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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss

**SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT**

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COMMONWEALTH OF MASSACHUSETTS,

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Plaintiff

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v.

DOCKET NO. MICR2012-1160

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BRANDON WINSTON,

*

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Defendant

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**JURY CHARGE AND QUESTIONS FROM DELIBERATING JURY
EXCERPTED FROM JURY TRIAL - DAY 6
BEFORE THE HONORABLE MAYNARD KIRPALANI**

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Woburn, Massachusetts
Courtroom 630
Tuesday, March 3, 2015

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1 (Proceedings. 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 Ladies and gentlemen, I'm now going to give you
6 my instructions on the law that applies both generally
7 in criminal cases and in the issues that have been
8 presented in this particular case. Please excuse my
9 voice. I'm struggling with a bit of a cold, but I'll
10 try and be clear.

11 Now before you begin your deliberations, I will
12 appoint one of you as a foreperson of the jury.
13 Members of the jury, let me point out to you at the
14 outset that being selected foreperson of the jury
15 carries with it neither more honor nor more pay than
16 any other juror's position. Each member of this
17 deliberating jury has an equal voice in this
18 deliberation and an equal vote with respect to the
19 verdicts on each of these pending indictments.

20 So we have a foreperson for two purposes:
21 first, to help you organize yourself and act as the
22 facilitator of your discussions and deliberations; and
23 second, to report your verdicts on behalf of the jury
24 in open court when you've reached your verdicts.

25 Now the presentation of the evidence has been

1 concluded and you've heard the closing arguments for
2 the attorneys for both the Commonwealth and for the
3 defendant, and so it's now my duty to instruct you
4 about the applicable law so that you can perform your
5 duty of deciding the disputed questions of fact in this
6 case. Ladies and gentlemen, I'm going to divide these
7 instructions into three parts, basically. The first
8 part will be general instructions associated with the
9 matters relating to all criminal cases and to the trial
10 of this case. The second part will be about the law
11 that relates specifically to the charges brought and
12 the issues raised in this particular case. And the
13 third area will be instructions regarding your
14 deliberations.

15 Now you must follow the law as I state it to
16 you whether you agree with it personally or not. Do
17 not be influenced by any personal likes or dislikes or
18 opinions or prejudices or sympathy.

19 Now what the lawyers may have said or suggested
20 that the law is, is not necessarily the law, and that's
21 because it's my responsibility, and mine alone, to
22 instruct you as to what the law is and how you must
23 apply the law to the facts that it will be your
24 responsibility to find in this case.

25 Now, members of the jury, as I give you my

1 instructions on the law, I am recording them on an
2 audiotape. When I've finished, I'll have the tape
3 marked for identification and I'll send it to you,
4 along with a tape recorder, to you in jury room so you
5 may listen to my recorded charge if and as necessary
6 during your deliberations.

7 But let me caution you, however, that you must
8 consider my entire charge, that is, all of my
9 instructions, in reaching your verdict. You're not to
10 overemphasize any one portion of those instructions or
11 ignore other portions of those instructions. All of my
12 instructions are equally important and you should pay
13 equal and careful attention to them.

14 I should also note that although we have a
15 court reporter who has worked to take down all that was
16 said and done during the course of the trial for the
17 record, we do not have any written transcripts of any
18 portion of the trial that we can give you for your
19 deliberations. You must therefore rely on your own
20 collective memories of the evidence, assisted perhaps
21 by your notes, which is the subject to which I now
22 turn.

23 I've allowed you to take notes if you wished
24 during the course of the presentation of the evidence
25 in this case. Such note taking was not required and

1 should not be considered by any of you to be a verbatim
2 transcript or record of what you have seen or heard
3 during the course of the trial. When you retire to the
4 jury room to deliberate your verdicts, please remember
5 that your notes are only an aid to your memory.
6 They're not a substitute for what you actually
7 remember.

8 Don't use your own notes to try to persuade
9 your fellow jurors because, as I've said, your notes
10 are not official transcripts. You should use your
11 notes only to assist you to recall what you may have
12 seen or heard during the trial. Whether you took notes
13 or not, you must rely on your own memory of the trial
14 and evidence in the jury room. Don't be unduly
15 influenced, therefore, by the notes of other jurors.

16 During the course of your deliberations you're
17 not to show your notes to anyone other than your fellow
18 jurors. And at the end of each day that you may be
19 deliberating, your notes, as we've done throughout the
20 trial, together with any and all materials you may be
21 working on, will be sealed or locked securely until
22 such time as you reconvene and resume your
23 deliberations.

24 Now your notes have not been and will not be
25 reviewed or examined by anyone, myself included. In

1 order to preserve the confidentiality of your
2 deliberations, after you've reached and returned your
3 verdict in open court I will direct the court officers
4 to collect and destroy any notes you've made in this
5 case.

6 Now as I said, in these instructions I'm going
7 to talk to you about some general legal principles that
8 apply to all criminal cases, including this one. Then
9 I will address matters of law that are relevant to this
10 particular case.

11 So, first, I want to discuss with you some
12 general principles. Indeed, they're fundamental
13 principles which apply to all criminal cases, and they
14 the presumption of innocence, the burden of proof and
15 the concept of reasonable doubt.

16 This is a criminal case and, as you know, it's
17 a cornerstone of our democracy that any person charged
18 with a crime is presumed to be innocent until he or she
19 is proven guilty beyond a reasonable doubt. That is a
20 presumption that belongs to each of you, it's a
21 presumption that belongs to me, and it is a presumption
22 that belongs to the defendant in this case.

23 The fact that a person has been charged with a
24 crime or indicted for a crime is absolutely no evidence
25 whatsoever of that person's guilt of any crime. As I

1 explained to you at the outset of this trial and as I
2 emphasize to you again now, an indictment is nothing
3 more than an accusation. It is a procedural vehicle
4 which brings a person before the Court for trial so
5 that a jury like yourself may determine whether the
6 person is guilty of not guilty. That is all an
7 indictment is.

8 Now the presumption of innocence also means
9 that no person ever has to prove his innocence. No
10 person charged with a crime ever has to explain
11 anything to a jury. Exactly the contrary is true: it
12 is the Commonwealth, the government, that prosecution,
13 which must prove each and every element of a particular
14 crime beyond a reasonable doubt before the defendant
15 may be found guilty of that crime. If the government
16 does not prove each and every element of the particular
17 crime charged beyond a reasonable doubt, then you, the
18 jury, must find the defendant not guilty of that crime.

19 This burden of proof never shifts. The
20 defendant is not required to call any witnesses or
21 produce any evidence, since he is presumed to be
22 innocent. This presumption of innocence stays with the
23 defendant unless and until the evidence convinces you,
24 the deliberating jury, unanimously, that the defendant
25 is guilty beyond a reasonable doubt. It requires the

1 jury to find the defendant not guilty unless his guilt
2 has been proved beyond a reasonable doubt. The
3 presumption of innocence alone is sufficient to acquit
4 the defendant unless you're satisfied beyond a
5 reasonable doubt of his guilt after careful and
6 impartial consideration of all of the evidence in this
7 case.

