

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, December 6, 2002  
9:47 a.m.

(Jane M. Williamson, Registered Merit Reporter)

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P R O C E E D I N G S

HEARING OFFICER DAHER: Sorry to keep you waiting, but I was having a little discussion with Judge Lombardi on some administrative matters. I think we'll pick up with Mr. Deakin. That's where we were.

THE CLERK: You're still under oath.

HEARING OFFICER DAHER: Go ahead, Mr. Braceras.

DAVID DEAKIN, Previously Sworn  
DIRECT EXAMINATION, Resumed

BY MR. BRACERAS:

Q. Mr. Deakin, when we broke on Wednesday we were talking about the sentencing guidelines. Do you recall that?

A. Yes, I do.

Q. I believe you have before you Exhibit 23?

A. Yes.

Q. When you said that you and Ms. Joseph considered the sentencing guidelines in reaching your sentencing recommendation in the Horton case, were you referring to the sentencing guidelines that are Exhibit 23?

A. Yes. Specifically I was referring to the

1 sentencing guide, which is the thinner of the two  
2 packets of Exhibit 23, which ends with the  
3 sentencing guidelines grid, which is the actual grid  
4 that we consult when we look at the sentencing  
5 guidelines.

6 Q. And is that sentencing guide part of the  
7 overall guidelines that are Exhibit 23?

8 A. That's correct. It's composed of the  
9 sentencing guide and then a felony and misdemeanor  
10 master crime list, which is a comprehensive list of  
11 crimes.

12 Q. At the time of the Horton case in 2000, how  
13 many sets of sentencing guidelines were in  
14 circulation in Massachusetts?

15 A. There was -- the only one that I've ever  
16 heard of anywhere at that time was this one, which  
17 is the Massachusetts Sentencing Commission proposed  
18 sentencing guidelines.

19 Q. Now, have you had experience using those  
20 sentencing guidelines or Exhibit 23?

21 A. Yes, I have; extensive experience.

22 Q. And what is that experience?

23 MR. EGBERT: Objection. Relevance.

24 HEARING OFFICER DAHER: What's the

1 relevancy?

2 MR. BRACERAS: We've heard extensive  
3 testimony from Judge Lopez that there were no such  
4 sentencing guidelines. She testified in part, based  
5 on her experience, that there were no such  
6 sentencing guidelines.

7 MR. EGBERT: She testified --

8 HEARING OFFICER DAHER: Go ahead.

9 MR. BRACERAS: Mr. Deakin is here now to  
10 say that sentencing guidelines were in circulation  
11 and were relied upon even if they had not yet been  
12 enacted into law.

13 MR. EGBERT: Judge, the fact that the  
14 district attorney's office relies upon them is  
15 totally irrelevant.

16 HEARING OFFICER DAHER: What's the nexus  
17 between the district attorney's office --

18 MR. BRACERAS: Your Honor, several points.  
19 First of all, during the sentencing colloquy during  
20 which Mr. Deakin was labeled "disingenuous," Mr.  
21 Deakin relied on the sentencing guidelines, even  
22 quoted the sentencing guidelines, cited the  
23 sentencing guidelines to the Judge in his colloquy  
24 and referred to these sentencing guidelines for the

1 proposed guidelines --  
2 HEARING OFFICER DAHER: Overruled. Go  
3 ahead.  
4 MR. EGBERT: That just is not so. Mr.  
5 Deakin referred to the sentencing guidelines, the  
6 proposed sentencing guidelines in his colloquy to  
7 the Court as to what his recommendation would be in  
8 the case. He did not refer to the sentencing  
9 guidelines when he was referring to the question  
10 asked by Judge Lopez as to a scale of 1 to 10.  
11 Judge, my problem with all of this is Judge Lopez's  
12 sentence is a legal sentence. It is not an issue in  
13 these proceedings. The Commonwealth's manner of  
14 making a recommendation is not an issue in these  
15 proceedings. There seems to be some misguided  
16 approach by the Commission here that the  
17 Commonwealth's recommendation is anything more or  
18 carries some greater weight than one party's lawyer  
19 advocating the position to a judge, and they may  
20 take on some kind of legal effect, and they don't.  
21 And to go into a lengthy embarkation on a  
22 determination of what the sentencing guidelines  
23 would be under -- not proposed sentencing  
24 guidelines, by the way. Sentencing guidelines which

1 were raised to the legislature and have been  
2 rejected, have never been approved. Even though  
3 they've gone to hearings and the like, they have  
4 never been adopted by the legislature.

5 HEARING OFFICER DAHER: Overruled.

6 Q. So what has your experience been in using  
7 the sentencing guidelines that are Exhibit 23?

8 MR. EGBERT: Judge, just so the record is  
9 clear, I object to this whole line of questioning.

10 HEARING OFFICER DAHER: Noted for the  
11 record.

12 A. In most of the lobby conferences that I've  
13 been involved in in Suffolk Superior Court --

14 MR. EGBERT: I object to anything about --

15 HEARING OFFICER DAHER: Sustained.

16 Q. What has your experience been in using the  
17 sentencing guidelines, Mr. Deakin?

18 A. The sentencing guidelines as I have  
19 presented them to the Court on numerous occasions,  
20 either at the Court's request --

21 MR. EGBERT: Judge, what court?

22 HEARING OFFICER DAHER: I beg your pardon?

23 MR. EGBERT: In what court?

24 MR. BRACERAS: Your Honor, he's entitled to

1 cross examination. He's answering my question.  
2 You've overruled the objection.

3 MR. EGBERT: These vague references to what  
4 he's done with other courts and what other judges  
5 might do as to whether or not they might --  
6 different judges consider different things every  
7 day. And whether some unnamed judge may have  
8 considered the proposed sentencing guidelines is  
9 irrelevant to these proceedings.

10 HEARING OFFICER DAHER: Overruled. Go  
11 ahead.

12 Q. Mr. Deakin, in approximately how many  
13 sentencings have you been involved in in Superior  
14 Court?

15 A. Dozens.

16 Q. In those dozens of sentencings,  
17 approximately how many times did you introduce or  
18 argue these sentencing guidelines?

19 A. I can only say the majority, if not the  
20 vast majority.

21 Q. And in any of those instances was there  
22 ever any confusion as to what you were relying on  
23 when you discussed the sentencing guidelines?

24 MR. EGBERT: Objection.



1           A.    No.  
2                    HEARING OFFICER DAHER:  I'm going to  
3 sustain that one.  
4                    MR. EGBERT:  Move to strike.  
5           Q.    Mr. Deakin, were you ever questioned as to  
6 which version of the sentencing guidelines you were  
7 arguing?  
8                    MR. EGBERT:  Judge, again, questioned by  
9 who?  This is the vaguest form of hearsay evidence  
10 without even identifying the participants.  
11                   MR. BRACERAS:  Your Honor, it's not  
12 hearsay.  It's just a question:  Has he ever been  
13 questioned by a judge, by defense counsel as to the  
14 source of the sentencing guidelines.  It goes to the  
15 very heart of the question raised by Judge Lopez  
16 that there was some confusion over the sentencing  
17 guidelines.  She opened the door to this.  
18                   MR. EGBERT:  I'd like him to refer to what  
19 section of Judge Lopez's testimony where she said  
20 she was confused about what sentencing guidelines.  
21                   HEARING OFFICER DAHER:  Mr. Braceras, can  
22 you point to that bit of testimony?  
23                   MR. BRACERAS:  Your Honor --  
24                   HEARING OFFICER DAHER:  I'm -- I'll take it

1 de bene and we'll strike it if he can't --  
2 MR. EGBERT: May we at least have questions  
3 and answers which don't call for hearsay responses?  
4 If he had a conversation with a judge which he's  
5 relying upon, then I think the conversation's  
6 participants ought to be identified and who said  
7 what at what time so that I can make an appropriate  
8 objection.  
9 MR. BRACERAS: Your Honor, it's not  
10 hearsay, but why don't we take it one question at a  
11 time and let's just go forward.  
12 HEARING OFFICER DAHER: Okay.  
13 Q. Mr. Deakin, you said you've been involved  
14 in dozens of sentencings in Superior Court; is that  
15 right?  
16 A. Yes.  
17 Q. In those dozens of sentencings on how many  
18 occasions were you questioned by a judge as to what  
19 the sentencing guidelines were?  
20 A. I've never been questioned by judges as to  
21 what they were. It's common knowledge --  
22 MR. EGBERT: Objection as to common  
23 knowledge.  
24 HEARING OFFICER DAHER: Sustained.

1 MR. EGBERT: Move to strike his answer.  
2 HEARING OFFICER DAHER: Allowed.  
3 MR. BRACERAS: Your Honor, I would just say  
4 that just the last portion of that would be  
5 stricken.  
6 HEARING OFFICER DAHER: That's exactly  
7 right. I agree. Go ahead.  
8 Q. Mr. Deakin, what was the proposed sentence  
9 under the guidelines in the Horton case?  
10 A. So that I'm clear, do you mean the sentence  
11 that we proposed or the sentence that the guidelines  
12 set out?  
13 Q. The sentence that the guidelines set out.  
14 A. The guidelines for the crime of assault on  
15 a child with intent to rape set out a presumptive  
16 sentence of 60 to 90 months, which I think is 5 to  
17 7-1/2 years, if my math is right.  
18 As to kidnapping, at the time it was  
19 difficult, because of the master crime list that I  
20 had at the time, for me to know whether it was a  
21 Level 7 or a Level 6 offense. If it were a Level 7  
22 offence, it would be the same presumptive sentence;  
23 that is, it would be 90 months. If it were a Level  
24 6, it would be the presumptive sentence of 40 to 60

1 months, which is three years and four months to five  
2 years, again, if my math is right.

3           And then for the crimes of indecent assault  
4 and battery on a child, assault and battery by means  
5 of a dangerous weapon, and assault and battery, they  
6 were lesser presumptive sentences. I don't know if  
7 you want me to go through all of them. We were  
8 mainly operating with the two main charges.

9           Q.    And those two main charges were?

10          A.    Assault on a child with intent to commit  
11 rape, and kidnapping.

12          Q.    Now, you've discussed the presumptive  
13 sentence of 5 to 7-1/2 years; is that right?

14          A.    That's correct.

15          Q.    What does that mean, presumptive sentence?

16          A.    The grid is laid out in such a way that if  
17 you take the sentence offense level, which runs down  
18 the left side of the grid, up and down the left side  
19 of the grid, and you look at the defendant's record  
20 category, which runs along the bottom of the grid,  
21 you then see where those two intersect. And it  
22 gives you a -- it gives a block, which you can see  
23 here, and in that block is the presumptive sentence.  
24 That means that is the sentence that it is

1 anticipated a judge will start from, a judge  
2 following the guidelines will start from in imposing  
3 a sentence.

4 A judge is then asked to consider  
5 aggravating factors and mitigating factors, a  
6 non-exhaustive list of which is included in the  
7 sentencing guidelines. The judge then applies those  
8 factors and arrives at a sentence. But the  
9 presumptive sentence is the starting point for the  
10 judge.

11 Q. You met with Ms. Joseph to discuss the  
12 sentencing recommendation before the August 1st  
13 lobby conference?

14 A. That's right.

15 Q. Approximately how much before the lobby  
16 conference?

17 A. As I said yesterday, I don't remember if it  
18 was days or it was as much as a week or ten days. I  
19 think it was within a few days of the lobby -- a few  
20 days before the lobby conference.

21 Q. Following the August 1st lobby conference  
22 among Judge Lopez and counsel, did ADA Joseph report  
23 back to you?

24 A. She did. I believe that she called me from

1 the courthouse, and we spoke fairly briefly about  
2 it. She then returned to the office and we spoke  
3 more extensively about it.

4 Q. What did she report to you happened at the  
5 lobby conference?

6 MR. EGBERT: Objection.

7 HEARING OFFICER DAHER: What is your  
8 objection?

9 MR. EGBERT: Hearsay.

10 HEARING OFFICER DAHER: Overruled. Go  
11 ahead.

12 A. She told me that she had presented the  
13 Commonwealth's recommendation for sentence that we  
14 had discussed previously. She told me that the  
15 defense had presented a request, a sentencing  
16 recommendation. She told me that the defense had  
17 presented a -- at that time it was described as a  
18 psychological report. I understood it to be a  
19 psychological report on the defendant, and that the  
20 Judge -- that Judge Lopez had then announced or told  
21 the parties what her contemplated sentence would be.  
22 That's what she told me on the phone essentially,  
23 and then we talked more once she got back.

24 Q. Did she discuss with you whether she should

1 contact the victim and the victim's family?

2 A. I don't recall specifically if she  
3 discussed that. That would be --

4 MR. EGBERT: Objection.

5 HEARING OFFICER DAHER: Sustained.

6 A. I don't recall specifically if we discussed  
7 that.

8 Q. Did you discuss how the district attorney's  
9 press policy applied to the Horton case?

10 A. Yes, we did. ADA Joseph asked me whether I  
11 thought the press office ought to be notified.

12 MR. EGBERT: May I interrupt? Is this  
13 still on the telephone?

14 MR. BRACERAS: I'll clarify that.

15 HEARING OFFICER DAHER: I'd appreciate  
16 that.

17 Q. Mr. Deakin, you've mentioned that there was  
18 a telephone call and then a subsequent meeting. Can  
19 you distinguish --

20 HEARING OFFICER DAHER: He didn't say that.  
21 He stated that he went from a telephone call in  
22 regards to what the contemplated disposition may be,  
23 and then you jumped into the press. So we don't  
24 know whether it took place contemporaneously or

1 subsequent thereto.

2 MR. BRACERAS: I believe he testified that  
3 they met afterwards, but we can clarify that.

4 HEARING OFFICER DAHER: Okay.

5 Q. Mr. Deakin, after the August 1st lobby  
6 conference, did you have any discussions with Ms.  
7 Joseph?

8 A. Yes. As I think I testified previously,  
9 she called me from the courthouse, I believe. We  
10 had a fairly brief telephone conversation. She  
11 returned to the office and we had a more lengthy  
12 discussion.

13 Q. Now, you reported some aspects of what ADA  
14 Joseph reported to you on the lobby conference. Can  
15 you distinguish as to whether she told you those  
16 items on the phone or during the subsequent meeting?

17 A. I know that she told me on the phone that  
18 she had presented the recommendation that we had  
19 agreed upon, presenting that the defense counsel had  
20 presented a recommendation and that the Judge had  
21 notified the parties of her contemplated sentence.  
22 I don't recall if she discussed with me the  
23 psychological report on the phone or when she  
24 returned to the office. I know we discussed it when



1 she returned to the office, but I'm not sure whether  
2 we discussed it on the phone.

3 As to the press policy, I believe we  
4 discussed that on the phone and then a follow-up  
5 discussion in my office. I'm fairly certain of  
6 that.

7 Q. Now, in August 2000, did the district  
8 attorney's office had have a press policy?

9 A. Yes, we did.

10 Q. Could you describe that for us?

11 A. The policy -- there was a written policy  
12 and there was a customary policy. The written  
13 policy was part of the ADA employee manual that  
14 every ADA was given and required to review at the  
15 beginning of his or her employment and periodically  
16 in service as we went on.

17 The written policy provided that, with one  
18 exception, any time the press contacted an assistant  
19 district attorney to discuss a case, the assistant  
20 district attorney, before speaking with the press,  
21 was required to speak to the press office to notify  
22 them of the nature and -- well, the fact that there  
23 had been contact and what the nature of that contact  
24 was and what the press wanted to discuss.

1           The press office would then decide, in  
2 consultation with the executive staff, whether the  
3 ADA should discuss things with the press, whether  
4 some other member of the office should discuss  
5 things with the press, or no one should.

6           The customary policy, which was reinforced  
7 through both written interoffice memoranda, emails  
8 and then sometimes just orally -- oh, actually, if I  
9 may stop there, I said there was one exception to  
10 the written policy. The one exception is part of  
11 the written policy was that if the press approached  
12 an ADA just outside the courtroom after a hearing,  
13 the ADA was permitted to repeat for the press those  
14 things that had been said on the record so that the  
15 press would have an accurate -- you know, ability to  
16 quote accurately what was said on the record.

17         Q.    Why don't we just stop right there.

18           MR. BRACERAS: Your Honor, I would like to  
19 mark for identification Exhibit 25.

20                     (Document marked as Exhibit 25  
21                     for identification)

22           MR. BRACERAS: Your Honor, may I approach?

23           HEARING OFFICER DAHER: Please.

24         Q.    Mr. Deakin, showing you Exhibit 25, do you

1 recognize that?  
2 A. I'm looking through it. It appears to be a  
3 copy of our office policy and procedures manual.  
4 Q. Does that include the written policy on the  
5 press that you were just discussing?  
6 A. Yes.  
7 MR. BRACERAS: Your Honor, I would like to  
8 offer that as Exhibit 25.  
9 HEARING OFFICER DAHER: Any objection?  
10 MR. EGBERT: My objection is on the grounds  
11 of completeness. It is not a complete document. It  
12 purports to be a policy and procedures manual from  
13 the DA's office, but only has a section in it, and I  
14 don't have any other way of knowing that whether  
15 there are other sections that relate to or from  
16 these particular matters. I'm entitled to the whole  
17 document.  
18 MR. BRACERAS: Your Honor, the whole  
19 document has been made available to --  
20 MR. EGBERT: No, it hasn't.  
21 MR. BRACERAS: -- to Mr. Egbert.  
22 MR. EGBERT: No, it hasn't. Don't make an  
23 allegation like that when you know better.  
24 MR. BRACERAS: Your Honor, we're

1 introducing the press policy. The press policy is  
2 contained in this.

3 HEARING OFFICER DAHER: Could there be  
4 something else in the manual --

5 MR. BRACERAS: We can ask Mr. Deakin  
6 whether there's anything else.

7 MR. EGBERT: I don't have to take Mr.  
8 Deakin's word for it. When you introduce a manual,  
9 you don't --

10 HEARING OFFICER DAHER: Where is the  
11 manual?

12 MR. BRACERAS: Your Honor, Mr. Egbert in  
13 this case introduced sections of the DSM-IV. He  
14 didn't introduce the entire DSM-IV.

15 HEARING OFFICER DAHER: You didn't ask for  
16 it.

17 MR. BRACERAS: Well, certainly it was  
18 available. If Mr. Egbert wants the rest of this  
19 manual, he can request it and it will be provided to  
20 him.

21 HEARING OFFICER DAHER: Overruled. If you  
22 want it, you can make a motion and we'll get it for  
23 you.

24 MR. EGBERT: I want it.

1 HEARING OFFICER DAHER: We'll get it.  
2 MR. EGBERT: I want it before I begin cross  
3 examination.  
4 HEARING OFFICER DAHER: All right.  
5 (Document marked as Exhibit 25  
6 moved into evidence)  
7 Q. Mr. Deakin, turning to Exhibit 25, is that  
8 the written press policy that you were discussing?  
9 A. Yes, it is.  
10 Q. Now, were there any other aspects of the  
11 written press policy that you have not described?  
12 A. Well, I haven't listed every single  
13 provision. I basically have to read it for that,  
14 but I think I've summarized it effectively.  
15 Q. You've also said that there is an unwritten  
16 policy or customary practice at the office  
17 concerning the press; is that right?  
18 A. That's correct.  
19 Q. What is that?  
20 MR. EGBERT: I object. If you have a  
21 written press policy, I suppose that dictates what  
22 goes on. Now we get into some unwritten custom?  
23 MR. BRACERAS: Your Honor, that's cross  
24 examination. Mr. Egbert can cross-examine Mr.

1 Deakin on that point. That does not go to this  
2 question.

3 HEARING OFFICER DAHER: Overruled. Go  
4 ahead.

5 Q. Is there a practice beyond the written  
6 policy?

7 A. There is.

8 Q. And what is that?

9 A. It is that when ADAs or any other member of  
10 the office encounter cases that are likely to  
11 generate news coverage or may be in fact newsworthy,  
12 they are instructed to notify the press office and  
13 they can notify the press office directly or they  
14 can go to their supervisors to discuss whether it's  
15 appropriate to notify the press office. But there  
16 is an expectation that ADAs will come into contact  
17 with newsworthy cases and notify the press office so  
18 that they can monitor the status of the case and  
19 contacts with the press.

20 Q. You mentioned the press office. Who is in  
21 the press office of the Suffolk County district  
22 attorney's office?

23 A. At the time of this case?

24 Q. At the time of the Horton case.

1           A.    The chief of the press office was Jim  
2    Borghesani.  He had an assistant -- I believe at  
3    that time the assistant was Dave Falcone, but I  
4    could be wrong.  I'm not positive.  But he always  
5    had an assistant.  I believe it was Dave Falcone at  
6    that time.

7           Q.    And who in the office supervised the press  
8    office?

9           A.    The district attorney supervised the press  
10   office.  Often he delegated that to the First  
11   Assistant District Attorney's responsibility.  It  
12   was one of the two of them or both.

13          Q.    When you say the district attorney, you  
14   mean Ralph Martin?

15          A.    That's correct.

16          Q.    And who was the First Assistant at the  
17   time?

18          A.    Elizabeth Keeley.

19          Q.    As a result of your discussion with ADA  
20   Joseph on August 1st -- and just to clarify, when  
21   you said that she returned from the courthouse after  
22   that conversation and you had a meeting with her,  
23   that was still on August 1st?

24          A.    That's correct.

1 Q. As a result of your discussion with Ms.  
2 Joseph on August 1st, did you give consideration as  
3 to whether the office press policy warranted  
4 forwarding information about the Horton case to the  
5 press office?

6 A. Yes, we discussed that. And I concluded  
7 that the press office ought to be notified. I also  
8 concluded that the first assistant district attorney  
9 ought to be notified simultaneously. In fact, what  
10 I did was to call the first assistant district  
11 attorney and review with her the appropriateness of  
12 contacting the press office at that time.

13 Q. Do you recall when you made that contact  
14 with the first assistant?

15 A. It was August 1st. It was, I think, in the  
16 afternoon, but it was August 1st.

17 Q. And to clarify, it was you who made the  
18 final decision as the head of the child abuse unit  
19 to forward this information to the first assistant?

20 A. That's correct.

21 Q. After speaking with First Assistant Keeley,  
22 do you know whether she contacted the press office  
23 to issue a press release?

24 A. I don't know from my own knowledge. I know



1 what she indicated she would do, but that's what  
2 I...

3 Q. What did she indicate she would do?

4 MR. EGBERT: Objection.

5 HEARING OFFICER DAHER: Sustained.

6 Q. Do you know if the press office was ever  
7 contacted?

8 MR. EGBERT: Objection. Again, some basis  
9 of knowledge for the statements are about to come.  
10 "Do you know" could be based on any number of  
11 things.

12 HEARING OFFICER DAHER: Mr. Braceras?

13 MR. BRACERAS: Your Honor, he was  
14 supervisor of the child abuse unit. He knew that a  
15 press release was subsequently issued by the press  
16 office. So I think a question as to whether you  
17 know whether the press office was released is a  
18 valid one. As a supervisor in the office, he would  
19 know whether one was released or not.

20 MR. EGBERT: Judge --

21 HEARING OFFICER DAHER: Could you lay a  
22 foundation -- Mr. Braceras, would you get from Mr.  
23 Deakin what precisely his position was and what his  
24 duty was in the district attorney's office.

1                   MR. BRACERAS: I think we got something  
2 yesterday, but --

3                   HEARING OFFICER DAHER: In re knowledge  
4 that the press -- that a communication to the press  
5 was made.

6                   Q. Mr. Deakin, after your conversation with  
7 Ms. Keeley, what was your understanding as to what  
8 was going to happen in regards to the press of the  
9 Horton case?

