

COMMISSION ON JUDICIAL CONDUCT
Complaint No. 2000-110 et seq

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:
In the Matter of Investigation of: :
The Honorable Maria I. Lopez, :
Associate Justice, Superior Court :
Department :
- - - - - x

BEFORE: Hearing Officer E. George Daher,
 Chief Justice (Ret.)

Harvey Chopp, Clerk

APPEARANCES:

Goodwin Procter LLP
(by Paul F. Ware, Jr., Esq., Roberto
M. Braceras, Esq., and Cheryl R.
Brunetti, Esq.) Exchange Place, Boston, MA
02109, for the Commission on Judicial
Conduct.

Law Offices of Richard M. Egbert
(by Richard M. Egbert, Esq.
and Patricia A. DeJuneas, Esq.)
99 Summer Street, Suite 1800,
Boston, MA 02110, for the Honorable
Maria I. Lopez.

held at
Edward W. Brooke Courthouse
24 New Chardon Street
Boston, Massachusetts
Friday, November 22, 2002
9:37 a.m.

Carol H. Kusnitz, Registered
Professional Reporter

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Maria Lopez
(By Mr. Egbert) 4-12

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P R O C E E D I N G S

1
2 MR. EGBERT: Good morning, Your Honor.
3 HEARING OFFICER DAHER: How are you?
4 MR. EGBERT: Your Honor, before Judge Lopez
5 takes the stand, I want to address one matter, if I
6 may?
7 HEARING OFFICER DAHER: Sure. Go ahead.
8 MR. EGBERT: First, let me hand up, if I
9 may --
10 HEARING OFFICER DAHER: Go ahead.
11 MR. EGBERT: Judge, I have handed up an
12 article under the byline of David Webber from the
13 Boston Herald -- I believe Mr. Webber is here -- and
14 I would ask to call him as a witness for a brief
15 moment, because I don't want to rely merely on
16 newspaper articles.
17 But if the article is true, then Jillian
18 Pearson, the Executive Director of the Judicial
19 Conduct Commission, gave statements to Mr. Webber
20 sometime before this morning, which he published, in
21 which she described, one, complaints that were sent
22 to the Commission but were not issued by the
23 Commission, a violation of both the statute and
24 rules of the Commission.

1 Two, she discussed a pending case, pending
2 before you. She is in fact a combined litigant and
3 the ultimate -- member of the ultimate factfinder
4 and decisionmaker in this case. And she has
5 violated both the canons of ethics and the rules of
6 the Commission on Judicial Conduct in a number of
7 ways.

8 It is, in my judgment, both inappropriate,
9 bad judgment and the height of stupidity for this to
10 occur in the midst of a proceeding where it has been
11 and continues to be an allegation of the Respondent
12 that the Commission has kowtowed and played to the
13 press in many ways and pandered to the press in many
14 ways, and now is violating their own rules by
15 dealings with the press.

16 HEARING OFFICER DAHER: What exactly --
17 after that presentation, what exactly -- what are
18 you looking for? I'm still in a quandary. You are
19 on record making a comment.

20 MR. EGBERT: I'm putting it on the record
21 of these proceedings. I want it on the record of
22 these proceedings, that's all.

23 HEARING OFFICER DAHER: You have recorded
24 your anger and your dissatisfaction. And indeed,

1 there may be some action, I don't know, if indeed
2 justified against Ms. Pearson. But you're on
3 record. It is part of the transcript. And we can
4 move on, I take it.

5 MR. EGBERT: Except I would like to call
6 Mr. Webber to confirm the statements.

7 HEARING OFFICER DAHER: Confirm what
8 statements?

9 MR. EGBERT: The statements made by Ms.
10 Pearson, or allegedly made by Ms. Pearson.

11 HEARING OFFICER DAHER: Motion is denied.

12 MR. WARE: Your Honor, may I respond
13 briefly to --

14 HEARING OFFICER DAHER: I've already ruled
15 on it, but again --

16 MR. WARE: Not on the Court's ruling with
17 respect to Mr. Webber, but I think that in fairness
18 to Ms. Pearson, I should make a couple of
19 observations so that we do have a record here that
20 can be considered at the appropriate time.

21 HEARING OFFICER DAHER: But, again, if you
22 notice precisely what Mr. Egbert did, he took
23 something from the newspaper and commented on that.
24 Are you going to offer testimony in regards --

1 MR. WARE: No.
2 HEARING OFFICER DAHER: -- to Ms. Pearson
3 or what her motivation was or anything like that?
4 MR. WARE: No, your Honor.
5 HEARING OFFICER DAHER: You can --
6 MR. WARE: No, I don't want to do that.
7 But all I would like to do is point out that the
8 issue here, and in any proceeding, whether criminal
9 or this proceeding, is prejudice. And in this
10 instance all the article really says is that there
11 are a number of additional complaints which were
12 screened out because those complaints were not a
13 basis for the investigation.
14 If anything, it would seem to me that
15 that's --
16 HEARING OFFICER DAHER: The record says --
17 the report says what it says, Mr. Ware.
18 MR. WARE: It says what it says.
19 HEARING OFFICER DAHER: Anything else?
20 MR. WARE: Just that the rules provide that
21 there's a screening function, and obviously the 63
22 complaints which have been given to the Judge are
23 those complaints which have been screened.
24 HEARING OFFICER DAHER: Okay. You're on

1 record.
2 Let's pick it up.
3 THE WITNESS: I'm still under oath, I
4 understand.
5 HEARING OFFICER DAHER: I think we left on
6 Page 76 where somebody was going to do their nails
7 or something?
8 MR. EGBERT: That's right.
9 THE HEARING OFFICER: That's where we were?
10 MR. EGBERT: We were about to have our
11 nails done. But before we do, Judge --
12 THE HEARING OFFICER: Is this hooked up, by
13 the way?
14 MR. WARE: We are not intending to use the
15 screen today.
16 HEARING OFFICER DAHER: Fine. Go ahead.
17 MR. EGBERT: Judge, we referred last
18 Wednesday to Defendant's Exhibits H and I.
19 HEARING OFFICER DAHER: Yes, you did.
20 MR. EGBERT: Apparently, or at least I
21 don't think that was moved into evidence formally.
22 HEARING OFFICER DAHER: If I'm not
23 mistaken, I had Mr. -- Mr. Pierce put them in
24 evidence. He marked them.

1 MR. EGBERT: I thought so, too, but in any
2 case --
3 HEARING OFFICER DAHER: I have the exhibit
4 list.
5 MR. EGBERT: -- I offer them again.
6 HEARING OFFICER DAHER: H and I.
7 THE CLERK: They are in there.
8 HEARING OFFICER DAHER: I know they are
9 marked.
10 MR. EGBERT: So I would offer them.
11 HEARING OFFICER DAHER: Any objections?
12 MR. WARE: No objection, Your Honor.
13 (Documents marked as Exhibits H
14 and I in evidence)
15 MR. WARE: While we're on the subject, at
16 the beginning of the hearing, both counsel agreed
17 that on the exhibit list before the Court, those
18 exhibits identified not in bold -- that is, with
19 normal typeface on the exhibit list -- are
20 undisputed. And to the extent those need to be
21 formally offered, I now do so. The ones that were
22 in bold are the disputed ones, and we are offering
23 those as we get to them.
24 HEARING OFFICER DAHER: No problems with

1 that?
2 MR. EGBERT: No.
3 HEARING OFFICER DAHER: Good.
4 (Documents marked as Exhibits 2, 3, 4,
5 5, 7, 16, 17, 22, 24, 32, 41, 42, 45,
6 46, 47, 48, 49, 50, 51 in evidence)
7 HEARING OFFICER DAHER: Pick it up. Let's
8 go.
9 MARIA LOPEZ, Previously Sworn
10 CROSS EXAMINATION, Resumed
11 BY MR. EGBERT:
12 Q. Judge, when we left, we were talking about
13 the conference that you had in your chambers with
14 Ms. Joseph on August 4th of the year 2000, correct?
15 A. Correct.
16 Q. And you recall that there was some
17 discussion of the statement that "you belong in the
18 suburbs"?
19 A. Correct.
20 Q. And would you turn to Page 76 of your own
21 testimony.
22 A. Yes.
23 Q. And this was at a deposition you gave to
24 the Commission, correct?

1 A. Correct.

2 Q. And would you read into the record your
3 answer to the question, "What did you mean by that?"

4 A. "What I meant by that is that she really,
5 you know -- she wouldn't be able to understand an
6 Ebony Horton; that if she understood -- if her life
7 experience was a little broader, if she was a little
8 more sophisticated about people who are marginalized
9 in our society and had a little more compassion
10 about it, she would understand better. And I guess
11 when I said the suburbs -- I mean, I live in the
12 suburbs. Okay. So it was sort of a
13 characterization about the woman who, you know,
14 stays home, goes to the beauty parlor and does her
15 nails. That's all."

16 Q. Did you say that to Ms. Joseph?

17 A. I did -- no, I didn't -- I didn't say this
18 to Ms. Joseph. I said this to Mr. Ware, the nail
19 characterization.

20 Q. And when you made that characterization to
21 Mr. Ware, what did you mean by that?

22 A. It really didn't capture what I meant. I
23 had given Mr. Ware a number of other definitions and
24 descriptions of my opinion about Ms. Joseph and what

1 I meant by the suburbs argument. So it was a sort
2 of, I don't know, maybe a flippant comment directed
3 to Mr. Ware, something like that, but --

4 Q. Was it a flippant comment when you directed
5 it to Ms. Joseph?

6 A. No. But I never made the nails comment to
7 Ms. Joseph.

8 Q. When you said, "you belong in the suburbs,"
9 was that flippant?

10 A. Oh, no.

11 Q. What you were trying to describe to her
12 was, as you stated earlier, that you thought that
13 she was having some difficulty dealing with urban
14 issues and urban crimes?

15 A. Correct.

16 Q. And then you also said: "And so I said --
17 it's almost like this case is just too edgy,
18 involves issues that someone that is just such --
19 wouldn't understand."

20 A. That's correct.

21 Q. And had she exhibited to you a lack of
22 desire and/or ability to try to understand issues
23 that were before you at the time?

24 A. Did she demonstrate her evidence? No, she

1 did not.

2 Q. Well, did she demonstrate by her conduct or
3 her statements that she was indifferent to the
4 problems which you were describing?

5 A. Absolutely.

6 Q. You testified on your direct examination, I
7 think you said that -- you were saying that she
8 couldn't do her job?

9 A. Did I say that in my deposition or did I
10 say it in my direct?

11 Q. In your direct examination. You made some
12 reference --

13 A. Oh, I agreed with Mr. Ware when he said --
14 you meant -- I said -- I think that's what happened.

15 Q. Well, let me ask you, were you telling her
16 she couldn't do her job?

17 A. No, I wasn't telling her she couldn't do
18 her job. I was telling her that she wasn't
19 performing her job in the way that a lawyer in her
20 position should have been doing it.

21 Q. And that was as a result of the hysteria or
22 hoopla that had been caused on August 4th by the
23 press release and the conduct that went on in the
24 courthouse?

1 A. Was that the only reason I believe she
2 wasn't conforming --

3 Q. No. That was at or about that time?

4 A. Yes.

5 Q. And based on the factors you had described
6 previously?

7 A. Correct.

8 Q. In cases of child sexual abuse and the
9 like, is it normal for the district attorney's
10 office to draw attention to those kinds of cases, in
11 your experience?

12 A. Unless you are dealing with, you know, a
13 situation involving many victims, generally when you
14 have a case such as this particular one, where it
15 involved one victim --

16 MR. WARE: I'm going to object, Your Honor,
17 as to what is normal for the --

18 HEARING OFFICER DAHER: Sustained.

19 Q. In your experience with these cases, what
20 have you observed to be the normal function in that
21 regard?

22 MR. WARE: Objection to "the normal
23 function."

24 HEARING OFFICER DAHER: Sustained.

1 Q. What do you regularly see?

2 A. Okay. In the past -- and I have had many
3 of these cases involving child sexual abuse victims,
4 and I have never had the press brought in on a case
5 of this nature before in my 14 years.

6 Q. And can you imagine or envision -- strike
7 that. Can you, in your experience, understand the
8 likely or potential harm to the child victim by
9 creating this kind of press hysteria?

10 MR. WARE: Objection to this notion of
11 creating press hysteria, Your Honor.

12 HEARING OFFICER DAHER: I think the choice
13 of words -- that's sustained. If she wants to
14 testify as to her experience of 14 years as a judge,
15 that's fine, but I'm going to sustain Mr. Ware's
16 objection. Go ahead.

17 Q. And can you, from your 14 years of
18 experience, tell us some of the problems that might
19 be created by attracting large amounts of press
20 coverage to a case such as the Horton case as far as
21 the victim is concerned.

22 A. Well, in this particular case, where we had
23 a possible plea, if there was -- if the press was to
24 affect the opportunity to secure that plea from the

1 defendant, then the matter would have to go to
2 trial. And child victims of sexual abuse have
3 already undergone the traumatic experience involved
4 in the incident. Putting them through a trial
5 process is always of utmost consideration and should
6 be of utmost consideration to the district
7 attorney's office as well as to the court system.

8 So bringing attention to a case such as
9 this, where there was a possible plea, affected the
10 possibility or could have affected the possibility
11 of getting that plea done that day. And if that
12 happened, then you would have to subject the child
13 to the trauma of the court proceedings.

14 Q. And in fact did the manner -- strike that.
15 Did the press, on this particular occasion, August
16 4th of 2000, affect the ability to conduct the plea
17 hearing that day?

18 A. On that day, yes. There was an emotional
19 catastrophe going on.

20 Q. And was the defendant in court?

21 A. The defendant was in court with her mother.

22 Q. Was the defendant in the courtroom?

23 A. No, not in the courtroom on August 4th, no.

24 Q. And why didn't the defendant come in the

1 courtroom?
2 MR. WARE: Objection.
3 HEARING OFFICER DAHER: Sustained.
4 Q. What were you told as to why the defendant
5 didn't come in the courtroom?
6 MR. WARE: Objection.
7 HEARING OFFICER DAHER: Sustained.
8 MR. EGBERT: Judge, her specific --
9 HEARING OFFICER DAHER: I know you have
10 tremendous latitude in this case --
11 MR. EGBERT: Judge, there are specific
12 findings at issue here that the Judge made as to the
13 continuance, specific findings on these very issues.
14 The information she had as to those findings is --
15 must be fully relevant.
16 HEARING OFFICER DAHER: Mr. Ware.
17 MR. WARE: Your Honor, I don't dispute the
18 Judge's understanding of certain facts is relevant
19 here.
20 HEARING OFFICER DAHER: I think in this
21 case she is entitled to it. Overruled. Go ahead.
22 Q. What information did you have as to why the
23 defendant wasn't in your courtroom?
24 A. My understanding was that the defendant and

1 mother were in some other room in the courthouse,
2 that they were extremely upset, emotionally
3 distraught, were upset with the defendant's lawyer,
4 in fact, and did not want to come into the
5 courtroom.

6 Q. And if the defendant was indicating that he
7 would not go forward with the plea that day, what
8 were your options?

9 A. Mark it down for trial.

10 Q. Could you force a plea?

11 A. I can't force a plea, no.

12 Q. Could you force the defendant to come in
13 that day and plead guilty?

14 A. I could not.

15 Q. And the options were to continue the case
16 or mark it down for trial; is that correct?

17 A. Correct.

18 Q. Was that fact, in your mind, that the case
19 had been derailed in that fashion, good for the
20 victim?

21 A. It was not good for the victim at all.

22 Q. Why not?

23 A. Because that meant that there was --
24 there's the possibility now that there would be a

1 trial, that this victim would be put through a trial
2 process. I was aware, based on representations made
3 to me during the lobby conference, that there were
4 some discrepancies in the different versions given
5 by the victim to the police and then to the sexual
6 assault unit, and, I guess, on the interview that
7 they did of him.

8 So I knew that this was a case that
9 presented some rather traumatic possibilities for
10 the victim.

11 Q. And in fact -- in fact, Judge, you knew,
12 didn't you, that if the case went to trial, there
13 would be allegations by the defense that there were
14 consensual acts of sexual conduct and the like and
15 matters which would put the victim in a bad light;
16 is that right?

17 A. Correct.

18 Q. And it would then be up for a jury to
19 determine which of those disputed facts were true,
20 correct?

21 A. That's right.

22 Q. And you knew that there were a number of
23 statements made by the victim on videotape which
24 would affect his credibility, didn't you?

1 A. Yes, I knew that.
2 MR. WARE: I'm going to object again to
3 trying the victim in this case.
4 HEARING OFFICER DAHER: I understand --
5 MR. EGBERT: I'm not trying the victim.
6 HEARING OFFICER DAHER: But again, when she
7 started in this line of inquiry, there wasn't any
8 really seasonable objection to it. Overruled. You
9 can continue with this line.
10 BY MR. EGBERT:
11 Q. Judge, so that it's clear, the Court
12 doesn't try the victim, do you?
13 A. No. The defense attorney does.
14 Q. And you have been around criminal cases
15 long enough to know that if they're litigated
16 criminal cases, oftentimes the victim will go on
17 trial by the defense, correct?
18 A. Absolutely.
19 Q. That could be a fairly ugly affair at
20 times?
21 A. It certainly can. It is part of our
22 adversarial system.
23 Q. And would you agree with me that it is not
24 a particularly pleasant experience for a 12-year-old

1 boy?