8 Now the burden is on the Commonwealth to
9 prove beyond a reasonable doubt that the
10 defendant is guilty of the charges made against
11 him. What is reasonable doubt? The term is often used
12 and probably pretty well understood, though it is not
13 easily defined. Proof beyond a reasonable doubt does
14 not mean proof beyond all possible doubt because
15 everything in the lives of human beings is open to some
16 possible or imaginary doubt.

17 A charge is proved beyond a reasonable doubt
18 if, after you have compared and considered all of the
19 evidence, you have in your minds an abiding conviction
20 to a moral certainty that the charge is true. When we
21 refer to moral certainty, we mean the highest degree of
22 certainty possible in matters relating to human
23 affairs, based solely on the evidence that has been put
24 before you in this case.

25 I've told you that every person is presumed to

1 be innocent until he or she is proved guilty and that
2 the burden of proof is on the prosecutor. If you
3 evaluate all the evidence and you still have a
4 reasonable doubt remaining, the defendant is entitled
5 to the benefit of that doubt and must be acquitted. It
6 is not enough for the Commonwealth to establish a
7 probability, even a strong probability, that the
8 defendant is more likely to be guilty than not guilty.
9 That is not enough. Instead, the evidence must
10 convince you of the defendant's guilt to a reasonable
11 and moral certainty, a certainty that convinces your
12 understanding and satisfies your reason and judgment as
13 jurors who are sworn to act conscientiously on the
14 evidence. That is what we mean by proof beyond a
15 reasonable doubt.

16 Next, ladies and gentlemen, I'm going to
17 instruct you with respect to matters that may have
18 occurred or arisen during the trial and generally about
19 the evidence and what you may do with the evidence that
20 you've heard in this case. And first, let me mention
21 again to you what the respective roles of the attorneys
22 in this trial are.

23 Attorneys have very important responsibilities.
24 It's their role to present evidence in the case that's
25 most helpful to their respective positions. It is also

1 their duty to object when evidence is offered that they
2 believe may be inadmissible under our Rules of
3 Evidence. And the way those matters have been handled,
4 as you've observed, is that I have either ruled on the
5 objection from the Bench and the case has proceeded, or
6 we've had a discussion at the side of the Bench outside
7 of your hearing, where I've addressed the matter of law
8 at issue, made a decision, and the case has proceeded.

9 I don't think I have to point out to you that
10 any such activity on the part of any attorney in this
11 case in making an objection or requesting a sidebar
12 conference is not to be held against either the
13 Commonwealth or the defendant or either of the
14 attorneys in your consideration of the evidence or in
15 your deliberation on your verdicts. Each of the
16 attorneys is carrying out his and her duties, and his
17 and her obligations, and his and her responsibilities,
18 as advocates for the Commonwealth and the defendant.

19 Now, since determining the facts of this case
20 is your duty and not mine, let me also remind you that
21 you are to draw no inferences, favorable or
22 unfavorable, to either side, because of anything that
23 I, as the Judge, may have said or done during the trial
24 of this case. If somehow you think that during the
25 course of the trial I made certain rulings that

1 suggested how I felt the case was going in or how any
2 issue of fact should be resolved, or how you should
3 find the facts, then you are to disregard it, because
4 it would be improper for me to do that, I don't intend
5 it, and the decision that you make on what the facts
6 are in this case must be made free from interference
7 from anyone, myself included.

8 My role as the Judge is to see that there's
9 been a fair, orderly and efficient trial of this case.
10 My role is also to rule on questions of evidence and
11 matters of law, and to instruct you on the law, as I'm
12 now doing.

13 Now your role in this case, ladies and
14 gentlemen, is the most important role in the trial
15 because you and you alone will determine what the facts
16 are. In a sense, you are judges when you do that: you
17 are the sole judges of the facts. It doesn't matter
18 what I or the lawyers think the facts are. All that
19 matters are what you find the facts to be.

20 Now in deciding what the facts are, you all
21 have certain tools available to you. The primary ones
22 are you own common sense, good judgment and general
23 life experiences. Don't leave those tools here in the
24 courtroom. Bring them with you into the jury room and
25 use them as you deliberate.

1 Now if in the course of opening statements or
2 closing arguments, or during the trial itself, any of
3 the attorneys or even I as the Judge call to your
4 attention matters of evidence that you do not remember
5 collectively as a jury, then you're free to ignore it,
6 because it's your memory of what the testimony was and
7 what the evidence is that controls your deliberations
8 in the case.

9 You alone will determine the weight and the
10 effect and the value of the evidence and the
11 credibility, that is, the believability of the
12 witnesses. Once you make those determinations of fact,
13 then it is your duty to apply them to the law as I now
14 give it to you.

15 Now in deciding whether the defendant is guilty
16 or not guilty of each of the charges that have been
17 brought against him, you should, of course, act without
18 prejudice, without fear or favor, and make your
19 judgment solely from a fair consideration of all of the
20 evidence. Emotion or sympathy for one side or the
21 other has no place in your deliberations.

22 And you're not to decide this case on the basis
23 of what you may have learned or heard outside of this
24 courtroom or on the basis of any guesswork or
25 speculation or suspicion or unanswered questions in

1 your mind. You may not speculate as to what might be
2 or might not have been the facts, and you must not be
3 influenced by the popularity or the lack of popularity
4 of the crimes that have been charged. Rather, you must
5 confine your consideration to the evidence and nothing
6 but the evidence, and your decision must be based on
7 common sense, good reasoning and good judgment. Your
8 decision must be made without partiality and without
9 concern for the effects or the consequences of that
10 decision.

11 Now let me talk to you about what is evidence
12 and, equally importantly, what is not evidence.
13 Evidence is what you've heard from the lips of the
14 witnesses who have testified here in court before you,
15 under oath, and given answers to questions put to them
16 by the attorneys. You've had a chance to listen to
17 each witness, to observe each witness, to consider all
18 of what he or she has said and how they've said it.
19 And that is evidence.

20 Evidence is also the documents, photographs,
21 diagrams and other items and things that were received
22 into evidence and marked as numbered exhibits during
23 the trial of the case. And they will be with you in
24 the jury room for your review.

25 Evidence is also any facts upon which the

1 parties have agreed and which I've told you that you're
2 to accept as undisputed in this trial. These agreed
3 facts are called stipulations. In this trial the
4 Commonwealth and Mr. Winston have agreed or stipulated
5 to the information contained in Exhibit No. 25
6 regarding the results of certain DNA testing. This
7 means that they both agree that what's stated in that
8 stipulation are facts. You are therefore to treat
9 these facts as undisputed and proved.

10 Of course, the quality or strength of the proof
11 is not determined by the sheer volume of evidence or
12 the number of witnesses that have been presented at
13 trial. Rather, it's the weight of the evidence, that
14 is, its strength in tending to prove or disprove the
15 issues at stake, that is important.

16 The weight of the evidence is not necessarily
17 determined by the number of witnesses, if any, called
18 to testify by either side or the number of exhibits, if
19 any, introduced into evidence by either side.