10                  MR. EGBERT: Objection. It's hearsay.

11                  HEARING OFFICER DAHER: What we have right  
12 here is the fact that the man is in a supervisory  
13 position in the district attorney's office. He has  
14 knowledge as to the procedure, the customary  
15 workings, the ordinary workings of the --

16                  MR. EGBERT: Judge, we're not talking about  
17 custom; we're not talking about ordinary workings.  
18 We're talking about specific cases and specific  
19 knowledge. And if his basis of knowledge was based  
20 upon hearsay evidence is inappropriate, I don't care  
21 if it's the supervisor, the king or the president.  
22 The fact of the matter is if he can't testify from  
23 personal knowledge what he saw, felt, touched, it's  
24 hearsay, unless there is some exception.

1                   MR. BRACERAS: Your Honor, Exhibit 7 is  
2 already in evidence. It's the press release. Mr.  
3 Deakin knows that the press office issued the press  
4 release. If he had an understanding, after meeting  
5 with Ms. Keeley, that a press release was going to  
6 be issued, he can testify to that --

7                   HEARING OFFICER DAHER: Overruled.

8                   Q. Mr. Deakin, what was your understanding,  
9 after meeting with Ms. Keeley, as to what was going  
10 to happen with regard to the press in the Horton  
11 case?

12                  A. My understanding is that she was inclined  
13 to instruct the press office to issue a press  
14 release, but I didn't know whether the final  
15 decision had been made to that effect, but I  
16 understood that that was where she was headed.

17                  Q. By the way, what is the purpose of a press  
18 release for the DA?

19                  MR. EGBERT: Objection.

20                  HEARING OFFICER DAHER: Sustained.

21                  Q. Mr. Deakin, you're chief of the child abuse  
22 unit?

23                  A. Yes.

24                  Q. Do you have experience with issuing press

1 releases in your cases?

2 A. I don't issue them myself, but I have  
3 experience with working with the press office in  
4 issuing press releases.

5 Q. And you've worked with the press office in  
6 the past to issue press releases?

7 A. Yes.

8 Q. Why does the DA's office issue a press  
9 release?

10 MR. EGBERT: Objection.

11 HEARING OFFICER DAHER: Mr. Braceras?

12 MR. BRACERAS: What's the objection? It  
13 goes to what the purpose of a press release is. Mr.  
14 Egbert has made the great argument that this press  
15 release is somehow being prejudicial to the  
16 defendant. I think it's relevant as to why the DA's  
17 office would issue a press release.

18 MR. EGBERT: This is outside the scope of  
19 his knowledge and authority. He's already told us  
20 that he's not authorized to issue a press release,  
21 he's not authorized to decide whether a press  
22 release issues at all. And the fact that he's  
23 worked on them doesn't mean he knows whether the  
24 district attorney issues press releases.

1 HEARING OFFICER DAHER: Overruled.

2 A. The purpose of issuing a press release is  
3 to notify -- to notify the press who will presumably  
4 then notify the general public of the cases that the  
5 district attorney's office is bringing before the  
6 Court, the nature of the crimes that are being  
7 prosecuted, the efforts made on behalf of the people  
8 of the Commonwealth by the district attorney's  
9 office to see that the crimes are prosecuted  
10 properly, and to notify the public of the outcome of  
11 the prosecution.

12 Q. Mr. Deakin, if you would just turn to the  
13 bigger notebook on the witness stand and turn to  
14 Exhibit 7.

15 A. I see Exhibit 7.

16 Q. Do you recognize Exhibit 7?

17 A. Yes, I do.

18 Q. Exhibit 7 is the press release for the  
19 Horton case that was issued on August 3rd; is that  
20 right?

21 A. Yes, it is.

22 Q. With the headline or title "Boston Man  
23 Expected to Plead to Child Kidnapping, Sexual  
24 Assault"?

1           A.    Yes.  
2           Q.    Did you draft Exhibit 7?  
3           A.    No, I did not.  
4           Q.    Who was responsible in the office for  
5 preparing press releases?  
6           A.    The press office.  
7           Q.    Since August 1st have you been able to  
8 determine whether or not your office complied with  
9 its press policies in the Horton matter?  
10          A.    The press office, as far as I can tell,  
11 complied with the office policies in issuing the  
12 press release in the Horton matter, yes.  
13          Q.    To your knowledge, did Ms. Joseph make any  
14 contact with the press or do anything that was  
15 inconsistent with the DA's press policy?  
16          A.    No.  
17          Q.    Would it have been inconsistent had you not  
18 presented the Horton case to the first assistant?  
19 That is, inconsistent with the DA's press policy?  
20          A.    I think it would have been inconsistent  
21 with the press policy for us not to present it to  
22 the press office. Presenting it to Elizabeth Keeley  
23 was a step that I took because of the nature of the  
24 case. But had we not presented it at a minimum to

1 the press office, it would have been a violation, in  
2 my view, of the office's press policy.

3 Q. And in your view would it have been  
4 inconsistent with the your press policy had ADA  
5 Joseph not raised the matter with you in the first  
6 instance?

7 A. Again, I think her obligation under the  
8 policy was to notify the press office. I think she  
9 contacted me for the same reason that I contacted  
10 Elizabeth Keeley: Was to review the application of  
11 the press policy to the case. But had she not  
12 raised it with either me or the press office, she  
13 would have been in violation of the press policy.

14 Q. Do you know whether Ms. Joseph was  
15 instructed to forward information on the Horton case  
16 prior to the August 1st lobby conference at the time  
17 of arraignment?

18 A. I don't know of my own. I don't know. I  
19 don't recall whether I instructed her to or not.  
20 And I don't know whether anyone else did.

21 Q. What type of information in your child  
22 abuse unit would be forwarded to the first assistant  
23 or the press office at the time of arraignment?

24 MR. EGBERT: Which one? First assistant or

1 the press office?

2 MR. BRACERAS: Let's start with the first  
3 assistant.

4 A. That would depend. Typically -- the first  
5 assistant -- as I think I testified on Wednesday,  
6 the first assistant district attorney has to sign  
7 off on all direct indictment requests. Often the  
8 first assistant will put a note on the direct  
9 indictment request, "ADA -- let's use my name -- ADA  
10 Deakin to keep press office and first assistant  
11 apprised of developments in the case." Sometimes  
12 the first assistant will just write, "Keep press  
13 office apprised of developments in the case."

14 So what materials would be provided would  
15 depend a lot on the specific facts of the case.  
16 Sometimes there would be actual materials like  
17 supplementary police reports that we received or  
18 other documentation. Sometimes it would just be  
19 emails to the relevant parties, saying here's what's  
20 going on. Sometimes it would just be informal  
21 conversations. It really depends on what the  
22 facts -- how the case develops.

23 Q. You said in your conversations with ADA  
24 Joseph that there was some discussion about a



1 defense report; is that right?

2 A. That's correct.

3 Q. What was your understanding of what that  
4 report was on August 1st?

5 A. My understanding of what that report was  
6 was a report prepared by somebody who worked for the  
7 Committee for Public Counsel Services about the  
8 defendant and the defendant's psychological  
9 background. I didn't have extensive discussions  
10 with ADA Joseph about it. My understanding was that  
11 the report didn't raise questions of the defendant's  
12 competency to stand trial or the defendant's  
13 criminal responsibility. But other than that,  
14 that's about all I can remember.

15 Q. Did the DA's office respond to that report?

16 A. No, we did not.

17 Q. Why not?

18 MR. EGBERT: Objection. He wasn't even  
19 there.

20 MR. BRACERAS: Your Honor, at any time. He  
21 became aware of the report on August 1st. He became  
22 involved in the case one or two days later. And the  
23 question is, did he respond to the report. He's the  
24 supervisor on the case and he became aware of this

1 report.  
2 MR. EGBERT: This case was over as far as  
3 what sentence was being imposed at the conclusion of  
4 the August 1st lobby conference, and everything  
5 relating to this report and what the DA clearly  
6 should have done in reference to refuting the report  
7 was completed by the time she left the court on  
8 August 1st.  
9 HEARING OFFICER DAHER: Overruled. Go  
10 ahead.  
11 A. I'm sorry. Can you repeat that?  
12 Q. Why didn't the DA respond to this report?  
13 MR. EGBERT: Objection.  
14 A. ADA Joseph was very dismissive of the  
15 report.  
16 MR. EGBERT: Your Honor --  
17 HEARING OFFICER DAHER: Sustained.  
18 MR. EGBERT: Move to strike.  
19 HEARING OFFICER DAHER: Stricken.  
20 THE WITNESS: I apologize, Your Honor.  
21 HEARING OFFICER DAHER: That's okay.  
22 MR. EGBERT: I object to the apologies from  
23 a lawyer who knows better.  
24 MR. BRACERAS: Your Honor, it's not Mr.

1 Egbert's place to start reprimanding a witness.  
2 MR. EGBERT: When Mr. Deakin turns to the  
3 Court with his apologies --  
4 HEARING OFFICER DAHER: I think Mr. Deakin  
5 was just being courteous, and if he had misspoken,  
6 he was apologizing, and I think that's the vein that  
7 it should be accepted.  
8 Q. Mr. Deakin, I'm just trying to get beyond  
9 the distraction here. Why didn't you respond to the  
10 report?  
11 MR. EGBERT: I'm sorry; I didn't hear the  
12 question.  
13 Q. Why didn't you respond to this report?  
14 MR. EGBERT: Objection. There's no  
15 evidence in the case yet to get to that question.  
16 MR. BRACERAS: Your Honor, you just  
17 overruled that objection.  
18 HEARING OFFICER DAHER: Overruled.  
19 A. After discussing the report, we didn't feel  
20 that it merited --  
21 MR. EGBERT: I object to the "we." The  
22 reason for this, it's very important we have his own  
23 testimony here.  
24 MR. BRACERAS: Your Honor, they were in a

1 meeting. These are two DAs working on a case. They  
2 came to a conclusion as to whether to respond to  
3 this report. This is a legitimate answer.

4 HEARING OFFICER DAHER: I'm going to allow  
5 him to use the first person plural. Go ahead.

6 A. We concluded that the report was not of a  
7 type that required a response in the circumstances  
8 of this case. It was also not clear to me at the  
9 time -- it appeared to me the report had not been  
10 made part of the record, and it was not clear to me  
11 to what extent, if any, the Judge intended to rely  
12 upon it in sentencing. For those two reasons, we  
13 did not respond to the report.

14 Q. Now, on August 4th the Horton case was  
15 scheduled for a plea and disposition; is that right?

16 A. That's correct.

17 Q. You didn't go to court that morning on  
18 August 4th, did you?

19 A. No. It was an office day for me. I was  
20 working in my office.

21 Q. Who was assigned to handle the plea and  
22 disposition in the Horton case?

23 A. ADA Joseph, who had been assigned to it all  
24 along.

1 Q. What happened in the Horton case that  
2 morning?

3 MR. EGBERT: Objection. He wasn't there.

4 MR. BRACERAS: Your Honor, he's the  
5 supervisor on the case.

6 HEARING OFFICER DAHER: Sustained.

7 Q. Did you at some point receive a report from  
8 Ms. Joseph on the Horton case after the conference  
9 on August 4th?

10 A. Yes, I did. I actually received two calls,  
11 one from the first assistant, one from ADA Joseph.  
12 They were both about the Horton case and ADA Joseph.  
13 I cannot recall which came first. I believe that  
14 the call from the first assistant came first, but  
15 I'm not positive of the order.

16 Q. After receiving these calls, what was your  
17 understanding as to what had occurred in the Horton  
18 case?

19 MR. EGBERT: It's a report of hearsay  
20 statements.

21 MR. BRACERAS: Your Honor, we're getting at  
22 Mr. Deakin's understanding. Several things. First  
23 of all, we're getting at his understanding. He was  
24 the supervisor of this case. He's testified that --

1 HEARING OFFICER DAHER: Overruled.

2 A. My understanding was that there had been a  
3 lobby conference --

4 MR. EGBERT: Sorry. If you're letting in  
5 his understanding based on conversation, I object to  
6 it obviously. You overruled me. At least have him  
7 put in the conversation, not some conclusory  
8 statement.

9 HEARING OFFICER DAHER: I'm not going to  
10 tell Mr. Braceras about how to put in his case. You  
11 obviously have great experience as an examiner, Mr.  
12 Egbert. I'm pretty sure you'll get it in.  
13 Overruled.

14 A. My understanding is there had been a lobby  
15 conference with the Judge, defense counsel, and ADA  
16 Joseph; that during that lobby conference, the Judge  
17 had berated Ms. Joseph and criticized her very  
18 sharply and in harsh tones, and that there was some  
19 question of whether the plea was going to go forward  
20 on that day or not.

21 Q. What did Ms. Keeley instruct you to do with  
22 respect to the Horton case?

23 A. She instructed me to go to the courthouse  
24 and assist ADA Joseph in resolving the situation.

1 Q. And did you do that?

2 A. Yes, I did.

3 Q. Approximately how long after your  
4 conversations with Ms. Keeley and Ms. Joseph did you  
5 arrive at the courthouse?

6 A. However long it took me to pack up my  
7 things and walk over there. Fifteen minutes, I  
8 would guess.

9 Q. When you arrived at the courthouse, did you  
10 meet with Ms. Joseph?

11 A. I did.

12 Q. How did she appear?

13 A. She appeared shaken, upset. I had never  
14 seen her look that way before.

15 Q. After meeting with Ms. Joseph, did you have  
16 an opportunity to have a conversation with the  
17 defense counsel, Ms. Goldbach?

18 A. I did. I first had a conversation with Ms.  
19 Joseph, a fairly brief one, and then I had a  
20 conversation with Anne Goldbach, defense counsel.  
21 Part of that conversation was just the two of us, me  
22 and Anne Goldbach, and part of that conversation was  
23 with ADA Joseph present. I'm not sure whether we  
24 spoke -- I'm sorry; I don't recall whether Anne

1 Goldbach and I spoke alone first and then Ms. Joseph  
2 joined us or whether the three of us spoke first and  
3 then Ms. Goldbach and I spoke alone.

4 Q. What was the substance of this first  
5 conversation with Ms. Goldbach?

6 MR. EGBERT: Objection. Hearsay.

7 MR. BRACERAS: Your Honor, it's not  
8 hearsay. It's not offered for the truth of the  
9 matter.

10 MR. EGBERT: What's it offered for?

11 MR. BRACERAS: It's offered for what Mr.  
12 Deakin did in response to this conversation. We  
13 have to get at what he did on August 4th.

14 MR. EGBERT: Judge, it is an attempt to get  
15 in out-of-court statements of Ms. Goldbach without  
16 complying with the rules. It is not relevant to  
17 anything else. And when asking what he did as a  
18 result of some conversation, that's fine, but not  
19 the contents of it.

20 HEARING OFFICER DAHER: Last word?

21 MR. BRACERAS: It's plainly not hearsay.  
22 It's not offered for the truth of the matter.

23 HEARING OFFICER DAHER: What is it offered  
24 for?



1 MR. BRACERAS: It's offered to see what Mr.  
2 Deakin did in response.

3 MR. EGBERT: Just ask him.

4 MR. BRACERAS: We will get there, but this  
5 is my witness, and if he wants to ask him --

6 HEARING OFFICER DAHER: Overruled. Go  
7 ahead.

8 Q. What was the subject of your first  
9 conversation with Ms. Goldbach?

10 A. In the first conversation that I had with  
11 Ms. Goldbach, she expressed real dissatisfaction, I  
12 mean, anger at me and the office for issuing a press  
13 release, which she actually showed me. It was the  
14 first time I actually had seen it. And she had it.  
15 I don't remember her exact words, but it was  
16 something like how could you do this or something to  
17 that effect.

18 Q. And that press release is Exhibit 7?

19 A. That's right.

20 Q. What was your response to this concern of  
21 Ms. Goldbach?

22 A. Well, first I told her that I hadn't read  
23 it, and she gave me the copy to read. And as I was  
24 reading it, she pointed specifically to the first

1 line of the second paragraph, which says, "Charles  
2 Horton, 31, a transgendered person who appears as a  
3 woman," and then she pointed to that portion and she  
4 said, "Why is that in there? Why is that in there?"  
5 I took her to mean the fact that the defendant was  
6 transgendered.

7 Q. How did you respond to her?

8 A. Well, first I asked her to let me finish  
9 reading the whole thing so that I could comment on  
10 it. And after I did that, I told her that I didn't  
11 know why it was in there and that I regretted that  
12 sentence or that phrase in the press release.

13 Q. You mean you regretted the use of the word  
14 "transgendered"?

15 A. Right, "a transgendered person who appears  
16 as a woman." I regretted that phrase.

17 Q. Now, when you say you regretted that use of  
18 the phrase, you're not suggesting that --

19 MR. EGBERT: Objection to leading.

20 HEARING OFFICER DAHER: I didn't hear that  
21 again. What was the question? Can you play that  
22 back for me?

23 MR. BRACERAS: Your Honor, I was in the  
24 middle of a question.

1 MR. EGBERT: Any question that begins  
2 "you're not saying" --  
3 HEARING OFFICER DAHER: Would you play it  
4 back.  
5 MR. BRACERAS: I should at least be allowed  
6 to finish the question.  
7 HEARING OFFICER DAHER: You are entitled to  
8 that. Go ahead. Finish the question.  
9 Q. Mr. Deakin, when you said that the use of  
10 the word "transgendered" was regrettable, you  
11 weren't suggesting that this violated the  
12 office's -- the office's press policy, were you?  
13 MR. EGBERT: Objection.  
14 HEARING OFFICER DAHER: What's the  
15 objection?  
16 MR. EGBERT: Leading.  
17 HEARING OFFICER DAHER: It is, but I'm  
18 going to allow him some latitude. Go ahead.  
19 A. No, I'm not suggesting it violated the  
20 office press policy.  
21 Q. You're not suggesting it violated any other  
22 standard of ethics?  
23 A. No, I'm not.  
24 Q. Now, did Ms. Goldbach raise any other

1 concerns with you on August 4th? Let's stay with  
2 that first meeting.

3 A. She raised other concerns with me. Whether  
4 it was in the first meeting or -- I can't tell you  
5 which meeting. This was a very sort of fluid  
6 situation. I'm not sure which part of the meeting  
7 she raised it, but she did raise another concern  
8 with me.

9 Q. And what was that?

10 A. She said to me something like -- and I  
11 don't think I'm quoting her directly -- but, "This  
12 isn't what it looks like." And she said -- and I  
13 asked her, "What do you mean?" And she said, "Talk  
14 to Jay Greene." And the name didn't immediately  
15 ring a bell for me. I asked her, "Who is Jay  
16 Greene?" She said he was one of the detectives on  
17 the case. And I said, "What does Jay Greene say?"  
18 Because I wasn't aware of any report or anything  
19 from Jay Greene in the case. And she said, "Talk to  
20 Jay Greene." And I said, "Anne, what would he say?  
21 Why are you asking me to talk to Jay Greene now on  
22 the eve of the plea?" And we went back and forth  
23 like that. And finally she said, "He would say that  
24 when he got there, the boy, was" -- she used an

1 expression -- I don't know if it was "cool as a  
2 cucumber" or something like that -- something that  
3 means calm. That when Jay Greene got there, he was  
4 calm. And she said also Jay Greene would say that  
5 the boy is not the -- again, she used a word like  
6 "angel" or "choirboy." I don't remember what it  
7 was, but it was an image that means innocent. It  
8 conveys innocence. "He's not the angel or choirboy  
9 that you're saying he is."

10 Q. Did you ever speak with Jay Greene?

11 A. No, I did not.

12 Q. Why not?

13 A. Because, as I told Anne Goldbach, I took  
14 Anne Goldbach's word for what she was saying Jay  
15 Greene would say. I told her, "Anne, I've known you  
16 for a long time. If you say he said this, I believe  
17 he said it." I asked her, "What is the relevance of  
18 either of those pieces of information, assuming that  
19 Jay Greene would say it, to the offense or to the  
20 plea that we're here today," and she either couldn't  
21 or wouldn't answer it -- I'm sorry. She did not  
22 answer me.

23 Q. What was your understanding as to when  
24 Detective Greene arrived on the scene of the

1 incident?

2 A. My understanding was that the initial --  
3 the grand jury testimony is that the initial  
4 responding officers were Officers Rose and Sweeney,  
5 uniformed officers of the Boston Police Department,  
6 who actually came upon the crime as it was  
7 happening. And that at some point they called for  
8 detectives to respond, and several detectives  
9 responded. I think it was two pairs of two  
10 detectives, and Jay Greene, as I understand it, was  
11 one of those detectives.

12 Q. Did you ever hear from any source that  
13 Detective Greene was first on scene?

14 A. I've heard from every source that's  
15 involved in the case that he was not first on scene.  
16 First on scene were the uniformed Officers Rose and  
17 Sweeney.

18 Q. Now, did anyone suggest to you on August  
19 4th that the defendant's plea was in jeopardy?

20 A. You mean that it was in jeopardy of not  
21 happening?

22 Q. Yes.

23 A. No, no one ever suggested that to me.

24 Q. Were you concerned that the defendant's

1 plea was in jeopardy or that the defendant might  
2 choose not to plead guilty?  
3 A. No.  
4 Q. Did Judge Lopez ever express concern that  
5 the defendant may choose not to plead guilty on  
6 August 4th?  
7 A. Not in my presence, no.  
8 Q. Now, on August 4th did you at some point  
9 approach the courtroom clerk?  
10 A. Yes.  
11 Q. Why did you do that?  
12 A. I asked the court clerk to see whether Anne  
13 Goldbach and I could meet with Judge Lopez to  
14 discuss the situation in her chambers.  
15 Q. Why did you want to see the Judge?  
16 A. I hoped, based on a small amount of prior  
17 experience before Judge Lopez, that I might be able  
18 to speak with her and Anne Goldbach and try to  
19 resolve some of the tension that seemed to exist  
20 between Judge Lopez and ADA Joseph, whom I  
21 supervised. I was hoping to calm things down.  
22 Q. Did the Judge agree to see you?  
23 A. All I know is that the court clerk told me  
24 that the Judge would not see us.

1 Q. Now, turning to Exhibit 17 in the binder --  
2 A. I see it.  
3 Q. -- Exhibit 17 is the Commonwealth's motion  
4 in opposition to a continuance, with the Judge's  
5 findings on it; is that right?  
6 A. That's correct.  
7 Q. Did you play a role in preparing the motion  
8 in opposition to a continuance?  
9 A. Yes. I worked with ADA Joseph to draft it,  
10 and I actually typed it.  
11 Q. When did you do that?  
12 A. During the lunch recess.  
13 Q. How long did you have to do that?  
14 A. I don't remember exactly how long the lunch  
15 recess is. It's usually an hour.  
16 Q. Did you go back to your office to prepare  
17 this?  
18 A. No. We went downstairs one floor to the  
19 grand jury office, which was on the 14th floor.  
20 Q. What was the basis of your motion to oppose  
21 the continuance?  
22 A. The basis for our motion was --  
23 MR. EGBERT: Objection. Are we talking  
24 about the basis that's described in the written



1 document?

2 MR. BRACERAS: No, Your Honor. I think the  
3 question stands. It's what is the DA's basis for  
4 the motion to continue, not what the exact words  
5 were in Exhibit 17.

6 MR. EGBERT: Judge, by law, the basis  
7 proposed to the Court is what's contained in the  
8 document.

9 HEARING OFFICER DAHER: Overruled. Go  
10 ahead. If I could just interrupt you for one  
11 moment. Now, the first time that you heard of the  
12 not so angel-like qualities or the noninnocence of  
13 the victim was by Ms. Goldbach?

14 THE WITNESS: Yes, Ms. Goldbach telling me  
15 what she said Mr. Greene said.

16 HEARING OFFICER DAHER: Did Ms. Joseph ever  
17 communicate anything like that to you?

18 THE WITNESS: No.

19 HEARING OFFICER DAHER: It was Ms. Goldbach  
20 that communicated that?

21 THE WITNESS: That's correct.

22 HEARING OFFICER DAHER: That she had  
23 received some information which wasn't objected to  
24 by Mr. Egbert that was from Mr. Greene; is that

1 correct?

2 THE WITNESS: She wasn't clear to me. I  
3 tried to see if she got it from Jay Greene or some  
4 intermediate source, but she was representing to me  
5 what Jay Greene would say and I couldn't get her to  
6 tell me if she had spoken to him directly.

