions to a jury just because they bring
9 up. I would be more inclined to say that
10 compliance is not part of the instructions on the
11 law that relate to this case, that consent is a
12 concept that relates to the instructions and I
13 could reinstruct them on consent.

14 MS. TAGLIARENI: I think that's fair. I
15 don't think 'compliance' should necessarily be
16 defined for them, because it has nothing to do
17 with the instruction.

18 THE COURT: I don't think I can define it
19 for them because it's not part of my instruction.

20 MS. TAGLIARENI: Right.

21 THE COURT: I don't intend that they apply
22 any concept of compliance to this.

23 I mean, if they're thinking, Well, if she
24 goes along with something, is that consent,
25 that's, --

1 MS. TAGLIARENI: But that's in the context
2 of what you've already instructed them, I would
3 suggest.

4 MR. ZALKIND: They used the word
5 'compliance,' your Honor. And if, in fact, she
6 was complying, she could comply and be refusing
7 consent. She could be comply, and it'd be
8 evidence of consent. You know, the consent is
9 there.

10 MS. TAGLIARENI: I would strongly object
11 to that definition or that instruction being
12 given to them.

13 THE COURT: Yeah. I don't think I would
14 say anything about compliance except that, 'No
15 part of my instruction referenced the word
16 compliance or comply. As to the definition of
17 consent, I will reinstruct you on the concept of
18 consent as it applies to this case.'

19 MS. TAGLIARENI: That's what I would ask
20 for. I think that's --

21 MR. ZALKIND: I would ask that the second
22 part of your instruction not go, just the first
23 part of your instruction.

24 THE COURT: That compliance is not part of
25 my instruction?

1 MR. ZALKIND: Right.

2 THE COURT: I mean, I can do it in a two-
3 part process. If they have a question after
4 that, I'm sure it's coming right back out of the
5 jury room.

6 MS. TAGLIARENI: I think they can be
7 reminded that they have the tape with your
8 instructions about consent.

9 THE COURT: So maybe I'll refer them to
10 the consent. And if I haven't answered their
11 question, they're free to pose another one in
12 writing, so.

13 Okay. You can bring the jury in at this
14 time.

15 **(In court with jury at 12:48 p.m.)**

16 THE CLERK: Case on trial, your Honor.

17 All parties are present, all jurors are
18 present.

19 THE COURT: And, yes, ladies and gentlemen
20 of the jury, I do have your note signed by the
21 foreperson at 12:30. And the question posed was
22 "What is the definition/difference between
23 consent and compliance?"

24 And so the first thing I would say is that
25 no part of my instructions to you on the law used

1 the term 'compliance' or 'comply.' I did not
2 instruct on any concept under the law regarding
3 compliance.

4 I did instruct you on consent, which is a
5 concept that applies to this case and, in fact,
6 proof of consent is one of the elements of the
7 offense the Commonwealth must prove. Those
8 instructions are on the audiotape that I gave
9 you, so you certainly may refer to those if you
10 have a question about my instructions on consent.

11 If, when you return to the jury room, if
12 you feel that it would be useful for me to
13 reinstruct you on consent, or if you have another
14 question now that I've answered, as best I can,
15 this one, you may certainly send me that in
16 writing.

17 We need to do this in writing. I can't
18 engage in a dialogue with you in the jury box and
19 invite questions for many reasons, some of which
20 are probably obvious.

21 So that is my answer to your question at
22 this point. And again, I'll stress that if you
23 wish me to reinstruct you on consent or you have
24 a question about my instructions on consent, or
25 any other question, please feel free to send that

1 back out to me with the court officer.

2 MR. ZALKIND: May be go to sidebar for a
3 moment?

4 THE COURT: Yes.

5 **(Sidebar conference as follows:)**

6 MR. ZALKIND: You said that the
7 Commonwealth has to prove consent and Mr. Brandon
8 did not, beyond a reasonable doubt, that he did
9 not consent, that Mr. [REDACTED]

10 THE COURT: I guess I misstated. The
11 Commonwealth has to prove the element of lack of
12 consent. I'll just say that.

13 **(End of sidebar.)**

14 THE COURT: Ladies and gentlemen, I am
15 reminded that I misstated something, that lack of
16 consent is an element that the Commonwealth must
17 prove in this case, not consent, of course. So
18 it is the burden on the Commonwealth to prove
19 that the complainant did not consent to any
20 indecent touching that you may find had taken
21 place. So I stand corrected on that. The
22 element that the Commonwealth must prove beyond a
23 reasonable doubt is that there was a lack of
24 consent.

25 All right. The jury may be taken back to

1 the jury room.

