

LCRVMAXT

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 -----x
4 UNITED STATES OF AMERICA,

5 v.

20 CR 330 (AJN)

6 GHISLAINE MAXWELL,

7 Defendant.

Jury Trial

8 -----x

9 New York, N.Y.
10 December 27, 2021
11 10:30 a.m.

12 Before:

13 HON. ALISON J. NATHAN,

14 District Judge

15 APPEARANCES

16 DAMIAN WILLIAMS

17 United States Attorney for the
18 Southern District of New York

19 BY: MAURENE COMEY

20 ALISON MOE

21 LARA POMERANTZ

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24 HADDON MORGAN AND FOREMAN

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BY: JEFFREY S. PAGLIUCA

LAURA A. MENNINGER

-and-

BOBBI C. STERNHEIM

-and-

COHEN & GRESSER

BY: CHRISTIAN R. EVERDELL

Also Present: Amanda Young, FBI

Paul Byrne, NYPD

Sunny Drescher,

Paralegal, U.S. Attorney's Office

Ann Lundberg,

Paralegal, Haddon Morgan and Foreman

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1 (Trial resumed; jury not present)

2 THE COURT: I did receive a note.

3 May we please have the following items: Different
4 colored Post-Its; white paperboard; highlighters, different
5 colors; and then Matt's transcript; and then also may we have a
6 definition of "enticement."

7 So we're going to get started on the supplies. We'll
8 get them colored Post-Its, white paperboard. I'm not sure
9 exactly what they mean but we'll try and find a large pad, and
10 we'll also give them a whiteboard and dry erase markers and
11 then highlighters.

12 Ms. Moe, Matt's transcript you'll get printed
13 immediately?

14 MS. MOE: Yes, your Honor.

15 THE COURT: Okay. And then I'll hear from the parties
16 as to how they would like to respond to the request for a
17 definition of "enticement."

18 MS. MOE: Your Honor, with respect to the jury's
19 question regarding enticement, our view is that the Court's
20 instruction, which is on page 21, instruction number 15: "The
21 terms persuaded, induced, enticed, and coerced have their
22 ordinary everyday meanings." That remain true now, and so we
23 would propose referring them to that portion of the Court's
24 instruction.

25 MR. EVERDELL: Your Honor?

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1 THE COURT: Just a moment.

2 Trying to get my things up and running here.

3 Yes.

4 MR. EVERDELL: Yes, your Honor.

5 So I think there are -- if I recall, there are cases
6 that do try to define those words in a little bit more detail.
7 I don't have those cases at my fingertips and I'm trying to get
8 them online, but I don't think we have WiFi in the courtroom.

9 THE COURT: I have one. *United States v. Almonte*, 16
10 CR 670; and *United States v. Dupigny*, 19 CR 528, gave a little
11 bit of elaboration on that series of words.

12 For "entice" -- I think this is true for both those
13 cases, I'll confirm -- they provided in the charge that
14 "entice" means to attract, induce, or lure using hope or
15 desire. I think I recall, Mr. Rohrbach, you referenced that
16 definition at one point when we were discussing an issue, if
17 I'm not mistaken.

18 Is that what you had in mind, Mr. Everdell?

19 MR. EVERDELL: The one I was thinking of, I think, is
20 the one -- I'm trying to find the name, is it -- should be in
21 my notes. Just give me one minute, your Honor. The one where
22 we were arguing the Rule 29, which I cited to the Court,
23 *Broxmeyer*, I think; am I correct about that?

24 THE COURT: I don't know. This was the causation --
25 you wanted me to define with respect to causation, is that

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1 the --

2 MR. EVERDELL: One moment, your Honor.

3 THE COURT: I think it was -- it was the one I was
4 talking about with the issue of causation, but I believe that
5 case also tried to define the words separate and apart from the
6 causation issue.

7 MS. MOE: Your Honor, the government would have no
8 objection to the Court providing the instructions set forth in
9 *Almonte* and *Dupigny*.

10 THE COURT: That's the model I have. Those charges, I
11 believe, also provided the language that we did include, which
12 is what the parties agreed on, which is that these words have
13 their ordinary meaning.

14 So on the table derived from *Almonte* and *Dupigny* is:
15 "Entice" means to attract, induce, or lure using hope or
16 desire. I think we would also reference them back to the line
17 that you indicated, Ms. Moe.