7 HEARING OFFICER DAHER: Go ahead.

8 BY MR. BRACERAS:

9 Q. Mr. Deakin, what was the basis of your  
10 office's opposition to the continuance in the Horton  
11 case?

12 A. We -- ADA Joseph and I, that is --  
13 couldn't -- I'm sorry. I couldn't see any reason  
14 for the continuance -- to continue this case from  
15 the day that it was being heard. The victim, as I  
16 understood it, and his family had been told prior to  
17 August 4th that the case would result in a plea and  
18 sentencing on August 4th and it would therefore be  
19 essentially over from his point of view. And the  
20 boy's grandmother had been in the courtroom, I was  
21 told, since before court convened in the morning,  
22 waiting to deliver a victim impact statement. So  
23 our feeling was, without a legitimate basis for a  
24 continuance and with concerns for the victim and his

1 family, hoping to see the case resolved and be done  
2 with it, that there was no grounds for a  
3 continuance. And that's why we filed the motion.

4 Q. Was there anything else other than the  
5 inconvenience to the grandmother, who was in the  
6 courtroom?

7 A. Yes. There was our concern for all  
8 victims -- with child victims and their families,  
9 that when they're told a case is going to be over,  
10 whether it's by plea or by trial, when we call them  
11 -- which we often have to do -- and tell them  
12 there's been a continuance, they report to us  
13 anxiety, upset, it's stressful. So we were  
14 concerned that the boy and his family would be put  
15 through unnecessary stress or trauma by this  
16 continuance. And we didn't want it to happen.

17 Q. Are all of those concerns written in  
18 Exhibit 17?

19 A. They're not written expressly. I think  
20 they're fairly inferable from what is written in  
21 Exhibit 17.

22 Q. Was this a good-faith opposition to the  
23 continuance?

24 A. Absolutely.

1 Q. On August 4th did you have to request that  
2 the Horton case be called?

3 A. I don't recall how the Horton case was  
4 called. I don't recall whether we had to request it  
5 or not. I know -- I've answered your question. I  
6 don't recall.

7 Q. When the case was called, did you appear  
8 along with Ms. Joseph?

9 A. I appeared -- I actually stood at the  
10 podium. Ms. Joseph was seated at counsel table next  
11 to me, and we appeared together, although I was the  
12 one doing the speaking.

13 Q. Was this your first appearance in the  
14 Horton case?

15 A. Yes.

16 Q. In appearing in the case, were you  
17 replacing Ms. Joseph?

18 A. No. I was joining Ms. Joseph. We were  
19 now -- in my view, we were now co-counsel.

20 Q. Now, when Judge Lopez came on the bench,  
21 she ordered that the case would be continued, and  
22 she did that without hearing argument?

23 A. I believe that's correct.

24 Q. What was your understanding as to why the

1 case was continued?

2 MR. EGBERT: Objection.

3 HEARING OFFICER DAHER: Overruled. Go  
4 ahead.

5 A. My understanding was that the Judge had  
6 said that she would continue the case until the  
7 press went away.

8 Q. Now, the Judge never indicated that she was  
9 continuing the case out of concern that the plea  
10 would be revoked by the defendant?

11 MR. EGBERT: Respectfully, Judge, he wasn't  
12 there. Your Honor, we are reaching the point of --

13 MR. BRACERAS: Mr. Deakin is in the August  
14 4th hearing.

15 MR. EGBERT: Well, he wasn't at the lobby  
16 conference.

17 MR. BRACERAS: Your Honor, I'm asking Mr.  
18 Deakin, when the Judge took the bench, she announced  
19 that the case was going to be continued. This is  
20 while the Commonwealth's motion to oppose a  
21 continuance was pending. She announces that it's  
22 going to be continued, and I'm asking if she ever  
23 indicated on the record or elsewhere whether she  
24 said that because the defendant was going to

1 withdraw his plea.

2 HEARING OFFICER DAHER: I think previous to  
3 the last question was the reasons that the case  
4 would be continued was because the press was there.  
5 Then you asked him somewhat of a leading question as  
6 to whether the plea, I suspect, would be revoked or  
7 not, is that it?

8 MR. BRACERAS: Yes.

9 Q. The question was whether there was any  
10 indication by the Judge that the continuance was  
11 based on any reason other than the presence of the  
12 press.

13 A. On the record? When the Judge took the  
14 stand? I'm sorry; I'm confused myself, I'm afraid.  
15 If you could repeat the question, that would be  
16 great.

17 Q. Okay. Going back, you indicated that the  
18 Judge -- it was your understanding that the case was  
19 continued because of the presence of the media?

20 A. Correct.

21 Q. Did the Judge in open court on August 4th,  
22 when you appeared, ever indicate that the case was  
23 being continued because of concern that the  
24 defendant would not plead guilty?

1 A. No.

2 Q. Did the Judge indicate on the record any  
3 reason other than the presence of the media for  
4 continuing the case?

5 A. Yes. And for clarity's sake, the Judge  
6 didn't mention the presence of the media on the  
7 record. That's something that I had heard. The  
8 Judge, as I recall, explained that the court docket  
9 was too crowded to reach the case. I remember the  
10 Judge mentioning that there were a large number -- I  
11 don't remember the number -- of bail hearings that  
12 had to be done in the afternoon. And she announced  
13 that there wasn't time to do the plea.

14 Q. And at the hearing you pursued your motion  
15 in opposition to the continuance?

16 A. I presented it and informed the Judge that  
17 it had been filed.

18 Q. You had some limited argument on that?

19 A. It was a very brief argument, yes.

20 Q. Now, if you turn to Exhibit 42, which is  
21 the transcript of that hearing -- we'll put it up on  
22 the screen for you as well.

23 A. I've got it.

24 Q. And if you turn to Line 16.

1           A.    On Page 2?  Which page are we talking  
2 about?  
3           Q.    On Page 3.  
4           A.    Line 16?  
5           Q.    Yes.  You'll see that you requested written  
6 findings in this case; is that right?  
7           A.    That's correct.  
8           Q.    And the Court's response was on the record?  
9           A.    The highlighted portion says, "Okay.  You  
10 will get written findings."  
11          Q.    What was Judge Lopez's tone when she said  
12 this in court?  
13          A.    Her tone was intense.  
14          Q.    Did the Court, in fact, make the findings  
15 which are set forth in Exhibit 17 after this  
16 hearing?  
17          A.    I assume the Court did.  I mean, they were  
18 faxed to us.  I don't have personal knowledge that  
19 the Court made these findings, but they seemed to be  
20 findings of the Court.  
21          Q.    They were faxed to you after the hearing;  
22 is that right?  
23          A.    That's correct.  
24          Q.    And they were endorsed by Lopez, J?



1 A. Right.

2 Q. So it's a fair inference that Judge Lopez  
3 made these findings?

4 A. I inferred that, yes. I've always assumed  
5 that the Judge did.

6 Q. Now, if you look at Exhibit 17, you'll see  
7 that Judge Lopez made a finding in the first  
8 paragraph that "ADA Joseph called the press in." Do  
9 you see that? It's also on the screen.

10 A. Yes, I do.

11 Q. Do you agree with that?

12 A. No.

13 Q. Was that statement accurate?

14 A. No.

15 Q. Now, the findings also go on to say that,  
16 "Ms. Joseph has a habit of doing this."

17 A. Right.

18 Q. Was that correct?

19 A. I'm not aware of Ms. Joseph ever having  
20 called the press in. So no, it's not correct.

21 Q. The findings also say -- and this is in  
22 Exhibit 17, and we'll highlight it on the screen --  
23 that "The Court finds that ADA Joseph attempted to  
24 embarrass and ridicule a defendant suffering from a

1 psychological disorder." Do you see that?  
2 A. I do.  
3 Q. Was that accurate?  
4 MR. EGBERT: How would he know?  
5 HEARING OFFICER DAHER: Mr. Braceras?  
6 MR. BRACERAS: Is that an objection?  
7 HEARING OFFICER DAHER: The question is,  
8 how would he know.  
9 MR. BRACERAS: Well, Your Honor, perhaps  
10 the question is how would the Judge know.  
11 MR. EGBERT: She testified --  
12 HEARING OFFICER DAHER: Let him finish, Mr.  
13 Egbert.  
14 MR. BRACERAS: Certainly Mr. Deakin is ADA  
15 Joseph's supervisor. He was the point person in the  
16 office. He was involved in notifying Ms. Keeley  
17 about the press. He knew what was going on in that  
18 case. Certainly he had a better basis than Judge  
19 Lopez in assessing whether ADA Joseph attempted to  
20 embarrass and ridicule a defendant.  
21 HEARING OFFICER DAHER: Help me, Mr.  
22 Egbert. How would Judge Lopez know that?  
23 MR. EGBERT: Judge Lopez has a right as a  
24 judge to make inferences and draw inferences from

1 conduct in making her findings. That was her task,  
2 as your task is every day, that you take whatever  
3 facts are before you and you make inferences from  
4 them.

5 By the way, right or wrong, you draw  
6 inferences. This witness is not so entitled, nor  
7 can he testify as to whether or not that is accurate  
8 or not. He can't read her mind.

9 HEARING OFFICER DAHER: It would seem that  
10 this is somewhat of a shorthand opinion in the sense  
11 that "attempted to" -- that was Judge Lopez's  
12 opinion.

13 MR. EGBERT: Right.

14 HEARING OFFICER DAHER: And consequently,  
15 it would seem that Mr. Deakin would likewise have an  
16 equally valid opinion.

17 MR. EGBERT: His opinion is irrelevant.  
18 These are a judge's findings. What his opinion is  
19 is absolutely irrelevant. And, quite frankly, if he  
20 thought they were improper, he had a course of  
21 conduct and avenue to take.

22 You should know particularly it says  
23 specifically, even in the Judicial Conduct  
24 Commission's legislative statement of their

1 functions, that at no time are they empowered or  
2 authorized in any way to act as some kind of an  
3 appellate tribunal of a judge's findings. And this  
4 is getting so far -- the issue in this case is what  
5 Judge Lopez heard and saw and what she found. His  
6 opinion is irrelevant as to that.

7 HEARING OFFICER DAHER: Mr. Braceras, the  
8 last word?

9 MR. BRACERAS: Your Honor, I'm not asking  
10 Mr. Deakin for a legal opinion or an order of the  
11 Court. We're asking for his assessment of the  
12 accuracy of this finding. The accuracy of this  
13 finding, and the basis for this finding is plainly  
14 at issue in this case as to what this finding was  
15 based on.

16 Now we have ADA Joseph's supervisor, the  
17 co-prosecutor on the case. We should be able to  
18 hear from him whether this statement had any basis  
19 in fact.

20 HEARING OFFICER DAHER: I'm going to  
21 sustain Mr. Egbert on this one. Sustained.

22 BY MR. BRACERAS:

23 Q. Mr. Deakin, did you ever come to learn --

24 HEARING OFFICER DAHER: Again, Mr.

1 Braceras, what we have is Judge Lopez working with  
2 ADA Joseph, and then we have Mr. Deakin's making a  
3 motion, and Judge Lopez made a finding after  
4 extensive negotiations with Ms. Joseph. So I think  
5 Mr. Egbert --

6 MR. BRACERAS: Your Honor, first of all,  
7 Mr. Deakin prepared the motion. And the extensive  
8 negotiation has all been revealed to Mr. Deakin, was  
9 reported to Mr. Deakin. And the testimony on this  
10 point goes back to, again --

11 HEARING OFFICER DAHER: I'm going to  
12 sustain Mr. Egbert on this one.

13 BY MR. BRACERAS:

14 Q. Mr. Deakin, did you ever learn anything  
15 about Ms. Joseph or the Horton case that supported  
16 this statement?

17 MR. EGBERT: Objection.

18 HEARING OFFICER DAHER: Same argument?

19 MR. EGBERT: This one's even further off,  
20 because we know that there are a number of meetings,  
21 conferences and the like that occurred between ADA  
22 Joseph and Judge Lopez, which he was not present in.  
23 And again --

24 HEARING OFFICER DAHER: I sustained you on

1 the former motion -- objection, but this one I'm  
2 going to allow Mr. Braceras to have it. Overruled.  
3 A. I hope I have the question right.  
4 HEARING OFFICER DAHER: Do you want it  
5 played back?  
6 THE WITNESS: No. I think I remember it,  
7 Your Honor. Thank you.  
8 A. I never learned anything in the entire  
9 course of this case that would justify -- in my view  
10 would justify this finding.  
11 MR. EGBERT: I move to strike that.  
12 HEARING OFFICER DAHER: Overruled.  
13 Q. Mr. Deakin, what was your reaction to this  
14 statement when you read it?  
15 A. I was outraged.  
16 Q. Mr. Deakin, if you turn to the next  
17 paragraph, Judge Lopez goes on to find that the DA  
18 -- the Commonwealth sought to turn the court  
19 proceedings into a circus. Do you see that?  
20 A. I do.  
21 Q. Did you agree with that finding?  
22 MR. EGBERT: Objection.  
23 A. Absolutely not.  
24 HEARING OFFICER DAHER: What's the

1 objection?

2 MR. EGBERT: My same objection as to what  
3 he agrees with were the Court's findings.

4 MR. BRACERAS: Your Honor, this finding  
5 goes --

6 HEARING OFFICER DAHER: What we have here  
7 is we have a supervisor who's been working, I take  
8 it, with Ms. Joseph for some time. I suspect that  
9 as a supervisor, he has knowledge coming to him as  
10 to the operation of the procedure of a trial. He  
11 can answer, for example, as to whether Ms. Joseph  
12 did anything to turn the court proceedings into a  
13 circus. If he has any knowledge of that, fine; I'd  
14 like to hear it. He's the supervisor.

15 MR. EGBERT: He's a supervisor, but these  
16 are court findings. These are court findings that  
17 you're accepting testimony --

18 HEARING OFFICER DAHER: I appreciate that.

19 MR. EGBERT: -- from one of the parties as  
20 to whether or not the party who lost thinks the  
21 findings are right.

22 HEARING OFFICER DAHER: But again, what we  
23 have right here, Judge Lopez made a finding. And  
24 now, in rebuttal, Mr. Braceras is trying to show

1 that, you know, whether indeed -- in their view, the  
2 validity to make such a statement. Overruled. Go  
3 ahead.

4 BY MR. BRACERAS:

5 Q. Mr. Deakin, did you think that this  
6 statement was accurate?

7 A. I thought it was false.

8 Q. Now, you were at the courthouse for the  
9 majority of that day, August 4th?

10 A. I was there for probably about half of the  
11 court day, so --

12 Q. Approximately when did you arrive?

13 A. I don't know. It was before the lunch  
14 recess, which is usually taken at one. So sometime  
15 in the midday.

16 Q. And you were there until the end of the  
17 court day?

18 A. I don't believe so. I think I left just  
19 before the bail reviews began.

20 Q. Well, you were there until after the Horton  
21 case was called?

22 A. Yes.

23 Q. Now, did you have an opportunity to observe  
24 the media present at the courthouse?



1           A.    Yes.  
2           Q.    Did you observe any improper conduct by the  
3 media?  
4           A.    I did not observe any improper conduct by  
5 the media, no.  
6           Q.    Was there anything at the courthouse that  
7 day to suggest a circus-like atmosphere?  
8           A.    Not that I observed.  
9           Q.    Now, if you go to the next paragraph,  
10 there's a finding that, "The Court found that there  
11 was little, if no, impact on the alleged victim..."  
12 Do you see that?  
13          A.    Yes.  
14                MR. EGBERT: "... as this is a plea."  
15 Let's read the whole statement.  
16                MR. BRACERAS: Your Honor, I think this is  
17 my witness.  
18                MR. EGBERT: You can't read a half a  
19 finding.  
20                MR. BRACERAS: Your Honor, Mr. Egbert can  
21 cross-examine Mr. Deakin --  
22                HEARING OFFICER DAHER: It's not going to  
23 hurt you. If we could just speed it up. There is a  
24 little "...as this is a plea." You've got it, Mr.

1 Egbert.

2 MR. BRACERAS: It's the interruption that  
3 is more disruptive.

4 HEARING OFFICER DAHER: Go ahead.

5 Q. Mr. Deakin, Judge Lopez finds that, "There  
6 is little, if no, impact on the alleged victim, as  
7 this is a plea." Do you see?

8 A. Yes.

9 Q. And it's fair to infer that what you meant  
10 is there is little, if no, impact to the continuance  
11 of the alleged victim?

12 A. That's how I understood the finding.

13 Q. Did you agree with that?

14 A. No, I did not.

15 Q. Why is that?

16 A. Well, in my experience it is hard on  
17 victims to tell them the case is going to be  
18 resolved and then have to tell them that it's going  
19 to be continued for a month. So I surmised that  
20 there was probably significant impact on the victim.

21 Q. Now, to your knowledge, did Judge Lopez  
22 ever take any evidence as to these findings?

23 A. None that I'm aware of, no.

24 Q. And you're aware that these findings were

1 made public?

2 A. Yes, I am aware of that.

3 MR. BRACERAS: Your Honor, is now a good  
4 time for the morning break?

5 HEARING OFFICER DAHER: I don't care. That  
6 would be fine.

7 (Recess.)

8 BY MR. BRACERAS:

9 Q. Mr. Deakin, on September 6th the parties  
10 returned to court for the plea and sentencing in  
11 Horton; is that right?

12 A. That's right, in Middlesex Superior Court.

13 Q. Who appeared for the Commonwealth on that  
14 day?

15 A. I did, along with ADA Joseph.

16 Q. Did you have any contact with Judge Lopez  
17 between the August 4th hearing and the September 6th  
18 sentencing?

19 A. No, I did not.

20 Q. Did you have any contact with defense  
21 counsel between the August 4th hearing and the  
22 September 6th sentencing?

23 A. No, I did not.

24 Q. When you arrived at the courthouse on

1 September 6th, did you observe the defendant and Ms.  
2 Goldbach enter the courtroom?

3 A. Yes, I did.

4 Q. And from where did they enter the  
5 courtroom?

6 A. They entered from a door behind the  
7 Judge's -- not directly behind the Judge's bench,  
8 but sort of as you're looking at the Judge's bench,  
9 flanking it on the right, it's -- well, I don't know  
10 if the record will get this, but it's basically in  
11 the same position as the door in this courtroom  
12 except that it's on the right instead of the left.

13 Q. Were you ever notified by Judge Lopez that  
14 special arrangements had been made for the --

15 MR. EGBERT: Objection to the  
16 characterization.

17 HEARING OFFICER DAHER: Overruled. Go  
18 ahead.

19 Q. Were you ever notified by Judge Lopez that  
20 special arrangements had been made for the defendant  
21 and defense counsel to enter the courthouse on  
22 September 6th?

23 A. No, I was not.

24 Q. Were you ever notified of this by defense

1 counsel?

2 A. No, I was not.

3 Q. Was the consent of the district attorney  
4 ever sought for these special arrangements?

5 A. No. To my knowledge, it was not.

6 Q. Did defense counsel ever make a request for  
7 such special arrangements for the defendant to enter  
8 the courthouse?

9 A. Not to my knowledge.

10 Q. Was any effort made by the Court to  
11 accommodate the victim and the grandmother on  
12 September 6th?

13 A. I'm not aware of any effort to accommodate  
14 either of them, although I would note that the  
15 victim, as I understand it, was not present on  
16 September 6th. It was only his grandmother.

17 Q. The grandmother was present?

18 A. Yes.

19 Q. And you aren't aware of any accommodations  
20 made for the grandmother on that day?

21 A. No.

22 Q. And you aren't aware of any efforts to  
23 accommodate the victim, had he chosen to go?

24 A. No efforts made by the Court. We made

1 efforts, the district attorney's office did, but  
2 none by the Court that I'm aware of.

3 Q. Now, have you had an opportunity to review  
4 the videotape of the proceedings on September 6th?

5 A. I reviewed that videotape either September  
6 6th or September 7th, but not since then, so it's  
7 been a couple of years, but I have seen it.

8 Q. Were you aware on September 6th that the  
9 Court limited the media's ability to photograph the  
10 defendant?

11 A. Yes, I was.

12 Q. Do you know if defense counsel had  
13 requested such limitations of the press's access to  
14 photograph the defendant?

15 A. I don't know.

16 Q. So you have no knowledge of any request by  
17 defense counsel for that type of limited access to  
18 photograph the defendant?

19 A. I'm not aware of any such request, no.

20 Q. Now, in the course of a plea hearing, where  
21 does a defendant -- where is the defendant normally  
22 located in the courtroom?

23 A. Normally, although there is some fairly  
24 substantial variation in practice, but normally the

1 defendant is seated in the witness box.  
2 Q. Is the defendant put under oath?  
3 A. Yes.  
4 Q. Now, turning to Exhibit 22, which is the  
5 transcript of the September 6th plea and sentencing?  
6 A. I see that.  
7 Q. If you turn to Page 8, Line 7, which is up  
8 on the screen --  
9 A. Page 8, Line 7. Yes, I see that.  
10 Q. The Court stated that -- the Judge had  
11 initially indicated that the defendant, Horton,  
12 would be placed into the community corrections  
13 program. Do you see that?  
14 A. I do.  
15 Q. And the Court, Judge Lopez, notes that the  
16 defendant would not be accepted into the community  
17 corrections program; is that right?  
18 A. That's correct.  
19 Q. What was your understanding as to why the  
20 defendant was not accepted into the community  
21 corrections program?  
22 MR. EGBERT: Objection.  
23 HEARING OFFICER DAHER: Overruled.  
24 A. It's my understanding that because he was

1 pleading guilty to violent offenses, he would not be  
2 admitted to the community corrections program.

3 Q. If you turn several pages forward to Page  
4 12 of the transcript, at Lines 8 to 11.

5 A. Yes.

6 Q. Before you gave your recitation of the  
7 facts, the Judge stated at Line 8 on Page 12, "Now,  
8 I will hear from the DA's office, and I want to hear  
9 only the facts that pertain to these indictments.  
10 Okay?" Do you see that?

11 A. I do.

12 Q. What did you understand the Court to mean  
13 in this regard?

14 A. I didn't really understand it, because  
15 that's all --

16 MR. EGBERT: If he didn't understand it,  
17 that's the end of the answer.

18 MR. BRACERAS: He should be allowed to  
19 finish his answer, Your Honor. He's on direct.

20 MR. EGBERT: On direct or anywhere else, if  
21 he didn't understand it. The question is what did  
22 you understand, and he said he didn't understand it.

23 HEARING OFFICER DAHER: Why don't you  
24 finish, and I'll entertain your motion.



1           A.    I didn't understand it because that's all  
2 we do customarily at plea colloquies is we recite  
3 the facts that pertain to the indictment.  So I  
4 didn't understand why the Judge was saying -- it  
5 essentially goes without saying.

6           MR. EGBERT:  I'll withdraw my objection.

7           Q.    Let's watch your recitation of the facts.

8           MR. BRACERAS:  And, Your Honor, for your  
9 assistance we'll play it up on the video, but it  
10 will be Pages 12 through the first line of Page 16  
11 of the transcript.

12                   (Videotape playing)

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

16           MR. DEAKIN:  Yes, Your Honor.  Your Honor,  
17 were this matter to go to trial, the Commonwealth  
18 would prove the following facts.

19                   On Saturday, November 20th of 1999, a  
20 12-year-old boy, the victim in this case, was  
21 walking to his home in Dorchester.  It was just  
22 after 8 p.m., when the boy was walking home from a  
23 friend's house.  As he walked along Corona Street,  
24 heading towards Geneva Avenue, a car pulled up

1 beside him. In the car was the defendant who  
2 appeared to the boy to be a woman he did not know.

3 The defendant told the boy that the  
4 defendant was searching for a missing son named  
5 Michael and that the defendant would pay \$100 to  
6 anyone who found the missing boy. The defendant  
7 asked the victim to get into the car, and the boy  
8 agreed.