2 A. It would not be for the child or the
3 child's family.

4 Q. And, by the way, I keep using the words
5 "12-year-old boy." Is that how old you thought this
6 boy was?

7 A. Based on the date of birth on the police
8 report, yes.

9 Q. And isn't it also based on the
10 representations of counsel?

11 A. Yes.

12 Q. Judge, I show you Defendant's Exhibit G.
13 Do you recognize what that is?

14 A. Yes.

15 Q. What is it?

16 A. It's the Commonwealth's statement of the
17 case, which was provided to me by the assistant
18 district attorney during the August 1st lobby
19 conference.

20 Q. And in that statement of the case, what is
21 that generally used for?

22 A. It's used as -- this is what they base the
23 summary of the evidence that they present to the
24 judge during the lobby conference.

1 Q. And would you categorize it as laying out
2 kind of the important facts?
3 A. Yes.
4 MR. EGBERT: Your Honor, I would offer the
5 Commonwealth's statement of case in evidence.
6 HEARING OFFICER DAHER: Do you have a copy
7 of it, Mr. Ware? Do you want a copy?
8 MR. WARE: Yes, Your Honor, I have a copy.
9 HEARING OFFICER DAHER: All right.
10 MR. WARE: I do not object.
11 HEARING OFFICER DAHER: Okay.
12 (Document marked as
13 Exhibit G moved into evidence)
14 BY MR. EGBERT:
15 Q. Judge, do you have that before you?
16 A. I do.
17 Q. And what age did the Commonwealth indicate
18 to the Court the victim was?
19 A. Twelve years old.
20 Q. And during -- in the statement of the case,
21 by the way, was there any mention of the fact that
22 the defendant was transgendered and dressed like a
23 woman?
24 A. No, there wasn't.

1 Q. And during -- and at the time, by the way,
2 of that statement of the case in these proceedings,
3 are you familiar with whether or not the
4 Commonwealth ever asked that the defendant be held
5 because he was a danger?

6 A. No.

7 Q. At --

8 A. There was never -- they never sought a
9 dangerousness petition in the District Court, later
10 on when she was arraigned in the Superior Court --

11 Q. There was never --

12 A. They never sought a dangerousness
13 determination.

14 Q. And a dangerousness determination by the
15 Court could cause the defendant to be held without
16 bail, for example; is that right?

17 A. That's right.

18 Q. And that was never sought?

19 A. Never sought.

20 Q. After you had this conference in the lobby
21 with Ms. Joseph and Ms. Goldbach, did you indicate
22 to them in the lobby that the case would probably be
23 continued?

24 A. I did.

1 Q. Did you go right out and continue the case?

2 A. No.

3 Q. Where did Ms. Joseph go in this lobby
4 conference?

5 A. After the lobby conference? I don't know
6 where she went, but obviously she went and got Mr.
7 Deakin, who eventually showed up in the courtroom.

8 Q. Did you see Ms. Joseph at any time before
9 the case was called again, sometime in the
10 afternoon?

11 A. Not before it was called, no.

12 Q. At some point in time you came out on the
13 bench -- strike that. You had come out on the bench
14 and done a number of cases during that day; is that
15 right?

16 A. Correct.

17 Q. And is it the custom in the First Session
18 that the Court will handle a number of cases and
19 then recess to lobby other cases and the like?

20 A. Correct. There were no lobbies that day,
21 though, because it was my last day in the session.

22 Q. And did you come out on the bench at some
23 point in time and address the Horton case?

24 A. Yes, I did.

1 Q. Do you recall approximately what time that
2 was?

3 A. It was after lunch. I mean, it could have
4 been 2:00, 2:30. I'm not quite sure.

5 Q. Now, when you came out on the bench, it was
6 your intention to continue the case?

7 A. Well, I was -- I was going to continue the
8 case if I couldn't get a plea that day. But I was
9 hopeful that I would get a plea, because if I had to
10 continue the case, it would then have to go over to
11 Middlesex, and that is a burden to the system.

12 Q. Was it apparent to you by the time you came
13 out on the bench and addressed the Horton case that
14 there would be no plea that day?

15 A. Yes. When I saw that the defendant and
16 mother were not in the courtroom, I just determined
17 that, okay, this has to be continued.

18 Q. Now, you could have ordered him into the
19 courtroom, correct?

20 A. I could have.

21 Q. And did you make a judgment as to why that
22 wouldn't be a good idea?

23 A. Because I believed it would just be an
24 emotional plea. I didn't know if we would get

1 through with it, and, you know, I was concerned
2 about the emotional state of everybody involved in
3 this case.

4 Q. At some point in time, up until then, you
5 had found out that both the defense lawyer and the
6 prosecutor had been crying, correct?

7 A. Right.

8 Q. And you found out that the defendant and
9 his mother had been crying, correct?

10 A. Correct.

11 Q. And that they were up in some other room,
12 not in the courtroom?

13 A. That's right.

14 Q. And you made the judgment at the time that
15 that wasn't likely to produce a knowing, voluntary
16 intentional plea; is that right?

17 A. Correct.

18 Q. When you came out on the bench, did you
19 announce that the case would be continued?

20 A. I believe I did.

21 Q. I want to -- this is Exhibit 42 from the
22 Commission's exhibits.

23 A. I have a transcript of those proceedings.

24 Q. When you came out, Mr. Deakin was there and

1 addressed you, correct?
2 A. Yes.
3 Q. And he told you that -- and you announced,
4 didn't you, that the case was going to be continued
5 until the week of August 21st?
6 A. That's correct.
7 Q. And "You can come and see me in Middlesex
8 County"?
9 A. That's correct.
10 Q. You said, "I have sixteen bails and a lot
11 of other things to take care of. So this case is
12 being put over for the plea at another time in
13 Middlesex," correct?
14 A. Correct.
15 Q. Now, was that a true statement?
16 A. Absolutely.
17 Q. Did you have 16 bails to take care of?
18 A. I believe there were 18.
19 Q. And did you have much left to do that day?
20 A. Yes.
21 Q. And had you made the determination that, in
22 fact, as you said before, you didn't think the plea
23 was going to go forward under its current
24 circumstances and you weren't going to wait any

1 longer and keep it around?

2 A. That's right.

3 Q. Were those your only reasons for continuing
4 the case?

5 A. My only reasons being the emotional
6 disarray?

7 Q. No. That you had 16 bails.

8 A. Oh, no.

9 Q. What were your other reasons for continuing
10 the case?

11 A. All of the reasons included into my
12 findings, that this plea had essentially been
13 aborted by the -- what caused it -- by the press
14 causing an emotional reaction to the entire
15 scenario.

16 Q. Why didn't you come out and say all the
17 things that you ultimately found in your findings
18 with regard to the continuance?

19 A. Well, no one up to that point had objected
20 to the continuance. I thought everyone was on the
21 same page on it. So by saying I have 16 bails and a
22 lot of other things to do, I'm going to continue it,
23 was my way of telling the lawyers, I don't want to
24 hear further argument. I heard you all in the

1 lobby, and let's just get a date and move on.

2 Q. And then what happened?

3 A. Then Mr. Deakin stood up and asked me to
4 make findings pursuant to Chapter 278, Section 16F.
5 He presented me with a written motion requesting
6 those findings.

7 Q. And that written motion with regard to the
8 278, 16F, what is that statute about?

9 A. It's a statute that requires a judge to
10 make findings on continuances where there is a
11 Commonwealth objection, and it specifically relates
12 to cases involving child victims.

13 Q. I want to show you, as --

14 MR. EGBERT: I ask the Court to take
15 judicial notice of 278, Section 16F.

16 (Document marked as Exhibit P
17 for identification)

18 Q. Do you have that before you?

19 A. Yes.

20 Q. Are you familiar with that statute?

21 A. Yes, I am.

22 Q. That statute requires the Commonwealth to
23 do certain things in regard to informing the judge
24 of matters concerning a child victim; is that right?

1 A. That's correct.

2 Q. And what it says is, doesn't it, that,
3 number one, it must tell you whether or not the
4 child or the child's representative agrees to such
5 request for a continuance, correct?

6 A. That's right.

7 Q. Number two, what effect the granting of the
8 continuance will have on the child?

9 A. Correct.

10 Q. Correct? It is basically an impact
11 statement?

12 A. That's right.

13 Q. And that has to be in the filing with that
14 document, correct?

15 A. That's right.

16 Q. Did the Commonwealth ever allege, in its
17 motion in opposition to a continuance, that there
18 would be an adverse impact to the child?

19 A. No. The representation concerned the
20 grandmother being there.

21 Q. And I'm going to show you now, if I may --
22 turn to Commission's Exhibit No. 17, if you would.

23 A. Yes.

24 Q. That's the motion and findings; is that

1 correct?

2 A. Yes.

3 Q. Now, the motion -- the motion says, "As
4 reasons therefore," as to their opposition, "the
5 Commonwealth states that the child victim in this
6 case and his family was made aware that the case
7 would be resolved today."

8 A. Correct.

9 Q. "The child's guardian, his maternal
10 grandmother, has been present in the courtroom since
11 early this morning," correct?

12 A. Correct.

13 Q. "She would like to be present when her
14 impact statement is read in court"?

15 A. Correct.

16 Q. Is there anything in there about an adverse
17 impact to the child?

18 A. No.

19 Q. Is there a singular statement under the
20 statute that the child will be adversely impacted by
21 a continuation of this plea?

22 A. No.

23 Q. In fact, when it says "The child's
24 guardian, his maternal grandmother, has been present

1 in the courtroom since early this morning. She
2 would like to be present when her impact statement
3 is read in court," that was not of any consequence,
4 was it?

5 A. It was of no consequence to the purposes of
6 this particular statute, no.

7 Q. And in fact it was clear to you, wasn't it,
8 that when the plea took place at another time, she
9 would be able to read her impact statement in open
10 court, right?

11 A. Correct.

12 Q. And, by the way, did the Commonwealth ever
13 ask you to let the grandmother read the impact
14 statement that day so she wouldn't have to come
15 back?

16 A. No.

17 Q. Mr. Ware asked you if you brought the
18 grandmother up to the bench to talk to her. Did
19 you?

20 A. No, I did not.

21 Q. Whose job is it to present the information
22 to the Court under this statute so the Court has the
23 facts before it as to the impact on a child?

24 A. It is the Commonwealth's burden to put that

1 forth to the Court.

2 Q. Isn't it in fact required by the statute
3 that they file an impact statement in those regards?

4 A. That is correct.

5 Q. And did they do so under the statute?

6 A. No, they did not.

7 Q. Did you consider this to be a good-faith
8 opposition to the continuance under 278, Section
9 16F?

10 A. No.

11 Q. Did it provide any of the details which are
12 the norm in a case like this?

13 A. No, not -- it provided nothing -- not the
14 details that would be required under the statute,
15 no.

16 Q. And after being presented with that, Mr.
17 Deakin asked you to make findings, and then you said
18 he would get findings; is that correct?

19 A. Correct.

20 Q. And then you made certain findings with
21 regard to these proceedings; is that correct?

22 A. Yes.

23 Q. And when you made these findings, you did
24 so based upon the information you had before you as

1 you wrote the findings; is that correct?
2 A. That's correct.
3 Q. Now, you were asked whether or not you
4 called up Ralph Martin or anybody in his office to
5 get information ex parte. Did you do that?
6 A. No.
7 Q. Would you do that?
8 A. No.
9 Q. Was it your obligation to do it?
10 A. No, it was not.
11 Q. Would it be right for you to do it?
12 A. I wouldn't think so.
13 Q. Would you consider it appropriate to call
14 up the district attorney and get private information
15 in order to make a ruling?
16 A. No. I would never do that.
17 Q. Did the Commonwealth seek to provide you
18 with any further information?
19 A. No.
20 Q. Did they ask to be heard and you turned
21 them down?
22 A. No.
23 Q. Did they ask to make a written submission
24 and did you turn them down?

1 A. No.
2 Q. Let's get to the findings that you made.
3 First of all, let me ask you, did you make these
4 findings in good faith?
5 A. I certainly did.
6 Q. Did you believe them when you made them?
7 A. Absolutely.
8 Q. And, by the way, has anybody ever appealed
9 these findings?
10 A. No.
11 Q. Has anybody asked you to reconsider these
12 findings?
13 A. No.
14 Q. Has anybody ever asked you to have a
15 hearing on these findings?
16 A. No.
17 Q. Is there a right of appeal from findings by
18 a court?
19 A. They could have appealed me on this, yes.
20 Q. And wouldn't they be able to appeal under
21 Chapter 211, Section 3?
22 A. Absolutely.
23 Q. Did they take such an appeal?
24 A. They did not.

1 Q. Had they come to you for reconsideration
2 and asked you to reconsider this matter, that might
3 have been subject to an evidentiary hearing,
4 couldn't it?

5 A. It could have.

6 MR. WARE: Objection.

7 HEARING OFFICER DAHER: What's the
8 objection?

9 MR. WARE: As to what would have happened.

10 HEARING OFFICER DAHER: Sustained.

11 MR. EGBERT: Judge, may I be heard for a
12 moment?

13 HEARING OFFICER DAHER: Sure. Go ahead.

14 MR. EGBERT: I think the fact, Your Honor,
15 is that, although the Commission's position in this
16 regard is that these findings are somehow
17 misrepresentative, the fact that the district
18 attorney didn't want to take the chance of coming
19 back on a reconsideration motion and have an
20 evidentiary hearing where they would be placed under
21 oath seems to me to speak to the legitimacy of the
22 filing.

23 HEARING OFFICER DAHER: Sustained. The
24 objection is still sustained. Let's go.

1 BY MR. EGBERT:

2 Q. In the findings you make the following
3 findings: "The case was on for a change of plea
4 today," number one?

5 A. Yes.

6 Q. And was that a true statement?

7 A. Correct. Yes, it is.

8 Q. It was scheduled for a possible change of
9 plea, correct?

10 A. Yes.

11 Q. Did you know at the time whether it would
12 actually be a plea?

13 A. At which time?

14 Q. When you came in in the morning, for
15 example?

16 A. No, I did not.

17 Q. And then, "ADA Joseph, unhappy with the
18 Court's position." Let's stop there. Had the
19 district attorney indicated to you that she was
20 unhappy with your position?

21 A. Yes, she did. During the August 1st lobby
22 conference she indicated her unhappiness and
23 disagreement with me.

24 Q. When you say your "position," do you mean

1 the sentence that you were going to impose?
2 A. I think that says "disposition."
3 Q. "Disposition."
4 A. Yes. That's the sentence, yes.
5 Q. The sentence you were going to impose?
6 A. Yes.
7 Q. And then you said "called the press in. Ms.
8 Joseph has a habit of doing this," right?
9 A. Correct.
10 Q. Now, what do you mean by "called the press
11 in"?
12 A. I believed that she was, as the line
13 "ADA" --
14 MR. WARE: Your Honor, I'm going to object.
15 The question isn't what she thinks today, how she
16 interprets it today. It's what she meant at the
17 time, and I don't believe that was my colleague's
18 question.
19 HEARING OFFICER DAHER: It wasn't.
20 Sustained.
21 MR. EGBERT: I asked, what did she mean by
22 that statement.
23 HEARING OFFICER DAHER: Mr. Ware.
24 MR. WARE: I don't object to that.

1 HEARING OFFICER DAHER: You got it.

2 A. What I meant by that statement was that,
3 based on my experience in two prior cases with Ms.
4 Joseph, after having reviewed the DA's press
5 release, because these findings were made after I
6 had seen that press release, I came to the
7 conclusion that it was Ms. Joseph, as the line ADA,
8 that had provided information about this case to the
9 press office, particularly because there were some
10 unique facts in that press release that only the
11 line DA would know about.

12 Q. And when you say "called the press in," did
13 you mean that she picked up the phone and called the
14 press?

15 A. No. I meant she started the ball rolling.
16 She generated it. She, you know, went to somebody
17 and said, "Let's do it," something like that.

18 Q. And was there any doubt in your mind at
19 that time that that was the case?

20 A. No doubt in my mind whatsoever.

21 Q. And then you said, "The defendant suffers
22 from an identity disorder. She looks female in all
23 respects."

24 A. "Sexual."

1 Q. "Sexual identity" -- why don't you read it
2 for me.

3 A. "The defendant suffers from a sexual
4 identity disorder. She looks female in all
5 respects."

6 Q. And was that true?

7 A. Absolutely.

8 Q. And why did you think it was necessary to
9 put that in?

10 A. Well, for a number of reasons. First, it
11 was referenced in the DA's press release, but I
12 thought it was a necessary finding for my subsequent
13 finding concerning ridiculing and embarrassing
14 someone with a psychological disorder.

15 Q. Okay. So then you indicated, "When the
16 defendant" -- why don't you read it.

17 A. "When the defendant and her mother were
18 getting off the elevator on the 15th floor, there
19 was a television camera waiting for her in the
20 hallway."

21 Q. Now, had that been reported to you by
22 someone who was an officer of the court?

23 A. Correct, and it was undisputed that that is
24 what happened.

1 Q. When you say it is undisputed, what do you
2 mean by that?

3 A. Well, I mean no one -- that was represented
4 to me by Anne Goldbach, I think even -- maybe even a
5 court officer. But, I mean, that is what everybody
6 understood had happened.

7 Q. Did Ms. Joseph ever indicate to you that
8 that didn't happen?

9 A. No.

10 Q. Did she ever ask you to have a hearing on
11 that?

12 A. No, she didn't.

13 Q. What's your next finding?

14 A. "The defendant and her mother refused to
15 get off the elevator. There was an eruption in the
16 hallway, with the defendant's mother yelling at the
17 press."