18 MS. MOE: Yes, your Honor.

19 THE COURT: Just a moment.

20 MR. EVERDELL: Your Honor, I'm sorry.

21 THE COURT: Take your time.

22 MR. EVERDELL: Because I don't have internet access,
23 so I can't pull it up on my computer.

24 THE COURT: *Broxmeyer*, which is 616 F.3d 120, defined
25 "entice" as "to draw on by exciting hope or desire; allure."

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1 MR. EVERDELL: Your Honor, I think then we'll just go
2 with the *Dupigny* and *Almonte* one that you raised before.

3 THE COURT: Okay.

4 MS. MOE: Thank you, your Honor.

5 And we also now have the transcript of Matt's
6 testimony. We're happy to hand that up.

7 THE COURT: Okay. One of my law clerks will grab that
8 please and take it to the CSO, while Ms. Williams is getting
9 the supplies; so that just goes to the CSO.

10 In response to the note, I will write: Dear jury, we
11 are gathering the supplies you requested. We've sent back
12 Matt's transcript. As for your question regarding the
13 definition of enticement -- could you give me the page and line
14 again of the charge, Ms. Moe?

15 MS. MOE: Yes, your Honor. It's on pages 21 and 33;
16 those are instruction number 15 and also instruction number 26.

17 THE COURT: Okay. So for page 21, what's the line
18 number or lines?

19 MS. MOE: It's on lines 5 and 6, your Honor.

20 THE COURT: And for 33?

21 MS. MOE: They are on the same lines, your Honor, on
22 lines 5 and 6, page 33.

23 THE COURT: Okay. I left my charge back there.

24 So I'll refer them to pages 21 and -- page 21, lines 5
25 and 6; and page 33, lines 5 and 6. I will then say: Further,

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1 "entice" means to attract, induce, or lure using hope or
2 desire.

3 Ms. Moe.

4 MS. MOE: Yes, your Honor. Thank you.

5 THE COURT: Mr. Everdell.

6 MR. EVERDELL: That's fine, your Honor. Thank you.

7 THE COURT: All right. Thank you.

8 I will write that note and send it back. We'll
9 mark -- I'm sorry, I forget what court exhibit we're on, but
10 we'll mark this note as the next court exhibit once
11 Ms. Williams reminds me where we are.

12 All right. Thank you.

13 Yes.

14 MS. STERNHEIM: Judge, I just have a quick statement,
15 and I'm asking the Court's assistance.

16 You mentioned on Friday that -- I guess it was
17 Wednesday that we're supposed to wear N95 masks in the
18 courtroom -- or in the courthouse, I should say.

19 THE COURT: Yes.

20 MS. STERNHEIM: And it's my understanding that one has
21 been provided for Ms. Maxwell, but she can only wear it in the
22 courtroom. And I think that that is not a correct health
23 standard.

24 THE COURT: The rule actually is in the courthouse.

25 MS. STERNHEIM: In the courthouse.

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1 THE COURT: Entry into the courthouse is required to
2 wear an N95 or KN95.

3 MS. STERNHEIM: And I would ask that the Court direct
4 the marshals to permit her to wear it throughout the day.

5 THE COURT: I will consult with the marshals through
6 the district executive's office. But my understanding of the
7 new rule as of today is that entry into the courthouse requires
8 wearing at all times, except briefly when eating or drinking, a
9 KN95 or N95. But I'll get confirmation of that.

10 MS. STERNHEIM: Thank you very much.

11 THE COURT: Anything else?

12 MS. MOE: No your Honor. Thank you.

13 MR. EVERDELL: No, your Honor. Thank you.

14 THE COURT: Thank you.

15 (Recess pending verdict)

16 THE COURT: We have another note, which will be Court
17 Exhibit 13: May we also have Parkinson's transcript.

18 Ms. Moe, you'll provide that?

19 MS. MOE: Yes, your Honor. We'll take care of that
20 right away.

21 THE COURT: Okay.

22 And let me just note we have now sent back everything
23 requested in the prior note in terms of supplies, Matt's
24 transcript, as well as the response from me that I outlined
25 last time.

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1 Anything else, counsel?