20 You're to use all of your common sense,
21 experience and good judgment in evaluating the
22 evidence. You should consider all of the facts and
23 circumstances in evidence and all of the witnesses and
24 exhibits that have been presented during the trial in
25 determining whether the Commonwealth has proved each of

1 the elements of each of the crimes charged against the
2 defendant in this case beyond a reasonable doubt.

3 Now some things that have occurred during the
4 course of this trial are not evidence, and you may not
5 consider these things in deciding the facts of the
6 case. As I've already told you, the indictments in
7 this case are not evidence. The fact that the
8 defendant has been indicted in this case is absolutely
9 not evidence with respect to his guilt or innocence.

10 A question put to a witness by either attorney,
11 no matter how artfully phrased, is not evidence and is
12 not to be considered by you unless and until the
13 witness answers or adopts that question. Only the
14 answers given by each witness are evidence.

15 Also, you may not consider as evidence any
16 question, answer or other matter that I have ordered
17 stricken from the record and told you to disregard
18 during the trial.

19 Now in reviewing documents in evidence, you may
20 find that some information has been whited out, blacked
21 out or, as we say, redacted. And that is because the
22 Court has made legal rulings about what evidence is
23 relevant to this case or because the document contains
24 extraneous matter. You should not draw any negative
25 inference against either party based upon these

1 redactions nor are you to speculate about what
2 information has been redacted.

3 The opening statements and closing arguments of
4 counsel are important and helpful and appropriate, but
5 they are not evidence in this case. The personal
6 beliefs of the Court or counsel on any issue in this
7 case or on what the evidence is, are not evidence.

8 Anything that you may have seen or heard or
9 read about this case outside of this courtroom or while
10 you were not sitting here in the courtroom, is not
11 evidence.

12 My instructions to you on the law and anything
13 that I may have said to you in passing during the
14 course of this trial is not evidence.

15 Now, consider the evidence as a whole. Don't
16 make up your minds about what the verdict should be
17 until you've retired to the jury room to decide this
18 case and you and your fellow jurors have discussed all
19 of the evidence thoroughly, thoughtfully and carefully.

20 Now, in the trial of this or any other case,
21 there are two kinds of evidence, and we call them
22 direct evidence and circumstantial evidence. Direct
23 evidence is proof of a fact, such as the testimony of
24 any eye witness, that is, someone who comes into the
25 courtroom to tell you what he or she heard, saw or

1 felt. And generally such testimony is based on the
2 witness's five senses.

3 Circumstantial evidence is proof of a chain of
4 circumstances from which you may infer or conclude that
5 a fact exists, even though it has not been proven
6 directly. So let me give you some examples.

7 Suppose when you go home at the end of the day
8 today for some reason it's important for you to know
9 whether the mailman had been to your house or not. If
10 someone at your home were to tell you that he or she
11 saw the mailman at your mailbox, then that would be
12 direct evidence that the mailman had been to your
13 house. The question for you then would be whether you
14 believe what the person has told you.

15 On the other hand, suppose that person tells
16 you not that he or she saw the mailman at the mailbox,
17 but only that he or she found mail in the mailbox.
18 That's circumstantial evidence that the mailman has
19 been there. No one saw him, but you can reasonably
20 infer from the presence of mail in the mailbox, along
21 with your past experience, that someone from the Postal
22 Service has put mail in the mailbox.

23 But suppose you needed to know which mailman it
24 was, whether it was the regular mailman who usually
25 comes to your house, or whether the regular one was on

1 vacation and a substitute came. You could not infer
2 from the presence of mail in the mailbox that it was
3 the usual mailman, only that it was someone from the
4 Postal Service.

5 Now you're entitled to consider both kinds of
6 evidence. There's no difference at all in the
7 probative value between direct and circumstantial
8 evidence. Circumstantial evidence is competent to
9 establish guilt beyond a reasonable doubt.

10 Either direct or circumstantial evidence may
11 come in a variety of forms. Evidence may be
12 testimonial, documentary, physical, forensic or
13 scientific. The law does not require any particular
14 type of evidence.

15 Whether the evidence is direct or
16 circumstantial, the Commonwealth must prove the
17 defendant guilty beyond a reasonable doubt from all of
18 the evidence in this case. Where the Commonwealth's
19 case is based only on circumstantial evidence, and that
20 is for you to say, you may find the defendant guilty
21 only if those circumstances are conclusive enough to
22 leave you with a moral certainty, a clear and settled
23 belief, that the defendant is guilty and that there is
24 no other reasonable explanation of the facts as proven.

25 Now I've used the word inference. An inference

1 is a permissible deduction that you may make from
2 evidence that you have accepted as believable.

3 Inferences are things you do every day, little steps in
4 reasoning in which you take some known information,
5 apply your experience in life to it and then draw a
6 conclusion.

7 You may draw an inference even if it is not
8 necessary and inescapable so long as it is reasonable
9 and warranted by the evidence. But you may not indulge
10 in conjecture or guesswork in drawing inferences. In
11 order to convict the defendant, you must find that all
12 of the evidence and reasonable inferences that you have
13 drawn, taken together, prove that he is guilty beyond a
14 reasonable doubt. If it does not, you must acquit him.

15 It will be your duty to decide any disputed
16 questions of fact. You will have to determine which
17 witnesses to believe and how much weight to give their
18 testimony. You should give the testimony of each
19 witness whatever degree of belief and importance that
20 you judge it is fairly entitled to receive. You are
21 the sole judges of the credibility of the witnesses,
22 and if there is any conflict in the testimony it is
23 your function to resolve those conflicts and to
24 determine where the truth lies.

25 Now, you have great power in this regard. In

1 evaluating the evidence presented by a witness, you,
2 the jurors, are free to believe everything that the
3 witness says, some of what the witness says or none of
4 what the witness says. If there are any conflicts in
5 the testimony, it's your function to resolve those
6 conflicts and determine where the truth lies.

7 All of you jurors have a great deal of
8 experience in life and with human nature, and you are
9 used to sizing up people every day and determining who
10 to believe and how much of what they say that you
11 believe. You're to use all of your common sense, life
12 experience and good judgment in assessing all of the
13 testimony and in deciding what you believe and what you
14 don't believe.

15 In determining credibility and the weight to be
16 given to the testimony of each witness, you should
17 consider and may be guided by such factors as the
18 conduct and demeanor of the witness while testifying,
19 the frankness or lack of frankness of that witness
20 while testifying, the reasonableness or
21 unreasonableness of the witness's testimony, the
22 probability or improbability of the testimony, the
23 opportunity or lack of opportunity to see or to know
24 the facts concerning that to which the witness has
25 testified, and the accuracy of the witness's memory as

1 well as the degree of intelligence shown by the
2 witness.

3 You may also consider a witness's motive to
4 testify for or against either party and, of course, the
5 interest or lack of interest that the witness has in
6 the outcome of the case.

7 You should also take into consideration the age
8 and the character and the appearance of each witness at
9 trial, as well as any bias that he or she may have
10 shown in their testimony, in determining the credit to
11 be given to his or her testimony.