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

21 The defendant then put a screwdriver to the  
22 boy's neck and told him to be quiet. The defendant,  
23 whose pants were partially down, then pulled the  
24 boy's head into the defendant's lap. The boy then

1 felt what the defendant said was the defendant's  
2 finger against his mouth. The defendant told the  
3 boy to suck the finger, and the defendant took the  
4 boy's head and moved it up and down.

5 The victim reports that he was crying and  
6 pleading to be allowed to go home. Using profanity,  
7 the defendant told the victim to shut up. The  
8 defendant told the victim to stop sucking the finger  
9 and instead to suck the screwdriver.

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

16 At approximately 8:28 p.m. on Saturday,  
17 November 20th, Officers Rose and Sweeney of the  
18 Boston Police Department were on routine patrol in  
19 their sector of Dorchester. They saw a 1996 Nissan  
20 Maxima parked in a dark area of the back lot of 50  
21 Park Street near a warehouse. It was not an area in  
22 which passenger cars typically had business at that  
23 time of night.

24 The officers turned on the cruiser's lights

1 and looked at the car. In it they saw a person,  
2 later identified as the defendant, moving up and  
3 down quickly. About ten seconds later the officers  
4 saw the head of a second person, later identified as  
5 the 12-year-old victim, rise up from the front  
6 driver's side area of the car. The officers  
7 approached the car and saw the defendant in the  
8 driver's seat with his pants unzipped and down  
9 around his hips.

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

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

21 THE COURT: Thank you. I believe that  
22 completes the facts that are relevant for purposes  
23 of these indictments."

24 (Videotape stopped.)

1 BY MR. BRACERAS:

2 Q. Mr. Deakin, Judge Lopez interrupted you  
3 here?

4 A. Yes.

5 Q. What was your understanding as to why she  
6 interrupted you?

7 MR. EGBERT: I'm sorry; I didn't hear that.

8 Q. What was your understanding as to why the  
9 Judge interrupted you at this point in your  
10 recitation of the facts?

11 MR. EGBERT: Objection.

12 HEARING OFFICER DAHER: I'll hear you, Mr.  
13 Braceras, as to his understanding as to why Judge  
14 Lopez did interrupt him during the proceedings.

15 MR. BRACERAS: Your Honor, Mr. Deakin was  
16 in the middle of his recitation of facts. It's  
17 relevant as to why he would have been interrupted.  
18 Why does he think, out of all the sentencing  
19 hearings he's done, he would have been interrupted  
20 in the middle of this recitation.

21 MR. EGBERT: I don't know why he thinks is  
22 relative to anything or what he thinks is relative  
23 to anything. The record speaks for itself. His  
24 opinions are not appropriate.

1                   MR. BRACERAS: Your Honor, the Judge is  
2 charged, among other things, with bias and the  
3 appearance of impartiality -- the appearance of  
4 bias; I'm sorry. Now, clearly the DA's impression  
5 as to why he's being interrupted and why he's having  
6 a limited opportunity to be heard is relevant to  
7 those charges.

8                   HEARING OFFICER DAHER: Overruled.

9                   A. I didn't understand why she was  
10 interrupting me, why the Judge was interrupting me,  
11 because I wasn't finished. It was strange.

12                  Q. Is it unusual to be interrupted in the  
13 middle of your recitation of facts?

14                  A. Very.

15                  Q. Now, what is the purpose of the recitation  
16 of facts in a sentencing hearing?

17                  A. The purpose of the recitation of the facts  
18 is to apprise the Court -- that is, the Judge -- of  
19 the facts that the Commonwealth would intend to  
20 prove to support the indictments were the case to go  
21 to trial, and also, to make a record for posterity,  
22 if I can use that term, of what the factual basis  
23 for the charge was. And, finally, to give the  
24 factual basis supporting the Commonwealth's

1 sentencing recommendation.

2 Q. Now, it is important to provide a  
3 recitation of facts, even after a judge has  
4 indicated or intended sentence at a lobby  
5 conference?

6 A. Absolutely.

7 Q. Why?

8 A. Well, first and foremost, if you don't make  
9 a record of the fact, there's no way for a review in  
10 court, if there were ever to be a review, to  
11 determine what facts underlie the indictments. So a  
12 judge has to make a finding that there is sufficient  
13 evidence on each element of each offense, and that  
14 has to be a matter of record.

15 Additionally, if the Commonwealth intends  
16 to argue for a sentence -- intends to advance a  
17 sentencing recommendation, it needs to have a  
18 factual basis to make that sentencing recommendation  
19 so that the Court is clear on why the Commonwealth  
20 is doing what it's doing, and the record, again, for  
21 purposes of later review, is also clear.

22 Q. In the Horton case, was it possible for  
23 Judge Lopez on September 6th to revisit or  
24 reconsider the intended sentence that she announced

1 on August 1st?  
2 MR. EGBERT: Objection.  
3 HEARING OFFICER DAHER: What's your  
4 objection?  
5 MR. EGBERT: My objection is to the word  
6 "possible."  
7 HEARING OFFICER DAHER: Overruled. Go  
8 ahead.  
9 A. Absolutely.  
10 Q. So September 6th was not a formality?  
11 A. It was a formal proceeding, but it was not  
12 a mere formality. It was part and parcel of the  
13 plea colloquy. Without it -- without September 6th,  
14 no sentence could have been imposed.  
15 Q. Now, you asked the Judge if you could  
16 continue your recitation of facts, and she allowed  
17 you?  
18 A. That's correct.  
19 MR. BRACERAS: So why don't we see the rest  
20 of that.  
21 (Videotape playing.)  
22 "MR. DEAKIN: Your Honor, if I may, there  
23 are additional facts that relate to the defendant's  
24 statements to the police about his intention at the



1 time, and I think therefore are directly relevant.

2 THE COURT: Okay. Go ahead.

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

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

12 The defendant said that the victim had  
13 volunteered to help find Mike and James, two other  
14 boils. The defendant said the two drove around  
15 looking for the teenagers, without success. The  
16 defendant told police that he had driven to 50 Park  
17 Street and parked the car there, which is where the  
18 police found him.

19 There, according to the defendant, the pair  
20 sat and discussed sexual things that the defendant  
21 had done. According to the defendant, the victim  
22 asked the defendant for oral sex. The defendant  
23 then asked the victim to show the defendant his  
24 penis. It was then that the police arrived,

1 according to the defendant.

2 The defendant conceded in the interview  
3 that the defendant's pants were unbuttoned in his  
4 words 'a little bit'. When asked if the two of them  
5 had physical contact, the defendant replied that  
6 they had only kissed. When asked about oral sex,  
7 the defendant answered that the 12-year-old victim  
8 had asked about the defendant's genitalia, and it  
9 was then that the defendant jokingly asked whether  
10 the victim wanted to perform oral sex on the  
11 defendant, who employed a common vulgarity to refer  
12 to female genitalia.

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

17 That in summary would be the facts the  
18 Commonwealth would prove if the matter went to  
19 trial."

20 (Videotape stopped.)

21 BY MR. BRACERAS:

22 Q. Now, Mr. Deakin, during this last part of  
23 your recitation of facts, was there something  
24 inaccurate in what you said?

1 A. Yes, there was.

2 Q. What was that?

3 A. Early in the tape clip that was shown, I  
4 recited three facts that the defendant had  
5 purportedly said about the boy: That he knew him as  
6 Sean, that he had a 19-year-old brother, and that he  
7 lived on Westville Street, and I said each of those  
8 were false. In fact, the first two were false. The  
9 third thing was true, and it was an error on my part  
10 to represent it as false.

11 Q. Was that information that the boy lived on  
12 Westville Street, was that in the police reports?

13 A. It was in the 911 report, the report of the  
14 initial responding officers.

15 Q. Was that information provided to defense  
16 counsel?

17 A. Yes, I believe at arraignment earlier in  
18 the discovery process all the police reports had  
19 been turned over to defense counsel.

20 Q. When did you become aware of the inaccuracy  
21 of your recitation on that one point?

22 A. Just under a month later I became aware of  
23 my error.

24 Q. What did you do when you became aware of

1 that mistake?

2 A. Well, first, I checked to make sure that it  
3 was in fact an error, and it was. I prepared a  
4 notice of disclosure to correct the record. I filed  
5 that, and normally by first class mail at the  
6 clerk's office at Suffolk Superior Court, with  
7 courtesy copies to Justice Lopez and to defense  
8 counsel.

9 Q. And if you could flip in the smaller  
10 notebook to Exhibit Q just to identify the notice of  
11 disclosure that you filed.

12 A. (Witness complies.)

13 MR. BRACERAS: Your Honor, do you have  
14 Defense Exhibit 2?

15 HEARING OFFICER DAHER: I've got it now.

16 A. Yes.

17 Q. Is that the notice of disclosure that you  
18 just described?

19 A. Yes, it is.

20 Q. Now, returning to the September 6th plea  
21 and sentencing hearing, did the defendant disagree  
22 with any of the facts that you recited in either of  
23 the two video clips that we saw?

24 A. Yes. Through counsel he disputed three of

1 the facts.

2 Q. What were they?

3 A. He disputed that his pants were --  
4 actually, may I consult the transcript just to  
5 refresh my memory? I don't want to be wrong.

6 Q. Yes. Exhibit 22, Page 18?

7 A. (Witness reviews document) Yes. Through  
8 counsel, the defendant first disputed that the  
9 defendant's pants were down at all.

10 Second, the defendant disputed that they  
11 had driven around in the way that I had described  
12 the boy reporting.

13 And third, the defendant disputed the \$50  
14 that the defendant gave the victim to be quiet.  
15 That's the way it was phrased. They disputed that.

16 Q. Were any of those three items material to  
17 the charges in the indictments?

18 A. Not material. At least two of them were  
19 relevant, but none of the three were material.

20 Q. In any event, the defendant agreed with all  
21 of the other facts that you recited on September  
22 6th; is that right?

23 A. That's correct. The transcript and my  
24 recollection are that the Judge asked him, "Okay.

1 Other than that, do you agree with all the other  
2 facts?" And the defendant said, "Yes."  
3 Q. Now, following your recitation of the  
4 facts, if you turn to Page 22 of the transcript, at  
5 Line 9 --  
6 A. Yes.  
7 Q. -- the Judge asked you to be heard on  
8 sentencing; is that right?  
9 A. I'm sorry; the page number here?  
10 Q. Page 19, Line 9. Sorry about that.  
11 A. Yes.  
12 Q. So following your recitation, the Court  
13 asked you to be heard on sentencing?  
14 A. That's correct.  
15 Q. And she states that -- Judge Lopez stated  
16 at Line 9 on Page 19, "I'll hear you on sentencing";  
17 is that right?  
18 A. That's correct.  
19 Q. You did not begin to speak without an  
20 invitation to do so?  
21 A. I began my sentencing recommendation after  
22 the Judge indicated that she would hear me on  
23 sentencing.  
24 Q. So let's see your sentencing

1 recommendation.

2 A. Just if I may, just to clarify. I  
3 apologize. There was a matter at side bar -- after  
4 the Judge asked to hear me on sentencing and before  
5 I actually began my sentencing argument, there was a  
6 matter at side bar. I don't know whether you're  
7 playing that.

8 Q. No. So I believe we'll be starting here.  
9 This is Page 20, Line 13, after the discussion at  
10 side bar?

11 A. Okay.

12 Q. So this is your sentencing  
13 recommendation -- I believe you can tell us what it  
14 is, but I believe this will be your sentencing  
15 recommendation after the side-bar conference.

16 (Videotape playing.)

17 "MR. DEAKIN: Thank you, Your Honor. As to  
18 sentencing, the Commonwealth's recommendation is as  
19 follows. As to count 002, which charges assault  
20 with intent to rape a child, the Commonwealth would  
21 recommend a sentence that is not less than 8 nor  
22 more than 10 years in state prison. As to count  
23 001, which alleges kidnapping, the Commonwealth  
24 would recommend a period of probation of ten years

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

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

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

22           The Commonwealth, in formulating the  
23 sentencing recommendation has consulted the  
24 sentencing guidelines grid and found that the



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

10 And the Commonwealth would note that in  
11 both cases, although the defendant is a Category 8,  
12 in terms of record; that is, no or a quite minor  
13 record, it recommends incarceration and not  
14 alternative sentencing.

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

1 successfully complete whatever treatment it deemed  
2 necessary as a result of that evaluation.

3 THE COURT: Do you know that he has already  
4 been evaluated?

5 MR. DEAKIN: I'm aware that there is a  
6 psychological profile for the Court that has been  
7 prepared. If that report satisfies the Probation  
8 Department as a sex offender evaluation, the  
9 Commonwealth would be satisfied with that report. I  
10 would ask the Court to defer to probation on whether  
11 that's a sufficient sex offender evaluation.

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

1 with the exception the victim impact statement,  
2 that's the Commonwealth's recommendation."

3 (Videotape stopped.)

4 BY MR. BRACERAS:

5 Q. Mr. Deakin, when you referred to the  
6 sentencing guidelines in this colloquy at Page 21,  
7 Line 20 and 21, through Page 22 of the transcript,  
8 you were referring to what is Exhibit 23 in this  
9 case?

10 A. That's correct.

11 Q. Did the Judge at any point in this colloquy  
12 or elsewhere in the September 6th proceeding  
13 indicate any confusion as to your reference to  
14 sentencing guidelines?

15 A. No.

16 Q. During the course of the sentencing  
17 colloquy, Judge Lopez asked whether the defendant  
18 should be sent to a male or female prison. Do you  
19 recall that?

20 A. I do.

21 Q. We can look at that.

22 (Videotape playing.)

23 "THE COURT: And would the Commonwealth  
24 requests that this defendant be sent to a male

1 prison or female prison."

2 (Videotape stopped.)

3 Q. How did you respond to the Judge on this  
4 point?

5 A. I responded that the Commonwealth would  
6 defer to the Commissioner of Corrections on the  
7 classification and assignment of prisoners and that  
8 I said that the Commonwealth understands that this  
9 is a difficult issue with respect to incarcerated  
10 individuals who are transgendered, but that the  
11 Commissioner of Corrections has procedures in place  
12 designed to accommodate those individuals' needs and  
13 protect their safety.

14 Q. At some point during the September 6th  
15 proceedings did you seek to introduce the victim  
16 impact statements?

17 A. We sought to read them into the record.

18 Q. How did you intend to read them into the  
19 record?

20 A. I intend to have ADA Joseph read the victim  
21 impact statements into the record.

22 Q. Why did you want Ms. Joseph to read the  
23 victim impact statements?

24 A. ADA Joseph and I had discussed this. She

1 is the person that the victim's guardian knew and  
2 had worked with throughout this case. She really  
3 had no relationship with me. She was present in the  
4 courtroom for the reading of her impact statement,  
5 and her daughter, the victim's mother, had also  
6 prepared one, although she was not present.

7 We felt that out of deference to the  
8 relationship that had developed between ADA Joseph  
9 and the victim's grandmother, his guardian, that it  
10 would be appropriate to have her read the victim  
11 impact statements.

12 Q. What is the importance of involving the  
13 victim and his family in these proceedings?

14 A. Well, in any criminal case, the victim has  
15 rights under the victim's bill of rights in the  
16 Commonwealth. We are particularly sensitive to the  
17 needs of child victims in these cases. Because the  
18 system is that much more imposing, strange,  
19 frightening to kids, it is vitally important in  
20 prosecuting child abuse cases that both the child  
21 and his or her family develop a trusting  
22 relationship with the victim witness advocate and  
23 the district attorney as well as the detectives  
24 working on the case.

1 Q. At some point during the proceedings on  
2 September 6th did you or Ms. Joseph give an  
3 indication to the Court that Ms. Joseph would in  
4 fact be reading the victim impact statements?

5 A. I'm sorry. Ask me the time frame again.

6 Q. At some point during the September 6th  
7 proceedings did you and Ms. Joseph do something to  
8 indicate to the Judge Ms. Joseph would be reading  
9 the victim impact statements?

10 A. When I said that we wanted to read the  
11 victim impact statements, I went to sit down and Ms.  
12 Joseph stood to read them.

13 Q. If you turn to Page 25 of the transcript,  
14 Line 19 --

15 A. Yes.

16 Q. -- you'll see you state, "And I would just  
17 ask that the Court hear the victim impact  
18 statement." Do you see that?

19 A. Yes.

20 Q. And do you see how the Court responds?

21 A. Yes.

22 Q. What did Judge Lopez say?

23 A. She said, "Sure. And would you read them,  
24 please."

1 Q. What did you interpret the Court to be  
2 saying here?

3 A. It was very clear in the context that Judge  
4 Lopez was saying that she would listen to the victim  
5 impact statements, but that she wanted me to read  
6 them, not Ms. Joseph.

7 Q. You don't believe that the Court was giving  
8 you a choice here, do you?

9 A. Oh, no, there was no choice. It was very  
10 clear that she was saying that I should read them  
11 and not Ms. Joseph.

12 MR. BRACERAS: Let's play another excerpt  
13 here of the video regarding the seriousness of the  
14 crime, and that's starting at Page 29, Line 16 of  
15 the transcript.

16 (Videotape playing.)

17 "THE COURT: Okay. Let me just ask you  
18 something. How long have you been in charge of the  
19 sexual assault unit?

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

21 THE COURT: Okay. How many of these sex  
22 cases have you seen?

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

1 THE COURT: A ballpark figure.

2 MR. DEAKIN: We see approximately 500 such  
3 investigations of sexual assault --

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

5 MR. DEAKIN: I think, Your Honor, and I'm  
6 not prepared with the figures, but I expect that we  
7 indict close to 100 cases a year.

8 THE COURT: Okay. And of those 100 cases,  
9 in terms of the facts of this case, on a scale of 1  
10 to 10, where would you put this case?

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

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



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

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

17                   I'll hear from the defense attorney.

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

19                   THE COURT: No, you may not. You may sit  
20 down.

21                   MR. DEAKIN: I --

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

1                   MR. DEAKIN: I object to being charged with  
2 being disingenuous.  
3                   THE COURT: I find it was disingenuous, and  
4 I know better than that. Go ahead."  
5                   (Videotape stopped.)  
6                   HEARING OFFICER DAHER: Could I get a cite  
7 on that victim impact statute, please?  
8                   MR. BRACERAS: The statute or in the  
9 transcript?  
10                  HEARING OFFICER DAHER: The statute.  
11 What's the cite on it?  
12                  THE WITNESS: It's the victim's bill of  
13 rights. I can certainly provide it to the Court. I  
14 don't know the cite offhand.  
15                  HEARING OFFICER DAHER: Mr. Egbert, would  
16 you have it?  
17                  MR. EGBERT: Yes, Your Honor. Chapter  
18 258B, Section 3.  
19                  HEARING OFFICER DAHER: Thank you.  
20                  BY MR. BRACERAS:  
21                  Q. Mr. Deakin, during this colloquy, the  
22 Court, Judge Lopez, asked you to scale this case on  
23 a scale from 1 to 10; is that right?  
24                  A. That's correct.

1 Q. You did not give the case an overall rating  
2 of 10, did you?

3 A. No, I did not.

4 Q. How did you rate the case?

5 A. I rated -- I explained that there were  
6 several axes that one would evaluate a case on in  
7 terms of its seriousness. As the clip shows -- I  
8 don't want to belabor a point that the Court just  
9 saw, but I said that in terms of this  
10 stranger/danger element of the case, it was a 10,  
11 because people are most frightened of people they  
12 don't know, those of whom they have no control,  
13 they're not aware of.

14 I said based on the age of the child, it  
15 was in the quite serious range, by which I meant it  
16 was not a 10, but it was quite serious. And then I  
17 explained, in terms of the completed sexual assault,  
18 what was actually disclosed by the child as a sexual  
19 assault, it was moderately serious.

20 My point was only in some respects it was  
21 quite serious; in some respects it was moderately  
22 serious. That's what I was trying to convey.

23 Q. Were you in any sense in these proceedings  
24 being disingenuous with the Judge?

1           A.    Absolutely not.  
2           Q.    You were not playing to the cameras?  
3           A.    No.  I was deliberately trying not to do  
4    that.  
5           Q.    Now, at the end of this last clip you were  
6    asked by the Judge to sit down; is that right?  
7           A.    I'd say I was told by the Judge to sit  
8    down.  
9           Q.    You were told by the Judge to sit down?  
10          A.    That's correct.  
11          Q.    Probably a fairer characterization.  
12                But you didn't sit down immediately, did  
13    you?  
14          A.    No, I did not.  
15          Q.    Why not?  
16          A.    I wanted to voice my objection to the Judge  
17    calling my actions disingenuous.  I felt that I had  
18    a right, as an advocate on behalf of the  
19    Commonwealth and as a lawyer, to put on the record  
20    my objection to her characterization of me as  
21    disingenuous.  In fact, I felt, as a lawyer for the  
22    Commonwealth, I had an obligation to do that.  
23                MR. BRACERAS:  Your Honor, now I'd like to  
24    mark and offer into evidence as Exhibit 1 Judge

1 Lopez's response to the charges in this case.  
2 MR. EGBERT: I think these are a matter --  
3 HEARING OFFICER DAHER: Are they not part  
4 of the case already?  
5 MR. BRACERAS: I think they're a matter of  
6 the case, but because they have statements made on  
7 behalf of the Judge, they are also admissions and  
8 they can be evidence.  
9 HEARING OFFICER DAHER: I get the point.  
10 MR. EGBERT: No objection.  
11 HEARING OFFICER DAHER: Go ahead.  
12 MR. BRACERAS: Exhibit 1. And these are  
13 admitted.  
14 (Document marked as Exhibit 1 moved  
15 into evidence)  
16 HEARING OFFICER DAHER: Mr. Braceras, now  
17 could Mr. Egbert, if he still wants it, could we get  
18 a complete manual of the district attorney's  
19 procedures? Do you have it?  
20 MR. BRACERAS: We don't have it. I don't  
21 think it's possible --  
22 MR. EGBERT: Judge, it's very interesting  
23 to me that Mr. Braceras said to you, in the midst of  
24 the argument on that objection, that they had given

1 me a copy -- a full copy of the district attorney's  
2 manual and now they tell you, when you ask them for  
3 it, that they don't have it. I don't know how they  
4 could have done both. We constantly get these  
5 responses from the Commission as it relates to these  
6 kinds of matters.

7 MR. WARE: Perhaps I should speak to this.  
8 This issue, of course, has been on the table for  
9 seven or eight months, and Mr. Egbert well knows  
10 that. The whole sentencing guidelines issue is not  
11 a stranger to the case. The DA's manual is not a  
12 stranger to the case. We're happy to provide it.  
13 We'll get it from the district attorney's office and  
14 give Mr. Egbert a copy. He's got a week to look it  
15 over.

16 MR. EGBERT: May I approach?

17 HEARING OFFICER DAHER: Yes. You're going  
18 to get it.

19 MR. EGBERT: I'm assuming that we're not  
20 going to be in cross before I get it.

21 MR. WARE: There's plenty of cross  
22 examination to do other than a DA's manual, and I  
23 think you can struggle along without it for an hour  
24 here.

1 MR. EGBERT: Judge, I'll do my own  
2 struggling. I've watched Mr. Ware struggle enough  
3 and I don't intend to do it myself, but we might as  
4 well proceed.

5 MR. BRACERAS: Your Honor, may I approach?

6 Q. I'm showing you what's been admitted now  
7 as --

8 HEARING OFFICER DAHER: Mr. Ware, if you  
9 don't have a copy of that manual, I can make a call  
10 and probably get one delivered to Mr. Egbert. Do  
11 you have one?

12 MR. WARE: We'll take care of that. I'm  
13 sure Mr. Egbert and I can work that out.

14 HEARING OFFICER DAHER: That's great.

15 MR. EGBERT: There's nothing to work out.  
16 It's going to be delivered to me.

17 HEARING OFFICER DAHER: We'll make sure you  
18 get it. Let's go.

19 BY MR. BRACERAS:

20 Q. Mr. Deakin, I'm showing you what's been  
21 admitted as Exhibit 1, Judge Lopez's response to the  
22 Commission on Judicial Conduct's charges. Do you  
23 see that?