2 MS. MOE: No, your Honor. Thank you.

3 MR. EVERDELL: No, your Honor.

4 THE COURT: Thank you.

5 (Recess pending verdict)

6 THE COURT: I have a note.

7 May we please have the transcript of David Rodgers.

8 MS. MOE: Yes, your Honor. We'll take care of that
9 right away.

10 THE COURT: Other issues to raise?

11 MS. MOE: Not from the government, your Honor.

12 Thank you.

13 MR. EVERDELL: Not from the defense.

14 THE COURT: We don't know what time the jury wishes to
15 deliberate to this evening. My inclination would be to -- it's
16 up to them when they wish to stop, so I assume we'll get a
17 note. So I think we'll wait for that. But I am inclined to
18 think about, if they are not done, extending deliberations
19 tomorrow for at least some amount of time. But I'll hear from
20 you on that. So you can think about it or respond to it now,
21 Ms. Sternheim.

22 MS. STERNHEIM: I would just say that I think the jury
23 should basically set its own schedule. You can suggest if they
24 want a longer day, but I don't think we should be pushing them.
25 They seem to be working very studiously and they seem to have a

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1 mind of their own. Because last week the Court invited them to
2 sit the extra day and they declined that. So an inquiry may be
3 appropriate, but I don't think telling them what they should do
4 is necessarily the right thing to do.

5 THE COURT: Well, I have told them previously that
6 they are here till at least 5. I think the question is
7 whether, in light of the circumstances we find ourselves, we
8 should encourage longer, if it's available to them. But you
9 think about it. I'll hear from you. I'm not intending to do
10 anything just yet. I presume we will hear from them as to this
11 evening, but think about the indication of at least some
12 extension of hours tomorrow if they have not completed the
13 task.

14 All right? Thank you.

15 (Recess pending verdict)

16 THE COURT: I have a note.

17 Under Count Four, if the defendant aided in the
18 transportation of Jane's return flight, but not the flight to
19 New Mexico, where/if the intent was for Jane to engage in
20 sexual activity, can she be found guilty under the second
21 element?

22 I'm going to let you take a -- if you want to just
23 take a look at the note. Counsel, you're welcome to take a
24 photo of it, if that helps.

25 MS. STERNHEIM: Thank you.

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1 THE COURT: Mark the note as Court Exhibit 14.

2 THE DEPUTY CLERK: 15.

3 THE COURT: 15.

4 Counsel, soon I'll look for your proposals.

5 Another note from the jury. This one says: We would
6 like to end deliberations at 5 p.m. today.

7 So we'll take up extending deliberations after we
8 resolve the response to this question.

9 (Counsel conferred)

10 THE COURT: All right. Let me get a proposal.

11 MR. EVERDELL: Happy to talk, your Honor.

12 THE COURT: Counsel, are you ready?

13 MS. MOE: I apologize, your Honor. Can we just have
14 one more moment to confer with our supervisor?

15 THE COURT: Okay.

16 MS. MOE: Thank you.

17 (Counsel conferred)

18 MS. MOE: Thank you, your Honor.

19 Apologies for the delay.

20 THE COURT: Defense counsel, are you ready?

21 MS. STERNHEIM: Yes.

22 THE COURT: Okay. Go ahead, Ms. Moe.

23 MS. MOE: Your Honor, our proposal would be to refer
24 the jurors to instruction number 21 on page 28 of the Court's
25 instructions, which pertains to comprehensive instruction with

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1 respect to the second element. Beyond that, we're not able to
2 parse the question because we find it confusing; so we think
3 the safest course is to refer the jurors to the comprehensive
4 instruction with respect to the second element.

5 THE COURT: Mr. Everdell.

6 MR. EVERDELL: Your Honor, I think the answer to this
7 question is no, and I'll tell you the rationale for this.

8 As to the jurors' note, they've clearly separated out
9 in their minds the flight to New Mexico versus the flight back
10 from New Mexico. And in their minds, there still is a
11 question, it would seem, that the flight -- whatever the
12 purpose of the flight to New Mexico was, whether it was for
13 illicit sexual activity or not, that is different from the
14 purpose of the flight back from New Mexico. And they are
15 asking can she be found guilty solely on if there's some aiding
16 and abetting, some helping of that flight from New Mexico,
17 which presumably the flight home they're saying.