18 Q. On what did you base that --

19 A. Again, representations made to me by Anne
20 Goldbach and by my court officer, I believe.

21 Q. And were those representations made in
22 front of Leora Joseph?

23 A. Yes.

24 Q. Did she ever indicate to you that she

1 disagreed with those facts?

2 A. No.

3 Q. That she disputed those facts?

4 A. No.

5 Q. Did she ever ask to have a hearing on those
6 facts?

7 A. No, she never did.

8 Q. Read on, please.

9 A. "The Court finds that ADA Joseph attempted
10 to embarrass and ridicule a defendant suffering from
11 a psychological disorder."

12 Q. On what did you base that fact?

13 A. I based that fact --

14 Q. That finding.

15 A. I based that finding on the information
16 that was contained in the district attorney's press
17 release, specifically the reference to a
18 transgendered -- that the defendant was
19 transgendered, a man who -- I believe that's what it
20 says -- who dressed and looked like a woman; and I
21 believe that that information was put in there
22 merely to appeal to the prurient interests of the
23 press and the public, to be provocative, to inflame
24 passions concerning this person, and generally to

1 depict this defendant as some sort of a freak.
2 Q. In fact, was that statement, "transgendered
3 and dresses like a woman," that wasn't contained in
4 the Commonwealth's statement of the case that they
5 gave at the beginning of the case, right?
6 A. No, no. I knew that --
7 Q. Listen to my question.
8 A. No, it was not.
9 Q. And did it strike you that the Commonwealth
10 was adding that to the press release -- by comparing
11 the press release --
12 HEARING OFFICER DAHER: Are you objecting
13 to that?
14 MR. WARE: Yes.
15 HEARING OFFICER DAHER: Sustained.
16 Q. By comparing the press release and the
17 statement of the case, did you draw any conclusions?
18 A. That they had not even mentioned the
19 transgendered status in the statement of the case
20 presented to the court. However, it was highlighted
21 in this press release.
22 Q. And then you indicate, "The Court finds" --
23 why don't you read on.
24 A. "The Court finds that the Commonwealth

1 caused this continuance because it sought to turn
2 the court proceedings into a circus."
3 Q. Were the court proceedings disrupted that
4 day?
5 A. Absolutely.
6 Q. And when you say "a circus," you don't mean
7 literally lions, tigers and elephants, do you?
8 A. No.
9 Q. What do you mean by that?
10 A. I mean that there was a disruption --
11 MR. WARE: Again, object to this
12 retrospective question. What did she mean at the
13 time?
14 HEARING OFFICER DAHER: I do -- I think I
15 detect a bit of levity into the proceedings, but I'm
16 going to sustain the objection.
17 BY MR. EGBERT:
18 Q. What did you mean by that?
19 A. I'm sorry. I lost your question.
20 Q. What did you mean by that statement?
21 A. Circus?
22 Q. Yes.
23 A. What I meant by that was that the court
24 proceedings had been turned into a situation where a

1 defendant was being ridiculed and embarrassed, and
2 that caused a complete disruption of the
3 proceedings.

4 Q. And then your next finding, read that,
5 please.

6 A. "There is little if no impact on the
7 alleged victim as this is a plea."

8 Q. Now, let's talk about that one: "There is
9 little if no impact on the alleged victim as this is
10 a plea." You were talking about the continuance,
11 right?

12 A. Correct.

13 Q. That wasn't about anything else in this
14 case, right?

15 A. No, no. I was addressing the statutory
16 requirements.

17 Q. Of what impact the continuance will have on
18 the victim?

19 A. Correct.

20 Q. Why didn't you think there would be much
21 impact on the alleged victim?

22 A. Because the case was supposed to plead,
23 which meant, then, that the victim would not be put
24 through the trauma of preparing for a trial process,

1 you know, going through a trial, being cross-
2 examined, and the victim would be spared that. And
3 I believe that's what the intent of the statute is.

4 Q. Well, what would the -- what impact did the
5 district attorney's office tell you the continuance
6 would have on the victim?

7 A. There was nothing in their motion
8 concerning the impact on the victim, only the
9 grandmother --

10 Q. So I'm asking you a question. What
11 information did the Commonwealth provide to you that
12 the continuance would have an adverse impact on the
13 victim?

14 A. None.

15 Q. And then you put, "The matter has been
16 rescheduled to September 6th"; is that correct?

17 A. Correct.

18 Q. Now, when you made those findings with
19 regard to the Commonwealth's submission, were they
20 made in good faith?

21 A. Absolutely.

22 Q. And did you believe them when you made
23 them?

24 A. I do. I did, and I do.

1 Q. And did you base them on the information
2 and facts that were before you?

3 A. Correct. Yes.

4 Q. And at that time, is it fair to say that
5 you were displeased with Ms. Joseph's conduct?

6 A. Very.

7 Q. And the conduct of the DA's office?

8 A. Yes.

9 Q. Did that form in you a bias against them?

10 A. No.

11 Q. Were you unable to perform your judicial
12 functions in any way?

13 A. No. Judges regularly get annoyed and mad
14 at lawyers.

15 MR. WARE: I object what other judges do in
16 other circumstances.

17 HEARING OFFICER DAHER: That's a
18 generalization. Sustained.

19 Q. You have been -- you have been to judges'
20 conferences in the past?

21 A. Many.

22 Q. Meetings of judges in the past?

23 A. Many.

24 Q. Dinners with judges in the past?

1 A. Many.

2 Q. Have any of your colleagues ever indicated
3 to you that they have on occasion been displeased
4 with one lawyer or another?

5 A. Many.

6 MR. WARE: Objection, Your Honor.

7 HEARING OFFICER DAHER: I'm going to
8 sustain that objection.

9 MR. WARE: I'm sure it has never happened
10 to Mr. Egbert or me.

11 HEARING OFFICER DAHER: Never happened to
12 me. I'm only joking.

13 MR. EGBERT: As long as the Court will take
14 judicial notice of it, I don't have to go much
15 further.

16 (Laughter)

17 Q. After you made these findings, you provided
18 copies to the district attorney's office, did you
19 not?

20 A. My clerk did. I gave the findings to my
21 clerk and instructed them or him to notify --

22 Q. And you have seen that these findings were
23 faxed to Joan Kenney at some point in time after the
24 hearing, correct?

1 A. Correct.

2 Q. And do you know why that was done?

3 A. I don't have a recollection. I probably
4 had a conversation with her about this that day. I
5 don't know if she was getting calls. I really don't
6 remember why it was that these were faxed to her.

7 Q. And -- but do you recall whether or not the
8 press was looking for your findings?

9 A. I believe they were, because they knew --
10 they left after I had continued the case, and they
11 knew that there were findings coming.

12 Q. Did you -- you were asked whether or not,
13 during the time from August 4th to September 6th, on
14 your scheduled plea and sentencing date, whether or
15 not you prepared a sentencing memorandum of your
16 findings with regard to disposition, correct? Do
17 you recall those questions?

18 A. Yes, I do.

19 Q. Have you ever done that before, before a
20 plea?

21 A. No. Never.

22 Q. Can you think of an occasion why a judge
23 would make sentencing findings on the record in the
24 file before a defendant actually pled guilty?

1 A. No, I can't. I mean -- I can't imagine
2 doing that myself. I've never done that.

3 Q. Weren't you informed by Ms. Joseph at the
4 time of these events that -- well, strike that.
5 Were you informed, between August 4th and September
6 6th, that the grandmother had made a statement with
7 regard to the appropriateness of a probationary
8 sentence?

9 A. Oh, I had read an article by John Ellement
10 concerning that, yes.

11 Q. And when was that article, do you recall?

12 A. It was the day after I granted the
13 continuance.

14 Q. And do you recall basically the substance
15 of what you read in that article?

16 A. I believe she was quoted as saying that she
17 didn't really have a problem with a probationary
18 sentence.

19 Q. And did you have any discussion with the
20 district attorney's office or any members of the
21 district attorney's office about what you had read?

22 A. No.

23 Q. And, in fact, by the time you had read it,
24 you had already made your decision as to what the

1 sentence was going to be; is that correct?
2 A. I made that decision August 1.
3 Q. You were asked a number of questions by Mr.
4 Ware as to whether or not your decision or your mind
5 could be changed with regard to your ruling on the
6 sentence. Do you recall all those questions?
7 A. Yes.
8 Q. When a judge makes a decision, what are the
9 factors that cause that decision to change?
10 A. A decision -- a sentencing decision could
11 change if new information is brought to the judge's
12 attention.
13 Q. And how would that be done?
14 A. It would be done through a motion or
15 request for a hearing to present additional
16 argument, but it would be done through the orderly
17 court process.
18 Q. Was there ever any attempt, between August
19 1st of the year 2000 and September 6th of the year
20 2000, by the district attorney's office to get you
21 to reconsider your position on sentencing?
22 A. No.
23 Q. Were you ever asked to conduct a hearing
24 where other facts or other evidence could be

1 presented to you?

2 A. No.

3 Q. Were you ever asked to have a conference
4 with the parties where the district attorney's
5 office could seek to dissuade you or to change your
6 mind?

7 A. No.

8 Q. Did you at any time -- were you at any time
9 presented with any information by the district
10 attorney's office which would indicate to you that
11 they had facts or evidence which they wanted you to
12 consider -- reconsider for purposes of your
13 sentence?

14 A. No.

15 Q. When you went -- when you went on September
16 6th to court that day to conduct the Horton
17 sentencing hearing, did you expect -- strike that.
18 Did you have any notice by anyone that they were
19 seeking to have you reconsider your sentence?

20 A. No.

21 Q. Now, as September 6th approached, you were
22 over in the Middlesex Courthouse?

23 A. Yes. I went to Middlesex the following
24 Monday, on August -- it would have been the 7th, I

1 think it was.
2 Q. Whatever day it was --
3 A. Yes.
4 Q. -- by September 6th, were you sitting in
5 Middlesex?
6 A. Yes, I was.
7 Q. And while you were sitting over there, did
8 you have discussions with any of your personnel
9 concerning the Horton case?
10 A. Absolutely.
11 Q. And do you recall who you spoke with?
12 A. I spoke initially to my clerk when I got
13 there so that he would know, in terms of scheduling
14 matters, that this was -- you know, that this case
15 was on for a particular date and time. I also had
16 to let him know, because when you move a case from
17 one county to another, the clerk and probation
18 officer from the county where the case comes from
19 has to travel with the case. So he had to be
20 prepared for that.
21 Q. Did you have other obligations by way of
22 informing them with regard to security and the like?
23 A. Yes.
24 Q. What were those obligations?

1 A. Well, my obligations were to make sure that
2 the court process could be conducted in an orderly,
3 efficient manner, and I was obviously concerned,
4 because of what had happened on August 4th, that we
5 might have another situation that could abort a
6 possible plea.

7 Q. So -- you had in mind, I take it, the fact
8 that the last time the press and Mr. Horton and his
9 family came in contact, there was some hysteria and
10 it interrupted the proceedings?

11 A. Correct.

12 Q. Did you let your court officers or clerks
13 know about that?

14 A. Oh, yes, I did.

15 Q. And what did you instruct them to do?

16 A. I instructed them to make arrangements so
17 that the defendant and whomever accompanied her
18 could be met outside of the courthouse to avoid the
19 public spaces, and that I wanted her put somewhere
20 so that we could get her into the courtroom, take
21 the plea, and get her out of there.

22 Q. And was your purpose to provide special
23 treatment to Charles Ebony Horton?

24 A. No.

1 Q. What was your purpose?

2 A. My purpose is to assure that there would be
3 an orderly, efficient, civilized administration of
4 justice, and that this plea could be accomplished
5 that day.

6 Q. And is it fair to say that you had in mind
7 the same reason you indicated previously as to why a
8 plea would be good for this case?

9 A. Yes.

10 Q. Now, when you -- when you made these
11 arrangements or had your personnel make the
12 arrangements, did you notify the DA's office?

13 A. No.

14 Q. Why not?

15 A. I don't have to notify the DA's office
16 about these arrangements.

17 Q. Has this got anything to do with the case
18 before you?

19 A. No. It all relates to security issues and
20 court administration issues.

21 Q. And have you had situations like this in
22 the past?

23 A. Many times.

24 Q. And do you bring counsel in to describe to

1 them the security measures that your court personnel
2 will undertake?

3 A. No, I don't. And sometimes the
4 arrangements are made directly by counsel with the
5 court officers.

6 Q. Did anyone in your courthouse object to the
7 arrangements that were being made?

8 A. No.

9 Q. And did you have any conversation with
10 anyone where they indicated that this was improper
11 in any way?

12 MR. WARE: Well, I don't know how they
13 could do that if they didn't know about them, but --

14 MR. EGBERT: If they didn't know about
15 them?

16 Q. Did the clerks know about them?

17 A. My clerks and my court officers assigned to
18 me in that session certainly knew about it.

19 Q. And did any of those parties make any
20 objections in any way to the arrangements that you
21 were making?

22 A. No.

23 Q. And you also took some measures with regard
24 to the press that day; is that right?

1 A. That's right.

2 Q. And, first of all, when you came in that
3 day, had the press previously notified the Court
4 that they wished to have permission to be in the
5 courtroom?

6 A. No, they never notified the Court or asked
7 for permission.

8 Q. And is that provided for under the rule?

9 A. Yes. There is a specific SJC rule dealing
10 with press matters and cameras in the courtroom.

11 Q. And when you arrived on September 6th, did
12 you understand that there would be cameras there?

13 A. When I got there, I learned that the
14 cameras were there.

15 Q. And did you have any conversation with
16 anybody at the SJC in that regard?

17 A. Yes. I called Joan Kenney concerning an
18 order that I had drafted that would limit the
19 cameras in the courtroom, that would order them not
20 to take the defendant's face.

21 Q. I want to show you what I believe has been
22 marked Defendant's A, on order limiting the use of
23 cameras.

24 A. Yes.

1 Q. Is that an order that you ultimately
2 executed?

3 A. Yes, that is.

4 MR. EGBERT: Your Honor, I would offer
5 that.

6 HEARING OFFICER DAHER: Any objections?

7 MR. WARE: No, Your Honor.

8 HEARING OFFICER DAHER: Mark it.

9 (Document marked as Exhibit A
10 moved in evidence)

11 Q. What did you order within that?

12 A. Basically I ordered that the cameras would
13 be allowed in the courtroom, and -- but that I
14 wanted limitations on that, and that limitation was
15 that they were not to take pictures, by way of still
16 or moving cameras, of the defendant's face.

17 Q. Why did you do that?

18 A. For a number of reasons. First, I -- as I
19 found -- I mean, I didn't see that there was any
20 reason to take the defendant's face in this
21 particular situation.

22 I was concerned that the cameras could be
23 provocative to this defendant, as they had
24 previously been. And obviously there is always some

1 concern that there might be public safety issues --
2 safety issues and risks involved to a defendant that
3 pleads to these kinds of charges.

4 Q. What did you care if Ebony Horton was
5 provoked?

6 A. If we had -- we would then have a
7 repetition of what had occurred on August 4th. And
8 if she was provoked, we would have an emotional
9 situation in the courtroom, and the plea would not
10 be able to be accomplished.

11 Q. And you thought that, drawing on what
12 occurred on August 4th, that was a likelihood?

13 A. Yes.

14 Q. Now, also you were asked questions
15 concerning the putting of the lawyers behind Ebony
16 Horton, the setup of the room in that regard, and
17 we'll get to it in a few minutes. But do you
18 remember that?

19 A. Yes, I do.

20 Q. And you were asked whether or not you did
21 that because you didn't trust the press, right?

22 A. Yes.

23 Q. Did that order have anything to do with the
24 press?

1 A. It had nothing to do with the press.

2 Q. What did it have to do it with?

3 A. It had to do with assuring that the
4 defendant would not be provoked, would not get
5 upset, would not be affected or intimidated by the
6 mere presence of the camera.

7 Q. And, once again, why did you care about
8 that?

9 A. Again, because if we went into one of those
10 emotional downswings, we would have another aborted
11 plea situation.

12 Q. As a judge, when you take a plea, is it
13 required of you that you make a determination that
14 the defendant is of sufficient mental ability and
15 capacity to knowingly, voluntarily and intelligently
16 enter the plea?

17 A. Those are required findings, yes.

18 Q. And is that -- how would you describe that
19 in terms of difficulty when you're dealing with
20 someone who has an acknowledged mental disorder?

21 A. Well, I have to establish that that
22 disorder does not interfere with the defendant's
23 ability to understand.

24 Q. And did that defendant's mental disorder

1 affect the manner in which you provided the security
2 on that day?

3 A. Yeah, it was related to the psychological
4 information I had about this particular defendant,
5 that there were potentials for, you know, outbursts
6 and -- a situation where she would not be responsive
7 to my questions, to the situation, yes.

8 Q. So now it's September 6th, and this plea is
9 about to occur. The press was there. You could
10 have had them excluded, couldn't you?

11 A. I certainly could have ordered them right
12 out of the courtroom.

13 Q. And why did you choose to reach the mix
14 that you reached in your orders?

15 A. I concluded that this was an appropriate
16 balance. It would allow the press to cover this
17 particular case that they had shown an interest in
18 from before, but that it would protect the court
19 process and allow it to proceed in an orderly and
20 efficient fashion.

21 Q. Is there a process under the SJC rules for
22 the press to object or seek review of your orders
23 with regard to them?