24 A. Yes, I do.

1 Q. Have you had an opportunity to review these  
2 before?

3 A. Yes, I have.

4 Q. In fact, these were made public when they  
5 were filed?

6 A. That's my understanding, yes. And I was  
7 delivered a copy.

8 Q. Now, if you turn to Page 8, Paragraph 15 --  
9 Paragraph 15 of Judge Lopez's response is on Page 7,  
10 but if you turn to Paragraph 15A on Page 8 --

11 A. Yes.

12 Q. -- you'll see that Judge Lopez lists the  
13 basis for her calling you disingenuous. Do you see  
14 that?

15 A. Yes, I do.

16 Q. Now, taking these one at a time, in  
17 Paragraph A, Judge Lopez asserts that you were being  
18 disingenuous because the adolescent victim in this  
19 case was almost certainly not prepubescent, was  
20 believed by the defendant to be 14 years old, and  
21 the offense here did not involve pedophilia. Do you  
22 see that?

23 A. I do.

24 Q. Is there any legal relevance to whether the



1 victim in this case was or was not prepubescent?  
2 MR. EGBERT: Objection.  
3 HEARING OFFICER DAHER: What's your  
4 objection?  
5 MR. EGBERT: Well, for this assistant  
6 district attorney to decide what is legally  
7 relevant --  
8 HEARING OFFICER DAHER: It goes to the  
9 element of whether he could put in a prima facie  
10 case pursuant to the statute.  
11 MR. EGBERT: Relevance has nothing to do  
12 with the prima facie case.  
13 HEARING OFFICER DAHER: I appreciate that.  
14 Overruled.  
15 Q. Mr. Deakin, was there any legal relevance  
16 to whether the adolescent victim was or was not  
17 prepubescent in this case?  
18 A. Not to the elements of any offense, no.  
19 Q. Was there ever any evidence or argument  
20 offered during any of the proceedings in the Horton  
21 case to go to show whether the victim was or was not  
22 prepubescent?  
23 MR. EGBERT: Judge, he wouldn't know that.  
24 He wasn't at all the proceedings.

1                   MR. BRACERAS: He was the supervisor  
2 supervising the case.

3                   HEARING OFFICER DAHER: Overruled. He  
4 should know it.

5                   A. Not to my knowledge, no. I believe there  
6 was not.

7                   Q. Now, was there any legal relevance in any  
8 of the charges against Mr. Horton as to whether he  
9 was or was not a pedophile?

10                  A. No.

11                  Q. Was there ever any evidence or argument  
12 offered at any time in the proceedings going to  
13 whether the defendant was a pedophile?

14                  MR. EGBERT: Objection.

15                  A. No.

16                  MR. EGBERT: Judge, if you're insistent on  
17 letting this line of questioning in, I have to put  
18 on the record, and I think it's important to note,  
19 that this witness was not present when the arguments  
20 were made by the district attorney's office and the  
21 defense counsel as to various facts which went into  
22 the issue of the sentence in this case.

23                  HEARING OFFICER DAHER: But the evidence  
24 is, Mr. Egbert, that he's a supervisor and

1 intimately involved with the workings of this case  
2 by the ADA and the office and the district  
3 attorney's office. So as a supervisor, I'm going to  
4 believe, and the Court's going to infer, that he  
5 knows as to what was taking place in this case.

6 MR. EGBERT: But wouldn't it be best, so  
7 that we don't embark --

8 HEARING OFFICER DAHER: Go ahead.

9 MR. EGBERT: -- to ask him the question  
10 whether or not he knows everything that was said at  
11 the August 1st sentencing?

12 HEARING OFFICER DAHER: I have no doubt  
13 that's going to be part of your cross examination,  
14 Mr. Egbert.

15 MR. EGBERT: Why don't we find out first --

16 HEARING OFFICER DAHER: I'm not going to  
17 try Mr. Braceras' case, and I'm going to allow you,  
18 as I have in the past, extensive opportunity to  
19 cross-examine.

20 Go ahead, Mr. Braceras.

21 MR. BRACERAS: Thank you, Your Honor.

22 BY MR. BRACERAS:

23 Q. Mr. Deakin, did you review the file in this  
24 case before the September 6th plea?

1           A.    Yes.  
2           Q.    Did you review all the materials in that  
3 file?  
4           A.    Yes.  
5           Q.    Did you consult with ADA Joseph?  
6           A.    Yes.  
7           Q.    Now, to your knowledge, was there ever any  
8 evidence presented into this case that the defendant  
9 was or was not a pedophile?  
10          A.    To my knowledge, there was not.  
11          Q.    Did the defense ever argue at September 6th  
12 or any other time to your knowledge that the  
13 defendant was not a pedophile?  
14          MR. EGBERT:  May I have a continuing  
15 objection to this line?  
16          HEARING OFFICER DAHER:  It's been noted.  
17          Q.    Your answer, Mr. Deakin?  
18          A.    Not to my knowledge, no.  
19          Q.    Turning back to Judge Lopez's response  
20 here, you'll see in the next paragraph Judge Lopez  
21 contends that you were being disingenuous because  
22 this crime did not involve abuse or betrayal of a  
23 family member.  Do you see that?  
24          A.    Yes.

1 Q. Now, was that a factor in your assessment  
2 of the seriousness of this case?

3 A. Not really, no. It's something that the  
4 case was not. It had no relevance to what the case  
5 was.

6 Q. But certainly you took into account the  
7 circumstances of the case?

8 A. Of course. Of course.

9 Q. Now, Judge Lopez, in her response, also  
10 says that you were being disingenuous because, in  
11 Paragraph C on Page 8, the adolescent had not been  
12 physically or repeatedly brutalized either by sexual  
13 penetration or otherwise, and then in Paragraph D it  
14 states the adolescent had suffered no physical  
15 injury. Do you see that?

16 A. Yes.

17 Q. Now, did you agree with those responses?

18 A. I certainly did not agree that the facts to  
19 which the defendant admitted did not involve  
20 physical and repeated -- did not involve brutal  
21 assault and repeated assault. As to D, it does  
22 appear that the adolescent suffered no physical  
23 injury, but I think that's a -- limiting injury to  
24 physical injury in a case like this is missing the

1 point. I think there's psychic injury that equally  
2 if not more significant.

3 Q. And when you were assessing the seriousness  
4 of the case during the September 6th proceedings,  
5 you relayed to the Court the nature of the injuries;  
6 isn't that right?

7 A. That's correct.

8 Q. Now, toward the end of the hearing on  
9 September 6th, you sought to be heard on the terms  
10 of probation --

11 A. Actually, if I may add something to that  
12 answer?

13 Q. Sure.

14 A. I did -- that is, I did convey the nature  
15 of that injury schematically and quickly because  
16 it's necessarily a somewhat abbreviated process.  
17 Part of the purpose of the victim impact statements  
18 is also to convey the impact more precisely by  
19 people more familiar with it.

20 Q. Well, when you were rating this case on a  
21 scale of 1 to 10, you did not give it a 10 in terms  
22 of physical --

23 A. Oh, I did not, no. That's right.

24 Q. Towards the end of the hearing you sought

1 to be heard on the terms of probation; is that  
2 right?  
3 A. Yes.  
4 MR. BRACERAS: Let's play that portion of  
5 the video. And that's Page 32 of the transcript.  
6 (Videotape playing.)  
7 "THE COURT: I don't want to hear from you  
8 anymore. Do you understand?  
9 MR. DEAKIN: Your Honor, if I may be heard.  
10 THE COURT: No. You will not be heard. I  
11 said I've heard enough.  
12 MR. DEAKIN: I'm only inquiring as to one  
13 of the conditions of the electronic monitor. It's  
14 not clear to me that the Probation Department will  
15 know the conditions of the electronic monitoring;  
16 that is, what is being monitored."  
17 (Videotape stopped.)  
18 BY MR. BRACERAS:  
19 Q. Now, in this section of the hearing you  
20 were not trying to be heard on the issue of you  
21 being disingenuous, were you?  
22 A. No.  
23 Q. You were just trying to clarify the terms  
24 of probation?

1           A.    That's right.  The Judge had ordered  
2 electronic monitoring of the defendant, but had not  
3 up to that point set out what the conditions to be  
4 monitored were going to be.  And what I anticipated,  
5 and I laid out after the part that you've seen, is  
6 that the Probation Department would have to come  
7 back to the Court and say what are we monitoring.  
8 We can monitor him with a bracelet, but what are the  
9 conditions?  Does he get to leave his house?  If so,  
10 when?  That kind of thing.  So I was trying to bring  
11 to the Court's attention that there needed to be  
12 conditions that could be monitored electronically so  
13 that we wouldn't have to all come back a day or two  
14 later to have Probation address that issue.

15           Q.    Mr. Deakin, turning to Exhibit 4 in this  
16 case -- and we'll put it up on the screen, and you  
17 also have it in your notebook here.  This is a  
18 statement that says, "In the Matter of Charles  
19 Horton in Response to Media Reports by Judge Maria  
20 Lopez."  Do you see that?

21           A.    Yes.

22           Q.    Have you seen this statement before?

23           A.    Yes.

24           Q.    What did you understand this statement to



1 be?

2 A. I understood it to be a statement, a public  
3 statement by Judge Lopez in reference to the Charles  
4 Horton case and media reports about it.

5 Q. When was the first time that you saw  
6 Exhibit 4?

7 A. I don't remember exactly. It was a day or  
8 two after the plea hearing. It was faxed to our  
9 office.

10 Q. Now, if you look at the last sentence in  
11 the first paragraph -- and we'll pull that out on  
12 the screen.

13 A. Yes.

14 Q. The statement says, "In this case there  
15 were certain facts before me, known by both the  
16 prosecutor and defense attorney, that were part of  
17 the plea conference and cannot be revealed by me,  
18 but which would undoubtedly change the  
19 characterization of this case as currently reported  
20 by some media outlets." Do you see that?

21 A. Yes, I do.

22 Q. Are you aware of any relevant facts known  
23 to you, the Judge and defense counsel that could not  
24 be revealed to the public in the Horton case?

1           A.   Essentially, no.  The name of the victim  
2 perhaps, but no.  I was unaware of any relevant  
3 facts known by both the prosecutor and the defense  
4 attorney that were part of the plea conference  
5 and that could not be made part of the public  
6 record.

7           Q.   Now, when you saw this press release and  
8 this statement in particular referring to other  
9 facts, what did you understand it to mean?

10           MR. EGBERT:  Objection.  His understanding  
11 of a press release is irrelevant.

12           HEARING OFFICER DAHER:  Overruled.  Go  
13 head.

14           A.   I really couldn't understand it because I  
15 wasn't aware of any such facts that fit that  
16 definition.  I didn't know what the Judge was  
17 referring to at all.

18           Q.   Now, if you look above -- and we'll pull  
19 this out -- in the first paragraph -- the press  
20 statement also says, "My statement in open court  
21 that it was a 'low-scale' matter pertained solely to  
22 the appropriate level of the sentencing  
23 guidelines..."  Do you see that?

24           A.   Yes.

1 Q. Now, at the time that you were in court in  
2 this last piece, when Judge Lopez said "low level,"  
3 did you understand her to be referring to the  
4 sentencing guidelines?

5 A. No. It wasn't mentioned in any kind of  
6 context of the sentencing guidelines.

7 Q. And under the sentencing guidelines would  
8 this, the Horton case, be low level?

9 A. No. The lead charges are Category 7 and  
10 Category 6, which is the third- and fourth-highest  
11 category. The highest category was Category 9 and  
12 is reserved for first-degree murder. Category 8 is  
13 reserved for second-degree murder, and I think rape  
14 of a child by force, a few other very serious  
15 crimes. A Category 7, the assault on a child with  
16 intent to commit rape. I think it occupies, but I'm  
17 not exactly sure, the same grid as manslaughter and  
18 some other quite serious charges. So those are on  
19 the very high end of the offense seriousness grid.  
20 So that even somebody with no record or a minor  
21 record, the presumptive sentence is quite a bit of  
22 state prison incarceration.

23 MR. BRACERAS: Thank you, Mr. Deakin.  
24 That's it, Your Honor.

## CROSS EXAMINATION

1  
2 BY MR. EGBERT:

3 Q. Mr. Deakin, do you have Exhibit 23 up  
4 there, the sentencing guidelines?

5 A. Yes, I do.

6 Q. I'd like to start there, if I may?

7 A. Certainly.

8 Q. So the record is crystal clear, are these  
9 sentencing guidelines the law of the Commonwealth of  
10 Massachusetts?

11 A. No, they do not have the binding force of  
12 law.

13 Q. Forget binding force of law. Are they the  
14 law in the Commonwealth of Massachusetts?

15 A. I don't see a distinction, but no, they are  
16 not the law in the Commonwealth of Massachusetts.

17 Q. Have they been adopted by the legislature  
18 in the Commonwealth of Massachusetts?

19 A. No, they have not.

20 Q. And have they been rejected by the  
21 legislature in the Commonwealth of Massachusetts?

22 A. I don't know that. I don't dispute it, but  
23 I don't know it for certain.

24 Q. You simply don't know.

1 A. I don't know.

2 Q. Do you know the status of these proposed  
3 guidelines as it relates to their being enacted into  
4 law in the Commonwealth?

5 A. They have not been enacted in the law of  
6 the Commonwealth.

7 Q. And so would you agree with me that they  
8 are not binding upon any court in the Commonwealth?

9 A. I would agree.

10 Q. And they are not the force of law in any  
11 court in the Commonwealth?

12 A. I would agree.

13 Q. And in fact, do you know whether or not  
14 there was debate in the legislature as to whether or  
15 not these guidelines are overly severe and should  
16 not be adopted?

17 A. I believe there was debate on both sides of  
18 that question, that they were overly severe and that  
19 they were not severe enough.

20 Q. And do you know whether or not in committee  
21 meetings, for example, and in hearings before the  
22 legislator, both the House and Senate, whether or  
23 not there was evidence taken concerning these  
24 guidelines?

1           A.    I don't know.  
2           Q.    Do you know, for example, what the  
3 statements of the Speaker of the House were with  
4 regard to these guidelines?  
5           A.    No, I don't.  
6           Q.    Do you know what the statements or  
7 recommendation of the Judiciary Committee was with  
8 regard to these guidelines?  
9           A.    I don't.  
10          Q.    You will agree with me, won't you, that  
11 district attorneys don't enact laws?  
12          A.    I agree with that, yes.  
13          Q.    And you and your office are not empowered  
14 to make laws on your own, correct?  
15          A.    That's correct.  
16          Q.    And you are bound by the laws that are  
17 passed by our legislature, correct?  
18          A.    Absolutely.  
19          Q.    And when the legislature sees fit not to  
20 pass a law, do you take a message from that?  
21          A.    I'm not sure I understand that question.  
22          Q.    Well, you've been a lawyer for some time,  
23 correct?  
24          A.    Yes.

1 Q. And you've been a DA for how many years?

2 A. Ten years.

3 Q. So when, for example, the district attorney  
4 proposes a bill in the legislature -- which is done  
5 quite often; isn't that right?

6 A. I don't know that it's done quite often.  
7 It's regularly done.

8 Q. And when it's regularly done, if the  
9 legislator does not pass that bill which is  
10 recommended by the district attorney's office, what  
11 does that mean to you? What do you understand that  
12 to mean?

13 A. I understand that to mean that the  
14 legislature doesn't feel that that bill should have  
15 the force of law.

16 Q. And the legislature, the body which is  
17 empowered to create such things as sentencing  
18 guidelines in this format, has determined that it is  
19 not an appropriate bill or set of guidelines to  
20 enact into law, correct?

21 A. That's my understanding.

22 Q. And that's the status of the sentencing  
23 guidelines which you've been referring to here  
24 today, correct?

1 A. That's true.

2 Q. Now, you also testified that you know  
3 nothing about any other kinds of guidelines,  
4 correct?

5 A. I don't think I testified about that. At  
6 the time in 2000, at the time of the Horton case,  
7 these are the only guidelines I was aware of being  
8 in existence.

9 Q. How about now?

10 A. Now I think -- I believe there's at least  
11 one and maybe two other sets of guidelines that have  
12 been presented -- I shouldn't say presented. That  
13 have been developed for either presentation or a  
14 possible presentation to the legislature.

15 Q. Are you aware of any Superior Court  
16 sentencing guidelines?

17 A. I'm not sure I understand. Exhibit 25 are  
18 Superior Court sentencing guidelines.

19 Q. Pardon me?

20 A. They're used often in Superior Court.

21 Q. These are proposed sentencing guidelines  
22 which have been rejected by the legislature,  
23 correct, Exhibit 23?

24 A. As I said, I don't know that they've been



1 rejected by the legislature, although I don't  
2 dispute that.

3 Q. Have they been passed?

4 A. No.

5 Q. Have they been presented to the  
6 legislature?

7 A. I believe so.

8 Q. Have they been passed?

9 A. No.

10 Q. Do you know of any guidelines entitled  
11 "Sentencing Guidelines of the Superior Court"?

12 A. I'm not familiar with those.

13 Q. And you've been an assistant DA for ten  
14 years?

15 A. Yes.

16 Q. Take a look at what I've just handed up to  
17 you, please.

18 A. Yes.

19 Q. Do you know what those are?

20 A. They appear to be -- it appears to be an  
21 appendix to -- it's an appendix to something that's  
22 headed "Sentencing Guidelines of the Superior  
23 Court."

24 Q. And are you familiar with the existence of

1 these guidelines?

2 A. Not specifically, no.

3 Q. How about unspecifically?

4 A. No, I'm not familiar with that.

5 Q. So in your ten years of experience as a  
6 district attorney in your statement that there are  
7 no other guidelines relevant to sentencing in the  
8 Superior Court, you simply had no knowledge that  
9 there were in fact a set of guidelines passed by the  
10 Committee on Probation and Parole --

11 MR. BRACERAS: Objection, Your Honor. Mr.  
12 Deakin testified that there were none others that  
13 were in use at the time.

14 MR. EGBERT: It existed in the Year 2000.

15 HEARING OFFICER DAHER: Let him finish.

16 MR. BRACERAS: These appear to be old. We  
17 can't tell where they come from. It's an Appendix  
18 D. We don't have the entirety of it. We don't see  
19 the year. Most of these judges are retired. So  
20 when Mr. Deakin testified that there was one set in  
21 use at the time, I think that Mr. Egbert is being  
22 inaccurate here.

23 HEARING OFFICER DAHER: I'll hear you.

24 MR. EGBERT: The record speaks for itself

1 as to what he said about the existence of other sets  
2 of guidelines. I make an offer to the Court and I  
3 will prove to the Court. What I've provided to the  
4 Court is the sentencing guidelines of the Superior  
5 Court which were adopted as a part of the Superior  
6 Court rules and part of the Superior Court  
7 procedures in approximately 1982 pursuant to a  
8 committee headed by the Honorable John Ronan and are  
9 in existence today. Superior Court judges who will  
10 appear before this Court will indicate the existence  
11 of these guidelines, their knowledge of them and  
12 their use in these proceedings.

13 HEARING OFFICER DAHER: Mr. Braceras, last  
14 word?

15 MR. BRACERAS: Your Honor, I'd object to  
16 these as being irrelevant. There's no evidence that  
17 Judge Lopez was aware of these or relied on these in  
18 any way. Further, I further object to these on  
19 grounds of completeness.

20 HEARING OFFICER DAHER: Overruled. Go  
21 ahead.

22 MR. EGBERT: But if there's something  
23 that's incomplete, I want to make sure --

24 MR. BRACERAS: Perhaps this is Appendix D.

1 Where does this come from? You have testified for  
2 us that these are from 1982. Perhaps we could have  
3 some actual evidence as to --  
4 MR. EGBERT: I'm going to tell you, if you  
5 want to know where to find them --  
6 HEARING OFFICER DAHER: Let's go.  
7 Overruled.  
8 MR. EGBERT: I'd offer them as the next  
9 defense exhibit.  
10 THE CLERK: We have a gap. E.  
11 HEARING OFFICER DAHER: We'll take a gap.  
12 THE CLERK: It will be Exhibit E.  
13 (Document marked as Exhibit E  
14 moved into evidence)  
15 Q. Now, Mr. Deakin, take a look at Exhibit E,  
16 if you would.  
17 A. Yes.  
18 Q. And thumb through them for a minute because  
19 I want to be sure that you've been given every  
20 opportunity to take a look at them.  
21 A. (Witness reviews document) Okay.  
22 Q. Having looked carefully now through them,  
23 is it your testimony that you had in the Year 2000,  
24 when you were before Judge Lopez, you had no idea or

1 understanding that these guidelines even existed?

2 A. That's correct.

3 Q. You can put them down. We'll come back to  
4 them later on.

5 Now, let's talk about the Horton case, if  
6 we could, and the conduct of the case both from the  
7 Commonwealth and defense side.

8 You were the supervisor of the case,  
9 correct?

10 A. That's correct.

11 Q. As a beginning point, as you sit here  
12 today, are you telling us that you think you know  
13 everything that was said to Judge Lopez in all of  
14 the proceedings that occurred outside of your  
15 presence?

16 A. Absolutely not.

17 Q. Do you know what defense counsel argued to  
18 Judge Lopez on August 1st of the Year 2000?

19 A. In a schematic form, I think I know some of  
20 it. I don't know all of it, no.

21 Q. Do you know the details of the argument?

22 A. I don't believe I do, no.

23 Q. Do you know the details of the argument  
24 that Leora Joseph made?

1           A.    I think I have a better sense of them,  
2   having discussed them with her in advance to some  
3   extent, but no, I don't know all the details.

4           Q.    So when you were asked all these questions  
5   about whether or not certain things were said to  
6   Judge Lopez in prior proceedings, the answer really  
7   is you don't know; isn't that right?

8           A.    I can't say that I know with certainty in  
9   proceedings that I wasn't present for.

10          Q.    Not only with certainty. Do you know at  
11   all, for example, what Anne Goldbach said to Judge  
12   Lopez about pedophilia?

13          MR. BRACERAS:  Objection, Your Honor.  At  
14   what point?  During the December 6th proceeding?

15          Q.    At any point in the proceedings where you  
16   weren't present?

17          A.    No, I don't.

18          Q.    Do you know at all what Anne Goldbach told  
19   Judge Lopez concerning psychosocial issues with  
20   regard to Mr. Horton?

21          A.    I know some about that, yes.

22          Q.    Do you know all of it?

23          A.    I doubt it.  I can't know what I don't  
24   know, so I don't know all of it.

1 Q. So in that whole series of questions we  
2 heard a few minutes ago about whether or not any of  
3 these matters were presented to Judge Lopez in  
4 proceedings that you weren't at, the answer is you  
5 don't know.

6 A. In most cases I think that's right.

7 Q. You started off your testimony on direct by  
8 indicating that a dangerousness hearing was not  
9 sought in the Horton case, correct?

10 A. That's correct.

11 Q. And there's some question of whether it  
12 should be sought in the District Court or the  
13 Superior Court, correct?

14 A. I'm not sure there was a question as to  
15 whether it should be. There were questions as to  
16 whether it can be.

17 Q. The DA's office, your office, of which you  
18 are the head of the sexual assault unit or whatever  
19 you want to call it --

20 A. That's not what I want to call it. The  
21 child abuse unit is the name.

22 Q. The child abuse unit. The DA's office in  
23 the Dorchester District Court is the same DA's  
24 office that you're in; is that correct?

1 A. Absolutely.

2 Q. Called the Suffolk County District  
3 Attorney'S Office?

4 A. Correct.

5 Q. Run by at the time Ralph Martin?

6 A. Correct.

7 Q. Now, when the defendant Horton was  
8 arraigned in the Dorchester District Court, did the  
9 Commonwealth seek a dangerousness hearing?

10 A. I believe the Commonwealth did not seek a  
11 dangerousness hearing.

12 Q. And that would be the decision of the  
13 Suffolk County District Attorney'S Office, correct?

14 A. In the sense that all decisions of all ADAs  
15 are ultimately presented as the decision of the  
16 district attorney's office, yes.