12 You're not required to accept a witness's
13 testimony even if the testimony is uncontradicted. You
14 may decide, because of the witness's bearing and
15 demeanor, or because of factors affecting his or her
16 testimony, or for other reasons sufficient to you, that
17 such testimony is not worthy of belief. Or if you are
18 satisfied that the witness's testimony is credible,
19 then you may accept that testimony and consider it
20 along with all of the other evidence in determining
21 whether the Commonwealth has proved the defendant's
22 guilt beyond a reasonable doubt.

23 Now, during the course of this trial there's
24 been evidence that the witness, Ms. Willingham, engaged
25 in an activity which could be considered criminal, on

1 the evening of January 14th, 2011, namely, possessing
2 cocaine and giving it to others. You may consider this
3 evidence to determine what, if any, effect this had on
4 the witness's testimony. That is, you're allowed to
5 consider this evidence to determine whether there's any
6 possibility that a prosecution witness is hoping for
7 favorable treatment regarding criminal activity even if
8 the Commonwealth has offered no inducements of any kind
9 to that witness and even if there is no evidence
10 indicating that there was any threat of prosecution.
11 You're also entitled to consider this evidence to
12 determine whether any bias on the part of Ms.
13 Willingham existed at the time of her initial
14 accusation of the defendant.

15 Now, the testimony of a witness may be
16 discredited or impeached by showing that he or she has
17 previously made a statement which is inconsistent with
18 his or her present testimony at trial. The prior
19 statement is admitted into evidence solely for your
20 consideration in evaluating the credibility of the
21 witness. Should you find the prior statement to be
22 inconsistent, you may consider that statement only in
23 connection with your evaluation of the credence to be
24 given to the witness's present testimony in court.
25 You're not to consider the prior statement as

1 establishing the truth of any fact contained in that
2 prior statement. However, there is an exception: if
3 the prior testimony was given before a grand jury, you
4 may consider that prior testimony for the truth of any
5 fact contained in it.

6 Now this completes the first part of my
7 instructions to you, and I now turn to the law that
8 applies to the issues that are raised in this case.
9 I'm now going to instruct you on the substance of the
10 law for each particular crime of which the defendant
11 has been accused.

12 The crime with which the defendant has been
13 charged is called indecent assault and battery on a
14 person 14 years of age or older. There are two
15 indictments of the defendant for this crime. Each
16 indictment is to be considered alone. Each charge in
17 the indictments is an accusation of a different crime,
18 and you're to weigh and consider that indictment
19 separate and apart from any other indictments. You
20 must consider each charge separately and return a
21 separate verdict of guilty or not guilty for each
22 charge.

23 Your verdict must be unanimous as to each
24 indictment, and it must be unanimous as to which
25 specific act constitutes the offense charge.

1 Now in this case, as I said, the defendant,
2 Brandon Winston, is charged with indecent assault and
3 battery on a person 14 years of age or older. Now, the
4 Commonwealth has charged Brandon Winston with two
5 counts of this crime. Each charge is based upon
6 separate and distinct alleged facts and circumstances.
7 I will begin by defining this crime.

8 Our State Legislature has specifically defined
9 indecent assault and battery on a person 14 years of
10 age or older in a statute, General Laws Chapter 265,
11 Section 13H. The relevant portion of the statute reads
12 as follows: whoever commits an indecent assault and
13 battery on a person who has attained age 14 shall be
14 punished.

15 Now an assault and battery is the intentional
16 and unjustified use of force, however slight, on the
17 person of another. Therefore, indecent assault and
18 battery on a person 14 years of age or older consists
19 of an assault and battery committed by means of an
20 indecent touching or contact without justification or
21 excuse or consent.

22 In order to prove the defendant guilty of
23 indecent assault and battery, the Commonwealth must
24 convince you, the jury, beyond a reasonable doubt, of
25 the following seven elements. The first element -- and

1 I'm going to list these, and then I'm going to go over
2 them in more detail to flesh them out.

3 The first element is that the alleged
4 complainant -- and I'm going to use that word, alleged
5 complainants, from time to time throughout this charge.
6 The alleged complainant in this case is [REDACTED]

7 [REDACTED] The first element is that the alleged
8 complainant was 14 years of age or older.

9 The second element is that the defendant
10 intended to engage in the touching. The third element
11 is that the defendant committed a touching, however
12 slight.

13 The fourth element is that the touching was
14 offensive. The fifth element is that the touching was
15 indecent.

16 The sixth element is that the touching was
17 committed without justification or excuse. And the
18 seventh element is that the indecent assault and
19 battery occurred without the alleged complainant's
20 consent.

21 So I will now define the elements again. The
22 first element, again, the Commonwealth must prove
23 beyond a reasonable doubt is that the alleged
24 complainant was 14 years or older at the time of the
25 offense.

1 The second element that the Commonwealth must
2 prove beyond a reasonable doubt is that the defendant
3 intended to commit the touching. You, the jury, may or
4 may not infer the defendant's intent by considering all
5 of the facts and circumstances, as well as the evidence
6 of the defendant's conduct offered during the trial.

7 The third element the Commonwealth must prove
8 beyond a reasonable doubt is that the defendant did, in
9 fact, engage in a touching, however slight. This means
10 that in this particular case you must be satisfied that
11 the Commonwealth proved the facts to support each
12 separate indictment. And here, I will identify the
13 facts alleged by the Commonwealth as to each of the two
14 separate indictments for indecent assault and battery.

15 So you must be satisfied that the Commonwealth
16 proved, as to the first indictment for indecent assault
17 and battery, that the defendant touched [REDACTED]

18 [REDACTED] vaginal area with his hand, while in
19 Cambridge. And you must be satisfied that the
20 Commonwealth proved, as to the second indictment for
21 indecent assault and battery, that the defendant
22 touched [REDACTED] [REDACTED] breast with his hand, while
23 in Cambridge.

24 The Commonwealth does not need to prove the
25 precise date and time of the crimes. Whether the

1 offenses occurred on a specific date is immaterial
2 because the date is not an essential element of the
3 offenses charge.

4 Now the fourth element the Commonwealth must
5 prove beyond a reasonable doubt is that the touching
6 was offensive. An offensive touching is an affront to
7 a person's integrity.

8 The fifth element the Commonwealth must prove
9 beyond a reasonable doubt is that the assault and
10 battery was indecent. Indecent means fundamentally
11 offensive to contemporary moral values. Indecent is
12 characterized as that which the common sense of society
13 would regard as immodest, immoral and improper. The
14 word indecent is not a technical term, but rather a
15 common word that may be assumed to be understood in its
16 common meaning by an ordinary jury.

17 What is indecent should be measured by common
18 understanding and practices. For example, the fondling
19 of a person's breast, touching his or her buttocks, or
20 reaching between his or her legs, may constitute
21 indecent assault and battery. In determining whether
22 the Commonwealth has met its burden in establishing the
23 indecent element of this offense, you may consider the
24 defendant's alleged actions.