24 A. Absolutely.

1 Q. Was any review taken in this case?
2 A. No.
3 Q. Did anyone seek review?
4 A. No.
5 Q. Did anyone seek a review from you?
6 A. No.
7 Q. I'm going to play -- and I know it's a
8 little lengthy -- but I'm going to play a tape of
9 the September 6th proceeding, and I may stop it on
10 occasion to ask you questions; is that right?
11 A. Yes.
12 MR. EGBERT: May I have the tape?
13 (Tape handed to Mr. Egbert by Ms. Brunetti)
14 (Videotape playing)
15 THE CLERK: As to Indictment No. 2000-
16 10029-001, this indictment alleges kidnapping. 002,
17 assault to rape a child, 003, indecent assault and
18 battery on a child under fourteen, 004, assault and
19 battery, and 005, assault and battery by means of a
20 dangerous weapon, at this time do you wish to change
21 your plea to each of these indictments?
22 DEFENDANT: Yes.
23 THE CLERK: What say you to these
24 indictments? Are you guilty or not guilty?

1 DEFENDANT: Guilty.
2 THE CLERK: Would you raise your right
3 hand, please. (Defendant sworn) You may be seated.
4 THE COURT: Would the lawyers identify
5 themselves for the record.
6 MR. DEAKIN: Good morning, Your Honor.
7 Assistant District Attorney David Deakin for the
8 Commonwealth. With me Assistant District Attorney
9 Leora Joseph.
10 (Videotape stopped)
11 BY MR. EGBERT:
12 Q. Let me stop there, for a moment. Mr.
13 Deakin stood up and identified himself for you,
14 correct?
15 A. Yes.
16 Q. And said that Ms. Joseph was with him at
17 the time, correct?
18 A. Yes.
19 Q. Who did you understand to be counsel who
20 would be addressing the Court on behalf of the
21 Commonwealth?
22 A. Mr. Deakin was the only one that stood up.
23 So I was under the opinion that he would be council
24 representing the Commonwealth in that case.

1 Q. Now, did anybody ever indicate to you that
2 Ms. Joseph was going to participate in the
3 proceedings in any active way?

4 A. No. No one ever indicated that.

5 Q. And in your experience as a Superior Court
6 judge, when there are -- is there a word for
7 somebody sitting in that chair?

8 A. Yes. It is somebody who is second seating,
9 second chairing.

10 Q. And typically, if someone second chairs a
11 case, are they allowed to speak objections or speak
12 to matters that are being addressed by other
13 counsel?

14 A. No, they are not -- they generally do not
15 speak in court.

16 Q. Except with what?

17 A. With the Court's permission.

18 (Videotape playing)

19 MS. GOLDBACH: Good morning, Your Honor.
20 Anne Goldbach from the Committee for Public Counsel
21 Services.

22 MS. KELLEHER: Good morning, Your Honor.
23 Victoria Kelleher, also from the Committee for
24 Public Counsel Services.

1 THE COURT: Okay. I need to ask the
2 defendant some questions. Listen carefully to the
3 questions I ask you. If there is something you do
4 not understand, please let me know, okay?
5 DEFENDANT: Yes.
6 THE COURT: Okay. Start by telling me your
7 name.
8 (Videotape stopped)
9 BY MR. EGBERT:
10 Q. Let me stop you there. Were you yelling at
11 the defendant there?
12 A. No.
13 Q. Is that your normal tone of voice?
14 A. Yes. I wanted to make sure the defendant
15 heard me, yes.
16 (Videotape playing)
17 DEFENDANT: Charles Horton.
18 THE COURT: You've got to speak up.
19 DEFENDANT: Charles Horton.
20 THE COURT: How hold are you?
21 DEFENDANT: Twenty-two.
22 THE COURT: How far have you gone in
23 school?
24 DEFENDANT: I got my GED.

1 THE COURT: Have you worked?
2 DEFENDANT: Before, yes.
3 THE COURT: What kind of work did you do
4 when you worked?
5 DEFENDANT: I worked at a bookstore, and I
6 worked in telemarketing.
7 THE COURT: Okay. What did you say first?
8 You said telemarketing, and what was the first
9 thing?
10 DEFENDANT: A bookstore.
11 THE COURT: A bookstore. Okay. Have you
12 used drugs or alcohol in the last 24 hours?
13 You've got to speak up. You can't just
14 shake your head, okay?
15 DEFENDANT: No, I haven't.
16 THE COURT: All right. Are you on any kind
17 of prescription medication?
18 DEFENDANT: No.
19 THE COURT: Okay. Is there anything at all
20 I should know about you that might affect your
21 ability to understand what you were doing at this
22 time?
23 DEFENDANT: No, Your Honor.
24 THE COURT: Have you had an opportunity to

1 discuss with your attorney the evidence that the
2 Commonwealth has against you?

3 DEFENDANT: Yes, Your Honor.

4 THE COURT: Have you discussed with your
5 attorney the elements of these indictments?

6 DEFENDANT: Yes.

7 THE COURT: And have you discussed with
8 your attorney any possible defenses you might have?

9 DEFENDANT: Yes.

10 THE COURT: Are you satisfied with her
11 advice?

12 DEFENDANT: Yes.

13 THE COURT: Okay. Now, the sentence -- and
14 I think I indicated that I was going to place the
15 defendant on probation for a period of five years.
16 I had initially indicated that I would be placing
17 him into the Community Corrections Program.

18 It appears that he will not be accepted at
19 the Community Corrections Program. Therefore, I am
20 going to place him on probation for a period of five
21 years, on electric monitoring for a period of one
22 year, and that you will be required to attend
23 counseling, and you are to stay away from children
24 under the age of 16. Okay.

1 Do you understand that that is the sentence
2 that you're going to get?
3 DEFENDANT: Yes.
4 (Videotape stopped)
5 BY MR. EGBERT:
6 Q. You say at that point to the defendant,
7 "Do you understand that that is the sentence that
8 you are going to get?"
9 A. Yes.
10 Q. So as far as the defendant and you and
11 everybody in that courtroom were concerned, the
12 defendant's sentence had been fully decided?
13 A. Correct.
14 Q. At the time that you told the defendant the
15 sentence he was -- you were going to deliver, did
16 the Commonwealth object and say they hadn't yet been
17 heard?
18 A. No.
19 Q. Did they ask to give you information to
20 have you reconsider that sentence?
21 A. No.
22 Q. Is it fair to say, in your experience, that
23 your delivery to the defendant of that information,
24 Here is your sentence, at least as far as the

1 dispositional aspects of the case, were final?

2 A. Correct. Yes.

3 Q. So what was the purpose of the rest of the
4 proceeding, from then on?

5 A. It was to establish on the record the
6 requirements of a plea, that it was an intelligent,
7 voluntary -- basically just to get it on the record.

8 Q. Was it to satisfy the rule, basically?

9 A. Yes.

10 Q. And did you envision at that time, in your
11 experience, that anything the prosecutors were going
12 to do thereafter was designed to influence the
13 sentence?

14 A. Anything a prosecutor -- I'm sorry, I
15 missed that.

16 Q. Did anything the prosecutors were going to
17 do after the fact of you delivering your sentence
18 there was designed to actually influence you or
19 change your mind?

20 A. Well, I don't know what the prosecutors
21 had, but -- I don't understand the question.

22 Q. After you deliver a sentence in court, has
23 it been your experience that the arguments of
24 counsel thereafter are for form or substance?

1 A. Okay. They are for form. They have had
2 their full and fair opportunity to be heard
3 previously.

4 Q. Did anybody indicate to you that they
5 wanted to present to you new facts or new
6 information or the like?

7 A. No.

8 Q. And did anybody object to you telling the
9 defendant at that time what their sentence was?

10 A. No.

11 Q. And once you told the defendant what the
12 sentence was, you couldn't go back on that, could
13 you?

14 A. I could not, no.

15 Q. And the defendant is then waiving all of
16 his rights, based upon what you've told him,
17 correct?

18 A. That's right.

19 HEARING OFFICER DAHER: Could you move
20 that. I don't think Mr. Ware can see it.

21 MR. EGBERT: Judge, I couldn't see it when
22 he had it either, and that's why I got up and walked
23 over there.

24 HEARING OFFICER DAHER: Bob, if you could

1 just move it slightly. I think that's fine.
2 MR. EGBERT: Can you see it?
3 HEARING OFFICER DAHER: I think I can. I
4 can.
5 (Videotape playing)
6 THE COURT: Have any promises been made to
7 get you to plead guilty?
8 DEFENDANT: No.
9 THE COURT: Have any threats been made to
10 get you to plead guilty?
11 DEFENDANT: No.
12 THE COURT: I'm required by law to inform
13 you that if you are not a citizen of the Unites
14 States, a conviction on these charges could have
15 immigration consequences for you, such as
16 deportation, exclusion from the country or denial of
17 U.S. citizenship. Do understand that?
18 DEFENDANT: Uh-huh.
19 THE COURT: Speak up.
20 DEFENDANT: Yes.
21 HEARING OFFICER DAHER: Okay. I'm also
22 required to inform you that you will be required, as
23 a result of pleading guilty to these indictments, to
24 register as a sex offender and that your failure to

1 register as a sex offender could subject you to
2 criminal penalties. Do you understand that?

3 DEFENDANT: Yes.

4 THE COURT: You also will be required to
5 provide a DNA sample to the State Crime Lab, and you
6 should know that your failure to provide that DNA
7 sample could also subject you to criminal penalties.
8 Do you understand that?

9 DEFENDANT: Yes.

10 THE COURT: Okay. When you plead guilty,
11 you give up a number of Constitutional rights.
12 First of all, you give up your right to be tried by
13 a jury, and in a jury trial there would be twelve
14 people who would be selected at random from the
15 community. You and your attorney would participate
16 in the selection of those twelve people. The twelve
17 people would be charged with listening to the
18 evidence and ultimately deciding whether or not the
19 Commonwealth has proven you guilty of these
20 indictments beyond a reasonable doubt.

21 It is the Commonwealth's burden to prove
22 you guilty beyond a reasonable doubt, and in a
23 criminal case, the jury verdict has to be unanimous.
24 That means that the twelve deliberating jurors must

1 all agree that the Commonwealth has met its burden
2 of proving you guilty with respect to each
3 indictment.

4 Now, do understand that that's what a jury
5 trial involves?

6 DEFENDANT: Yes.

7 THE COURT: And do you understand that when
8 you plead guilty, you give up your right to that
9 jury trial?

10 DEFENDANT: (Inaudible)

11 THE COURT: You've got to --

12 DEFENDANT: Yes.

13 THE COURT: And do you wish to give up your
14 right to that jury trial?

15 DEFENDANT: Yes.

16 THE COURT: Okay. You also have the right
17 to confront and cross-examine the witnesses that the
18 Commonwealth would have to bring in here in order to
19 try and prove you guilty beyond a reasonable doubt.
20 These are known as your rights of confrontation and
21 cross-examination. And when you plead guilty, you
22 give up those rights. Do understand that?

23 DEFENDANT: Yes.

24 THE COURT: Do you wish to give up those

1 rights?

2 DEFENDANT: Yes.

3 THE COURT: You also have the right to
4 remain silent and a privilege against self
5 incrimination. Those are rights that essentially
6 guarantee you that the Commonwealth must prove you
7 guilty without any help from you. Do you understand
8 that when you plead guilty, you give up those
9 rights?

10 DEFENDANT: Yes.

11 THE COURT: And do you wish to give up
12 those rights?

13 DEFENDANT: Yes.

14 THE COURT: Okay. Now, I will hear from
15 the DA's office, and I want to hear only the facts
16 that pertain to these indictments, okay?

17 (Videotape stopped)

18 BY MR. EGBERT:

19 Q. You said at that point, "I want to hear
20 only the facts that pertain to these indictments,"
21 right?

22 A. Correct.

23 Q. Why did you say that?

24 A. I had had some experience with some

1 injection of hyperbole in the presentation of facts
2 by ADA Joseph, and I wanted to make sure that Mr.
3 Deakin limited himself solely to those facts that
4 were necessary to take this plea of guilty, and
5 those would be the facts that would set out the
6 elements of each of the charges.

7 Q. So what the purpose of this statement of
8 facts at this point in time is is not an argument on
9 the sentencing, is it?

10 A. No, no. It is merely to establish
11 sufficient facts that the defendant agrees to, so
12 that I could find that he's agreeing to facts
13 sufficient for each indictment.

14 Q. And what is the problem of having a
15 prosecutor put on more facts or hyperbole, as you
16 call it, in this particular process?

17 A. It could provoke a defendant. It could
18 cause a defendant to take issue with certain
19 irrelevant facts that could -- could affect the plea
20 process.

21 Q. When you say affect the plea process, do
22 you mean -- what do you mean by that?

23 A. Well, a defendant could start taking issue
24 with certain facts, and then we could go off in some

1 tangent and the plea could be affected.
2 Q. When you say the plea can be affected, what
3 are you talking about?
4 A. Okay. The plea may not be able to be
5 completed.
6 Q. Now, I want to show you --
7 MR. EGBERT: May approach, Judge?
8 HEARING OFFICER DAHER: (Nods head)
9 MR. EGBERT: Your Honor, I'm going to have
10 the witness identify the document and ask to
11 introduce it.
12 A. This is the transcript of the plea
13 proceedings.
14 Q. That's a transcript of what?
15 A. The plea proceedings on September 6th --
16 no, I'm sorry. This is the Commonwealth versus
17 Estrada case. I'm sorry. I thought it was the plea
18 on -- no, this is February 10th, 1999.
19 Q. And what is that the case of?
20 A. That's the Commonwealth versus Estrada
21 case.
22 Q. And is that a case in which Ms. Joseph was
23 the assistant district attorney?
24 A. Yes.

1 Q. And were you required at that time to
2 caution her concerning the use of hyperbole during
3 the course of a recitation of plea facts?
4 A. I did. At the conclusion of the plea, yes.
5 Q. And would you turn to Page 26.
6 A. Yes.
7 Q. And what did you say to Ms. Joseph at that
8 time?
9 A. I said, "Next time that you are going to
10 recite facts to me on a plea, dispense with
11 hyperbole and subjective characterizations."
12 Q. And so that had been a problem in the past?
13 A. Yes.
14 Q. When you said that to Ms. Joseph, how did
15 you say it?
16 A. I said it in a normal tone of voice.
17 MR. EGBERT: Judge, I offer this transcript
18 as the --
19 HEARING OFFICER DAHER: Any objections?
20 MR. WARE: Your Honor, it is already
21 Exhibit 65.
22 MR. EGBERT: I didn't think they offered
23 it.
24 HEARING OFFICER DAHER: Yes, it is. Harvey

1 marked it. It was written in.
2 MR. EGBERT: Well, Judge, it was written
3 in, but it wasn't given to me.
4 HEARING OFFICER DAHER: Well, I have it.
5 Harvey wrote it in.
6 MR. EGBERT: I am getting more and more
7 confused here.
8 It is not in your book, is it?
9 THE WITNESS: No.
10 HEARING OFFICER DAHER: It was subsequent
11 to.
12 MR. EGBERT: Well, without notice to me.
13 THE CLERK: It was during the hearing?
14 MR. EGBERT: I mean, if you say...
15 HEARING OFFICER DAHER: It was subsequent
16 to the list -- the typed list that was submitted in
17 addition -- as a supplement thereto.
18 THE CLERK: It was offered to the Judge --
19 it was offered into evidence and the Judge admitted
20 it.
21 MR. EGBERT: During these proceedings?
22 THE CLERK: Yes.
23 MR. EGBERT: We missed it.
24 HEARING OFFICER DAHER: It's already in.

1 Thank you very much.

2 MR. EGBERT: Leave it as 65, then, and
3 we'll use that.

4 HEARING OFFICER DAHER: That is 65.
5 (Videotape playing)

6 MR. DEAKIN: Yes, Your Honor.

7 Your Honor, were this matter to go to
8 trial, the Commonwealth would prove the following
9 facts:

10 On Saturday, November 20th of 1999 a
11 12-year-old boy, the victim in this case, was
12 walking to his home in Dorchester. It was just
13 after 8:00 p.m. --

14 (Videotape stopped)

15 BY MR. EGBERT:

16 Q. Mr. Deakin just told you that a 12-year-old
17 boy was walking through Dorchester; is that right?

18 A. Correct.

19 Q. And so, once again, the Commonwealth is
20 telling you that this was a 12-year-old, not an 11-
21 year-old; is that correct?

22 A. Correct.

23 Q. Is that consistent with what they had told
24 you throughout this case?

1 A. Throughout the proceeding, yes.

2 (Videotape playing)

3 MR. DEAKIN: -- and the boy was walking
4 home from a friend's house. As he walked on Corona
5 Street, heading towards Geneva Avenue, a car pulled
6 up beside him. In the car was the defendant who
7 appeared to the boy to be a woman he did not know.

8 The defendant told the boy that the
9 defendant was searching for a missing son named
10 Michael and that the defendant would pay \$100 to
11 anyone who found this boy. The defendant asked the
12 victim to get into the car, and the boy agreed.

13 After the boy got in the car, the defendant
14 drove around for a time, finally bringing the boy to
15 a place he did not know. It was there the victim
16 reported that the police later found him with the
17 defendant. The defendant told the victim that this
18 was where the fictitious missing boy had been
19 playing. Stopping the car, the defendant then asked
20 the victim if he wanted to perform oral sex on the
21 defendant. The defendant used a common vulgarity to
22 refer to female genitalia. The boy said that he did
23 not want to do that and said that he wanted to go
24 home.