17 Q. Well, are the ADAs that handled the  
18 Dorchester District Court, are they given the  
19 discretion to determine whether or not a  
20 dangerousness hearing should be obtained?

21 A. In the first instance, yes, it's generally  
22 a decision that is generally reviewed either with  
23 their supervisor in the District Court or with a  
24 relevant supervisor in the Superior Court staff if



1 there is a relevant supervisor who's available.

2 Q. Do you have any reason to believe that the  
3 decision to not seek a dangerousness hearing in the  
4 Horton case was made in the normal course of affairs  
5 and business of the Suffolk County District  
6 Attorney's Office?

7 A. I would assume that it was.

8 Q. There was nothing unusual that you know  
9 about it in terms of its handling; is that correct?

10 A. Nothing that I know of, no.

11 Q. So at the outset it is a correct statement  
12 to say that the Suffolk County District Attorney'S  
13 Office never sought a dangerousness hearing with  
14 regard to Mr. Horton?

15 A. That's correct.

16 Q. And that wasn't some fluke or aberration.  
17 It was a conscious decision of the office.

18 A. As far as I know, yes.

19 Q. You have no reason to believe otherwise.

20 A. No, I don't.

21 Q. And you testified that you don't like to  
22 seek dangerousness hearings in child victim cases  
23 because it calls on the victim to testify, right?

24 A. It calls on the victim to testify very soon

1 after the incident of alleged abuse.

2 Q. In the event the person charged was  
3 believed by the Commonwealth of Massachusetts  
4 through the district attorney's office to be a  
5 predatory pedophile, subject to repeatedly offending  
6 against child victims, would that decision change?

7 A. It would be a factor in the decision. I'm  
8 not sure whether it would change. Each case depends  
9 upon a balancing of the risk posed by the  
10 perpetrator against the impact on the child victim  
11 or victims of having to go through a dangerousness  
12 hearing.

13 Q. So one of the factors which would be  
14 relevant to you would be whether or not the alleged  
15 perpetrator was someone who would go out and  
16 continuously or repeatedly reoffend?

17 A. To the extent that we can hazard a guess on  
18 that subject, yes, that is a factor that is  
19 involved.

20 Q. Was that considered in the Horton case?

21 A. Are you asking was that considered in the  
22 initial decision --

23 Q. We're on the stage of a dangerousness  
24 hearing.

1           A.    So we're asking about the initial  
2 arraignment at District Court?  
3           Q.    Yes.  
4           A.    I don't obviously know for certain.  I  
5 wasn't involved in the decision.  I would assume  
6 that to the extent it was -- let me rephrase that.  
7 I wasn't involved in the decision.  I don't know.  I  
8 would assume that it was.  
9           Q.    Well, you're the supervisor of the unit.  
10          A.    Right, but I'm not the supervisor of the  
11 Dorchester District Court.  
12          Q.    No, but you're the supervisor of the child  
13 abuse unit, right?  
14          A.    Yes.  
15          Q.    And we heard on direct that you know all  
16 and understand all as to everything that went on in  
17 the DA's office about this case.  Do you have any  
18 reason to believe that the people in Dorchester  
19 Court didn't take the appropriate matters into  
20 consideration in deciding not to have a  
21 dangerousness hearing?  
22          A.    Let me start by saying I don't believe I  
23 ever testified on direct that I know all and see  
24 all.

1 Q. Maybe that was Mr. Braceras.

2 A. I have no reason to think that the staff in  
3 Dorchester District Court didn't take into account  
4 all the relevant factors in deciding whether to seek  
5 a dangerousness hearing. That factor is one of  
6 them, though it's a difficult factor to evaluate at  
7 a very, very early stage in the case.

8 Q. Are you aware of any publicity with regard  
9 to the Horton case before August 4th of the Year  
10 2000?

11 A. Of my own personal knowledge?

12 Q. Right.

13 A. No, I'm not.

14 Q. On August 1st or before August 1st, you  
15 said that you met with Ms. Joseph and decided what  
16 the Commonwealth's recommendation would be in the  
17 case.

18 A. That's correct.

19 Q. Now, it's fair to say, isn't it, that when  
20 you make a Commonwealth recommendation -- let's  
21 stick to this case. You did not consider any of the  
22 factors related to the defendant when determining  
23 your recommendation.

24 A. I'm not sure I understand what you mean.

1 Q. You realize that there are a number of  
2 factors that go into sentencing.  
3 A. Of course.  
4 Q. And many of them relate to, for example,  
5 the status of the defendant, mentally, physically,  
6 rehabilitation-wise and the like --  
7 A. Yes.  
8 Q. -- that the Judge considers, right?  
9 A. Yes.  
10 Q. Did you consider those items when reaching  
11 your recommendation?  
12 A. Yes.  
13 Q. And what items did you consider before  
14 August 1st in making -- of the defendant's  
15 characteristics, let's call it for a moment, in your  
16 decision making?  
17 A. We assessed the defendant's age.  
18 Q. Let's stop there. What was his age?  
19 A. I think it was 20 or 21. I'd have to  
20 refresh my memory, though, for sure.  
21 Q. And how did that impact you?  
22 A. I'm not sure I understand.  
23 Q. You say you considered it in determining  
24 the appropriate recommendation. So was his age an

1   aggravating or a mitigating circumstance or none at  
2   all?

3       A.   It sort of wound up being a wash.  He was  
4   old enough, in our view, that his victimization of a  
5   boy was quite serious, as distinguished from, say, a  
6   13-year-old who abused a child a year or two younger  
7   than he.  On the other hand, his age was not such  
8   that we didn't consider that he was still a  
9   relatively young person.

10       Q.   So the answer is you considered his age and  
11   it didn't affect your recommendation at all.

12       A.   It affected us in sort of both directions,  
13   which wound up being something of sort of a wash.

14       Q.   So it didn't affect it at all.

15               MR. BRACERAS:  Objection, Your Honor.

16               HEARING OFFICER DAHER:  I want to hear it.

17       A.   It didn't push us up or down.  It affected  
18   it, but ...

19       Q.   It had no impact on your ultimate  
20   recommendation.

21       A.   I'm not sure I'd agree with that  
22   characterization of it.  It did have an impact, but  
23   the impact was about equivalent in both directions,  
24   meaning the ultimate effect was neutral.

1 HEARING OFFICER DAHER: Your recollection  
2 is he was about 20 or 21?

3 THE WITNESS: I think so.

4 Q. And what was the next factor or  
5 characteristic as to the defendant that you  
6 considered?

7 A. We considered the defendant's criminal  
8 history, which we had both reviewed his juvenile and  
9 adult probation records.

10 Q. And what did you find there?

11 A. We found a criminal -- a series of charges  
12 which was indicative of someone who seemed to  
13 encounter law enforcement fairly frequently over a  
14 short life. However, most of those charges did not  
15 result in convictions.

16 Q. Did any of the charges result in  
17 convictions?

18 A. In the sense that a continuance without a  
19 finding is the legal equivalent of a conviction, but  
20 it doesn't carry all of the same consequences as a  
21 continuance without a finding. There's no guilty  
22 finding entered.

23 Q. There were no prior convictions; am I  
24 correct?

1           A.    That's correct, assuming you're defining  
2   continuances without finding as non-convictions.  
3           Q.    Do you know what a conviction is under  
4   Massachusetts law?  
5           A.    Yes, I do.  
6           Q.    Did he have any prior convictions?  
7           A.    No, although for some purposes, a  
8   continuance without a finding is the legal  
9   equivalent of a conviction.  
10          Q.    For some purposes, an arrest can be taken  
11   into consideration.  
12                My question is, do you know what a  
13   conviction is under the law?  
14          A.    Yes, I do.  
15          Q.    Did he have any prior convictions?  
16          A.    He was never previously adjudicated guilty.  
17          Q.    Did he have any prior convictions under the  
18   law?  
19          A.    It depends on what law you're talking  
20   about. I'm willing to say no --  
21          Q.    Well, you know what the law is?  
22          A.    I do, and I'm also aware that for some  
23   purposes, a continued without a finding is the  
24   equivalent of a conviction.



1 Q. And when is that?

2 A. For the purposes of -- I'm trying to think.  
3 For the purposes of things like collateral estoppel.  
4 So whether a person committed an offense in the past  
5 is an issue at a subsequent case, his admission to  
6 sufficient facts that triggers the guilty finding is  
7 the legal equivalent of a conviction.

8 Q. Equivalent for a conviction --

9 A. For collateral estoppel.

10 Q. -- or admission?

11 A. I believe it's the legal equivalent for a  
12 conviction.

13 Q. And that's your testimony?

14 A. Yes. But your overall point that he had  
15 never been adjudicated guilty is correct.

16 Q. And how did that effect your  
17 recommendation?

18 A. It meant to us that we would not give this  
19 defendant the same benefit of the doubt as someone  
20 who had no prior contact with criminal -- with law  
21 enforcement, who had never been arrested, admitted  
22 to sufficient facts before.

23 Q. And what were the charges for which it was  
24 continued without a finding?

1           A.    I would have to consult the record.  I  
2 think there was a shoplifting charge -- I'd want to  
3 be careful, because I'm remembering some charges  
4 that I think he wasn't -- where the charges were  
5 dismissed.

6           Q.    Do you want to take a look at his record?

7           A.    Yes.

8           Q.    I think it's Exhibit 18.

9           A.    I don't have an Exhibit 18.

10          THE CLERK:  There it is.

11          A.    There were two counts of shoplifting  
12 separated by about a month in 1997, two counts of --  
13 well, there was a disorderly conduct case in 1995,  
14 two counts of -- one count of disorderly conduct and  
15 one count of trespassing, which appear to have been  
16 connected with the same incident about five days  
17 earlier in 1995.

18          Q.    And were those juvenile or adult records?

19          A.    It says, adult record information.  It  
20 looks like, as he was born in '77, these were adult  
21 convictions.

22          Q.    So you considered the fact that he had two  
23 counts of shoplifting and two disorderlies basically  
24 that were continued without a finding as meaning

1 that he should not be considered a person with no  
2 contacts or no encounters with the law?

3 A. That's right.

4 MR. BRACERAS: Objection. Can we just have  
5 a time frame? As of August 1st or as of September  
6 6th?

7 MR. EGBERT: I think the questions have all  
8 been related to the time you were formulating your  
9 recommendation, just before August 1st.

10 Q. Did you understand that to be case?

11 A. That's how I understood the question.

12 \*Q. And so that didn't affect you in any way up  
13 or down, I take it?

14 A. It affected us in the sense that if the  
15 same defendant had come before us --

16 Q. Mr. Deakin --

17 A. I'm trying to answer.

18 Q. Did it bring --

19 MR. BRACERAS: Your Honor, may the witness  
20 answer the question?

21 MR. EGBERT: I'd just like an answer to my  
22 question, and then he can explain it if he wants.

23 MR. BRACERAS: It was perfectly responsive.

24 HEARING OFFICER DAHER: Go ahead. Why

1 don't you finish up.  
2 Q. Did it bring your recommendation up or  
3 down? I think that can take a "yes" or "no" answer.  
4 HEARING OFFICER DAHER: Can you read the  
5 last question, please.  
6 \*(Question read)  
7 HEARING OFFICER DAHER: Mr. Braceras?  
8 MR. BRACERAS: I think that Mr. Deakin  
9 should be allowed to finish his answer to the  
10 question.  
11 HEARING OFFICER DAHER: It's a very simple  
12 question. Go ahead, Mr. Deakin, if you will.  
13 A. It affected us up, in the sense that where  
14 we might be inclined to give more benefit of the  
15 doubt to someone with no criminal history  
16 whatsoever, we did not give that benefit of the  
17 doubt to this defendant.  
18 Q. So that affected you up?  
19 A. Slightly, very, very slightly.  
20 Q. What other factors did you consider?  
21 A. We considered the defendant's transgendered  
22 status.  
23 Q. And how did you figure that?  
24 A. Well, both of us -- neither of us had

1 extensive experience with transgendered individuals,  
2 but both of us had a sort of background sense that  
3 transgendered individuals often have gone through  
4 unusually difficult experiences in childhood or in  
5 early adulthood. And to that extent, it affected us  
6 a little bit down. Not a lot; a little bit.

7 Q. A little bit down. Okay. What else?

8 A. We took into account the defendant's  
9 statements to police.

10 Q. That's part of the facts of the case,  
11 right?

12 A. Right, but his statements to the police  
13 revealed some things about himself.

14 Q. Okay. And did that bring you up or down?

15 A. It brought us up.

16 Q. What else?

17 A. As I sit here, I can't think of any other  
18 factors that we took into account about the  
19 defendant specifically.

20 Q. So did you -- let's leave it at that.

21 That's what you considered?

22 A. About the defendant himself.

23 Q. Right.

24 A. There are other factors we considered in

1 sentencing; but about the defendant himself, that's  
2 what we considered.

3 Q. Now, your recommendation for sentence was 8  
4 to 12 years? That's what you and Leora Joseph --

5 A. No.

6 Q. 8 to 10?

7 A. 8 to 10.

8 Q. Now, you've told us about these proposed  
9 guidelines, right?

10 A. Yes.

11 Q. Was that within the proposed guidelines?

12 A. It was above the proposed guidelines for  
13 any single offense that he was charged with. But it  
14 was below the proposed guidelines if you aggregated  
15 all the offenses with which he was charged.

16 Q. You know how the guidelines are made to  
17 work, don't you?

18 A. The question of whether to aggregate  
19 offenses for the guidelines is explicitly left for  
20 the Judge, so...

21 Q. And most circumstances in dealing with a  
22 singular event, how does it suggest that the  
23 guidelines are applied?

24 A. It sounds like you're familiar with the

1 guidelines.

2 Q. You're right. And I was at the legislature  
3 when they tried to push them through upon an  
4 unknowing --

5 MR. BRACERAS: Objection, Your Honor.  
6 Could we have a question here.

7 HEARING OFFICER DAHER: It's an interesting  
8 dialogue. Go ahead. Finish up.

9 A. I think different judges take different  
10 views about how to aggregate offenses during the  
11 guidelines.

12 Q. In any event, you decided to aggregate them  
13 up?

14 A. We didn't aggregate them up completely. We  
15 deviated upward slightly from the guidelines to  
16 reflect the number of offenses committed.

17 Q. You took -- in going to make your  
18 recommendation, you took the guidelines, right?

19 A. Yes.

20 Q. You went above the 60 to 90, correct?

21 A. Yes.

22 Q. And reached a conclusion of 8 to 10?

23 A. That's correct.

24 Q. That was a point of advocacy, wasn't it?

1 A. Yes.  
2 Q. That wasn't really what you wanted, was it?  
3 A. No, that is what we wanted.  
4 Q. Wasn't that prepared as an attempt to be up  
5 a certain amount, so you could somehow get something  
6 a little less than that?  
7 A. No.  
8 Q. So that was where you wanted to be? 8 to  
9 10?  
10 A. That's correct. That would have been our  
11 recommendation after trial.  
12 Q. Pardon me?  
13 A. That would have been our recommendation  
14 after trial.  
15 Q. After trial?  
16 A. Yes.  
17 Q. How about on a plea?  
18 A. If the defendant had agreed to some  
19 sentence of incarceration, we might have considered  
20 reducing our recommendation to meet that on an  
21 agreed-upon plea, it's possible.  
22 Q. How about an unagreed plea? Is that just  
23 the same as after trial?  
24 A. Yes.



1 Q. And is that the policy of your office?

2 A. Our office policy is to recommend the  
3 sentence that we believe is just and fair at every  
4 stage of the proceedings. There are times when  
5 considerations of -- practical considerations, such  
6 as problem of proof; humane consideration, such as  
7 sparing children having to testify at trial, and a  
8 whole range of others that I can't list, lead us to  
9 be willing to negotiate somewhat with defense  
10 counsel on a plea.

11 Q. Now, when Ms. Joseph went over to the  
12 conference on August 1st, did she talk to you first  
13 about how to handle it?

14 A. I don't specifically remember discussing  
15 with her how to handle the plea conference. My  
16 practice is that I usually have -- usually it's a  
17 fairly brief discussion with the lawyers who are  
18 going to plea conferences, although it's not always  
19 possible. So I don't know whether we did  
20 specifically in this case, although I would gather  
21 that we did.

22 Q. And did you consider at the time the child  
23 victim's desire or lack of desire to testify?

24 A. Yes.

1 Q. And had you had reported to you whether or  
2 not the child victim was interested in testifying?

3 A. Our understanding from the outset of the  
4 case was that the child never wavered in the view  
5 that although he wasn't eager to testify, he was  
6 willing to do so.

7 Q. Wasn't he anxious to testify?

8 A. I didn't know that he was ever described as  
9 anxious to testify.

10 Q. Did somebody tell you he was described as  
11 that?

12 A. I'm sorry?

13 Q. You said "I didn't know" -- what did you  
14 just say? "I didn't know" what?

15 A. That he was described as anxious to  
16 testify.

17 Q. Well, who told you he was described as  
18 anxious to testify?

19 A. I'm not sure that anyone told me that.

20 Q. Well, then why did you respond like that?  
21 I simply asked you if he was anxious to testify.

22 A. And I said I had not heard him described  
23 that way.

24 Q. So now Ms. Joseph goes over on August 1st

1 to this sentencing hearing, correct?

2 A. Yes.

3 Q. And you don't know what went on there?

4 A. I know some of what went on there. I know  
5 what ADA Joseph told me what went on there.

6 Q. You know what she told you when she came  
7 back, right?

8 A. I think -- I know what she told me when she  
9 called me and then what she told me when she came  
10 back.

11 Q. So you know what she told you from calling  
12 you and talking with you in person, correct?

13 A. Correct.

14 Q. And from all of that information, tell us  
15 what you know happened at the August 1st sentencing  
16 conference with Judge Lopez.

17 A. I know that there was a sentencing lobby  
18 conference. I know that ADA Joseph presented the  
19 Commonwealth's sentencing recommendation. And I'm  
20 frankly presuming -- though I don't know  
21 specifically --

22 Q. I don't want you to presume anything.

23 A. I know that she presented the  
24 Commonwealth's sentencing recommendation. I know

1 that Anne Goldbach from the Committee for Public  
2 Counsel Services, who represented the defendant,  
3 presented the defendant's sentencing recommendation.  
4 I know that Anne Goldbach presented a what I now  
5 know is labeled "Psychosocial Report" about the  
6 defendant --

7 Q. Wait a minute. What you now know?

8 A. Correct.

9 Q. You've been testifying on direct that you  
10 knew it at the time?

11 A. At the time I knew it was a psychological  
12 report of some kind. I didn't know the caption --

13 Q. Please refer only to what you knew during  
14 that conversation.

15 A. Okay. I knew that the defense had  
16 presented to the Court a psychological report of  
17 some kind. And I knew a few things about that  
18 report.

19 Q. What did you know?

20 A. I knew that it was prepared by someone who  
21 worked for the Committee for Public Counsel  
22 Services. I knew that it did not call into question  
23 the defendant's competency to stand trial. I knew  
24 that it did not call into question the defendant's

1 criminal responsibility. And I knew that it in  
2 general had information about the defendant's  
3 psychological background.

4 Q. And Ms. Joseph told you that?

5 A. Yes.

6 Q. She also told you, didn't she, that the  
7 report contained a statement that the defendant was  
8 unlikely to reoffend?

9 A. I don't know if she told me that. She may  
10 have. I don't know. I don't remember her telling  
11 me that.

12 Q. So is that all you knew at the time?

13 A. What I don't know is whether I knew the  
14 woman's name who had done it. I honestly don't  
15 recall if I knew that then or if I learned it  
16 subsequently. I think that's all I knew at the  
17 time. And I knew that Judge Lopez had indicated her  
18 intention to impose a sentence and what that  
19 sentence was.

20 MR. EGBERT: May I approach, Your Honor?

21 HEARING OFFICER DAHER: Sure.

22 Q. Mr. Deakin, I'm going to hand up to you,  
23 which we'll be referring to from time to time, two  
24 documents, one of which is before the Commission's

1 counsel. And the other is a deposition which  
2 occurred in my office.

3 Do you recall being there at those times?

4 A. Yes, I do.

5 Q. Do you want to check them to see that  
6 they're correct?

7 A. I'll take a quick look and make sure they  
8 are. (Witness reviews document)

9 THE CLERK: Do you want to mark them as I  
10 did?

11 MR. EGBERT: Once he identifies them.

12 A. It would take me a long time to go through  
13 these and say whether they're accurate transcripts.

14 Q. Do they appear to be the documents?

15 A. They are captioned that way. I have no  
16 doubt that they're the documents.

17 MR. EGBERT: I would ask that they be  
18 marked for identification.

19 MR. BRACERAS: Your Honor, I don't think  
20 they should be marked for identification. They are  
21 transcripts of depositions. They're hearsay. They  
22 are completely inadmissible.

23 MR. EGBERT: I haven't sought for their  
24 admission.

1 HEARING OFFICER DAHER: I can mark them for  
2 I.D.  
3 MR. EGBERT: I want to make the interview  
4 R-1 and the deposition R-2.  
5 (Documents marked as Exhibits R-1 and  
6 R-2 for identification)  
7 HEARING OFFICER DAHER: Mr. Braceras,  
8 you've seen this, I take it, prior to coming in  
9 today?  
10 MR. BRACERAS: Yes.  
11 HEARING OFFICER DAHER: Okay, good.  
12 BY MR. EGBERT:  
13 Q. Turn to Page 44 of R-2, if you would.  
14 A. R-2 is the deposition?  
15 Q. And I'll make your life easier and give you  
16 a pen to mark the interview R-1?  
17 A. (Witness complies) Okay.  
18 Q. And the deposition as R-2.  
19 A. (Witness complies) Thank you.  
20 Q. Would you turn to Page 44 of R-2, which is  
21 a deposition you gave in my office; is that correct?  
22 A. It appears to be, yes.  
23 Q. Have you seen this deposition before?  
24 A. Yes. In a different format. I got it in

1 micro form.

2 Q. Whatever form you've gotten it in, have you  
3 seen it?

4 A. Yes. I can't tell you -- I'd have to read  
5 it through to be sure it's the same thing I've seen,  
6 but I assume it is. And I've seen the copy of my  
7 deposition that your office sent to me.

8 Q. Now, would you turn to Page 44 and line 3,  
9 and do you see you were asked what were you told  
10 about that --

11 MR. BRACERAS: Objection, Your Honor. Is  
12 Mr. Egbert impeaching the witness here --

13 MR. EGBERT: Yes.

14 MR. BRACERAS: -- or refreshing his  
15 recollection?

16 MR. EGBERT: I'm impeaching him.

17 HEARING OFFICER DAHER: Overruled.

18 MR. BRACERAS: You can't just read the  
19 transcripts --

20 Q. Do you see the question that reads what  
21 were you told about that by Ms. Joseph?

22 A. Yes.

23 Q. You responded, "I was told that it was a  
24 psychological report prepared by a clinician



1 employed by the Committee for Public Counsel  
2 Services to evaluate the defendant and provide a  
3 social history and a recommendation on disposition."  
4 Do you see that?  
5 A. Yes.  
6 Q. "I learned that the report described the  
7 defendant's background in some detail, that it  
8 predicted there would be no repeat offense by the  
9 defendant..." Do you see that?  
10 A. Yes.  
11 Q. So let's stop there for a minute.  
12 You knew on August 1st that there was a  
13 report presented to Judge Lopez that predicted that  
14 the defendant would not reoffend?  
15 A. I must have. I didn't recall it when you  
16 were asking me there. But reading the transcript, I  
17 believe that I did.  
18 Q. And that is, you'll agree with me, a factor  
19 that is important in sentencing?  
20 A. Whether there will be a repeat offense?  
21 Q. Whether it's likely the defendant will  
22 reoffend.  
23 A. To the extent anyone has the qualifications  
24 to say that --

- 1 Q. Those kinds of arguments and decisions are  
2 made by judges every day, aren't they?
- 3 A. Yes, they are.
- 4 Q. And they rely on experienced background  
5 records and the like, correct?
- 6 A. Yes.
- 7 Q. And also recommendations of professionals  
8 or information by professionals, correct?
- 9 A. Usually by independent professionals, yes.
- 10 Q. You threw that in, "usually by independent  
11 professionals," right? Before if someone thought  
12 that the use of the CPCS professional was  
13 inappropriate or shouldn't be relied upon, what  
14 would a good lawyer do who represented the people of  
15 the Commonwealth of Massachusetts?
- 16 A. I would suggest that the lawyer would  
17 suggest to the Court that it shouldn't be relied  
18 upon.
- 19 Q. The lawyer in the first instance would say,  
20 "Judge, you shouldn't rely on that," right?
- 21 A. I think so.
- 22 Q. Because it's prepared by the CPCS person?
- 23 A. Right.
- 24 Q. And therefore, you ought to get an

1 independent review, correct?