18 THE COURT: So the flight from New Mexico to where?

19 MR. EVERDELL: Well, there is no record of a flight
20 from New Mexico. But what they are saying, I think, in this
21 note is they are separating out in their minds the flight to
22 New Mexico versus whatever flight she may have taken from New
23 Mexico. And I would say based on the instructions in the
24 Court's instructions which the government pointed to, there has
25 to be -- the significant or motivating purpose of the travel

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1 across state lines has to be that Jane engaged in illicit
2 sexual activity. There is no significant or motivating purpose
3 of a return trip where Mr. Epstein wasn't present; it's just a
4 return trip from New Mexico. That would not be a significant
5 or motivating purpose. She is just presumably going home, but
6 is not for the purpose of engaging in illicit sexual activity.

7 The testimony, if we are to believe it, is that she
8 went to New Mexico for some purpose to engage in sexual
9 activity, that's if you believe Jane's testimony. But
10 returning from there is not that purpose. Returning is
11 returning, or it's going somewhere else; it's going somewhere
12 away from where -- at least in the record, the evidence in the
13 record, if there is any -- Epstein was presumably in New
14 Mexico. This is her leaving New Mexico. So I don't think that
15 qualifies as a significant or motivating purpose. That travel
16 across state lines is for some other purpose.

17 MS. MOE: Your Honor, I don't believe this note is
18 that clear about what flight we're talking about. The note
19 begins by talking about an unspecified return flight, and then
20 it turns to talking about a flight to New Mexico. Then there's
21 a modifying clause about intent. It is unclear which of the
22 two flights we are now modifying.

23 I think the safest course here is to refer the jury to
24 the elements of the crime. I think guessing at what flight
25 they may be talking about is sort of beyond the reach of this

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1 question because they haven't identified a flight here.

2 MR. EVERDELL: Your Honor, I think they've been fairly
3 clear. They say: If the defendant aided in the transportation
4 of Jane's return flight, but not the flight to New Mexico. The
5 only evidence we have of a flight to New Mexico with Jane is
6 the one in the flight logs, and it is a flight to New Mexico.
7 And so the return flight would be some other flight besides the
8 flight to New Mexico.

9 She is also alleged that -- and to be honest, I think
10 it was a little unclear what may have happened in New Mexico
11 based on her testimony; but if there was any illegal sexual
12 conduct, the flight to New Mexico, this is what they are
13 debating, because they say, but not the flight to New Mexico,
14 where/if the intent was for Jane to engage in sexual activity.

15 Okay. So it seems that the jury is deliberating or at
16 least trying to decide whether the flight to New Mexico was for
17 the purpose of engaging in illegal sexual activity. And they
18 are confused that the return flight that happens after that,
19 could that be the basis alone for a conviction on Count Four.
20 Answer is no, because that return flight is not for the purpose
21 of illegal sexual activity.

22 MS. MOE: Your Honor, at the very least, the answer to
23 this can't be no, because a jury could infer intent to engage
24 in sexual conduct and the return of a flight in aiding and
25 abetting that.

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1 We can't tell which flight we're talking about, which
2 leg of a potentially multi-leg trip we're talking about. And
3 so I think here, again, the Court gave a thorough instruction
4 about this particular element. Because we can't tell which set
5 of facts they are asking about, I think the proper course here
6 is to refer the jury to the particulars with respect to this
7 element.

8 THE COURT: It's difficult to know and to have in my
9 head, based on the articulation of the question, as well as the
10 testimony, exactly what they are referring to. I don't know.

11 So I am inclined to follow the government's suggestion
12 here and to say, I can't provide an additional response to your
13 question other than to consider carefully the instructions as
14 to -- I mean, I could either point them to all of the count or
15 specifically to the second element, since that's what they're
16 asking about.

17 MR. EVERDELL: If we're going to just refer them to
18 certain language, I think we refer them to the language in the
19 last paragraph.

20 THE COURT: Page?

21 MR. EVERDELL: Page 28, instruction number 21, lines
22 14 through 17.

23 MS. MOE: Your Honor, those particular lines don't
24 appear to be what the jury is asking about. I recognize that
25 the note refers to Count Four and the second element, but the

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1 entire note seems to be about transportation of some kind. And
2 so we would propose just referring them to the instruction in
3 its entirety.