1 The defendant then put a screwdriver to the
2 boy's neck and told him to be quiet. The defendant,
3 whose pants were partially down, then pulled the
4 boy's head into the defendant's lap. The boy then
5 felt what the defendant said was the defendant's
6 finger against his mouth. The defendant told the
7 boy to suck the finger, and the defendant took the
8 boy's head and moved it up and down.

9 The victim reports that he was crying and
10 pleading to be allowed to go home. Using profanity,
11 the defendant tol the victim to shut up. The
12 defendant told the boy to stop sucking the finger
13 and instead to suck the screwdriver.

14 Shortly thereafter, the defendant saw that
15 the police had pulled up behind him. The defendant
16 pulled the boy's head up and gave the boy \$50 in
17 cash. The defendant told the boy that the defendant
18 was a dentist and that the boy should not say
19 anything to the police.

20 At approximately 8:28 p.m. on Saturday,
21 November 20th, Officers Rose and Sweeney of the
22 Boston Police Department were on routine patrol in
23 their sector of Dorchester. They saw a 1996 Nissan
24 Maxima parked in a dark area of the back lot of 50

1 Park Street near a warehouse. It was not an area in
2 which passenger cars typically had business at that
3 time of night. The officers turned on the cruiser's
4 lights and looked at the car. In it they saw a
5 person, later identified as the defendant, moving up
6 and down quickly. About ten seconds later, the
7 officers saw the head of the second person, later
8 identified as the 12-year-old victim, rise up from
9 the front driver's side area of the car. The
10 officers approached the car and saw the defendant in
11 the driver's seat with his pants unzipped and down
12 around his hips.

13 As Officer Sweeney approached the car, he
14 heard the defendant say to the victim, "Tell them
15 you were helping me look for my two kids." The
16 defendant told the officers that the boy was helping
17 search for a missing son, which the defendant later
18 acknowledged was not true.

19 The officers noted that the victim was
20 crying, and when they spoke to him, the boy told the
21 officers what had happened. The officers arrested
22 the defendant and found a screwdriver between the
23 console and front passenger seat of the car.

24 THE COURT: Thank you. I think that

1 completes the facts that are relevant for purposes
2 of these indictments.

3 (Videotape stopped)

4 BY MR. EGBERT:

5 Q. Now, you at that point broke in and said,
6 that completes the facts sufficient to support the
7 indictments, correct?

8 A. Right. He had related facts up to the
9 moment of arrest, and so the charges all related to
10 what happened before the arrest.

11 Q. So once the arrest -- once the arrest was
12 made, at least as to the facts relevant to what you
13 were considering, it was basically over; is that
14 correct?

15 A. It was over, yes.

16 Q. Certainly as to sufficient facts?

17 A. Correct.

18 Q. And is that why you told him you had heard
19 enough?

20 A. Yes.

21 Q. Or words to that effect?

22 A. "Thank you," I said.

23 Q. "Thank you."

24 A. Yes.

1 Q. And then Mr. Deakin thereafter asked to be
2 heard further; is that right?
3 A. Yes. He wanted to include something
4 contained in the defendant's statement to the
5 police.
6 MR. EGBERT: Your Honor, would this be a
7 good time to take a break?
8 HEARING OFFICER DAHER: Mr. Ware, is that
9 okay?
10 MR. WARE: Fine.
11 HEARING OFFICER DAHER: Sure. We'll take a
12 recess.
13 (Recess)
14 HEARING OFFICER DAHER: Okay.
15 (Videotape playing)
16 MR. DEAKIN: Your Honor --
17 THE STENOGRAPHER: One moment. One moment.
18 Okay.
19 MR. DEAKIN: If I may, there are additional
20 facts that relate to the defendant's statements --
21 (Videotape stopped)
22 BY MR. EGBERT:
23 Q. That person going "One moment. One
24 moment," Judge --

1 A. That's the court reporter changing her
2 tape.

3 (Videotape playing)

4 MR. DEAKIN: The victim also handed over to
5 the police the \$50 the defendant had given him. The
6 officers advised the defendant of his warnings under
7 Miranda, and he denied any wrongdoing.

8 At the police station detectives again
9 Mirandized the defendant and questioned him again.
10 The defendant told the police that the victim was
11 named Sean, had a 19-year-old brother and lives on
12 Westville Street, all of which were false.

13 The defendant said that the victim" --

14 MR. EGBERT: Let me stop you there.

15 (Videotape stopped)

16 BY MR. EGBERT:

17 Q. Mr. Deakin made the statement there that
18 the defendant had indicated a number of things,
19 including that he was familiar with the victim's
20 address. Do you recall that statement?

21 A. Yes.

22 Q. And he indicated to you, in open court,
23 that each one of the defendant's statements made to
24 the police were false, correct?

1 A. Correct.
2 Q. When he said that to you, did you know he
3 was not speaking the truth?
4 A. I certainly did.
5 Q. How did you know that?
6 A. Because I had read the statement, the
7 police report, the statement that the defendant had
8 given the police.
9 Q. And you also knew, from the discovery in
10 the case, that he was correct concerning the address
11 of the victim; is that right?
12 A. Correct.
13 Q. And so when Mr. Deakin told you that all of
14 the defendant's statements were untrue, including
15 one which would indicate he knew where the defendant
16 lived, at the time he made that statement you knew
17 it was not a true statement, correct?
18 A. Correct.
19 Q. Did you stop him at that time?
20 A. No.
21 Q. Did you chastise him at that time?
22 A. No.
23 Q. Were you concerned?
24 A. Yes.

1 Q. And in fact -- I want to show you this
2 document. Do you know what that is?
3 A. Yes. This was filed about a month after
4 the plea by the Commonwealth.
5 Q. And what is it entitled?
6 A. It is called "Commonwealth's Notice of
7 Disclosure."
8 Q. In your history in the Superior Court, have
9 you ever seen the Commonwealth file a notice of
10 disclosure like this after a plea is consummated?
11 A. I have never in my 14 years seen the
12 Commonwealth do something like that.
13 Q. And does this document indicate, some one
14 month after the plea, that in fact the Commonwealth
15 had misrepresented the evidence in the case?
16 MR. WARE: Object to that.
17 A. Correct.
18 MR. WARE: Nothing says the Commonwealth
19 misrepresented anything.
20 HEARING OFFICER DAHER: Sustained.
21 Q. Did it indicate in this disclosure that the
22 Commonwealth's statement of the facts in the case
23 were erroneous?
24 A. Yes.

1 Q. And did it indicate it particularly with
2 the statement --

3 HEARING OFFICER DAHER: Wait a minute. Are
4 you objecting?

5 MR. WARE: Yes, I'm objecting. The
6 document speaks for itself. It says there was an
7 inadvertent misstatement by the prosecutor.

8 HEARING OFFICER DAHER: Overruled. You can
9 have it. Go ahead.

10 A. Yes. The document indicates that Mr.
11 Deakin inadvertently included this fact among those
12 described as false, the fact being that the
13 defendant knew where this victim lived.

14 MR. EGBERT: And, Your Honor, I would offer
15 this "Commonwealth's Notice of Disclosure."

16 HEARING OFFICER DAHER: Any objections?

17 MR. WARE: No, Your Honor.

18 THE CLERK: This will be Exhibit Q.

19 (Document marked as Exhibit Q
20 moved into evidence)

21 BY MR. EGBERT:

22 Q. Based on your knowledge of the case at the
23 time, when you heard those statements being made,
24 did you believe -- did you have an opinion as to

1 whether or not Mr. Deakin was being candid with you?

2 A. I did not believe he was being candid, no.

3 (Videotape playing)

4 MR. DEAKIN: The defendant said that the
5 victim had volunteered to help find Mike and James,
6 two other boys. The defendant said the two drove
7 around looking for the teenagers without success.
8 The defendant told police that he had driven to 50
9 Park Street and parked the car there which is where
10 the police found him.

11 There, according to the defendant, the pair
12 sat and discussed sexual things that the defendant
13 had done. According to the defendant, the victim
14 asked the defendant for oral sex. The defendant
15 then asked the victim to show the defendant his
16 penis. It was then that the police arrived,
17 according to the defendant.

18 The defendant conceded in the interview
19 that the defendant's pants were unbuttoned in his
20 words "a little bit". When asked if the two had had
21 physical contact, the defendant replied that they
22 had only kissed. When asked about oral sex, the
23 defendant answered that the 12-year-old victim had
24 asked about the defendant's genitalia, and it was

1 then that the defendant jokingly asked whether the
2 victim wanted to perform oral sex on the defendant
3 who applied a common vulgarity to refer to female
4 genitalia.

5 When asked by detectives to tell them what
6 had really happened, the defendant replied that he
7 thought the victim was 14 years old and that he was
8 probably going to perform oral sex on the victim.

9 That in summary would be the facts the
10 Commonwealth would prove if the matter went to
11 trial.

12 THE COURT: Okay. Does the defendant agree
13 with all of those facts?

14 DEFENDANT: I mean, I really -- to be
15 honest, I don't.

16 (Videotape stopped)

17 BY MR. EGBERT:

18 Q. Now, you have been a Superior Court judge
19 for how many years?

20 A. Well, since 1993, so, what? It's 11 years,
21 12 years -- no; wait. No. I'm sorry. 19 --

22 Q. You're a judge; not a mathematician.

23 A. I'm sorry. I'm thinking of the entire
24 time. Eight, nine years.

1 Q. And during plea colloquies, does it
2 sometimes occur that the defendants take issue with
3 certain facts?

4 A. Yes.

5 Q. And can that be a problem?

6 A. It can be a problem if it goes to an
7 essential element of the crime.

8 Q. And at this point in time you hear the
9 defendant talking to his counsel kind of in a stage
10 whisper; is that correct?

11 A. Correct.

12 (Videotape playing)

13 (Discussion off the record)

14 MS. GOLDBACH: Your Honor, my client does
15 not agree that her --

16 THE COURT: Excuse me. You've got to speak
17 up. I can't hear you when you talk.

18 MS. GOLDBACH: My client does not agree
19 that her pants were down at the time nor does she
20 agree with that part of the Commonwealth's statement
21 that indicated that she said that she drove around
22 as described by Mr. Deakin.

23 DEFENDANT: (Inaudible)

24 THE COURT: And what else?

1 MS. GOLDBACH: And the \$50, that she gave
2 her \$50 to be quiet.
3 THE COURT: Okay. Other than that, do you
4 agree with all the other facts?
5 DEFENDANT: Yes.
6 THE COURT: Okay.
7 (Videotape stopped)
8 BY MR. EGBERT:
9 Q. Now, you hear the defense lawyer in a stage
10 whisper going to the defendant, "Yes, yes."
11 MR. WARE: Objection.
12 Q. Was the defendant in this case reluctant in
13 your opinion?
14 MR. WARE: Objection.
15 HEARING OFFICER DAHER: What is the
16 objection?
17 MR. WARE: Your Honor, we're now getting
18 into the minds of the victim and the defense
19 counsel. Counsel is characterizing it as a stage
20 whisper.
21 HEARING OFFICER DAHER: Sustained.
22 MR. EGBERT: Judge, what I would like to
23 get at is all of her observations and what she
24 concluded from them to show her state of mind as

1 she's on the bench and what she's dealing with.

2 HEARING OFFICER DAHER: The objection
3 remains sustained.

4 (Videotape playing)

5 THE COURT: For the record, I find that
6 there is a factual basis for the defendant's pleas
7 of guilty. I also find that the defendant is
8 pleading knowingly, voluntarily, intelligently, and
9 with full knowledge of its consequences. The Court
10 accepts the defendant's plea of guilty.

11 I'll hear you on sentencing.

12 MR. DEAKIN: Your Honor, I wonder if
13 defense counsel and the Commonwealth might approach
14 briefly as to one specific issue on sentencing for
15 the Court to review some matters before I put them
16 on the record?

17 THE COURT: Okay.

18 COURT REPORTER: Do you want this off the
19 record, Your Honor?

20 THE COURT: No.

21 (Videotape stopped)

22 BY MR. EGBERT:

23 Q. I want to stop you there, and that's not on
24 film. There was a bench conference.

1 A. Correct.

2 Q. And it related to the question of victim
3 impact statements?

4 A. Right. I believe they wanted to delete a
5 sentence in the victim impact statement.

6 Q. Could you turn to Exhibit 22 in the book.

7 A. Yes.

8 Q. And can you find the section dealing with
9 this bench conference?

10 A. Yes. It is on Page 19.

11 Q. Now -- so this occurred outside the cameras
12 and outside the presence of the public, so to speak;
13 is that right?

14 A. Correct.

15 Q. And in that Mr. Deakin tells you that or
16 discusses with you the victim impact statement,
17 correct?

18 A. Correct.

19 Q. And during that conversation does he ever
20 indicate to you at the bench that he wants some
21 different lawyer to now participate orally in the
22 sentencing proceeding?

23 A. No, there is no mention of anybody else
24 dealing with that victim impact statement at that

1 side-bar conference.

2 Q. And in fact does he indicate in there,
3 "As to the mother's statement, I would propose to
4 read it in its entirety" on Page 20?

5 A. Correct. I'm not -- I'm not referring to
6 that. Where is that? I was looking at the actual
7 transcript of it.

8 Q. So am I.

9 A. What pages?

10 Q. Let me just make sure you've got the same
11 exhibit.

12 A. It's this, the transcript of the change of
13 plea. I put them on the record.

14 Q. Page 20.

15 A. Okay. Yes.

16 Q. Does he indicate to you as to the mother's
17 statement, "I propose to read it in its entirety"?

18 A. Correct.

19 Q. And then he tells about what he's going to
20 do with the grandmother's statement, right?

21 A. Correct.

22 Q. At any point in time during that conference
23 does he say to you that he would propose that Ms.
24 Joseph read the statement?

1 A. No.

2 Q. Or ask permission for Ms. Joseph to read
3 the statement?

4 A. No. That was never mentioned to me.

5 Q. Did he at this time seek to have the
6 Court's permission to have another lawyer -- for him
7 to step down and have another lawyer handle a
8 portion of that sentencing proceeding?

9 A. No.

10 Q. In your experience as a Superior Court
11 judge, if a lawyer wanted a second-chair lawyer to
12 take part in a proceeding at a particular time, what
13 should they do?

14 A. They should ask leave of the Court to have
15 another lawyer speak.

16 Q. And give you some notice of their intent?

17 A. Correct.

18 Q. Was anything like that done in this case?

19 A. No.

20 Q. And so, then, if you look at the transcript
21 -- and it really doesn't show it -- but at some
22 point in time did Ms. Joseph rise?

23 A. I believe when they were about to read the
24 victim impact statement, Ms. Joseph began to get up.

1 Q. And what did you do?

2 A. I just looked at Mr. Deakin, and I said,
3 "You'll proceed with it." Something to that effect.

4 Q. Go to Page 25. And you see towards the
5 bottom it says, "And I would just ask that the Court
6 hear the victim impact statement"?

7 A. Yes.

8 Q. Who made that statement?

9 A. Mr. Deakin.

10 Q. And then did Ms. Joseph rise?

11 A. I believe that's when she began to rise,
12 yes.

13 Q. And you looked in their direction -- Mr.
14 Deakin's direction and said, "Sure. And would you
15 read them, please."

16 A. Correct.

17 Q. And why did you do that?

18 A. Because I didn't believe -- I didn't
19 understand that Ms. Joseph had any role in this case
20 any more. And she -- I had not been asked to allow
21 her to make any presentation at all in this matter.

22 Q. And Mr. Deakin then went on with the
23 presentation?

24 A. He did.

1 Q. Did you hinder that presentation in any
2 way?
3 A. Not at all.
4 Q. By the way, with regard to a victim impact
5 statement, that's simply a matter of reading,
6 correct?
7 A. That's correct.
8 Q. And the lawyer doesn't do advocating in
9 that regard, correct?
10 A. No.
11 Q. And it doesn't take any special skill, does
12 it?
13 A. None.
14 Q. It is just a matter of reading it in open
15 court?
16 A. Right. Anybody could do that.
17 (Videotape playing)
18 MR. DEAKIN: Thank you, Your Honor. As to
19 sentencing, the Commonwealth's recommendation is as
20 follows. As to count 002, which charges assault
21 with intent to rape a child, the Commonwealth would
22 recommend a sentence that is not less than eight nor
23 more than ten years in state prison. As to count
24 001, which alleges kidnapping, the Commonwealth

1 would recommend a period of probation of ten years
2 from and after the committed portion of the
3 recommended sentence. As to counts 003, 004 and
4 005, alleging indecent assault and battery on a
5 child, assault and battery, and assault and battery
6 by means of a dangerous weapon, the Commonwealth
7 would recommend that guilty findings be entered and
8 that these matters be placed on file.

9 Your Honor, I should note, as we've
10 discussed very briefly at the side bar, that the
11 victim's mother and grandmother are present in court
12 and have asked the Commonwealth to read impact
13 statements that they've prepared to the Court for
14 its consideration in sentencing. I would ask the
15 Court to consider those, obviously, as part of the
16 Commonwealth's sentencing presentation.

17 The reason for the Commonwealth's sentence,
18 to be brief, Your Honor, is the quite serious nature
19 of the facts to which the defendant has now
20 admitted. The Commonwealth believes that those
21 facts speak for themselves in terms of the
22 seriousness.