2 A. It depends on whether an independent review  
3 is indicated.

4 Q. Let's stop there. You shouldn't rely on  
5 it?

6 A. Correct.

7 Q. Do you know whether or not Ms. Joseph ever  
8 made that argument to Judge Lopez?

9 A. I don't.

10 Q. In your supervisory capacity, when she told  
11 you that Judge Lopez was presented with a report  
12 that the defendant was unlikely to reoffend, didn't  
13 you check with her or ask her what she said to  
14 refute that information?

15 A. I made the assumption from the way she  
16 described it that she conveyed to the Court that she  
17 didn't think the report was worthy of consideration.

18 Q. Would it surprise you to say that she has  
19 never testified to that in any proceeding anywhere  
20 in the world?

21 A. I don't know if that would surprise me or  
22 not.

23 Q. But you were making assumptions rather than  
24 asking?

1 A. I made an assumption.

2 Q. Is that right?

3 A. Yes.

4 Q. And you would agree with me that competent  
5 counsel for the Commonwealth, if they thought that  
6 this was not a valid report, would indicate that to  
7 the Court?

8 A. I would expect that, yes.

9 Q. And would you think it competent to sit  
10 there silently and say nothing about the reliability  
11 of the report under those circumstances?

12 A. I would not expect an attorney to remain  
13 silent, no.

14 Q. And wouldn't you at least -- if a judge was  
15 going to rely on such a report, wouldn't you seek to  
16 have an independent examination, so that you could  
17 refute the report?

18 A. It would depend on the circumstances. Not  
19 always, no.

20 Q. Well, on a circumstance where you realized  
21 that a judge was relying heavily on a report to  
22 impose a sentence which you substantially disagreed  
23 with.

24 A. I don't know -- in this case your question

1 is based on an assumption that the Judge was relying  
2 heavily on that report. I don't know if we ever  
3 knew that.

4 Q. You don't?

5 A. No.

6 Q. Did Leora Joseph tell you during your  
7 conversation on August 1st that she thought Judge  
8 Lopez was looking at this as a serious case that  
9 couldn't be given probation; but when she started to  
10 review the report, she became swayed? Did Leora  
11 Joseph tell you that?

12 A. She did not tell me that.

13 Q. Had you known that, would that be an  
14 interesting fact for you, as a supervisor?

15 A. Having reviewed the report subsequently, I  
16 would be surprised by that.

17 Q. You want to take issue whether or not the  
18 Judge should have relied on it, right? But let's  
19 get back to my question for a minute.

20 My question is, you're the supervisor of  
21 this attorney, Leora Joseph, correct?

22 A. Yes.

23 Q. Now I'm asking you whether or not she told  
24 you that Judge Lopez seemed to be swayed by the

1 report?

2 MR. BRACERAS: Objection, Your Honor.  
3 That's not the testimony.

4 HEARING OFFICER DAHER: Overruled.

5 A. She did not tell me that Judge Lopez seemed  
6 to be swayed by the report, no.

7 Q. Did she tell you that Judge Lopez was  
8 reading the report in her presence?

9 A. Yes.

10 Q. And did she tell you --

11 A. She indicated -- I'm not sure she told me  
12 specifically. That was the impression that I got  
13 yes.

14 Q. Did she tell you that she never objected to  
15 Judge Lopez or anyone else to not having a copy of  
16 the report?

17 A. She didn't tell me that. I knew that she  
18 didn't have a copy. I assumed that one was not  
19 provided to her.

20 Q. Do you know that she never asked for one?

21 A. I did not know that.

22 Q. Wouldn't a competent counsel -- if a report  
23 for which she was not familiar was being given to a  
24 judge at a sentencing hearing -- ask for a copy?

1           A.    I think that would depend in part, at  
2    least, on whether that report was going to be made  
3    part of the record and what the Judge indicated her  
4    response to the report was.

5           Q.    Mr. Deakin, you're sitting here under oath,  
6    a ten-year supervisor at the DA's office.  Do you  
7    teach your prosecutors that if there is a matter  
8    handed up to the Judge for her consideration and  
9    they don't have a copy, not to ask for a copy?

10          A.    No, I do not teach them that.

11          Q.    That's just bad lawyering, isn't it?

12          A.    I'm not sure I'd describe it as "bad  
13    lawyering."  I think the best practice would be to  
14    do it.  Not doing it; I'm not sure that that would  
15    be characterized as "bad lawyering."

16          Q.    To permit a judge to consider matters that  
17    you don't even know what they are is not bad  
18    lawyering?

19          A.    I'm not certain --

20                HEARING OFFICER DAHER:  What's the  
21    objection?

22                MR. BRACERAS:  That's not the testimony.

23                MR. EGBERT:  It's his testimony.

24                MR. BRACERAS:  He has testified --

1 HEARING OFFICER DAHER: I don't find it  
2 relevant. Let's move on. Let's move on. Whether  
3 it's good lawyering, bad lawyering, I can make my  
4 own findings on that.

5 MR. EGBERT: Judge, let me just go on a bit  
6 and stop me, if you will.

7 HEARING OFFICER DAHER: Good.

8 Q. You agree with me that competent lawyering  
9 is important to advocate the position of the  
10 Commonwealth?

11 A. I'm sorry, competent lawyering is  
12 important --

13 Q. Competent lawyering is important to  
14 advocate the position of the Commonwealth?

15 A. As it is to advocate any position, yes.

16 Q. I agree. But if you can answer my  
17 question, really, it will go faster, and I have some  
18 experience with the fact that we can do it 20 times.

19 Would you agree with me that competent  
20 lawyering is important in advocating the positions  
21 of the Commonwealth?

22 A. Of course.

23 Q. And that's because, isn't it, it's because  
24 you want the Judge to hear both sides of the



1 equation?

2 A. Correct.

3 Q. And you don't want the Judge to be  
4 influenced by matters which you could argue against  
5 if you had the information, correct?

6 A. I'm not sure I understand the question. I  
7 don't really understand the question.

8 Q. In other words, when a defense counsel is  
9 advocating a position to a judge through the use of  
10 reports, for example, it's important for the  
11 Commonwealth to be able to put its best position in  
12 regard to those reports before the Court to  
13 influence the Court to go by the Commonwealth's  
14 recommendation?

15 A. Certainly.

16 Q. Right?

17 A. Certainly.

18 Q. And judges rely on that, don't they?

19 A. I assume -- I don't know. I assume they  
20 do.

21 Q. In your experience, hasn't it been that  
22 judges rely on the Commonwealth's attorneys to put  
23 the Commonwealth's position forward?

24 A. Yes.

1 Q. And they don't do it by themselves, do  
2 they?  
3 A. Of course not.  
4 Q. Judges don't go telling you, "Boy, I'd like  
5 to go see your file" or things like that?  
6 A. No.  
7 Q. They expect that the Commonwealth lawyers  
8 will put before them all the information necessary  
9 and appropriate for them to make a decision?  
10 A. Yes.  
11 Q. And it will advocate in the Commonwealth's  
12 best interest?  
13 A. Yes.  
14 Q. Did you know that the report in question  
15 provided to the Judge information that the defendant  
16 suffered from chronic depression?  
17 A. I don't believe I knew that specifically,  
18 no.  
19 Q. You've had experience in the criminal law,  
20 correct?  
21 A. Yes.  
22 Q. And part of your experience tells you that  
23 there are some issues with mental health and mental  
24 illness that judges consider during sentencing?

1           A.    Of course.  
2           Q.    And it's important to know whether or not  
3 those conditions are real or not?  
4           A.    Yes.  
5           Q.    For example, if someone is posed or  
6 proposed as having some mental disorder or illness  
7 to a judge, that's something a judge might consider  
8 during sentencing, correct?  
9           A.    Yes.  
10           MR. BRACERAS:  Objection, Your Honor.  It's  
11 irrelevant whether it goes to mental illness or  
12 mental disorder.  
13           HEARING OFFICER DAHER:  Overruled.  
14           Q.    What is chronic depression to you?  
15           A.    I'm a little outside my area of expertise.  
16 What it means to me is it's a condition called  
17 clinical depression, which has to do with the  
18 suppression of emotional processes.  It basically  
19 means sort of an inability --  
20           HEARING OFFICER DAHER:  You're struggling.  
21 Do you know what chronic depression versus --  
22           THE WITNESS:  I do.  It means clinical  
23 depression that's ongoing.  
24           HEARING OFFICER DAHER:  Ongoing.  His

1 definition of chronic depression is it's ongoing.

2 Q. Do you consider that in the vernacular a  
3 psychological disorder or issue?

4 A. I'm careful not to offer opinions of that  
5 without doing some research.

6 HEARING OFFICER DAHER: He doesn't know.

7 Q. Did you do any research on chronic  
8 depression during the Horton sentencing phase?

9 A. No, I did not.

10 Q. Did Ms. Joseph tell you anything about  
11 allegations of chronic depression?

12 A. I don't believe that she did.

13 Q. Did she tell you that there was information  
14 provided to the Judge that Mr. Horton had suicidal  
15 thoughts?

16 A. I don't believe that she did. I don't  
17 remember it.

18 Q. And would that have been something you  
19 would have wanted to know?

20 A. It certainly couldn't hurt to know that.  
21 I'm not sure that any of the things that you're  
22 mentioning, like clinical depression or suicidal  
23 thoughts, are relevant really to the question of  
24 whether the defendant is likely to reoffend and what

1 the appropriate sentence is.

2 Q. You don't think in your experience that  
3 issues of chronic depression and suicidal ideations  
4 are relevant to the sentencing consideration that  
5 judges make -- not your recommendation, but the  
6 sentencing consideration that judges make?

7 A. Certainly.

8 Q. And you were unaware of the fact that that  
9 information had been provided to the Judge through  
10 this report of Ms. Katz; is that correct?

11 A. I was unaware of the specifics, yes, those  
12 particular specifics, yes.

13 Q. Would you turn to Exhibit 3, please, in the  
14 book.

15 A. (Witness complies).

16 Q. Have you seen that document before?

17 A. Yes.

18 Q. When is the first time you saw it, if you  
19 can tell us?

20 A. I'm not certain. I believe it was sometime  
21 in the spring or summer of this year.

22 Q. Certainly you didn't see it at the time of  
23 August 1st of 2000 through September 6th of 2000?

24 A. No, I did not.

1 Q. You've since read it, however; is that  
2 correct?  
3 A. Yes. It's been some time, but I have read  
4 it.  
5 Q. Why don't you take a brief look at it.  
6 A. (Witness reviews document)  
7 HEARING OFFICER DAHER: Mr. Egbert, Mr.  
8 Ware, any idea how long you want to go today?  
9 MR. EGBERT: I thought we made it known to  
10 the Judge that we can't go past 1:30.  
11 HEARING OFFICER DAHER: Okay.  
12 And secondly, do I have an expense as to  
13 how much for the rewiring?  
14 MR. BERRIMAN: We are actually trying to  
15 get a reduced rate, based on the fact that it's  
16 going to be longer, which could actually make it  
17 less expensive.  
18 HEARING OFFICER DAHER: I'm going to expect  
19 the defense to pay for it.  
20 MR. EGBERT: If I have any objections, I'll  
21 let you know.  
22 HEARING OFFICER DAHER: The Court did grant  
23 the continuance; I expect it to be paid for. Okay.  
24 Continue reviewing.

1           A.    I've had a chance to review it.  Thank you.

2           Q.    With regard to that report -- let me step  
3 back a minute.

4                    There are a number of factors which you  
5 know judges consider during sentencing phases of  
6 criminal proceedings, correct?

7           A.    Yes.

8           Q.    One of them is the serious nature of the  
9 crime or the seriousness of the crime, correct?

10          A.    Yes.

11          Q.    Others relate to deterrence?

12          A.    Yes.

13          Q.    Rehabilitation?

14          A.    Yes.

15          Q.    Suitability of incarceration versus  
16 alternative sentencing?

17          A.    Yes.

18          Q.    Those kinds of things?

19          A.    Yes.

20          Q.    Now, would you agree with me that the  
21 report which you looked at, Exhibit 3, addresses  
22 itself to all of those factors other than the  
23 seriousness of the offense?

24          A.    Remind me of the other factors that you

1 listed.  
2 Q. Rehabilitation.  
3 A. Yes.  
4 Q. Deterrence.  
5 A. Specific deterrence; that is, deterrence of  
6 this perpetrator, yes, not general deterrence.  
7 Q. Specific deterrence?  
8 A. Specific deterrence, yes.  
9 Q. It also addresses itself to reoffending?  
10 A. Yes.  
11 Q. It addresses itself to appropriateness of  
12 alternative sentencing?  
13 A. Yes.  
14 Q. And the factors going into that?  
15 A. Yes.  
16 Q. So it addresses each and every one of those  
17 factors which you know a judge considers?  
18 A. The ones that you've listed.  
19 Q. Right.  
20 A. Yes.  
21 Q. Did your office do anything to refute the  
22 report that was provided to Judge Lopez on August  
23 1st, which is Exhibit 3?  
24 A. No. In my view, we addressed --



1 Q. The answer is "no," isn't it?

2 MR. BRACERAS: Your Honor, may he answer  
3 the question?

4 HEARING OFFICER DAHER: I think he did.  
5 Overruled. Go ahead.

6 Q. After Ms. Joseph returned on August 1st or  
7 during the phone calls, but at least that  
8 information stage between the phone call and your  
9 in-person discussions, she was upset with the  
10 sentence the Judge indicated she would deliver,  
11 correct?

12 A. Yes.

13 Q. She was, I think you testified once before,  
14 she was shocked?

15 A. I'm not sure if I testified "shocked." It  
16 may be --

17 Q. "Stupefied" were your words?

18 A. I may have said that. It's accurate. I'd  
19 have to look it up to see if I said that, but I  
20 don't doubt I did.

21 Q. And did you talk with her about the level  
22 of her advocacy during the particular sentencing  
23 proceeding?

24 A. Not specifically, no.

1 Q. Did you ask her whether or not she had a  
2 full and fair opportunity to present the  
3 Commonwealth's position?

4 A. No. I expect she would have told me if she  
5 didn't.

6 Q. Did she tell you that she did not?

7 A. No.

8 Q. Did you ask her or did she tell you whether  
9 or not she was able to give all of the facts and  
10 information she thought relevant to sentencing on  
11 August 1st of 2000?

12 A. Again, we didn't discuss that specifically.  
13 I would have expected her to tell me if she hadn't.

14 Q. She did not tell you anything like that?

15 A. No.

16 Q. So as far as you understood it, it was a  
17 sentencing conference or a plea conference like all  
18 others in the way it was conducted?

19 A. In general terms, yes. I don't know  
20 specifically how it's conducted, but yes, in general  
21 terms.

22 Q. In other words, there was nothing  
23 remarkable to you about the manner or procedure in  
24 which the plea conference was conducted?

1 A. Not at that time, no.

2 Q. When you say, "Not at that time," did you  
3 receive information at another time?

4 A. Yes.

5 Q. And when did you receive more information  
6 or other information regarding the plea conference?

7 A. Much later after the plea had been done, I  
8 learned --

9 Q. Not what you learned. Who did you speak  
10 with? Who did you speak with to get this learning?

11 A. What I learned -- I guess I spoke to --

12 HEARING OFFICER DAHER: What's your  
13 objection?

14 MR. BRACERAS: Mr. Egbert asked a question.  
15 He interrupted him in the middle of Mr. Deakin's  
16 answer.

17 HEARING OFFICER DAHER: Help me out if you  
18 can. Was the psychosocial assessment, was that ever  
19 made part of the record? And if not, how can Judge  
20 Lopez rely on it? I'm trying to put it all into  
21 perspective.

22 MR. EGBERT: She can rely on any  
23 information provided to her at the plea conference,  
24 and you'll hear a number of judges who testify to

1 that. Plea conferences are often held, information  
2 is provided to the Court, sometimes given back to  
3 counsel, sometimes made a part of the probation  
4 record. And this fact was ultimately made a part of  
5 the probation file.

6 MR. BRACERAS: Your Honor, the short answer  
7 to your question is that the report was never filed.  
8 Judge Lopez did not retain a copy of the report, and  
9 it was only made a part of the probation file after  
10 the September 6th sentencing.

11 MR. EGBERT: After the sentencing, she gave  
12 it to probation. The fact of the matter is, Your  
13 Honor, these -- and I'll take it with Mr. Deakin  
14 also -- these are off-the-record plea conferences  
15 which happen every day in the Superior Court, where  
16 information is provided to the judges. And after  
17 the Judge has made their determination of sentence,  
18 various documents and the like are oftentimes  
19 returned to the parties.

20 MR. BRACERAS: Your Honor, it was only  
21 given to the press after the September 6th --

22 MR. EGBERT: Probation, not "press."

23 MR. BRACERAS: It was only given to  
24 probation after the September 6th conference, after

1 there had been this media firestorm that we've heard  
2 about.

3 HEARING OFFICER DAHER: Go ahead.

4 BY MR. EGBERT:

5 Q. Let's take this up right now. You've been  
6 in a number of plea conferences?

7 A. Yes.

8 Q. Are there matters put before the Court that  
9 are not a matter of record?

10 A. It happens. In my experience, it's  
11 relatively unusual.

12 Q. Aren't there plea conferences that are held  
13 off the record?

14 A. Often they are held off the record, yes.

15 Q. So everything that's said to the Judge in  
16 the plea conference is off the record?

17 A. That's correct. Most of it then becomes  
18 part of the record if there is, in fact, a plea.

19 Q. It does?

20 A. Most of it.

21 Q. Everything that the lawyers say to the  
22 Judge --

23 A. Not everything. Most.

24 Q. And in fact, there was reference in your

1 discussion with Judge Lopez on September 6th to the  
2 existence of the psychological evaluation, correct?

3 A. That's correct.

4 Q. And you knew that to mean this Exhibit 3,  
5 the report?

6 A. Right. As I said, I hadn't seen it, but I  
7 knew that there was a report.

8 Q. But you knew that's what she was talking  
9 about?

10 A. Yes.

11 Q. And that's what you were both referring to  
12 on September 6th?

13 A. Yes.

14 Q. So the existence of this report was known  
15 to you at the time?

16 A. Yes.

17 Q. Now, you indicated a moment ago -- you were  
18 about to say that you learned something about the  
19 plea conference sometime after the plea conference,  
20 right?

21 A. Right.

22 Q. Who did you learn that from?

23 A. From Judge Lopez's public statement.

24 Q. Pardon me?

1           A.    From the public statement that Judge Lopez  
2 issued.

3           Q.    From the public statement?

4           A.    Yes.

5           Q.    And does that discuss the plea conference?

6           A.    Yes.  It said, There are matters known to  
7 the Court, defense counsel and the prosecutor that  
8 can't be made part of the public record that would  
9 change the media reporting the case, something to  
10 that effect.

11          Q.    You made the assumption she was talking  
12 about something that happened at the plea  
13 conference, correct?

14          A.    I went over with ADA Joseph what was she  
15 referring to in the statement.  I sat down with her  
16 and said, "What is the Judge writing about here?  
17 What is her reference?"  And the only thing that  
18 either of us could think of that could arguably fit  
19 that definition was the psychological report.

20          Q.    When you say "arguably," certainly  
21 everything in the psychological report, except for  
22 that statement of "transgendered," which had been  
23 made public in another forum, that information was  
24 not releasable by the Judge, was it?

1           A.    I think it could have been released.  I can  
2 understand why a judge might not want to.  
3           Q.    In a press release?  
4           A.    No.  It could have been made part of the  
5 public record at the hearing.  
6           Q.    Could, but that's not what was done?  
7           A.    Right.  
8           Q.    You're talking about something that was  
9 issued after all the hearings, correct, that press  
10 statement?  
11          A.    Right.  I think --  
12          Q.    Well --  
13                MR. BRACERAS:  Your Honor, could the  
14 witness finish?  
15                MR. EGBERT:  It was a very simple question.  
16                HEARING OFFICER DAHER:  Go ahead.  
17          A.    All I was going to say is I think the Judge  
18 could have in a press statement referred in general  
19 terms to psychological issues that confronted the  
20 defendant that formed part of her sentence.  
21          Q.    We're going to come to this later; but  
22 since you brought it up, what the Judge could have  
23 done is said in some general statement there was a  
24 psychosocial report, correct?



1 A. Right.

2 Q. The Judge certainly couldn't have put the  
3 fact of that report in a press statement when they  
4 weren't on a public record; isn't that right?

5 A. I think the Judge could have created a  
6 sentencing memorandum --

7 Q. Answer my question. We're talking about a  
8 press release and you know it.

9 Now, I asked you simply, in your opinion,  
10 sir, under the Code of ethics and the like, could  
11 she have put those facts in a press release on the  
12 present state of the record?

13 A. I'm not certain of the answer to that.

14 Q. You know the answer is "no," don't you?

15 A. I don't know the answer is "no." It may be  
16 "no."

17 MR. BRACERAS: Objection.

18 Q. Pardon me?

19 A. I don't know that the answer is "no." It  
20 may well be "no."

21 Q. Now, when Ms. Joseph came back on August  
22 1st, the first thing you all talked about was  
23 contacting the press, right?

24 A. No, that was not the first thing that we

1 talked about.

2 Q. Well, did you talk about contacting the  
3 press?

4 A. Yes, we did -- not contacting the press,  
5 contacting our press office.

6 Q. When you contact your press office, it's  
7 for the purposes of them informing the press,  
8 correct?

9 A. It's for the purposes of them evaluating  
10 whether the press should be contacted.

11 Q. When she came back to your office, did she  
12 tell you that Judge Lopez had said, "You belong  
13 prosecuting cases in the suburbs, not in the city"?

14 A. I'm not sure. I think that's something  
15 that was said -- she told me that was said at the  
16 August 4th hearing, although I'm not positive of  
17 that.

18 Q. Do you have a memory which day that was?

19 A. I believe it was the August 4th hearing,  
20 but I'm not positive of that.

21 Q. So when she came back and you had the  
22 discussion and the like, did you talk about  
23 contacting the press office?

24 A. Yes.

1 Q. And did Ms. Joseph ask you whether it would  
2 be appropriate to notify the press in any fashion?

3 A. I don't know whether she said "press" or  
4 "press office." It was in the context of  
5 discussing --

6 Q. Have you testified about that in the past?

7 A. I'm sure I have. I don't recall it  
8 specifically.

9 Q. When is the last time you reviewed your  
10 interview with the Commission?

11 A. My interview with the Commission? A couple  
12 of days ago.

13 Q. And where were you when you reviewed it?

14 A. In my home.

15 Q. Have you reviewed it with Mr. Braceras?

16 A. I don't believe so.

17 Q. Do you recall at Page 48 -- and that was a  
18 statement you gave under oath back in August of  
19 2001, correct?

20 A. That's right.

21 Q. Would you agree with me that your memory of  
22 events was better then of things that occurred in  
23 the Year 2000 than it is today?