25 The sixth element the Commonwealth must prove

1 beyond a reasonable doubt is that the battery was
2 committed without justification or excuse. An example
3 of justification is a physical examination by a doctor.
4 An example of excuse is the situation where a person
5 sees another in danger, reaches out and, while removing
6 that other person from an oncoming vehicle, perhaps,
7 touches that person's breast. In this case the
8 Commonwealth must prove the absence of justification or
9 excuse beyond a reasonable doubt.

10 As to the seventh element the Commonwealth must
11 prove beyond a reasonable doubt, because of the age of
12 the alleged complainant you must consider the question
13 of her consent. When the complainant is 14 years of
14 age or older, the Commonwealth must prove beyond a
15 reasonable doubt that the alleged complainant did not
16 consent. This requires the Commonwealth to prove
17 beyond a reasonable doubt that the indecent assault and
18 battery occurred against the alleged complainant's
19 will. The phrase "against the alleged complainant's
20 will" means the same thing as without the alleged
21 complainant's consent.

22 The Commonwealth must prove that at the time of
23 the indecent assault and battery the alleged
24 complainant did not consent. You may consider evidence
25 of the alleged complainant's state of mind at the time

1 of the alleged incident on this issue of consent.

2 Now, an alleged complainant is not required to
3 use physical force to resist. However, you may
4 consider evidence of any attempt to restrain or confine
5 the alleged complainant, violence by the defendant, or
6 struggle or outcry by the alleged complainant, on the
7 issues of force and consent.

8 Lack of such evidence, however, does not
9 necessarily imply consent or the absence of force,
10 since in certain circumstances physical resistance may
11 not be possible. For example, an alleged complainant
12 in a certain situation may not resist with physical
13 force because of fear of bodily injury or because
14 actual force was being applied to him or her.

15 You may consider all of the circumstances and
16 the entire sequence of events in determining whether
17 the indecent assault and battery was without the
18 alleged complainant's consent and her ability to resist.
19 In this case there has been evidence that the
20 complainant had consumed alcohol, may have been
21 unconscious or asleep. If, because of the consumption
22 of drugs or alcohol or for some other reason, for
23 example, sleep, unconsciousness, mental retardation or
24 helplessness, a person is so impaired as to be
25 incapable of consenting to an indecent touching, then

1 an indecent touching occurring during such incapacity
2 is without that person's consent.

3 Now, if you find that the Commonwealth has
4 proved beyond a reasonable doubt that the complainant
5 was so impaired as to be incapable of consenting, as
6 I've just described, and if you further find that the
7 Commonwealth has proved beyond a reasonable doubt that
8 the defendant knew or reasonably should have known that
9 the complainant's condition rendered her incapable of
10 consenting, then the Commonwealth has proved the
11 element of lack of consent.

12 Now in determining whether the Commonwealth has
13 proven beyond a reasonable doubt that the defendant
14 reasonably should have known that the victim was
15 incapable of consenting, you should examine whether a
16 reasonable person in the circumstances known to the
17 defendant, would have known [REDACTED] [REDACTED] was
18 incapable of consent. When I say that the defendant
19 knew that she was incapable of consent, I mean that he
20 had actual subjective knowledge of the fact, that he
21 was conscious and aware of the fact. On this point, on
22 the point of the defendant's knowledge, you may
23 consider any impairment of the defendant's own thought
24 process by reason of any intoxication by drugs or
25 alcohol on his part.

1 When I say that the Commonwealth, in the
2 alternative, must prove that the defendant reasonably
3 should have known that [REDACTED] was impaired, I
4 mean this: that in the circumstances known to the
5 defendant, a reasonable person would have known that
6 she was incapable of consent. And when deciding
7 whether the Commonwealth has met its burden of proof,
8 you may consider any evidence that the defendant,
9 Brandon Winston, was affected by the consumption or
10 drugs or alcohol.

11 However, if the Commonwealth has not proved
12 that the complainant lacked the capacity to consent, or
13 if the Commonwealth has proved that the complainant did
14 lack the capacity to consent but it has not proven that
15 the defendant knew or reasonably should have known of
16 such incapacity, then in order to find the defendant
17 guilty of indecent assault and battery you must find
18 that the Commonwealth has proved the element of lack of
19 consent as I've defined this element for you earlier.

20 Therefore, if after considering all of the
21 evidence you find that the Commonwealth has proved
22 beyond a reasonable doubt each and every one of the
23 elements I've just defined, that is, that the defendant
24 intended to commit and engaged in an indecent touching,
25 however slight, that was offensive and that was

1 perpetrated on an alleged complainant who was 14 years
2 of age or older, without justification or excuse, and
3 without consent, then you shall find the defendant
4 guilty of indecent assault and battery.

5 If, however, you, the jury, find that the
6 Commonwealth has not proved the touching was indecent
7 beyond a reasonable doubt, then you shall consider
8 whether the defendant is guilty of what we call the
9 lesser-included offense of assault and battery.

10 The offense of indecent assault and battery on
11 a person 14 years of age or older includes this lesser
12 offense of assault and battery. As a matter of law,
13 the complaint that is before you which charges the
14 defendant with indecent assault and battery on a person
15 14 years of age or older also charges him with that
16 lesser-included offense of assault and battery.

17 The Commonwealth may prove the lesser-included
18 charge of assault and battery even if it fails to prove
19 the greater charge of indecent assault and battery on a
20 person 14 years of age or older. You may find the
21 defendant guilty of assault and battery only if you are
22 not convinced beyond a reasonable doubt that the
23 defendant is guilty of indecent assault and battery on
24 a person 14 years of age or older and you are convinced
25 beyond a reasonable doubt that the defendant is guilty

1 of assault and battery.

2 In summary, if you find that the Commonwealth
3 proved beyond a reasonable doubt that the defendant
4 committed an assault and battery but did not prove
5 beyond a reasonable doubt that the assault and battery
6 was indecent, then you would find the defendant guilty
7 of the lesser offense of assault and battery.

8 Now in considering these charges where the
9 intent of the defendant is an element of the crime, and
10 that is so in that the Commonwealth must prove that the
11 defendant intended the indecent touching of the
12 complainant, in determining whether the defendant acted
13 intentionally, you should give the word intentionally
14 its ordinary meaning of acting voluntarily and
15 deliberately and not because of accident or negligence.
16 By accident, I mean an unexpected happening that occurs
17 without intention or design on the defendant's part.

18 Now, intention is essentially a state of mind.
19 It means the purpose or objective of a person at the
20 time of an action. The intention of a person is to be
21 ascertained by his or his acts and the inferences to be
22 drawn from what is externally visible.

23 Intent ordinarily cannot be proved directly
24 because there's no way of reaching into and examining
25 the operations of the human mind. However, you may

1 determine the defendant's intent from any statement or
2 act committed or omitted and from all the other
3 circumstances that indicate his or her state of mind
4 provided first that you find that any and all such
5 circumstances occurred. The jury may, but need not
6 necessarily, infer from the conduct of the person that
7 he or she intended the natural and probable
8 consequences of his or her own acts.