23 The Commonwealth in formulating the
24 sentencing recommendation has consulted the

1 sentencing guidelines grid and found that the
2 assault with intent to rape a child being a category
3 7 offense carries a recommended sentence of
4 incarceration of not less than five nor more than
5 seven and a half years in state prison. And
6 kidnapping, which I frankly, Your Honor, had some
7 difficulty determining whether it was a 6 or a
8 category 7, but either category is recommending a
9 sentence of 3-1/2 to 5 or 5 to 7-1/2, depending on
10 which category it's properly in.

11 And the Commonwealth would note that in
12 both cases, although the defendant is a category A
13 in terms of record, that is no or a quite minor
14 record, it recommends incarceration and not
15 alternative sentencing.

16 The Commonwealth recommends that as to the
17 001 charge and kidnapping and any probationary
18 sentence that the Court deemed fit to impose that
19 the following conditions of probation be imposed.
20 First, an order to have no contact whatsoever,
21 directly or indirectly, with the victim in this case
22 or any members of his immediate family. Second,
23 that the defendant submit himself to a sex offender
24 evaluation by an evaluator determined by the Suffolk

1 County Probation Department and enter and
2 successfully complete whatever treatment it deemed
3 necessary as a result of that evaluation.
4 THE COURT: Do you know that he has already
5 been evaluated?
6 MR. DEAKIN: I'm aware that there is a
7 psychological profile for he Court that has been
8 prepared.
9 (Videotape stopped)
10 BY MR. EGBERT:
11 Q. What are you both talking about there?
12 MR. WARE: Objection to what is he talking
13 about.
14 Q. What are you talking about when you say,
15 "Do you know that he has already been evaluated"?
16 A. Yes, I'm referring to the only document in
17 the case that constitutes an evaluation of the
18 defendant.
19 Q. What was that?
20 A. That was the Katz report that was presented
21 to me in the August 1st lobby conference.
22 Q. And when he said, "I'm aware that there is
23 a psychological profile for the Court that has been
24 prepared," do you know of any other psychological

1 profile that had been prepared for the Court in this
2 case other than the Katz report?

3 A. That's the only one that had been prepared.
4 (Videotape playing)

5 MR. DEAKIN: If that report satisfied the
6 Probation Department as a sex offender evaluation,
7 the Commonwealth would be satisfied with that
8 report. I would ask the Court to defer to Probation
9 on whether that's a sufficient sex offender
10 evaluation.

11 That the defendant be ordered to have no
12 contact whatsoever with minor children, that the
13 defendant accept no employment or volunteer work
14 involving contact with children, that the defendant
15 be ordered to have no residence with minor children,
16 excepting his own siblings, if he has any. I don't
17 know, frankly, whether he has any. That his
18 compliance with the sex offender registry provision
19 be made a condition of his probation as well as an
20 independent legal requirement. And that his
21 requirement, whatever requirement is legally in
22 place at the time of his probation, to provide a DNA
23 sample also be made a condition of probation. And
24 with the exception of the victim impact statements,

1 that's the Commonwealth's recommendation.
2 THE COURT: And would the Commonwealth
3 request that this defendant be sent to a male prison
4 or female prison?
5 (Videotape stopped)
6 BY MR. EGBERT:
7 Q. With regard to that -- "would the
8 Commonwealth request that this defendant be
9 sentenced to a male prison or female prison" -- had
10 that been an issue that had been discussed between
11 you and counsel at prior proceedings?
12 A. Yes. We had discussed that during the
13 lobby conference. It had been brought to my
14 attention that while the defendant had been held
15 awaiting trial for the period of time until the bail
16 was reduced, in the Suffolk County jail, this
17 defendant had to be placed into protective custody,
18 because someone with the defendant's characteristics
19 would present a risk in the general population.
20 Q. And so that discussion occurred between you
21 and counsel on when?
22 A. On August 1st.
23 Q. Now, when you asked that question of Mr.
24 Deakin, I want you to listen to his response, and my

1 question to you is going to be whether or not it is
2 clear to you that Mr. Deakin was -- had prepared for
3 that question during the course of these
4 proceedings.

5 MR. WARE: I object to that question.

6 HEARING OFFICER DAHER: One second. What
7 is that? What is the objection predicated on?

8 MR. WARE: I don't -- if another question
9 is not going to be put, the question that has been
10 put to the witness as I understand it is what Mr.
11 Deakin did. The Judge wouldn't have any idea about
12 that.

13 HEARING OFFICER DAHER: Mr. Egbert.

14 MR. EGBERT: Well, let's let her listen to
15 the answer and I'll ask the question.

16 HEARING OFFICER DAHER: Go ahead.

17 (Videotape playing)

18 MR. DEAKIN: The Commonwealth is obviously
19 sensitive to and aware of the concerns for a
20 defendant who is trans-gender. The Commonwealth, in
21 making informal inquiry to the Commissioner of
22 Corrections, has determined that there are
23 protective custody arrangements available in all
24 different levels of security to accommodate someone

1 who cannot be safely placed with the general
2 population.

3 THE COURT: And protective custody means
4 they're locked up all day?

5 MR. DEAKIN: As I understand it, Your
6 Honor, that's what protective custody means in a
7 maximum security facility.

8 THE COURT: Right.

9 MR. DEAKIN: I also understand that the
10 likelihood of this defendant spending any time,
11 other than a night for classification, in a maximum
12 security facility is close to zero.

13 I understand, Your Honor, that protective
14 custody in a medium security prison, which is the
15 likely destination for this defendant, does not mean
16 essentially 23-hour lock down. It means residence
17 in a segment of the prison population that is deemed
18 non-violent, non-predatory. So that I think the
19 likelihood that this defendant would spend more than
20 one night in 23-hour protective custody lock down is
21 quite slim. But the Commonwealth is aware,
22 obviously, that that's within the discretion of the
23 Commissioner of Corrections, and while we are
24 sensitive to the problems that this presents for

1 everyone concerned, we also feel that the needs of
2 public safety and law enforcement justify a
3 significant incarcerative sentence.

4 (Videotape stopped)

5 BY MR. EGBERT:

6 Q. Let me stop there. From the nature of Mr.
7 Deakin's remarks to you, did it appear to you that
8 he had prepared in advance, as a lawyer, for this
9 question to come up at the hearing?

10 A. It was clear that he had made inquiry, and
11 it is something that the DA's office would have to
12 bring to the attention of the Department of
13 Corrections if they're seeking to place someone with
14 either some disability, some issues such as, you
15 know, the defendant in this case. They have to
16 bring that to the attention of the Department of
17 Corrections to make appropriate arrangements.

18 Q. So is it fair to say that this issue was
19 not a surprise to you?

20 A. No. I don't think it was a surprise to
21 anybody.

22 (Videotape playing)

23 MR. DEAKIN: Your Honor, at first reading
24 the victim impact statement the Ms. Diora Jones, the

1 grandmother of the victim, dated August 4th, 2000.
2 "To the Honorable Judge Lopez, As a mother
3 of seven children that I raised in Harbor Point
4 Complex, and a grandmother of 18 grandchildren, I
5 have never come across anything like this incident
6 that took place concerning my grandson, Ramon
7 Suarez. I don't know how this person was caught so
8 fast, but I said only by the grace of God and quick
9 detective work." Maybe this is -- excuse me. "It
10 has really kept the family closer as for all the
11 grands to make sure that this type of incident
12 doesn't happen again.

13 "This man has done a job as far as
14 emotionally and physically and mentally. Ramon's
15 marks at school have dropped dramatically after
16 this, but, thank God, he was able to maintain and
17 get promoted. I am hoping that all concerned
18 parties will make sure this person is prosecuted to
19 the full extent of the law.

20 "Sincerely, Mrs. Diora Jones, grandmother."

21 Reading from the statement of Ms. Diora J.
22 Jones, mother of the victim, also dated August 4th,
23 2000.

24 "Judge Lopez, As a single parent trying to

1 raise my children that I am decidedly proud of, I
2 try to keep them involved in both extra-school
3 programs and also after-school programs.

4 "When I was called on the phone and told to
5 come to the hospital, that something had happened to
6 my son, Ramon Suarez, it just tore me apart. As a
7 mother, I just didn't know which way to turn. I
8 just prayed and called my mother who is 57 years old
9 and has blood pressure problems. It has taken a
10 terrific impact on my life as well as Ramon. It was
11 a while before he would socialize and talk a little
12 bit about what happened. At the time he was
13 involved in a swimming competition. It is one of
14 his after-school programs.

15 "Ramon has been in counseling and therapy
16 since this terrible incident took place and will be
17 continuing for how long we don't know. Depends on
18 the child. As the mother of Ramon my medication has
19 been increased due to depression and stress to help
20 me overcome. Every time he goes out, I am a pack of
21 nerves until he returns. I got Ramon involved in
22 the Boston Indian Council Day Camp and also three
23 overnight camps for the summer.

24 "When he returns home, it will almost be

1 time for school. Having him away most of the summer
2 I thought it would take a lot off his mind in
3 regards to what happened to him. I hope this person
4 involved can be punished and understand this type of
5 behavior is not accepted.

6 "I know as a Judge you understand my
7 feelings, although there might be other things that
8 I am concerned about. But to each his own in life.
9 I want to say thank you for your concern and
10 interest in this case.

11 "Sincerely, Ms. Diora J. Jones, mother."

12 THE COURT: Okay. Let me just ask you
13 something. How long have you been in charge of the
14 sexual assault unit?

15 MR. DEAKIN: Twenty-one months, Your Honor.

16 THE COURT: Okay. How many of these sex
17 cases have you seen?

18 MR. DEAKIN: I'm not sure that I can answer
19 with an exact figure.

20 THE COURT: A ballpark figure.

21 MR. DEAKIN: We see approximately 500 such
22 investigations.

23 THE COURT: No, the ones that get indicted.

24 MR. DEAKIN: I think, Your Honor, and I'm

1 not prepared with the figures, but I expect that we
2 indict close to a hundred cases a year.

3 THE COURT: Okay. And of those hundred
4 cases, in terms of the facts of this case, on a
5 scale of 1 to 10, where would you put this case?
6 (Videotape stopped)

7 BY MR. EGBERT:

8 Q. When you asked that question of the
9 prosecutor, your sentence had already been decided,
10 correct?

11 A. Correct.

12 Q. He had just read the impact statements and
13 you reached these points in the proceedings,
14 correct?

15 A. Correct.

16 Q. What was your purpose in asking that
17 question?

18 A. To give some perspective to the
19 proceedings, to the DA, to the public that was going
20 to hear about this, that in the spectrum -- to put
21 this case in a rating amongst the kinds of child
22 abuse cases that we see in the court system on a
23 regular basis.

24 Q. And did you expect at that time for him to

1 advocate for the sentence or to address you with
2 candor with regard to your question?

3 A. I expected him to address me with candor,
4 knowing that, you know, a sentence is determined
5 taking many things into consideration.

6 Q. Now, thereafter -- and we'll play it all
7 through in a moment -- but thereafter, there's the
8 statement that Mr. Ware went over with you where he
9 says, "Depends -- I would say to Your Honor that
10 depends on -- there are several axes that one can
11 evaluate a case on.

12 "In terms of the lack of a relationship
13 between the perpetrator and the victim, I would say
14 this is a 10," and he goes on to discuss that and
15 the like.

16 A. Correct.

17 Q. And we'll get to the rest of it in a
18 moment.

19 A. Yes.

20 Q. If you can -- did you look at this case --
21 from 1 to 10 would make it the most serious of cases
22 that come before your court at any time, correct?

23 A. A 10 would.

24 Q. And --

1 A. Yes.

2 Q. And in child abuse cases or child sexual
3 assault cases, is it fair to say that many of those
4 cases come before you where a child has suffered
5 severe physical injury?

6 A. Yes. Where we have had aggravated child
7 rape situations where there is serious physical,
8 psychological injury, sometimes with the use of a
9 gun.

10 Q. Well -- and in this case -- in this case,
11 were you made aware through anyone or any fact that
12 there was any physical injury to the victim in this
13 case?

14 A. No.

15 Q. So is that one factor that goes into an
16 evaluation of the seriousness of the case in its
17 spectrum, so to speak?

18 A. That's correct. Every time we evaluate a
19 case for purposes of sentencing, we consider injury,
20 the nature of the injury to the victim.

21 Q. And with regard to this particular case --
22 strike that. With regard to sexual acts, did this
23 involve a completed sexual act of penetration?

24 A. No. The indictment concerned an attempted

1 rape.

2 Q. And had there been any act of penetration
3 or completed act of rape?

4 A. No.

5 Q. And would you consider it more serious,
6 generally, when a case involved completed sexual
7 acts?

8 A. Right. We're called upon all the time as
9 judges to draw those distinctions amongst cases, and
10 the highest and the most serious cases would be
11 those where, in fact, some sort of aggravated rape
12 has occurred.

13 Q. And when Mr. Deakin responded to you that
14 it was a 10 in that regard --

15 MR. WARE: Objection. That's not what Mr.
16 Deakin says.

17 MR. EGBERT: Well, it's right in front of
18 her.

19 Q. When he responded to you -- and I'll use
20 the exact words -- "In terms of the lack of a
21 relationship between the perpetrator and the victim,
22 I would say this is a 10, because what is relatively
23 rare," and he goes on to speak; is that right?

24 A. Yes.

1 Q. Did he give you any other numerical rating
2 during that discussion?
3 A. That's the only numerical rating that he
4 put forth during his entire presentation.
5 Q. Did you -- did you consider this case to be
6 a 10?
7 A. I did not consider this case to be a 10.
8 Q. Did you consider it to be serious?
9 A. It's a serious case, definitely.
10 Q. Did you feel at the time that Mr. Deakin
11 was being candid with you?
12 MR. WARE: Objection as to how she felt.
13 HEARING OFFICER DAHER: What is that again?
14 MR. WARE: Objection to how the Judge felt.
15 HEARING OFFICER DAHER: I'll hear you, Mr.
16 Egbert.
17 MR. EGBERT: Well, Your Honor, she's going
18 to have to explain the words she uses, and the words
19 she uses are based upon --
20 HEARING OFFICER DAHER: I think he's right.
21 Sustained.
22 Q. Did you shortly thereafter tell Mr. Deakin
23 you thought he was disingenuous on the record?
24 A. I did, unfortunately, and regrettably.

1 That's what led to the infamous clip in this case.
2 Q. What did "disingenuous" mean to you?
3 A. That he wasn't being candid with me.
4 Q. That he wasn't --
5 A. Genuine. Being honest with me.
6 Q. In response to your question?
7 A. Correct.
8 Q. By the way -- we're going to play it in a
9 minute -- do you remember the sequence of events
10 that then occurred?
11 A. I don't understand your question.
12 Q. After you and he had a colloquy, you said
13 to him words to the effect that I think you're being
14 disingenuous; is that right?
15 A. I did.
16 Q. Do you remember what he then said?
17 A. I don't remember -- I think I said "I'll
18 hear from the defense now."
19 Q. I want you to turn to Page 31 of the
20 transcript.
21 A. Yes.
22 Q. Do you have it before you?
23 A. Yes.
24 Q. And --

1 A. Oh, I see.

2 Q. You said, "Okay? And so I really think
3 it's disingenuous for you to tell me that this is a
4 10," right?

5 A. Yes.

6 Q. So you were telling him that you thought --
7 you thought -- your opinion was that it was less
8 than candid to treat this case as a 10, based on all
9 the factors that you, as a Superior Court judge, had
10 seen over the many years.

11 A. Correct.

12 Q. And then you said, "I'll hear from the
13 defense attorney."

14 A. That's right.

15 Q. Now, when you say, "I'll hear from the
16 defense attorney," what does that mean?

17 A. That the Commonwealth has completed not
18 only its factual presentation, but its sentencing
19 recommendation. I had -- in fact Mr. Deakin had
20 fully answered that unfortunate and regrettable
21 question, and so now it was the defense's turn to
22 speak.

23 Q. And did Mr. -- what -- customarily what
24 happens when you as a judge say, "I'll hear from the

1 defense"? What happens in the courtroom?
2 A. The lawyer that had been previously
3 addressing the Court sits down, and the other side
4 begins addressing the Court.
5 Q. And did Mr. Deakin sit down?
6 A. He did not.
7 Q. And did you then tell him to sit down?
8 A. I did.
9 Q. And did he sit down?
10 A. He did not.
11 Q. And do you consider that -- strike that.
12 What do you consider that to be?
13 A. He was in clear violation of a court order.
14 Contumacious conduct.
15 Q. Now, having all this in mind -- and we're
16 going to see it momentarily -- how would you
17 describe your conduct at that moment?
18 A. When I told him that I thought -- when I
19 told him to sit down?
20 Q. In the manner in which you said it.
21 A. Well, I was probably -- allowed my emotions
22 to get the better of me in that situation.
23 Q. Did you raise your voice?
24 A. I did.

1 Q. Did you act appropriately at that moment?

2 A. No. I should have been able to exercise
3 more control in the circumstances.

4 Q. Have you -- at any time in the past in your
5 judicial career has there been a complaint filed
6 against you for yelling at any lawyer?

7 A. No. I have never had such a complaint
8 filed.

9 Q. Anywhere?

10 A. Never.

11 Q. Let's watch the tape.

12 (Videotape playing)

13 MR. DEAKIN: Depends -- I would say to
14 Your Honor that depends on -- there are several axes
15 that one can evaluate a case on.