2 **(Jury exits to resume deliberations at 12:55**
3 **p.m.)**

4 THE COURT: We'll be in recess.

5 **(Recess at 12:56 p.m.)**

6 **(In court without jury at 2:40 p.m.)**

7 (H for I.D., admitted; Question from
8 Deliberating Jury.)

9 THE CLERK: Good afternoon, your Honor.
10 The case on trial, the parties are present.

11 There's been a question. It's been marked
12 H for Identification. The parties have viewed
13 the question. The jurors, for the record, are
14 not in the courtroom at this time.

15 THE COURT: Thank you, Mr. Doherty.

16 Have counsel seen the note from the juror,
17 which has been marked as Exhibit H?

18 Okay. The time, it says 14:30, roughly.

19 "We're unable to reach a unanimous
20 decision on either count. We feel we are at an
21 impasse."

22 Any thoughts from counsel?

23 MR. ZALKIND: I think they gotta keep
24 deliberating. It's too early. They haven't had
25 it long enough. I would just tell them to keep

1 deliberating.

2 THE COURT: All right.

3 MS. TAGLIARENI: I think it's a question
4 of whether the deliberations at that point have
5 been due and thorough and whether Tuey-Rodriguez
6 is called for at this point. I think that they
7 had about an hour of testimony on Tuesday, and
8 then four hours --

9 THE COURT: They've been deliberating
10 about nine hours.

11 MS. TAGLIARENI: Right.

12 I mean, if counsel's saying that the
13 deliberations are not due and thorough at this
14 time, I don't know if that's the defendant's
15 argument.

16 THE COURT: Okay. I'll make it simple.
17 I'm not prepared to declare that they have been
18 due at thorough at this point with a first note
19 from a jury. And so I'm not prepared to find
20 that they're deadlocked or that there's been due
21 and thorough deliberations, so.

22 There is a charge or an instruction,
23 sometimes called the A.B.A. charge, which has
24 been approved by the SJC in the Rodriguez
25 decision. It's really, it actually comes right

1 from my regular charge, but it just sort of
2 highlights the ability to, that they need to be
3 open to consulting with each other and don't
4 change your views. I have copies of it, if
5 counsel haven't looked at it recently.

6 MR. ZALKIND: I think I looked at it.

7 MS. TAGLIARENI: Yeah, I think I looked at
8 it, too, yeah.

9 THE COURT: Okay. So, I mean, --

10 MR. ZALKIND: There are two different
11 ones. There's the alternative one --

12 THE COURT: Well, I'm talking about the
13 alternative that's intended to be given, one, as
14 part of the charge optionally, and when a jury
15 comes in and reports some difficulty reaching a
16 decision.

17 So, I mean, it would be my inclination to
18 give the Appendix D Rodriguez charge, not the
19 Tuey-Rodriguez charge, but the one that is much
20 shorter and, you know, really asks them to
21 consult with each other.

22 MR. ZALKIND: I think once you give that,
23 then if they can't come back, that's the end of
24 it, so --

25 THE COURT: No, this is not the Tuey-

1 Rodriguez charge. This is the A.B.A. charge.

2 Let me just, just so we're all on the same
3 page, Jack will just pass out what I'm talking
4 about. This is what I would call a gentle prod,
5 as opposed to the Tuey-Rodriguez charge, which
6 has been described as coercive.

7 MR. ZALKIND: It's our position they
8 should just keep deliberating, your Honor, and
9 not give them the A.B.A. charge yet. I mean,
10 they might come back in an hour and say the same
11 thing and I might take a different position at
12 that point.

13 MS. TAGLIARENI: I think it's appropriate.
14 I think it's actually language that you already
15 gave them.

16 THE COURT: I have already given them this
17 language. This is from my charge. And the SJC
18 has said, in Commonwealth v. Rodriguez, that it's
19 appropriate, that it may be used when a jury
20 appears to be running into difficulty in reaching
21 a verdict.

22 I certainly feel that they're reporting
23 difficulty. Again, giving this charge does not
24 require if they come back and report a second
25 deadlock, it does not require a mistrial. As I

1 said, it's more of a reminder as to content here,
2 which they've already been told.

3 So it would be my intention to give them
4 this. I mean, I've found it to be effective in
5 the past.

6 MR. ZALKIND: Please note my objection,
7 your Honor.

8 THE COURT: Yes. The defendant's
9 objection is noted.

10 THE CLERK: Jury, your Honor?

11 THE COURT: Yes.

12 **(In court with jury at 2:48 p.m.)**

13 THE CLERK: Case on trial, your Honor.
14 All parties are present, all jurors are present.

15 THE COURT: Ladies and gentlemen of the
16 jury, I am in receipt of your note to me, which
17 states, "We are unable to reach a unanimous
18 decision on either count. We feel we are at an
19 impasse."