9 There are two forms of intent, general and
10 specific. General intent is when we do things
11 more or less unconsciously, such as sitting down
12 in a chair. We would not do it unless our mind
13 first resolved to do it, but it does not require
14 any concentration or focusing of the mind.

15 Specific intent is the act of
16 concentrating or focusing the mind for some
17 perceptible period. It is a conscious act and
18 the determination of the mind to do an act before
19 the desired act is committed.

20 In other words, an act performed with
21 specific intent is a conscious act, done with the
22 determination of the mind to commit the act.

23 Now, members of the jury, I'm now at the
24 third and final and shortest part of my
25 instructions to you on the law. And I'm about to

1 submit this case to you. And I need not remind
2 you that you have a grave responsibility here.
3 But I believe that you will bring to bear all of
4 the wisdom and judgment and conscience that you
5 possess in reaching your verdicts. All that we
6 expect from you is that you decide the case with
7 integrity and principle, without sympathy and
8 without prejudice, and return a verdict dictated
9 by your logic and reason and not by emotion,
10 because emotions have no place in the rendition
11 of verdicts.

12 We're looking for an impartial judgment
13 dictated by your reasoning in the fullest
14 discharge of your oath as jurors. Everyone who
15 comes before the Court stands equal before the
16 bar of justice, and therefore your verdicts must
17 be based on the law, the evidence and the facts
18 that you find, and nothing else.

19 Your verdicts must be unanimous, which
20 means that all twelve of the jurors who will be
21 deliberating on this case must agree. You should
22 continue your deliberations until you have
23 reached a verdict on which all twelve of the
24 deliberating jurors concur. Each juror has a
25 duty to consult with one another and to

1 deliberate with a view to reaching an agreement
2 if it can be done without violence to one's
3 individual judgment.

4 When you go into the jury room, you will
5 receive copies of the verdict slips. Each
6 verdict slip has the name of the case and the
7 indictment number on it. And it says "The jury
8 finds the defendant," and then there are three
9 choices: one, not guilty; two, guilty, offense as
10 charged, with indecent assault and battery on a
11 person over 14; or, three, guilty, lesser-
12 included offense, assault and battery. You can
13 only pick one, and you must pick one.

14 When all twelve jurors agree, and all must
15 agree one way or another, the foreperson should
16 check off the verdict and then sign it and date
17 it with pen. Remember, your verdict as to each
18 indictment must be unanimous, and your verdict as
19 to each indictment must be unanimous as to which
20 specific act constitutes the events charged.

21 Now, ladies and gentlemen, if during the
22 course of your deliberations you should have a
23 question about the law, my instructions to you on
24 the law, then you should do the following. You
25 should first all agree on the form of the

1 question and have the foreperson write it down on
2 a piece of paper. And the foreperson should give
3 that note to the court officer, who will bring it
4 to me. I'll call the lawyers together, we'll
5 consider your question and how I ought to answer
6 it, and then I will either bring you out here in
7 the courtroom and respond to you here in open
8 court with my answer to my question or, if it's
9 appropriate, I may simply write my answer out in
10 response to your question and send that answer
11 back to you in the jury room.

12 Now either way the process I described
13 accounts for a time lag between when you ask me a
14 question and when you get my answer. So if you
15 can continue to keep deliberating while awaiting
16 my response, by all means, please do so. But if
17 you find that you cannot go any further without
18 my response, then please stop. And I will get my
19 response to you as quickly as I can.

20 Now no member of this jury should ever
21 attempt to communicate with the Court by any
22 means other than a signed writing, and the Court
23 will not communicate with any member of this jury
24 on any subject touching the merits of this case
25 otherwise than in writing or orally here in open

1 court.

2 Now when I say you're not to communicate
3 with the Court on any subject touching the merits
4 of this case other than in writing, I mean you're
5 not to discuss, even with the court officers, the
6 officers who are looking out for you and who are
7 your connections with the Court, how things are
8 going in deliberations, what people are saying or
9 how you're feeling. Your communications with the
10 court officers should have to do with matters of
11 scheduling breaks, when you come back here in the
12 courtroom, that kind of thing. But do not, even
13 with the court officers, discuss what's going on
14 in your jury room. The court officers, as well
15 as any other persons, are forbidden to
16 communicate in any way or manner with any member
17 of this jury on any subject touching the merits
18 of this case.

19 And bear in mind that you're never to
20 reveal to any person, not even to the Court, how
21 the jury stands numerically or otherwise on
22 questions before you until such time as you reach
23 a verdict. And so, for example, if you do send
24 me a written question about the law or my charge,
25 please don't start it with, 'Judge, we're split 6

1 to 6 on this issue, and here's our question.' No
2 one should or needs to know how you may be
3 divided, only what your question is. So please
4 keep that in mind.

5 Now you may be thinking that arriving at a
6 unanimous verdict of twelve deliberating jurors
7 is not necessarily an easy task. It's going to
8 require very conscientious service on your part
9 and a very conscientious approach to your duty as
10 jurors. I suggest that you each approach it with
11 mutual respect for the opinions of your fellow
12 jurors, that you each have a disposition to
13 listen to each other, to be convinced as to one
14 another's arguments and persuaded as to one
15 another's views. Don't be afraid to change your
16 opinion if the discussion persuades you that you
17 should.

18 Don't hesitate to reexamine your own views
19 and come to a different conclusion if you're
20 convinced that your earlier conclusion was
21 erroneous, but don't come to a decision simply
22 because other jurors think that is the correct
23 decision. No juror should ever surrender his or
24 her honest conviction as to the weight or effect
25 of the evidence solely because of the opinions of

1 his or her fellow jurors or for the mere purpose
2 of reaching a verdict. Each of you must decide
3 this case for yourselves, and you should only do
4 so after you've considered all of the evidence,
5 discussed it fully and impartially with your
6 fellow jurors and listened to the views of your
7 fellow jurors.

8 Now the foreperson of the jury serves as
9 the moderator of your discussions. I choose a
10 person I think will be comfortable with the
11 responsibility of facilitating the meeting, and
12 for no other reason. He or she is responsible to
13 see that each of you and every one of you is
14 given the opportunity to speak and that the other
15 jurors listen respectfully to you when you speak.
16 However, each one of you has a vote, and each
17 juror's vote is weighted equally; the
18 foreperson's vote or opinion is not entitled to
19 any more weight than the vote or opinion of any
20 other juror simply because he or she is the
21 foreperson.

22 Also, you must understand that no member
23 of this jury is more or less qualified to decide
24 -- excuse me. I need to consult with counsel.

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

1 THE COURT OFFICER: I just got a call from
2 the jury pool downstairs. Juror No. 9's wife
3 just went into labor and she's at the hospital.

4 We can make him an alternate and just send
5 him on his way.

6 THE COURT: Well, I don't think I can make
7 him an alternate. I would have to dismiss him
8 because he would not have heard the entire charge
9 if he's let go right now.

10 Is there any objection to -- I think this
11 is grounds for excusing the juror. If there
12 would be any objection, I would hear it now.