16 In terms of the lack of a relationship
17 between the perpetrator and the victim, I would say
18 this is a 10, because what is relatively rare in
19 fact but perhaps most frightening to the general
20 population is the case of a person without a
21 relationship to a child who abducts the child off
22 the street, takes it to a secret location, and
23 sexually assaults the child. In terms of the age of
24 the child, I would say it's in the quite serious

1 range as well. The child was twelve years old at
2 the time.

3 In terms of the completed sexual assault
4 that the child has disclosed, I would say the that
5 the facts are in the moderately serious range. I
6 would also note, however, Your Honor, that the
7 assault was interrupted by police who came to a --
8 just happened upon this on routine patrol. And as a
9 prosecutor who has prosecuted a number of these
10 cases, I would remain concerned that this assault
11 might have been quite a bit worse had they not
12 quite -- had they not quite fortuitously come upon
13 what they came upon.

14 THE COURT: Well, let me just say that I've
15 been a Judge now since 1988, and I've seen many of
16 these cases. And in the scale of cases that charge
17 sexual assault of children, this is on a very level.
18 Okay? And so I really think it's disingenuous for
19 you to tell me that this is a 10.

20 I'll hear from the defense attorney.

21 MR. DEAKIN: Your Honor, if I may --

22 THE COURT: No, you may not. You may sit
23 down now.

24 MR. DEAKIN: I --

1 THE COURT: You may sit down now or I'll
2 get a court officer to make you sit down. And I'll
3 hear from the defense attorney.

4 MR. DEAKIN: I object to being charged with
5 being disingenuous.

6 THE COURT: I find it was disingenuous, and
7 I know better than that. Go ahead.

8 MS. GOLDBACH: Your Honor, on behalf of my
9 client, you know my client's background, you know
10 what kind of work and things that my client has done
11 since she was charged in this case. And for reasons
12 of my client's privacy, I'm not going to go int
13 those details at this time. But I'd ask Your Honor
14 to sentence my client as you indicated earlier this
15 morning.

16 THE COURT: Okay. Let's sentence her as I
17 indicated. Five years probation, one year of that
18 on electronic monitoring, counselling, stay away
19 from children under the age of 16.

20 THE CLERK: DNA sample?

21 THE COURT: Yes.

22 THE CLERK: As to all indictments,
23 concurrent, Your Honor.

24 MR. DEAKIN: Your Honor, if I may --

1 THE COURT: I don't want to hear from you
2 anymore. Do you understand?
3 MR. DEAKIN: Your Honor, if I may be heard.
4 THE COURT: No. You will not be heard. I
5 said I've heard enough.
6 MR. DEAKIN: I'm only inquiring as to one
7 of the conditions of the electronic monitoring.
8 It's not clear to me that the Probation Department
9 will know the conditions of the electronic
10 monitoring, that is, what is being monitored.
11 I think -- and I don't want to speak for
12 Probation -- they can certainly do it themselves --
13 I think there are requirements that the Court must
14 impose to say what is being monitored. There's a
15 range of possible options.
16 THE COURT: At this point I don't believe
17 the defendant is working?
18 MS. GOLDBACH: No, Your Honor, but was
19 about to start college this fall.
20 THE COURT: Okay.
21 MS. GOLDBACH: Here in Boston.
22 THE COURT: Okay. So the conditions will
23 be that she is to be at home except to attend her
24 counseling sessions, and she will be allowed to go

1 to college.

2 MS. GOLDBACH: Your Honor, additionally --
3 and this was part of her bail condition -- she
4 attends church three to four evenings a week, and
5 she had a curfew as part of her bail conditions, but
6 that curfew had been extended for those evenings
7 that she attended the church. Many members of her
8 family are involved in that church. Her mother
9 attends that church.

10 THE COURT: Okay. So you will make
11 arrangements so that for activities that are of an
12 educational or medical or religious basis, that
13 those will be allowed within the electronic
14 monitoring. Okay?

15 MR. DEAKIN: Your Honor, will the curfew
16 still be imposed?

17 THE COURT: What's the curfew now?

18 MS. GOLDBACH: 10:30 on the nights that my
19 client attended church and 9:30 on other nights.

20 THE COURT: Okay. Those same curfews will
21 apply.

22 MS. GOLDBACH: Your Honor, I'd ask you to
23 retain jurisdiction of this case.

24 THE COURT: And I will.

1 MS. GOLDBACH: Thank you.
2 THE COURT: It's been assigned to me.
3 MS. GOLDBACH: Thank you:
4 THE CLERK: May the sentence be imposed,
5 Your Honor?
6 THE COURT: Yes.
7 THE CLERK: Charles Horton, would you
8 please rise.
9 (Defendant rises)
10 THE CLERK: As to Suffolk Superior Court
11 Criminal Indictments 2000-10029-001 through and
12 inclusive of 005, it is ordered by the Court this
13 day that you be placed on probation for a period of
14 five years with the following conditions. The first
15 one year of your probation is to be served on the
16 bracelet program with the following restrictions:
17 Except for educational, medical, or religious
18 services, you are to be in your house by 9:30 each
19 evening. It is ordered by the Court that you obtain
20 counseling, that you have no contact with children
21 under the age of 16, that you provide the
22 Commonwealth with a DNA sample, and that you
23 register as a sex offender.
24 Do you understand and so recognize those

1 conditions?

2 DEFENDANT: (No verbal response)

3 MS. GOLDBACH: Your Honor, it's 10:30 on
4 the night that she attends church. Wednesday,
5 Friday and Saturday are her nights.

6 THE CLERK: Counsel, that can be worked out
7 with the Probation Department.

8 MS. GOLDBACH: Thank you.

9 THE COURT: Right.

10 MR. DEAKIN: I apologize to the Court. I
11 may have been writing. I didn't hear if there was a
12 no contact order with the victim that was read into
13 the record. Did the Clerk read it? I may have
14 missed, and I apologize if that's the case.

15 THE COURT: Did you read a no contact order
16 with the victim?

17 THE CLERK: No children under 16, Your
18 Honor.

19 THE COURT: Children under 16. Doesn't
20 that apply to the victim?

21 MR. DEAKIN: Until he turns 16, but I would
22 ask that the entire period of the probation that he
23 be ordered -- that the defendant be ordered to have
24 no contact with the victim --

1 THE COURT: Fine.
2 MR. DEAKIN: -- or members of his immediate
3 family.
4 THE CLERK: Charles Horton, you're also
5 ordered to have no contact with any alleged victim
6 in this case. Do you understand and so recognize?
7 DEFENDANT: Yes.
8 (Videotape stopped)
9 BY MR. EGBERT:
10 Q. Judge Lopez, would you agree with me that
11 you lost your temper?
12 A. I did.
13 Q. Do you regret that?
14 A. I do, very much so.
15 Q. And after that exchange, Mr. Deakin -- and
16 after your sentence was imposed, Mr. Deakin sought
17 to rise and speak to you again; is that right?
18 A. Correct.
19 Q. And did you think he was going to reargue
20 the disingenuous remark?
21 A. Well, I -- really, I thought he was going
22 to try to address me again. We had left it on a bad
23 note, so my initial instinct was that he sought to
24 address the Court again on the disingenuous comment.

1 Q. And once he made clear that he wished to
2 address you on another matter, what did you do?

3 A. I allowed him to present -- make his
4 presentation. I in fact implemented some of his
5 requests.

6 Q. And in fact after -- with regard to his
7 requests after that, did you grant a majority of
8 them or a good deal of them?

9 A. I think so, yes.

10 Q. And were you biased against him when you
11 granted those requests?

12 A. No.

13 Q. Were you biased against the Commonwealth in
14 any way?

15 A. No, I wasn't.

16 Q. You have said a number of times that you
17 thought this was -- your words were "regrettable."

18 A. Yes.

19 Q. And yet -- I'd like to get into your
20 thoughts for a moment. What were the reasons that
21 you thought it was disingenuous, based upon this
22 record, to consider this case a 10?

23 A. Well, there were a number of things that
24 occurred --

1 MR. WARE: Objection, Your Honor.
2 HEARING OFFICER DAHER: I'm going to allow
3 it. Overruled. Go ahead.
4 A. Keeping in mind that I knew that Mr. Deakin
5 had misrepresented to the Court a fairly important
6 fact; that is, that contrary to his representation,
7 the defendant did indeed know the address of the
8 victim. And so when he began to evaluate the case
9 as a 10, he then used the very fact that he had
10 misrepresented to put this case -- when he knew that
11 was a disputed issue at best, he then proceeded to
12 evaluate this case as a 10, using the very
13 misrepresented fact.
14 The other thing is that I --
15 MR. WARE: Your Honor, I'm going to object
16 and ask that it be struck. It mischaracterizes the
17 district attorney's statement, which is, it's a 10
18 only in the sense that these were strangers.
19 MR. EGBERT: It is her understanding at the
20 time.
21 MR. WARE: Why don't we let the witness
22 talk.
23 HEARING OFFICER DAHER: Why don't we
24 address that issue.

1 MR. EGBERT: It is her understanding at the
2 time and her reasoning at the time which is at
3 issue, and her perception.

4 MR. WARE: No, that's not true. Her
5 reasoning is not at issue. The conduct is at issue.

6 MR. EGBERT: Well, thank you very much, Mr.
7 Ware. Hopefully yours will be soon.

8 The fact of the matter is that what she's
9 entitled to do --

10 HEARING OFFICER DAHER: I'm going to
11 overrule it. You may have it. I want to hear it.
12 Go ahead.

13 A. Okay. So -- I don't know if I made myself
14 clear that one of the --

15 Q. Let me ask you another question. What I'm
16 asking you is for the various factors that went into
17 your reasoning that this case -- that the statement
18 that this case is a 10 was disingenuous.

19 A. All right. As I previously indicated, one
20 was the factual misrepresentation during the factual
21 presentation of the Commonwealth, later relied on by
22 him to support, justify placing the case in the most
23 serious level category.

24 That I knew he knew that a 10 case would

1 be, as I previously testified also, a case involving
2 some kind of an aggravated rape situation of a
3 child, serious injury, serious psychological,
4 physical injury, the use of a gun, or involving a
5 pedophile, and there had been no suggestion in this
6 case. Certainly if there was any evidence or any
7 suggestion in this case that Ebony Horton was a
8 pedophile, I would have agreed with him that the
9 case was a 10.

10 But in fact what the record showed was that
11 the Commonwealth themselves did not think this case
12 involved a pedophile. They never sought a
13 dangerousness petition. Dangerousness petitions are
14 routinely sought when the Commonwealth believes that
15 a defendant is either a menace or a danger to the
16 public at large or a danger to a particular
17 individual.

18 At no time did the Commonwealth ever seek
19 to have Mr. Horton -- Defendant Horton be determined
20 as a dangerous person that should be held without
21 bail.

22 The other aspect of it was that when I
23 asked him to evaluate the case on a 1-to-10 scale, I
24 wanted him to give me an honest response, and he

1 would know that when we go about determining
2 appropriate sentences, we include defendant-specific
3 characteristics. In his presentation he only,
4 again, used the facts from the Commonwealth's point
5 of view when he knew that we had other information
6 that would affect the way a sentence would be
7 determined in this kind of a case.

8 So for those reasons, and I believe that he
9 was being not candid with me.

10 Q. In these kinds of cases, is it important to
11 you to know or to have a feeling as to whether or
12 not a defendant before you is a pedophile or a
13 recurring violator?

14 A. Absolutely.

15 Q. And was there any information in this case
16 that the defendant was a pedophile or a recurring
17 violator?

18 A. There was absolutely no evidence, not even
19 a suggestion of it by the Commonwealth through the
20 entirety of the proceedings involving this case.

21 Q. And was it -- did you have any affirmative
22 evidence that the defendant was neither a pedophile
23 in the legal sense, or a recurring or
24 likely-to-recur violator?

1 A. Well, I had a number of things. First, I
2 had a diagnosis of the defendant as being -- having
3 a sexual gender identity disorder, which I know to
4 be unrelated to pedophilia.

5 Q. When you say you know to be unrelated,
6 where do you get that information from?

7 A. I have gotten that information in the
8 course of conferences, readings, information that
9 has been brought to my attention in the course of
10 other cases involving sexual aberrant behavior.

11 Q. And what else did you have?

12 A. I also had a criminal record that showed no
13 sex offenses involving children. In fact a de
14 minimus record of misdemeanors, I believe.

15 I also had this psychological report in
16 which there was no indicia -- there were no
17 characteristics of a pedophile, the characteristics
18 being some kind of an obsession, a compulsion, an
19 uncontrollable impulse regarding sex with children.

20 Q. Was that psychological report ever disputed
21 by anyone in front of you?

22 A. It was never disputed.

23 Q. And were there any other things that you
24 were considering at the time?

1 A. I think that's what I remember at this
2 point in time.
3 Q. Now, everybody keeps saying you made this
4 statement "low scale" out of your mouth. Do you
5 recall that?
6 A. Yes.
7 Q. It appears what you actually said was "low
8 level"; is that right?
9 A. "Low level," correct.
10 Q. And not that that's of great significance.
11 What did you mean?
12 A. What I meant is -- which is what I meant
13 Mr. Deakin to do, and which is what to some extent
14 he proceeded to do -- is to use the factors that we
15 would commonly use in evaluating a case for the
16 purpose of sentencing and give a value to it.
17 It's -- those are the kinds of factors that we have
18 in the proposed sentencing guidelines and in other
19 guidelines such as the Superior Court guidelines
20 that Justice Ronan had written some time ago. But
21 it's the same general factors.
22 We all know, in the criminal justice
23 system, that when you evaluate a case, there are
24 certain standard things that you would look at.

1 Q. And, by the way, in our sentencing scheme
2 in the Commonwealth of Massachusetts, is a judge
3 required to consider, along with the nature of the
4 offense, the characteristics of the defendant?

5 A. Absolutely. They're critical to a
6 determination of whether or not, you know, what kind
7 of a sentence this individual should get.

8 Q. Now, you said a number of times you
9 regretted the words you used and the display of
10 temper; is that right?

11 A. That's correct.

12 Q. Do you nevertheless believe that you acted
13 on that occasion and in the Horton case in an
14 unbiased and fair fashion and delivered a sentence
15 that you believe to be an appropriate one?

16 A. Correct. I arrived at that sentence on
17 August 1st. I was completely unbiased. I
18 considered only the information that was before me
19 concerning the crime and the particular
20 characteristics of the defendant. So I was
21 completely fair and unbiased in arriving at that
22 sentence.

23 Q. And, by the way, did you appear before the
24 Commission on Judicial Conduct and tell them that

1 you felt your conduct in losing your temper and
2 choice of words was inappropriate and would set the
3 judiciary in a bad light?

4 A. Yes, I absolutely went there -- I can't
5 remember the date. It was last year, I believe.
6 Was it April? I think it was -- I can't remember
7 the exact date. I appeared with my then counsel,
8 Mike Mone, before members of the Commission, and I
9 apologized. I told them that I understood the
10 impact that that kind of behavior would cause in
11 terms of putting the judiciary in a bad light in the
12 public arena, and I very much regretted that I had
13 had that flaw that moment.

14 Q. Now, after the proceedings concluded on
15 September 6th, is it fair to say that there was some
16 media activity with regard to you and the sentence?

17 A. That's very fair to say.

18 Q. And how would you describe it?

19 A. Well, it began escalating. We had some
20 media calls immediately the afternoon of the
21 sentencing, because -- I believe it had been in the
22 noontime news. The radio talk shows were already
23 talking about it. Then the following day -- and --
24 the afternoon the calls were to the courthouse.

1 They were calling the clerk's office. I believe
2 they called Joan Kenney. But they were looking for
3 comments on this.

4 Q. And during the course of -- strike that.
5 During the course of September 6th and 7th, did you
6 have occasion to have conversations with Joan Kenney
7 at the Supreme Judicial Court press office?

8 A. I had many conversations with her.

9 Q. Did you have conversations with Judge
10 Suzanne DelVecchio, the Chief Judge of the Superior
11 Court?

12 A. I did.

13 Q. And did you have conversations with trusted
14 friends and associates?

15 A. I had conversations with friends,
16 colleagues, yes.

17 Q. And is it fair to say that you were
18 concerned of the portrayal that you were releasing a
19 predatory pedophile?

20 A. That was my foremost concern, because that
21 went to the heart of my disregard for public safety.
22 Nothing could be further from the truth.

23 Q. And during those conversations that you had
24 on the 6th and the 7th, did you propose to Judge

1 DelVecchio and others a way to get your sentencing
2 feelings out to the public?

3 A. Right. When I saw, you know, the way the
4 press was portraying this, I wanted to issue a
5 sentencing memorandum --

6 Q. Let me stop you for a minute. What's a
7 sentencing memorandum?

8 A. A sentencing memorandum is a memorandum
9 issued by a judge explaining a sentence, you know,
10 laying out the factors that led to the sentence
11 determination.

12 Q. Now, in a sentencing memorandum, would you
13 have been prohibited, from your understanding, in
14 any way from including within that memorandum each
15 and every fact and factor known to you at the time
16 of the delivery of the sentence?

17 A. I would not have been precluded. In my
18 adjudicative responsibilities as a judge, I could
19 use any facts that have been brought to me in the
20 course of judicial proceedings in order to -- and
21 make findings concerning those.

22 Q. And would that include disputed facts?

23 A. Correct.

24 Q. Would that include the information provided

1 to you during your lobby conferences with counsel?