20 First of all, everyone appreciates the
21 hard work, diligence and dedication you've shown
22 to your job, but here is my instruction to you at
23 this time based on your note.

24 The verdict must represent the considered
25 judgment of each juror. In order to return a

1 verdict, it is necessary that each juror agree to
2 the verdict.

3 Your verdict must be unanimous. It's your
4 duty as jurors to consult with one another and to
5 deliberate with a view to reach an agreement if
6 you can do so without violence to individual
7 judgment. Each of you must decide the case for
8 yourself, but do so only after an impartial
9 consideration of the evidence with your fellow
10 jurors.

11 In the course of your deliberations do not
12 hesitate to reexamine your own views and change
13 your opinion if convinced it is erroneous. But
14 do not surrender your honest conviction as to the
15 weight or effect of evidence solely because of
16 the opinion of your fellow jurors or for the mere
17 purpose of returning a verdict.

18 You are not partisans, you are judges,
19 judges of the facts. Your sole interest is to
20 ascertain the truth from the evidence in this
21 case, and I ask you now to return to your
22 deliberations with these thoughts in mind.

23 **(Jury exits to resume deliberations at 2:50 p.m.)**

24 **(Recess on this matter.)**

25 **(In court without jury at 4:10 p.m.)**

1 (I for I.D., admitted; Note from
2 Deliberating Jury.)

3 THE COURT: We did receive a note at four
4 o'clock, which I assume counsel have seen, "We
5 are still at the same impasse we were at
6 earlier," at four o'clock, from the foreman.
7 They also indicated that they wanted to break
8 around four, to the court officer separately,
9 when inquired. So they understand they need to
10 come back tomorrow anyway.

11 Any thoughts or comments from counsel
12 about the latest note and what my response ought
13 to be?

14 MS. TAGLIARENI: I think that we should
15 let them go and give them Tuey in the morning.

16 THE COURT: That's kind of the way I'm
17 leaning. I think they have deliberated for, you
18 know, four hours and a full day. So, they've
19 reported an impasse twice now. They spent two
20 hours after the last instruction, so I would be
21 leaning towards declaring that there's been full
22 and thorough deliberation and giving them Tuey-
23 Rodriguez in the morning, in which case I would
24 just say, 'I've received your note and I will
25 have a further instruction to you in the morning

1 based on what you've reported to me,' and leave
2 it at that.

3 MR. ZALKIND: I would rather -- I have no
4 problem with you giving them an instruction
5 tomorrow morning. I'd rather not tell them that
6 they're getting anything tomorrow.

7 THE COURT: All right. So I'll just say,
8 'I'll see you tomorrow.' I'm okay with that,
9 too. I think that they recognize already that
10 they need to come back, so.

11 All right. So I will just say I've got
12 their note and, We will see you tomorrow morning,
13 then, basically.

14 You can bring the jury in.

15 **(In court with jury at 4:12 p.m.)**

16 THE COURT: Ladies and gentlemen, it's
17 after four o'clock. I did receive your note. I
18 want to continue to thank you for your continued
19 efforts to reach unanimity on this case. At this
20 point I'll simply ask you to report at nine
21 o'clock tomorrow morning, and we will see you
22 then.

23 Please remember all of my instructions to
24 you regarding not communicating about the case.

25 The jury is excused for the night.

1 **(Jury exits at 4:13 p.m.)**

2 THE COURT: Okay. So, as I said, unless
3 somebody persuades me otherwise, I do intend to
4 give them the Tuey-Rodriguez charge in the
5 morning when they return.

6 MS. TAGLIARENI: Thank you.

7 THE COURT: So if there's nothing else,
8 we're in recess.

9 MR. ZALKIND: Thank you.

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11 **(Recess at 4:13 p.m.)**

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CERTIFICATION

I, Christina O'Neill, Official Court Reporter, do hereby certify that the foregoing, Pages 1 through 19 inclusive, is a true and accurate transcription, to the best of my knowledge, skill and ability, from the record of the court proceedings in the above-entitled matter.

I, Christina O'Neill, further certify that the foregoing is in compliance with the Administrative Office of the Trial Court Directive on Administrative Format.

I, Christina O'Neill, further certify that I neither am counsel for, related to, nor employed by any of the parties to this action in which this hearing was taken, and further certify that I am not financially nor otherwise interested in the outcome of the action.

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Date

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