13 MS. TAGLIAREN: No.

14 MR. ZALKIND: No.

15 THE COURT: All right. So Juror No. 9 is
16 excused.

17 How shall we do this, Jack?

18 THE COURT OFFICER: Want me to just go up
19 to him and ask him to step out? I'll just walk
20 him out this way.

21 THE COURT: All right. And does anybody
22 care what I say to the jurors? I usually say
23 it's nothing they did or said.

24 MR. ZALKIND: They probably know.

25 MS. TAGLIAREN: I think they can know

1 why.

2 THE COURT: Yeah. I think I'd feel
3 comfortable telling them. Okay.

4 THE COURT OFFICER: So want me just to
5 take him out now?

6 THE COURT: Yeah. Okay.

7 (*Juror No. 9 steps down and leaves courtroom.*)

8 THE COURT: Ladies and gentlemen of the
9 jury, lest you be wondering what's going on, we
10 just received word that Dr. Seung's wife is in
11 labor and has been taken to the hospital. So we
12 have pulled Dr. Seung aside, and we're going to
13 have to excuse him from further jury service,
14 because, as you know, these things may take some
15 time and we can't just suspend for that purpose.

16 So we do -- as you know or you may have
17 guessed, we do pick alternates, and so we have
18 sufficient jurors to finish this case. So it's
19 nothing that Dr. Seung has done or said, or
20 anything other than the fact that he's about to
21 have a blessed event, so.

22 So let me resume with where I was in the
23 charge.

24 As I said, you must understand that no
25 member of this jury is any more or less qualified

1 to decide the truth of the facts in this case or
2 to deliberate on the verdict solely because of
3 their age, occupation, gender, education,
4 background or beliefs. You've all heard the same
5 evidence, listened to the same witnesses and
6 looked at the same exhibits. You're all under
7 the sanction of the same oath that you took as
8 jurors at the start of this case when you agreed
9 to well and truly try the issues between the
10 Commonwealth and this defendant according to the
11 evidence and the law.

12 Bear in mind that you're not partisans,
13 you're not advocates. You are judges; you are
14 judges of the facts of this case, and that's
15 truly an important responsibility. I'm confident
16 that you will discharge that task faithfully and
17 well as you work to reach your verdicts in this
18 case.

19 Now when you're in the jury room you
20 should all talk about this case only in the
21 presence of each other. At some point your lunch
22 will be brought to you, it's been ordered and
23 will be available to you soon. And if you'd
24 like, you may decide as a group to suspend your
25 deliberations, have lunch, and then return to the

1 deliberations, or may decide as a group that
2 you'd like to work through lunch while
3 deliberating. Either way is fine. The only
4 thing we can't have is half of you having lunch
5 and half of you deliberating. That doesn't work.

6 So please do it all together. And the
7 foreperson is charged with responsibility to
8 ensure that you're all working together as a jury
9 of twelve on this case at all times.

10 Now we set no limit or pace to your
11 deliberations. We ask only that you give full,
12 fair and thorough consideration to the evidence
13 in reaching your verdict in this case.

14 We may be working in the courtroom here
15 today but we'll interrupt whatever we are doing,
16 since you're the most important responsibility I
17 have, in order to receive a question or a verdict
18 from you, at any time other than between the
19 hours of 1:00 and 2:00. And that's because I
20 have to give the good people who work in this
21 courthouse a lunch break, and the lawyers, and
22 everyone else who's involved with the trial of
23 this case. So if you have a verdict or a
24 question between 1:00 and 2:00, you'll need to
25 hold it until two o'clock, and then we'll deal

1 with it as promptly as we can.

2 Now the court day usually ends at four.

3 If you're deliberating at four o'clock, I'm gonna
4 send in a court officer to ask if you'd like to
5 deliberate a little bit further. But at some
6 point, probably no later than 4:30 p.m., I will,
7 if you've not reached a verdict, ask you to
8 suspend your deliberations for the day. And
9 we'll bring you back tomorrow morning at nine
10 o'clock and ask you to resume your deliberations
11 at that time.

12 The exhibits will be with you in a few
13 moments, as soon as we've checked them out. The
14 original jury slip will be with you, and the tape
15 recording of my charge will be with you shortly,
16 as well.

17 At this time let me see counsel at
18 sidebar.

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

20 THE COURT: I may have missed a little bit
21 of recording those last five minutes, just so you
22 know. But if there's anything about jury
23 deliberations that the jury would like to hear
24 about again, of course I can reinstruct them.

25 Yes. Ms. Hernandez.

1 MS. HERNANDEZ: We have an objection to
2 your Honor not giving the instruction on the
3 history of sexual conduct between the defendant
4 and the complainant, and it reads as follows,
5 "Evidence has been introduced in this case
6 regarding sexual conduct between Mr. Winston and
7 Ms. [REDACTED] which occurred between the charged
8 offenses in this case. This evidence, if you
9 believe it, is relevant to whether or not Ms.
10 [REDACTED] later consented to the alleged
11 touching charged in this case."

12 THE COURT: Okay.

13 MR. ZALKIND: We object to that.

14 THE COURT: Noted. And I stick to my
15 original ruling on that.

16 Anything from the Commonwealth?

17 MS. TAGLIAREN: No. Thank you.

18 THE COURT: Okay. So we will now reduce
19 the jury and send them out.

20 (**End of sidebar.**)

21 THE COURT: Now, ladies and gentlemen,
22 when we impanel a jury at the beginning of a
23 trial we never know whether some personal
24 emergency will arise during the course of the
25 trial that will require one of the jurors be

1 excused from further jury duty. And we had
2 graphic evidence of that a few minutes ago.

3 To avoid having to start the trial all
4 over again if that should occur, we impanel
5 fourteen jurors, even though by law the case will
6 eventually be decided by only twelve of you. And
7 the time has now come to reduce your number to
8 that twelve.

9 The Clerk will draw one of your names at
10 random. That juror will be designated as an
11 alternate juror and will not take part in your
12 deliberations unless it is necessary to provide a
13 substitute for one of the other jurors.

14 Now if fate makes you the alternate juror,
15 please do not take it personally; each of you has
16 an equal and random chance of deliberating on
17 this jury. Your presence up to this point, and
18 your continuing availability if you should be
19 needed, is, of course, an important contribution
20 to the administration of justice. The court
21 officer will make you as comfortable as possible
22 while the jury deliberates if you are that
23 alternate.

24 So the Clerk will now reduce the jury to
25 twelve jurors, after which I'll appoint a

1 foreperson.