2 A. That's right.

3 Q. Would it include the information in the
4 psychosocial report?

5 A. Yes, it would.

6 Q. Would it include information in police
7 reports and other discovery that was included in
8 this case?

9 A. That's right.

10 Q. And what would have been your purpose in
11 issuing the sentencing memorandum?

12 A. My purpose in issuing a sentencing
13 memorandum was to get the public to understand that
14 I had not released a predatory pedophile, the facts
15 upon which I relied to make that determination, to
16 explain to the public that my sentence would
17 appropriately consider their interests, and to
18 hopefully explain myself to the public.

19 Q. Were you counseled against doing that?

20 A. Yes.

21 Q. Who counseled you against doing that?

22 A. Chief Justice DeVecchio said that she
23 didn't think it was a good idea; that if I issued a
24 sentencing memorandum, it would probably promote

1 more press activity. So she did not think it was a
2 good idea. And actually my lawyer at the time also
3 did not think it was a good idea.

4 Q. And Judge DelVecchio you have a great deal
5 of respect for, I understand, do you not?

6 A. Yes.

7 Q. Indicated to you, best to just let it die,
8 so to speak?

9 A. Correct.

10 Q. But it didn't die.

11 A. It did not die.

12 Q. And the activity became substantial, did it
13 not?

14 A. Unbelievably unprecedented as far as I'm
15 concerned.

16 Q. Now, Judge, tell us what went on the 6th
17 and the 7th and the 8th concerning your interaction
18 with anonymous members of the public, the press, and
19 your family.

20 A. On the 6th we began receiving some calls at
21 the courthouse from reporters looking for a comment,
22 as well as from angry citizens who were leaving
23 unpleasant messages for me.

24 Q. By the way, did you come to an

1 understanding as to whether or not the whole of the
2 sentencing hearing had been published or played in
3 any of the press?

4 A. I only knew that on the six o'clock news on
5 the 6th of September that clip where I tell Mr.
6 Deakin to sit down. Just three or four seconds of
7 that entire proceeding was what was played in the
8 news.

9 Q. And -- Okay. So you received some calls.
10 What else was going on?

11 A. On the 6th?

12 Q. On the 6th.

13 A. Okay. On the 7th we were then that day,
14 because it was after I had been -- the clip had been
15 on the news the night before. We were besieged with
16 calls. You know, at the courthouse they were
17 calling my clerk's office, leaving, you know,
18 horrible, horrible messages for me.

19 Q. When you say "horrible," what kinds of
20 messages?

21 A. Well, you know, calling me all kinds of
22 names, telling me -- they called me a spick, go back
23 to Cuba; different messages that they would leave to
24 the clerk. And the clerks related some of them, but

1 it got to the point where they just said "just
2 another one of those angry calls, nasty calls," and
3 they wouldn't really articulate to me what was being
4 said. But clearly that there were numerous, very
5 terrible calls about me.

6 Q. And did anything happen at your house?

7 A. Yes. That night we began getting calls at
8 home from certain people. I mean, the house thing
9 began the following day really intensely, when the
10 radio talk show people had given my phone number and
11 address over the radio and were telling people to
12 call me, to come to my house, to do things to my
13 kids and to me. So although we were getting some
14 calls on the 7th at home, it became horrendous after
15 my phone number was given out over the radio.

16 Q. And in fact did some radio personalities
17 show up in your driveway or outside your driveway
18 and actually conduct some show out there?

19 A. Yes. I believe it was the morning of the
20 8th when they -- I became aware that a radio talk
21 show that was -- was broadcasting from the end of my
22 driveway.

23 Q. And during that period of time, can you
24 tell us -- you told us some calls that went to the

1 court. Can you give us a sampling of some of the
2 calls that came to your home on the 6th and 7th?

3 A. We were getting calls saying that I should
4 be raped, that I should watch out, I should be
5 dragged out by my hair and hung on a tree, that I
6 should watch out for my kids, be careful. Your kids
7 are going to be kidnapped and raped. There were --
8 you know, calling me a spick. They were saying that
9 my husband was a spick-loving kike Jew bastard.
10 They were saying all kinds of ethnic, racial things
11 about us, and threatening my kids and me.

12 Q. Now, what did that do to your state of mind
13 on the 6th and the 7th and the 8th?

14 A. I was horrified. I was horrified for my
15 children, for my family. It had been an incredible
16 invasion of my family life to have this radio --
17 these radio people broadcasting from my driveway in
18 a morning when my kids were going to school, you
19 know, in front of my neighbors, and then they gave
20 out my telephone number, and people immediately
21 began to call and say things. It was incredibly
22 threatening to everyone, to my children and to me.

23 Q. And did these -- did these people who were
24 calling you, did they indicate that it was -- that

1 they were angry about the sentence you had delivered
2 in the Horton case?

3 A. Yes. Basically it was all about the
4 sentence. They thought I had released a predatory
5 pedophile, that I was -- you know, that -- they were
6 just so mistaken. But that was what they were
7 saying things about; the sentence.

8 Q. During the course -- during the course of
9 this time period, was it determined that -- by Joan
10 Kenney that a press release ought to be issued?

11 A. Right. There was some conversation where
12 Joan suggested that maybe, given the quantity of
13 calls coming into her office, I think she thought
14 maybe a press release would take care of it.

15 Q. And what was your desire at the time?

16 A. I always wanted to issue a sentencing
17 memorandum and fully explain myself on the record.

18 Q. But you didn't do that.

19 A. No, I did not.

20 Q. Why not?

21 A. Well, I was getting, you know, directives,
22 suggestions, advice, you know, from my chief, from
23 my lawyer, and, you know, I, like them, was hopeful
24 that this would end in the media.

1 Q. In the meantime were you having
2 conversation with Joan Kenney concerning the facts
3 and circumstances surrounding this case, Ebony
4 Horton, and your thought processes with regard to
5 the sentence?

6 A. Correct.

7 Q. And what was the purpose of that?

8 A. Well, she was getting calls. And so she --
9 she was going to respond, which she does, and she
10 did with me on a number of occasions is she gets the
11 call from the press, she calls me, tells me what
12 they're asking about. I then tell her what would
13 respond to that, and then she decides whether or not
14 that's something that we should -- the way we should
15 respond to some extent.

16 Q. Now, did -- ultimately -- and we'll come
17 back to it -- but ultimately a press release was
18 issued, correct?

19 A. Yes.

20 Q. And without -- now, did you issue the press
21 release?

22 A. I did not draft it. I knew it was being
23 issued on my behalf, but I knew it was being issued
24 by the Supreme Judicial Court's Public Information

1 Office.

2 Q. So from a technical standpoint you didn't
3 issue it by passing it out to the press, correct?

4 A. Correct. I didn't draft it, and I didn't
5 issue it.

6 Q. But you were responsible for its issuance;
7 is that a fair statement?

8 A. Correct.

9 Q. Kind of like you felt Ms. Joseph called the
10 press.

11 A. That's right.

12 Q. And not that it was some physical act, but
13 it was a participation in.

14 A. That's right.

15 Q. And when this press release was drafted, do
16 you have a clear recollection today of each and
17 every conversation you had with Ms. Kenney and Judge
18 DelVecchio concerning its drafting?

19 A. No. It is -- it was a very confusing,
20 hectic, traumatic time. I know I had many
21 conversations with many people, multiple
22 conversations with Joan Kenney. So I don't have a
23 clear recollection of each conversation and what I
24 said in each conversation.

1 Q. Do you take responsibility for the content
2 of the press release?

3 A. Absolutely.

4 Q. It purports to be your statement, correct?

5 A. It is my statement.

6 Q. And you're responsible for it.

7 A. That's right.

8 Q. You have -- now, at the time that you --
9 did you review it back then, just before its
10 release?

11 A. Yes. I think it was -- it was read to me
12 over the phone, I believe, by Joan Kenney initially,
13 and then I understood that the Chief Justice,
14 Justice DelVecchio, was reviewing it, and that she
15 would make some changes or she did -- I learned that
16 she did make some minor changes on it.

17 Q. And when you -- did you review it at the
18 time?

19 A. Well, I reviewed it to the extent that, you
20 know, it was read to me. You know, I thought it
21 contained the -- you know, sufficient information to
22 adequately inform the public in a press release.

23 Q. It wasn't a sentencing memorandum, was it?

24 A. It was not a sentencing memorandum.

1 Q. It wasn't an attempt at a sentencing
2 memorandum, was it?
3 A. Not at all.
4 Q. And at the time that it was issued, did it
5 appear to you to be substantially accurate?
6 A. Yes.
7 Q. Now, at a deposition that was conducted of
8 you, it was gone over with you line by line, that
9 press release, right?
10 A. Right.
11 Q. And when you went over it line by line, you
12 testified on occasion that certain parts of it were
13 inaccurate, in your mind, correct?
14 A. Inaccurate, incomplete, yes.
15 Q. Was the substance of the release itself an
16 accurate reflection of what you wanted to portray?
17 A. It was an accurate reflection, yes, for
18 purposes of a press release.
19 Q. This is the press release basically. Can
20 you see that?
21 A. Yes, I can.
22 MR. EGBERT: Judge, can you see that?
23 HEARING OFFICER DAHER: (Nods head)
24 Q. Now, the first line says, "The Judicial

1 Canons prohibit judges from commenting on pending
2 and impending cases." And you were asked by Mr.
3 Ware at deposition, "Is that a true statement,"
4 correct?
5 A. That's right.
6 Q. And you answered to him you didn't think it
7 was true, right?
8 A. Correct.
9 Q. Is it true or isn't it?
10 A. Well, it's not a complete statement of what
11 the canons provide, because judges are not
12 prohibited from commenting, you know, absolutely.
13 There are things that judges can comment on. There
14 are circumstances in which they can't comment. So
15 it's not a full and complete statement of that
16 canon.
17 Q. But it's accurate enough for a press
18 release, in your view?
19 A. Correct.
20 Q. Would it be more accurate if it said, "The
21 judicial canons prohibit judges from commenting on
22 pending and impending cases, under some
23 circumstances"?
24 A. Yes, or "except in some circumstances."

1 Q. So, "except," right?

2 A. Yes.

3 Q. Then those exceptions were not important to
4 the content of the meaning that you intended to
5 portray; is that correct?

6 A. That's correct.

7 Q. Now then it says, "Although I cannot
8 comment on matters that were before me regarding the
9 defendant, Charles Horton, I do think it is
10 necessary to clarify media reports that suggest I
11 was insensitive to the victim and his family."

12 So here you have a sentence that says, the
13 canons prohibit the judges from commenting on
14 pending and impending cases.

15 A. Yes.

16 Q. You cannot comment on matters that were
17 before you, right?

18 A. That's right.

19 Q. And then you go ahead and comment.

20 A. Correct.

21 Q. So was that an accurate statement,
22 "Although I cannot comment on matters that were
23 before me regarding the defendant, Charles Horton"?

24 A. It is an accurate statement for a press

1 release.

2 Q. What would be a more accurate statement in
3 the law?

4 A. "Although I cannot comment on matters that
5 were before me, in a press release regarding the
6 defendant, Charles Horton."

7 Q. Is that right?

8 A. Correct.

9 Q. That is because you can comment on anything
10 you wanted in a sentencing memorandum, correct?

11 A. That's correct. And -- yes.

12 Q. Go ahead.

13 A. And I could have also commented on
14 procedural issues and, you know, legal issues. The
15 canons are not an absolute ban from commenting.
16 They provide certain conditions.

17 Q. It then goes on to say, "I do think it is
18 necessary to clarify media reports that suggest I
19 was insensitive to the victim and his family,"
20 correct?

21 A. That's right.

22 Q. Were you intending to be insensitive to the
23 victim and his family?

24 A. Absolutely not. Just -- no.

1 Q. And had you, during your sentencing
2 decision, taken into account fully the victim and
3 his family and their plight in these proceedings?

4 A. Very much so. It is always a consideration
5 in these kinds of cases.

6 Q. And, Judge, although -- well, let me go
7 back. It says, "My statement in open court that it
8 was a 'low scale' matter pertained solely to the
9 appropriate level of the sentencing guidelines used
10 by judges in sentencing convicted defendants,"
11 correct?

12 A. Correct.

13 Q. First of all, are there sentencing
14 guidelines in the Commonwealth of Massachusetts?
15 When I say sentencing guidelines, I mean statutorily
16 imposed sentencing guidelines.

17 A. We have no mandated obligatory sentencing
18 guidelines in Massachusetts.

19 Q. I'm going to take you back even more than
20 that. I want you to listen to my question. Are
21 there any statutorily-imposed sentencing guidelines
22 in the Commonwealth of Massachusetts?

23 A. Only with regard to mandatory sentencing,
24 but nothing else.

1 Q. Are there any statutorily-imposed
2 sentencing guidelines in the Commonwealth of
3 Massachusetts?

4 A. No.

5 Q. Thank you. You would think we never met.

6 So when this press release talks about
7 sentencing guidelines, what would be -- what would
8 be a fuller explanation of that statement or a more
9 well-drafted explanation of what you were trying to
10 say?

11 A. Okay. "My statement in open court...
12 pertained solely to the" -- I guess after "solely"
13 you would insert the factors that would be
14 considered by judges in arriving or in determining
15 the appropriate level of sentencing guidelines.
16 "Solely to"... Yes.

17 Q. So, in other words, what judges in
18 Massachusetts have is factors to consider in
19 determining a sentence.

20 A. Correct.

21 Q. Right? And they basically become the
22 guidelines used by judges in sentencing in
23 Massachusetts, because we don't have sentencing
24 guidelines.

1 A. Correct.

2 Q. Isn't that right?

3 A. Right.

4 Q. And so when you look at that, it is not a
5 clearly accurate statement of the law, is it?

6 A. Right. Because we don't have sentencing
7 guidelines, it is not a statement, a clear statement
8 of the law.

9 Q. Does it fairly portray what you were trying
10 to say?

11 A. Absolutely.

12 Q. And that is that "low scale" to you -- what
13 you were talking about is the factors that judges
14 consider in determining sentencing guidelines or
15 guide you in sentencing of convicted defendants?

16 A. And I believe I said "low level," not "low
17 scale."

18 Q. I think you did. You did say "low level."
19 So you and Ms. Kenney and everybody else used the
20 wrong word in any event; is that right?

21 A. Right.

22 Q. Now, "In this case, there were certain
23 facts before me, known by both the prosecutor and
24 the defense attorney, that were part of the plea

1 conference and cannot be revealed by me, but which
2 would undoubtedly change the characterization of
3 this case as currently reported by some media
4 outlets." Correct?
5 A. Correct.
6 Q. Well, when you say cannot be revealed by
7 you, you could have revealed all of those in a
8 sentencing memorandum, couldn't you?
9 A. That's right.
10 Q. So is that an accurate statement?
11 A. It's not an accurate statement of what I --
12 of what I could have done with the facts that I knew
13 of.
14 Q. Well, it says here, "cannot be revealed by
15 me." Is that an accurate statement?
16 A. It would be more accurate if it said, "in a
17 press release."
18 Q. Which this was.
19 A. Yes.
20 Q. And so you could have, as you said, issued
21 a sentencing memorandum with all the facts known to
22 you throughout the whole proceeding, correct?
23 A. Correct.
24 Q. And what were -- were there facts known to

1 you and the prosecutor and the defense attorney
2 which would, in your opinion, have changed the
3 characterization of the case?

4 A. Absolutely.

5 Q. And what are those facts and circumstances
6 that you had in mind?

7 A. Those would be the facts contained in the
8 psychological assessment that I had, the disputed
9 facts that had been presented to me in the lobby
10 conference, the defendant's criminal record
11 information, police reports which were not part of
12 the public record.

13 Q. For example, in that psychosocial report,
14 I'll call it, there was -- there was a finding by a
15 competent clinician that the person before you was
16 not a predatory pedophile, correct?

17 A. That's correct.

18 Q. And was not a likely recidivist, repeater.

19 A. Unlikely to repeat an offense of this kind
20 or something like that.

21 Q. And that would be an important fact to you.

22 A. Very important.

23 Q. And all of the matters which you have
24 previously discussed that went into your sentence

1 that were not a matter of public record are matters
2 which you're talking about there.

3 A. That's right; that I could not reveal
4 there.

5 Q. And you said that, "Based on the facts of
6 the case before me, the plea conference attended by
7 the prosecutor and the defense attorney, the
8 applicable law, and the sentencing guidelines, the
9 defendant was given a fair sentence," correct?

10 A. Correct.

11 Q. What sentencing guidelines?

12 A. That is just a generic reference to the
13 factors that we use, and have used for many years,
14 to determine what an appropriate sentence is in that
15 case.

16 Q. Did you feel, at the time that was issued,
17 that it was a generally accurate reflection of your
18 position?

19 A. For its purpose, it was accurate of what
20 had gone on, what my position was, yes.

21 Q. And do you today consider it generally
22 accurate as to your position for a press release?

23 A. Yes, although I guess I would change the
24 "low scale" to "low level."

1 Q. And...
2 HEARING OFFICER DAHER: Mr. Egbert, do you
3 want to suspend at this point until Monday morning
4 or do you want to continue?
5 MR. EGBERT: That would be fine.
6 HEARING OFFICER DAHER: Mr. Ware, how does
7 that sound to you?
8 MR. WARE: That's acceptable.
9 HEARING OFFICER DAHER: Thank you.
10 (Whereupon, at 12:45 p.m. the
11 hearing was adjourned)
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C E R T I F I C A T E

I, Carol H. Kusnitz, Registered
Professional Reporter, do hereby certify that the
foregoing transcript, Volume IV, is a true and
accurate transcription of my stenographic notes
taken on November 22, 2002.

Carol H. Kusnitz
Registered Professional Reporter

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