4 MR. EVERDELL: Your Honor, I don't find this note
5 confusing. And I think simply saying it's confusing --

6 THE COURT: Well, I find it confusing. For example, I
7 don't know if this is a question about aiding and abetting. I
8 don't know.

9 MR. EVERDELL: Your Honor, I think this is pretty -- I
10 think this is a question about whether you can hold her
11 accountable for a return flight, if you believe that she had
12 something to do with arranging that return flight from New
13 Mexico; whereas the first flight to New Mexico may have been --
14 at least there's some testimony to consider about whether that
15 was for the purpose of illegal sexual activity. It was not
16 true of the return flight, the flight back, wherever she was
17 going, home, somewhere else, somewhere away from Mr. Epstein.

18 I think they are asking, Can we consider if Ms.
19 Maxwell had anything to do with that flight, arranging of that
20 flight, whether she can be convicted, because it's on the
21 return trip from an area where Jane claims she was involved in
22 sexual abuse.

23 THE COURT: But it says where/if the intent was to
24 engage -- for Jane to engage in sexual activity.

25 MR. EVERDELL: Right. They are saying with a flight

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1 to New Mexico, where/if there was an intent for Jane to engage
2 in sexual activity. So there is still an open question in
3 their minds about whether the flight to New Mexico, that
4 travel, was for the purpose of engaging in illegal sexual
5 activity.

6 But they are now considering whether the flight out of
7 New Mexico, if Ms. Maxwell had any -- did anything to do with
8 that flight, with arranging that flight, could we convict her
9 on that count alone. Because there is no, I think, evidence
10 that she arranged the flight going to New Mexico; instead, they
11 are considering now whether there's any evidence that she may
12 have arranged the flight out of New Mexico. And is that enough
13 to provide a conviction on Count Two? And I think the answer
14 to that is pretty clearly no -- I'm sorry, Count Four I should
15 have said, not Count Two. Because there's no evidence of that.

16 And there is also -- there is no -- in the
17 instructions themselves, that would not be a significant or
18 motivating purpose for that travel across state lines. That
19 would simply be for her to return home. That's not travel for
20 the purpose of engaging in illegal sexual activity.

21 MS. MOE: Your Honor, I think this colloquy
22 illustrates how confusing the note is. We are now guessing at
23 what hypothetical facts the jury is talking about; and then
24 guessing hypothetically what their legal question is on top of
25 that. And I think we're compounding guesswork, what this

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1 question is about. And so the question is about the element;
2 the charge is about that particular element. I think more
3 guesswork here makes this more confusing and not less
4 confusing. I think, as the Court pointed out, some aspects of
5 this note are about aiding and abetting. And so even referring
6 the jury just to instruction number 21 leaves out that aspect
7 of the jury's deliberations and their determination on this
8 particular issue. And so we think the safest course is to
9 provide the jury with applicable law in this area, and they can
10 find the facts as they see fit and as they apply to these
11 particular instructions.

12 MR. EVERDELL: Your Honor, I don't think this is a
13 question about aid and abetting, broadly speaking. I think
14 they are talking about the flights to and from New Mexico. I
15 think that much is pretty clear from the note. And whether or
16 not Ms. Maxwell had anything to do with arranging that
17 travel --

18 THE COURT: But your legal contention is she can't be
19 found guilty of this count unless the jury concludes that she
20 aided in the transportation to New Mexico.

21 That's not legally accurate, is it?

22 MR. EVERDELL: Your Honor, the instruction itself says
23 it has to be a significant or motivating purpose for the travel
24 across state lines.

25 THE COURT: Right.

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1 MR. EVERDELL: Right?

2 The travel back to a place where she is presumably not
3 engaging in illicit sexual activity, that is not a significant
4 or motivating purpose for that travel.

5 THE COURT: You didn't answer my question.

6 MR. EVERDELL: Maybe I'm confused by the question,
7 your Honor.

8 THE COURT: To be found guilty on this count, must the
9 jury conclude that she aided in the transportation of Jane's
10 flight to New Mexico?

11 MS. MENNINGER: Your Honor, may I interject myself
12 into this conversation?

13 THE COURT: If you answer the question, I would value
14 it.

15 MS. MENNINGER: I will.

16 It has to be a place for which the travel was a
17 significant or motivating purpose for illegal sexual activity.

18 In this hypothetical that they've given in this
19 question, they have a comma in two places. The first place
20 they have a comma is after the return flight, comma, but not
21 the flight to New Mexico, where the intent was for Jane to
22 engage in sexual activity, comma. So they have excluded out
23 where they're hypothetically claiming that the flight to New
24 Mexico was the place for which the intent was for Jane to
25 engage in sexual activity.