2 THE CLERK: Thank you, your Honor.

3 Your Honor, I've placed the tokens with
4 all the numbers of the remaining jurors in this
5 box and will draw one out.

6 The juror in Seat No. 4, you've been named
7 the alternate of the jury.

8 THE COURT: All right. Thank you, sir,
9 for your service and the service you will render.

10 And I appoint John Mandeville, who is in
11 Seat No. 6, as the foreperson of this jury.

12 The court officers may now be sworn.

13 THE CLERK: Yes, your Honor.

14 **COURT OFFICERS ARE SWORN.**

15 THE COURT: The jury may be taken to the
16 jury room.

17 (**Jury exits to begin deliberations at 12:52 p.m.)**

18 (*Counsel reviews exhibits.*)

19 THE CLERK: At this time is counsel for
20 the Commonwealth satisfied with the exhibits and
21 the verdict slips?

22 MS. TAGLIARENTE: Yes. The Commonwealth is
23 content.

24 MR. ZALKIND: Yes.

25 THE CLERK: Counsel for the defense?

1 MR. ZALKIND: Yes.

2 (D for I.D., admitted; Jury Charge
3 Cassette Tape.)

4 (Recess at 12:55 p.m.)

5 (In court without jury at 3:10 p.m.)

6 (E for I.D., admitted; Note from
7 Deliberating Jury.)

8 THE CLERK: Your Honor, the note from the
9 jury has been marked for Identification, E.

10 THE COURT: Has counsel seen it?

11 THE CLERK: Yes.

12 THE COURT: Actually, we'll mark for
13 identification my note to the jury asking if they
14 wanted to go home or deliberate further. They
15 indicated that they didn't want to go home at
16 that time. Anybody is free to examine that.

17 (F for I.D., admitted; Note from the Court
18 Regarding Dismissal for the Day.)

19 THE COURT: More importantly, E is a
20 question, which says, "Does Brandon's
21 understanding of [REDACTED] ability to consent need
22 to be proven beyond a reasonable doubt?"

23 So I think the short answer to that
24 question would be yes, although it might benefit
25 from a little more context in the telling. So

1 I'll ask counsel for comments on an answer to
2 this question.

3 MR. ZALKIND: The answer is yes, period,
4 to the question that was asked.

5 THE COURT: Ms. Tagliareni.

6 MS. TAGLIARENI: Your Honor, I apologize.
7 I didn't bring up a copy of the jury
8 instructions. But my recollection is that you
9 gave a fairly lengthy --

10 THE COURT: Let me pass out just the, this
11 is the part that dealt with lack of capacity and
12 the defendant's inability, or whether the
13 defendant knew or should have known. That's the
14 passage from what I gave them.

15 MS. TAGLIARENI: My suggestion would be to
16 instruct them again with respect to this. I
17 think that it's really the last three paragraphs.

18 THE COURT: Well, I also think the answer
19 is found in, actually, the first sentence of the
20 second paragraph, "If you find that the
21 Commonwealth has proved beyond a reasonable doubt
22 that the complainant was so impaired as to be
23 incapable of consenting as I've just described,
24 and if you further find that the Commonwealth has
25 proved beyond a reasonable doubt that the

1 defendant knew or reasonably should have known
2 that the complainant's condition rendered her
3 incapable of consenting, then the Commonwealth
4 has proved the element of lack of consent."

5 So I could say the Commonwealth has the
6 burden of proving that the defendant knew or
7 reasonably should have known that the
8 complainant's condition rendered her incapable of
9 consenting beyond a reasonable doubt.

10 MR. ZALKIND: I would just say yes to the
11 question. That's what they asked. You are
12 explaining it again, but when the jury comes down
13 with a question, I think you've got to answer it
14 as their question is.

15 MS. TAGLIAREN: I don't --

16 MR. ZALKIND: And there is a true answer
17 to it, and it doesn't need to be explained. That
18 is what it is. They're not putting a curveball
19 in the question.

20 MS. TAGLIAREN: I don't think you can
21 just say yes, because their language doesn't use
22 the same language as your Honor instructed, with
23 "knew or reasonably should have known."

24 THE COURT: Well, it also doesn't reveal
25 any misunderstanding of my charge either as

1 posed, just because they don't use the same
2 language, "understanding of her ability to
3 consent" is the way they put it

4 MS. TAGLIARENI: I would ask that you give
5 at least the second paragraph again. I think it
6 does answer their question, but it gives them the
7 information that they need. And again, it's just
8 reiterating the information that they've already
9 been provided.

10 THE COURT: I think there's a little bit of
11 merit in both sides here. I am contemplating
12 saying, "The short answer to your question is
13 yes. The Commonwealth has the burden of proving
14 beyond a reasonable doubt that the defendant knew
15 or reasonably should have known that the
16 complainant's condition rendered her incapable of
17 consenting."

18 MR. ZALKIND: I can live with that.

19 THE COURT: All right. Well, that's what
20 I'm going to say, then. So let me just get it
21 down before I get them back in here.

22 MR. ZALKIND: Are you going to write it to
23 them or read it to them out here?

24 THE COURT: Pardon me?

25 MR. ZALKIND: Are you going to send it in

1 to them?

2 THE COURT: I suppose I don't need them
3 out here to brief them for such a short passage.
4 I could write it out and send it in, particularly
5 since it's late in the day.

6 Unless there's any request. I don't think
7 this needs to be --

8 MR. ZALKIND: No, you can send it in, as
9 long as I can see it.

10 THE COURT: Well, you can see it before
11 they see it.

12 MR. ZALKIND: Thank you.

13 (*Pause.*)

14 THE COURT: Matt, if you could show that
15 to counsel.

16 (*Pause.*)

17 MR. ZALKIND: I have no problem with this.

18 MS. TAGLIARENI: Could I see it?

19 MR. ZALKIND: Yeah.

20 MS. TAGLIARENI: Thanks.

21 Thank you.

22 THE COURT: All right. Then my answer has
23 been recorded on Exhibit E. So Exhibit E will be
24 taken back into the jury room by the court
25 officer.

1 And we stand in recess.

2 They had indicated an interest in staying,
3 obviously past four. There may be a limit on how
4 much longer I can keep them, because it's based
5 on having a court reporter, a court officer and a
6 Clerk, who don't have issues with childcare or
7 anything like that. So I will see where we are i
8 in a few minutes.

9 MR. ZALKIND: Thank you.

10 (**Recess at 4:25 p.m.**)

11 (**In court with jury at 4:37 p.m.**)

12 THE COURT: Ladies and gentlemen of the
13 jury and alternate, I understand that you
14 indicated to the court officer that you wished to
15 go home now and resume your deliberations
16 tomorrow at nine. It being past 4:30, that's
17 perfectly appropriate. And so you will suspend
18 your deliberations until nine o'clock tomorrow
19 morning.

20 Please be here promptly at nine. We
21 appreciate your diligent service in this matter.
22 And we'll see you tomorrow morning.

23 Please remember not to discuss any aspect
24 of this case with anyone or do anything to try
25 and attempt to gain any information about this

1 case or the issues in it. And we will see you
2 tomorrow morning. Thank you.

3 **(Jury exits at 4:40 p.m.)**

4 THE COURT: Court's in recess.

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6 **(Recess at 4:41 p.m.)**

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CERTIFICATION

I, Christina O'Neill, Official Court Reporter, do hereby certify that the foregoing, Pages 1 through 57 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.

Christina O'Neill

Date

200 Trade Center Plaza, Room 616
Woburn, Massachusetts 01801
(781) 939-2761

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