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1 THE COURT: Wow.

2 MS. MENNINGER: And they are asking, Can we find her
3 responsible for the return flight, but not that flight to New
4 Mexico, where the intent was to engage in sexual activity.
5 That's why I think they have written it with the commas as they
6 are.

7 THE COURT: Okay.

8 MS. MENNINGER: So they have to be directed --

9 THE COURT: Let me try again. Can I get a yes or a no
10 to my question? Is it your legal position that the jury must
11 conclude, in order to convict on this count, that the defendant
12 had to aid in the transportation of the flight to New Mexico?

13 MS. MENNINGER: I don't believe that -- no, no, it is
14 not my contention.

15 THE COURT: Thank you.

16 MS. MENNINGER: And the reason is the indictment does
17 not specify New Mexico. It could be a flight to New York, for
18 example. It could be a flight to New Mexico. It could be any
19 place, the purpose for which was to engage in illegal sexual
20 activity. So it doesn't have to be to New Mexico.

21 THE COURT: I agree with that.

22 This is why it's difficult to parse the question
23 without assuming a variety of meanings, and I'm trying to track
24 your comma argument.

25 MS. MENNINGER: Had they placed the comma after New

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1 Mexico rather than the place where they did put the comma, then
2 that would have told us, can't she be responsible for aiding in
3 the transportation of the return flight, comma, but not the
4 flight to New Mexico, comma. That would then put the where/if
5 the intent was --

6 THE COURT: That would be an entirely different
7 meaning to the question.

8 MS. MENNINGER: I think so.

9 THE COURT: No, I agree. What I don't know is I don't
10 know what they meant and I don't know how much weight to put on
11 that comma placement; because, as you've noted, that precise
12 sentence without that comma has an entirely different meaning.

13 MS. MOE: Yes, your Honor.

14 And I think at the point at which we're parsing jury
15 notes like statutes this finely, I think it illustrates the
16 point that this note is confusing; that we're not sure what the
17 jury is asking about either factually or legally.

18 The question is about the second element; and so we
19 think the proper course is to refer the jury to those
20 particular instructions. And the jury is free to send a
21 clarifying note, if they wish to do so. But I think when we
22 are parsing commas this finely in a note that is unclear, it's
23 unclear which clauses are modifying which clauses, or which
24 flights we're even talking about, I think it's far too
25 confusing to give simple answers here.

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1 THE COURT: I can't answer this ambiguous question no.
2 I don't know that the answer is no, even with the ambiguity;
3 because I don't know if what they have in mind is an aiding and
4 abetting question, which we haven't discussed yet.

5 MS. MENNINGER: They never used the word "abet."

6 THE COURT: That's true. I won't assume that's the
7 question for purposes of the answer, but I also don't assume
8 the meaning that you've put on it for purposes of the answer.
9 So the only solution here is to say, I direct you to consider
10 the full instruction on Element 2 of Count Four on page 28.

11 MS. MENNINGER: Our request would be to emphasize the
12 portion of that that talks about the purpose of the travel.
13 Because they have highlighted the purpose of the travel in
14 their question. And the way I read it is certainly that that's
15 their question. If they don't have evidence that the intent on
16 the return flight was for purposes of sexual activity, then I
17 do think the answer, as Mr. Everdell said is, no, they can't
18 convict.

19 MS. STERNHEIM: May I have a moment?

20 (Counsel conferred)

21 MR. EVERDELL: Your Honor, I'm sorry to raise another
22 issue, but I think we have to, given the note itself.

23 One moment. Sorry. The photograph on the phone keeps
24 disappearing.

25 We're talking about they are referring to Count Four,

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1 which is the substantive transportation count, which, as we
2 know, has to deal with the violation of New York law. And they
3 are talking about flights to New Mexico; and can she be found
4 guilty on the second element of Count Four regarding these
5 flights to New Mexico.

6 So I think we may have to respond to the jury on that
7 score as well, which is the fact that they have to be
8 considering New York events for Count Four, rather than -- or
9 violations of New York law, which wouldn't occur in New Mexico
10 for there to be a conviction on Count Four.

11 MS. MOE: Your Honor, I think that's exactly why we
12 proposed directing the jurors to the entirety of the
13 instruction, which says just that. The second paragraph of
14 that same instruction reminds the jury, as the instruction does
15 throughout, that we're talking about New York Penal Law,
16 Section 130.55. And so I think our proposal remains the same
17 that they be referred to the entirety of the instruction, which
18 includes that language, among other aspects of this particular
19 element.

20 THE COURT: Yes.

21 MS. STERNHEIM: Judge, may I be heard for a moment?

22 THE COURT: Sure.

23 MS. STERNHEIM: I think the fact that the jury has
24 mentioned New Mexico regarding a count that pertains to New
25 York is not just cleared up by referring them to the

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1 instruction. Clearly they are making an error concerning which
2 state begins with "New." And I suggest that if the Court
3 wishes to refer them to the charge, the Court also clears up
4 the fact that Count Four requires a violation of New York law,
5 not New Mexico law.

6 THE COURT: That's certainly why we should refer them
7 to the whole charge. That's what lines 7 through 10 make
8 clear.

9 MS. MOE: Yes, your Honor.

10 The only illegal sexual activity identified in the
11 entirety of the jury charge is a statute in New York. There
12 cannot be any risk of confusion on that score. This particular
13 charge reminds the jury of that and includes that language as
14 well. The jury has not been charged about any laws in New
15 Mexico; so there can't be any risk of confusion for exactly
16 that reason.

17 MR. EVERDELL: I just don't understand the confidence
18 about how there can be no possible confusion --

19 THE COURT: This conversation is stopping.

20 My decision is to refer them back to this charge,
21 because it is a proper instruction on the second element to
22 Count Four. I do not know what this question means. It's too
23 difficult to parse factually and legally what they're asking.
24 So the only option in those circumstances is to direct them
25 back to the count.

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1 So I'll take any requests beyond simply saying, I
2 received your note. I refer you to instruction number 21 on
3 page 28. Please consider carefully the full instruction.

4 MS. MOE: Yes, your Honor.

5 THE COURT: Mr. Everdell?

6 MR. EVERDELL: That's fine, your Honor.

7 THE COURT: Okay. I'll do that. And then -- well,
8 let me write it, and then we'll send it back, and then we'll
9 discuss -- because we have to bring them in to dismiss them.

10 So I received your note. I refer you to instruction
11 number 21 on page 28. Please consider the entirety of the
12 instruction.

13 MS. MOE: Yes, your Honor. Thank you.

14 THE COURT: Okay.

15 MR. EVERDELL: Without waiving our prior objection.

16 THE COURT: Understood.

17 All right. While Ms. Williams is handing that to the
18 CSO, for extending deliberation times going forward.

19 MS. MOE: Yes, your Honor.

20 We've considered the matter. And the government's
21 view is that is within the Court's discretion certainly to set
22 a schedule for jury deliberations. Given the circumstances, we
23 agree that it's prudent to advise the jury that, barring any
24 scheduling complications, they should expect an extended day
25 tomorrow.

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1 MS. MENNINGER: Your Honor, at this point, because it
2 has only been three days, we believe that any suggestion that
3 they should stay later is beginning to sound like urging them
4 to hurry up, when clearly they know that they can deliberate as
5 long as they want and they should be able to deliberate as long
6 as they want. They haven't expressed any hesitation. They've
7 been asking for transcripts, they've been asking for materials.

8 While we would not mind the Court giving an
9 instruction much like it did last week, telling the jurors that
10 should they choose to stay later on any given day, the Court
11 can make arrangements for them to do so, we would object to
12 trying to urge them to stay later if they are not asking to do
13 so and aren't expressing any difficulty in proceeding with the
14 deliberations that they are currently undertaking.

15 MS. MOE: Your Honor, the Court has previously
16 extended certain days or contracted certain days, depending on
17 our schedule; and, in fact, I think the first day of
18 deliberations we had an extended day on the consent of both
19 parties. We don't believe that sends any kind of signal, other
20 than that the Court is setting a schedule. And we think that's
21 appropriate here given the circumstances.

22 THE COURT: I think what we should do, I'll tell them
23 that if deliberations are not complete starting tomorrow, I
24 would like you to make yourselves available to deliberate until
25 at least 6 p.m. each day. Of course, if you all agree to

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1 deliberate later than that, you're most welcome to do so.

2 Please let me know by note when you wish to stop, but the
3 default going forward will be 6 p.m., unless anyone indicates
4 to Ms. Williams that that constitutes a hardship. Okay?

5 MS. MENNINGER: That would be our concern, your Honor,
6 obviously, that some of them do have hardships.

7 THE COURT: As I did last time, I'm going to tell them
8 the default will be 6; but if it's a hardship, they should let
9 Ms. Williams know, in which case -- so, again, the language
10 will be, If deliberations are not complete starting tomorrow,
11 I'd like you to make yourselves available to deliberate until
12 at least 6 p.m. Of course, if you all agree to deliberate
13 later than that, you're most welcome to do so. Please just let
14 me know by note when you wish to stop. But the default going
15 forward will be 6 p.m., unless anyone indicates to Ms. Williams
16 on their way out that that is a hardship. Okay?

17 MS. MOE: Yes, your Honor. Thank you.

18 MS. MENNINGER: Your Honor, we would object to adding
19 the "If deliberations are not complete." I think that any kind
20 of suggestion that the deliberations should be resolving by a
21 certain time or not resolving could potentially --

22 THE COURT: That is the precise language I used last
23 week in asking if they wanted to sit on Thursday. It didn't
24 cause them to think that they had to complete their
25 deliberations.

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1 MS. MENNINGER: But the rest of the language, your
2 Honor, last Thursday was "if you want to." And this one seems
3 a little bit more like we're suggesting that you do it unless
4 you have a hardship.

5 THE COURT: I clearly have discretion to set the
6 schedule, there's no doubt about that. And I can do it over
7 your objection. So I'm happy to give -- I think we should set
8 it as a default, unless there's a hardship.

9 MS. MENNINGER: I understand that, your Honor. I just
10 would request -- and it's our request that your Honor not
11 include the language "unless deliberations are complete."

12 THE COURT: I will use the same language that I used
13 last week. It's precisely the same language I used on multiple
14 occasions without objection. And I don't want them to assume
15 that I think it should take longer than that. That's the
16 concern. So I don't want them to assume what I'm saying, that
17 I'm suggesting it should take longer. I don't want them to
18 assume it should take shorter. I'm happy to add, if you want,
19 Of course, I don't mean this in any way to pressure you; you
20 should take all the time you need.

21 MS. MENNINGER: Yes, very much would appreciate that,
22 your Honor.

23 THE COURT: Ms. Moe.

24 MS. MOE: No objection, your Honor. Thank you.

25 THE COURT: All right. Bring in the jury.

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1 (Jury present)

2 THE COURT: Thank you, everyone. Hi, members of the
3 jury. Please be seated.

4 I did receive your note asking to finish today at 5,
5 so I brought you in to dismiss you.

6 A few things.

7 Of course, bear all of my instructions in mind.
8 Please continue to take precautions in light of the increase in
9 the variant. I need all of you here and healthy, of course.
10 So take your masks, be cautious. I appreciate that.

11 You'll begin again tomorrow at 9 a.m. Same
12 instructions: Wait till everyone is there, then begin your
13 deliberations.

14 If deliberations are not complete starting tomorrow, I
15 would like you to make yourselves available to deliberate until
16 at least 6 p.m. Of course, if you all agree to deliberate
17 later than that, you're most welcome to do so. Please just let
18 me know by note when you wish to stop. But I'd like you to
19 plan to deliberate until at least 6 p.m.

20 As with the last time, if that is a hardship that you
21 can't do, let Ms. Williams know that on your way out and we'll
22 adjust. But otherwise, please plan for 6 p.m. Of course, by
23 this I don't mean to pressure you in any way. You should take
24 all the time that you need.

25 With that, I bid you a good night.

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1 Be safe. And we'll see you tomorrow. Thank you.

2 (Jury not present)

3 THE COURT: Matters to take up?

4 MS. MOE: Not from the government, your Honor.

5 Thank you.

6 MS. STERNHEIM: Nothing.

7 THE COURT: Okay. I'll see you tomorrow.

8 Be safe, everyone.

9 (Adjourned to December 28, 2021 at 9:00 a.m.)

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