24 A. In many respects, yes.

1 Q. Let's get to this particular item.  
2 "Question: How did she contact your press office or  
3 contact the media in this case"?  
4 A. Yes.  
5 Q. And that was asked of you by counsel for  
6 the Commission, correct, Mr. Braceras?  
7 A. Yes.  
8 Q. And you responded, "She contacted me to let  
9 me know -- this is immediately after the first  
10 conference -- to let me know that the defendant was  
11 going to enter a guilty plea, what the likely  
12 disposition was going to be and asked me whether it  
13 would be appropriate to notify the press in any  
14 fashion. That's how she did it"?  
15 A. Right.  
16 Q. Was that your testimony then?  
17 A. Yes.  
18 Q. Was it a truthful statement?  
19 A. Yes.  
20 Q. So it's true that one of the things that  
21 she talked about with you on August 1st when she  
22 came back to the office was whether it would be  
23 appropriate to notify the press in any fashion,  
24 right?

1           A.    Yes, referring to the press office.  We  
2    don't notify the press --  
3           Q.    Sir, did you say "press office" here?  
4           A.    No, I did not.  I left the word "office"  
5    off that.  
6           Q.    You left the word "office" out?  
7           A.    Correct.  
8           MR. BRACERAS:  Objection, Your Honor.  
9    Perhaps Mr. Egbert wants to read two lines down,  
10   where it discusses --  
11           MR. EGBERT:  I'll read anything you want.  
12   I'll read the whole thing if you want.  
13           MR. BRACERAS:  Perhaps you could read the  
14   next answer, Lines 21 through 23 and 24.  
15           MR. EGBERT:  You read it.  
16           MR. BRACERAS:  It says, "I told her that I  
17   thought it was something that ought to be discussed  
18   with the first assistant and that it was a decision  
19   that ought to be made by the executive staff..."  
20           BY MR. EGBERT:  
21           Q.    Now, my question to you is -- that's you  
22   talking what you said back to her?  
23           A.    Right.  
24           Q.    What she said to you is, Would it be

1 appropriate to notify the press?  
2 A. I don't recall if she said "press" or  
3 "press office." They are synonymous in our office.  
4 Q. Your testimony on that was clear in 2001,  
5 wasn't it, when you said "press"?  
6 A. Yes. It was clear. But in our office,  
7 notifying the press and notifying the press office  
8 are the same thing.  
9 Q. Exactly, because you know that that's how  
10 you get to the press, through your press office,  
11 correct?  
12 A. Our press office --  
13 \*Q. Sir, do you know that's how you get  
14 information --  
15 MR. BRACERAS: Objection.  
16 HEARING OFFICER DAHER: Let him finish.  
17 Go ahead, Mr. Deakin.  
18 THE WITNESS: I'm sorry, I don't know if  
19 Mr. Egbert had completed his question.  
20 HEARING OFFICER DAHER: Read the last  
21 question.  
22 \*(Question read)  
23 A. I think I understand the question. If  
24 there's a question of press notification, that

1 decision is referred to the press office and the  
2 executive staff. That's what I meant then. That's  
3 what I mean now.

4 Q. And you know that the press office is the  
5 beginning of the ball rolling, getting information  
6 to the press?

7 A. It can be.

8 Q. Right?

9 A. Or it can be the end of not getting  
10 information to the press.

11 Q. But it's the beginning of it?

12 A. It can be.

13 Q. And in this particular instance, you were  
14 clear, were you not, that both you and Ms. Joseph  
15 agreed in each other's presence that the press  
16 office should be notified?

17 A. Yes, subject to running that by Elizabeth  
18 Keeley first. We both thought so, but at least I  
19 wanted to run it by her, by Elizabeth Keeley.

20 Q. My question -- and again, qualify if you  
21 will -- did you both agree that the press office  
22 should be notified?

23 A. Yes, subject to approval by Elizabeth  
24 Keeley.

1 Q. So it's clear to you, isn't it, from your  
2 conversation with Ms. Joseph, that she knew the  
3 press office was being notified, correct?

4 A. Yes.

5 Q. No question about that?

6 A. I don't have any question in my mind, no.

7 Q. And in fact, you are the person who told  
8 Ms. Joseph to provide all appropriate information to  
9 Mr. Borghesani in the press office; isn't that  
10 correct?

11 A. I honestly don't recall today whether I did  
12 that or whether Elizabeth Keeley did that. I  
13 believe that is what happened. Who instructed her  
14 to do it, I'm not positive.

15 Q. Let's go to the transcript of the  
16 deposition at Page 59 through 60.

17 HEARING OFFICER DAHER: Are you objecting?

18 MR. BRACERAS: Your Honor, Mr. Egbert can  
19 refresh the witness' recollection. He cannot just  
20 read this hearsay into the record. He can refresh  
21 his recollection. Mr. Deakin has testified he  
22 doesn't have a recollection on this point.

23 MR. EGBERT: These are statements under  
24 oath previously given.



1                   MR. BRACERAS: They're not admissible.  
2    It's hearsay, and there's nothing to impeach him on  
3    here. If this is refreshing recollection, that's  
4    fine. He can't just read prior testimony into the  
5    record.

6                   HEARING OFFICER DAHER: Why don't you look  
7    at it.

8                   MR. EGBERT: Judge, I have a right to  
9    impeach this witness' credibility with prior sworn  
10   statements. And I have a right to ask him whether  
11   or not he said it, to read it to him, and ask him  
12   whether or not that's his answer.

13                  HEARING OFFICER DAHER: Mr. Braceras, if  
14   there are prior inconsistent statements -- Mr. Ware,  
15   what do you want to say?

16                  MR. WARE: We are getting two concepts of  
17   evidence confused here. This witness is a nonparty.  
18   It is not like my cross examination of Judge Lopez.  
19   She's a party. Her whole transcript is in as  
20   Exhibit 32.

21                  As to third-party witnesses, if the witness  
22   says, "I don't remember," counsel is not entitled  
23   then to offer his transcript. He's entitled to show  
24   it to him and say, "Does this refresh your

1 recollection?" It doesn't make the transcript  
2 admissible.

3 HEARING OFFICER DAHER: That's what I just  
4 asked Mr. Deakin to do.

5 MR. EGBERT: Judge, respectfully, I believe  
6 Mr. Ware is absolutely wrong on the rule. That is  
7 not the rule at all. I have the right -- since this  
8 information was sworn --

9 HEARING OFFICER DAHER: Why doesn't he look  
10 at it and see if he can testify from his own memory.  
11 If he can't, then I'll make a ruling on it. Go  
12 ahead. Take a look at it.

13 A. (Witness reviews document) Mr. Egbert,  
14 where am I reading? I think I know, but I want to  
15 be sure.

16 Q. Let's start with the question that says,  
17 "You knew the press was going to be notified in some  
18 form?" And you answered, "Correct."

19 MR. BRACERAS: Objection, Your Honor, Mr.  
20 Egbert now has ruled on this issue.

21 HEARING OFFICER DAHER: He's responding to  
22 Mr. Deakin for a starting point. Now, what page are  
23 we on again? 59?

24 MR. EGBERT: I'm on Page 59.

1 Q. Did you testify under oath --  
2 MR. BRACERAS: Objection, Your Honor. I  
3 think the proper procedure here is to refresh his  
4 recollection.  
5 HEARING OFFICER DAHER: One second. What  
6 page are we on? Page 59.  
7 MR. EGBERT: I'd like to be heard.  
8 HEARING OFFICER DAHER: Go ahead.  
9 MR. EGBERT: He can whine all he wants back  
10 there about refreshing his memory, but the fact of  
11 the matter is he didn't testify that the press was  
12 going to be notified. The question is very simple:  
13 "You knew that the press was going to be notified in  
14 some form?" Answer: Correct." 59, Line 2.  
15 HEARING OFFICER DAHER: What page are we  
16 on?  
17 MR. EGBERT: 59 of R-2.  
18 HEARING OFFICER DAHER: You can take a look  
19 at it.  
20 THE WITNESS: What lines?  
21 MR. WARE: It's apparently the deposition,  
22 not the statement  
23 BY MR. EGBERT:  
24 Q. You understand R-2 is the deposition?

1           A.    I'm on the right page.  Should I read the  
2 whole page?  
3           HEARING OFFICER DAHER:  Read it.  Take your  
4 time.  Read it.  
5           A.    (Witness reviews document)  Okay.  I've  
6 read that page.  
7           Q.    Did you testify on that occasion --  
8           MR. BRACERAS:  Objection, Your Honor.  
9           HEARING OFFICER DAHER:  And the objection  
10 being?  
11           MR. BRACERAS:  He can ask him what his  
12 current recollection is now.  He cannot impeach him  
13 when he lacks memory.  
14           MR. EGBERT:  It's a prior inconsistent  
15 statement.  
16           MR. WARE:  He says he doesn't remember.  
17 There are rules of evidence.  
18           MR. EGBERT:  Are we going to have them all  
19 jumping up?  
20           Ms. Brunetti, do you want to say anything?  
21           MS. BRUNETTI:  No.  
22           HEARING OFFICER DAHER:  Do you want to make  
23 an argument, Mr. Egbert?  
24           MR. EGBERT:  These are prior inconsistent

1 statements of the witness, which go to the  
2 credibility of the witness. Prior inconsistent  
3 statements of a witness which were made under oath  
4 are not only in as impeachment evidence, but they  
5 come in as substantive evidence of the matters  
6 testified to. That's classic evidence in the  
7 Commonwealth of Massachusetts.

8 HEARING OFFICER DAHER: Mr. Braceras?

9 MR. BRACERAS: Well, Mr. Egbert is  
10 referring to inconsistent statements. There's  
11 nothing inconsistent here. If a witness says, "I  
12 don't have a recollection," that's not inconsistent  
13 with something said a year previous.

14 MR. EGBERT: Let's go back and take it step  
15 by step.

16 BY MR. EGBERT:

17 Q. I'm going to ask you a simple question.  
18 Did you know the press was going to be  
19 notified in some form?

20 MR. BRACERAS: At what point?

21 Q. On August 1st or thereabouts of the Year  
22 2000.

23 A. My recollection is that I knew that that's  
24 the direction that Elizabeth Keeley was intending to

1 go. I'm not sure that I knew it as a final matter,  
2 but I understood that's what she was inclined to do.

3 Q. So you knew the press was going to be  
4 notified? That was your understanding, as we've  
5 used here so much, right?

6 A. That's what I said, yes.

7 Q. And you conveyed that understanding to Ms.  
8 Joseph, correct?

9 A. I believe I did. I don't have a specific  
10 memory of doing so.

11 Q. And in fact, didn't you talk to ADA Joseph  
12 about making sure that Jim Borghesani had the  
13 information necessary to notify the press?

14 A. I believe that I did. I'm not certain,  
15 however, whether I did that or Elizabeth Keeley did  
16 that.

17 Q. Did you testify under oath on Page 59, Line  
18 19 of Exhibit R-2 as follows: "I know that I" --

19 MR. BRACERAS: Objection, Your Honor.

20 HEARING OFFICER DAHER: Overruled.

21 Q. "I know that I talked to ADA Joseph about  
22 making sure that Jim Borghesani had the information  
23 necessary to notify the press"?

24 A. I assume that I did testify that way.

1 Q. No. Did you?

2 A. I don't remember how --

3 Q. Look at it, Page 59.

4 A. I am looking at it. I assume it's a  
5 correct transcription. I reviewed the deposition at  
6 the time. Yes, I must have testified that way.

7 MR. EGBERT: Your Honor, I offer into  
8 evidence Line 17 through 23 of Page 59 of the  
9 deposition.

10 MR. BRACERAS: Objection, Your Honor.

11 HEARING OFFICER DAHER: Overruled.

12 Q. Now, was Ms. Joseph tasked with the  
13 function of providing Mr. Borghesani with the  
14 necessary information?

15 A. I believe so.

16 Q. Do you know?

17 A. I testified here today I don't know --

18 Q. Did you testify under oath on August 23 of  
19 the Year 2002 to the following question and give the  
20 following answer: "Was Ms. Joseph tasked with the  
21 function of providing Mr. Borghesani with the  
22 necessary information? Answer: I believe so"?

23 A. That's what I testified to today: "I  
24 believe so."

1 Q. Do you have any memory different than that?

2 A. No.

3 Q. And it's your understanding, isn't it, that  
4 Ms. Joseph provided the information to Mr.  
5 Borghesani, which ultimately was used in the press  
6 release, isn't it?

7 A. I believe so.

8 Q. That's your memory, isn't it?

9 A. I don't have a firm memory of it. It's my  
10 best belief that she did, yes.

11 Q. Well, did you testify under oath on Page 60  
12 to this question and give the following answer:

13 "And so it's your understanding that she provided,"  
14 meaning Ms. Joseph, "the information to Mr.  
15 Borghesani which ultimately was used in the press  
16 release? Answer: That's my memory."

17 A. Yes.

18 Q. And, sir, didn't you testify before the  
19 Commission at an interview with -- before Mr.  
20 Braceras, that you were pretty sure that you recall  
21 that he, meaning Mr. Borghesani, and Leora Joseph  
22 discussed it so that he could get the basic facts of  
23 the case to present to put in the press release?

24 MR. BRACERAS: Objection, Your Honor.



1 HEARING OFFICER DAHER: Overruled. Go  
2 ahead.  
3 A. I don't know what page --  
4 Q. I'm asking you if you said that.  
5 A. I don't recall whether I said that. I'd  
6 have to --  
7 Q. Do you have any memory as you sit here  
8 today -- do you have any memory as you sit here  
9 today of Ms. Joseph talking with Mr. Borghesani to  
10 provide him information to put in the press release?  
11 A. I think I assumed that she had. I don't  
12 know that I -- I wasn't present for a discussion. I  
13 assumed that she had.  
14 MR. EGBERT: May I have a minute, Your  
15 Honor?  
16 HEARING OFFICER DAHER: Yes.  
17 (Pause)  
18 BY MR. EGBERT:  
19 Q. Did you do anything to assure that the  
20 information that got to the press release or the  
21 press office was such that complied with the ethical  
22 obligations of lawyers and prosecutors on the  
23 release of information to the press?  
24 A. I relied on the press office and the

1 executive staff supervisory structure to see that  
2 that was done.

3 Q. Is the press office, to your knowledge --  
4 are the people in the press office lawyers?

5 A. As I understand it, I don't believe either  
6 of the people in the press office at that time was a  
7 lawyer.

8 Q. And did you have any established practice  
9 to review press releases before they went out?

10 A. In the time that I had been supervisor, my  
11 memory is that most, if not all, of the press  
12 releases that went out -- and there weren't many --  
13 I would have looked at, yes.

14 Q. Mr. Deakin, how many hours did you spend  
15 preparing for your testimony here with Mr. Braceras  
16 or other members of the Commission staff?

17 A. Are you asking in total?

18 Q. Yes. I'm asking total.

19 A. Excluding the interview and the deposition  
20 that you conducted?

21 Q. No, not matters of record. Meetings,  
22 preparing for them.

23 A. 12 or 15.

24 Q. And during those meetings and preparation

1 sessions, it's true, is it not, that Mr. Braceras,  
2 for example, would tell you about what other  
3 witnesses testified to?

4 A. Not once.

5 Q. Not once?

6 A. Not once.

7 Q. Did he tell you what questions I would ask  
8 of other witnesses?

9 A. He told me topic areas that you had asked  
10 of other witnesses. He never told me a question  
11 that you had asked other witnesses.

12 Q. Has he gone over with you your prior  
13 testimony?

14 A. In maybe one or two instances. But in  
15 general, no. We may have discussed it in one or two  
16 instances. I don't want to say "never," but it was  
17 rarely, if ever.

18 Q. Haven't you testified in the past that you  
19 had a practice with Mr. Borghesani where you were to  
20 see all press releases before they went out? Have  
21 you not testified to that in the past?

22 A. I think I testified that there was a custom  
23 that I would review press releases.

24 Q. What did you mean by "custom"?

1           A.    That's that sort of habit that we had  
2 gotten in in the relatively short time that we had  
3 been working together.

4           Q.    And you testified previously that you  
5 relied on that custom to comply with the rules of  
6 ethics?

7           A.    That's true.

8           Q.    So you relied on the custom of Mr.  
9 Borghesani showing you the press releases, so that  
10 you could comply with your canons of ethics,  
11 correct?

12          A.    Correct.

13          Q.    And then you testified in the past that Mr.  
14 Borghesani didn't show you this press release,  
15 correct?

16          A.    That's also correct.

17          Q.    Never discussed it with you, correct?

18          A.    No, he did not.

19          Q.    And didn't provide you the information that  
20 would be going into the press release?

21          A.    No, he did not.

22          Q.    Correct?

23          A.    That's correct.

24          Q.    And all of that basically gets you off the

1 hook for its content, correct?  
2 A. Actually, no, I don't think it gets me off  
3 the hook.  
4 Q. Has anybody told you what Mr. Borghesani  
5 testified to in deposition?  
6 A. No.  
7 Q. Not a word?  
8 A. Not a word.  
9 Q. You have not discussed it with anyone?  
10 A. No.  
11 Q. Including Mr. Braceras?  
12 A. Including Mr. Braceras or anyone else from  
13 the Commission.  
14 Q. Did you or did you not discuss with Mr.  
15 Borghesani using the words "transgendered person"?  
16 A. After --  
17 Q. Before the press release was issued.  
18 A. No, I did not.  
19 Q. And you have a clear memory on that?  
20 A. Yes, I do.  
21 Q. Now, as I understand it now, based on this  
22 testimony, you, Ms. Joseph, and Ms. Keeley all knew  
23 that this information was going to the press office,  
24 correct?

1 A. That's correct.

2 Q. And that it was being put into a press  
3 release, correct?

4 A. That was my understanding, yes. I didn't  
5 know it for a fact, but that was the direction it  
6 was going.

7 Q. And that was the understanding amongst you  
8 all generally, wasn't it?

9 MR. BRACERAS: Objection, Your Honor. How  
10 could he testify to the understanding of Ms.  
11 Keeley --

12 MR. EGBERT: Certainly he's been testifying  
13 to their understandings about everything else in  
14 this case.

15 HEARING OFFICER DAHER: Sustained.

16 Q. Well, did you understand that Ms. Joseph  
17 knew that, too?

18 A. Yes.

19 Q. And that Ms. Keeley knew that, too?

20 A. Yes.

21 Q. And from your observations of facts and  
22 circumstances that went on in your presence?

23 A. I'm sorry, I don't understand that  
24 question.

1 Q. From your observation of facts and  
2 circumstances that went on in your presence, that's  
3 how you came to those understandings?  
4 A. It was actually through conversations.  
5 Q. Conversations with Ms. Joseph?  
6 A. And Ms. Keeley.  
7 Q. And your conversations with Ms. Joseph made  
8 it clear to you that she knew this was going in a  
9 press release?  
10 A. I think like me, she knew that's the  
11 direction it was going. I don't think she knew that  
12 a final decision had been made.  
13 Q. So you agree with me that basically you and  
14 Ms. Joseph and Ms. Keeley, if you add her to the  
15 loop, initiated the process of ultimately issuing a  
16 press release?  
17 A. Yes.  
18 Q. And you knew that?  
19 A. Yes.  
20 Q. And Ms. Joseph knew that?  
21 A. I believe she did, yes.  
22 Q. And when your office issues a press  
23 release, is it fair to say that if it's in a case of  
24 yours, that you issued the press release?

1 A. No. The office issued the press release.

2 Q. And do you consider yourself a part of the  
3 office?

4 A. Yes.

5 Q. And in charge of a particular case, you  
6 take responsibility for what goes on in a particular  
7 case?

8 A. Yes.

9 Q. And that basically is your obligation,  
10 correct?

11 A. Yes.

12 Q. And so if a press release is issued, it's  
13 issued under your authority?

14 A. No, it's issued under the authority of the  
15 executive staff. I have a role in this, but the  
16 executive staff makes the decision.

17 Q. Is it issued with your permission?

18 A. I don't have -- as a line ADA or even as a  
19 unit supervisor, I don't have the ultimate say -- in  
20 fact, I don't have the say in whether a press  
21 release is issued. I can suggest that one be issued  
22 or suggest that one not be issued. I can discuss  
23 it, but ultimately the executive staff makes that  
24 decision.



1 Q. In this particular case, was it your  
2 understanding that Ms. Joseph would be shocked that  
3 the press was notified in the Horton case?

4 MR. BRACERAS: Objection.

5 HEARING OFFICER DAHER: Sustained.

6 Q. Well, did you have conversations with her  
7 about whether or not she was shocked that the press  
8 was notified?

9 A. I did not have conversations with her about  
10 that.

11 Q. Did she tell you that she was shocked about  
12 the press being notified?

13 A. I don't remember her ever saying that she  
14 was shocked.

15 Q. Did she tell you that she knew the press  
16 was going to be notified?

17 A. I don't think we ever had a discussion  
18 about that. As I said, there was an understanding  
19 that that was the direction it was going.

20 Q. Well, one of the conversations that you had  
21 with her was about her conversations with Judge  
22 Lopez on August 4th, correct?

23 A. On August 4th?

24 Q. Right.

1           A.    Yes.  
2           Q.    And she reported to you then, didn't she,  
3           that Judge Lopez basically indicated that Ms. Joseph  
4           had been responsible for notifying the press?  
5           A.    Yes, she did indicate that.  
6           Q.    And did Ms. Joseph tell you that she had  
7           nothing to do with it?  
8           A.    No.  
9           Q.    Did she tell you that she didn't know the  
10          press was going to be notified?  
11          A.    No.  
12          Q.    It was clear to you that she knew the press  
13          was going to be notified, right?  
14          A.    It was clear to me that she knew that was  
15          the direction the decision was going.  
16          Q.    That was where this was headed?  
17          A.    Yes.  
18          Q.    And that she was the person that initiated  
19          it, correct?  
20          A.    I'm not sure -- I guess it depends on what  
21          you mean by "initiated." She asked me whether it  
22          would be appropriate under the press policy to  
23          notify the press office. If that's "initiating it,"  
24          then yes.

1 Q. And then she participated in informing the  
2 press office of the information necessary to include  
3 in a press release?  
4 A. I believe so.  
5 Q. You say you believe so. You know that's  
6 the case, don't you?  
7 A. As I'm testifying today, I believe so. I'm  
8 not positive of that.  
9 Q. You've testified to it on a number of  
10 occasions in the past under oath, correct?  
11 MR. BRACERAS: Objection.  
12 HEARING OFFICER DAHER: Sustained. Let's  
13 move on.  
14 MR. EGBERT: Judge, is this a good time to  
15 recess?  
16 HEARING OFFICER DAHER: Okay. We'll pick  
17 it up on Monday. If you want to work out a doubling  
18 up of the time, I'll be delighted to accommodate  
19 you. Mr. Ware, I know what your problem is.  
20 Thursdays are out of the question. But if  
21 you want to have an extended hours, I would be  
22 delighted to do that.  
23 MR. EGBERT: I've cleared my schedule.  
24 What hours?

1 MR. WARE: I'd like to have as full a day  
2 as the Court can accommodate, and I'd like to  
3 understand when the lunch break is and that kind of  
4 thing.

5 HEARING OFFICER DAHER: We'll start at 9:30  
6 and go until 3:00. And if you're a witness --

7 MR. WARE: With no break, you're saying?

8 HEARING OFFICER DAHER: No, of course a  
9 lunch.

10 MR. WARE: Why don't we go from 9:30 to  
11 4:30.

12 HEARING OFFICER DAHER: That would be fine.

13 MR. EGBERT: I can tell you that we have to  
14 have some break for lunch and rest.

15 MR. WARE: I don't have a problem with the  
16 lunch break, as long as we're going to get an  
17 extended day.

18 HEARING OFFICER DAHER: We can't get a  
19 transcript to review if we break at 4:30; is that  
20 correct?

21 THE COURT REPORTER: You can get it emailed  
22 late in the evening, but the transcript itself will  
23 be delivered the following day.

24 HEARING OFFICER DAHER: We can live with

0205

1 that. We'll go from 9:30 to 4:30.  
2 (Whereupon, the hearing was  
3 adjourned at 1:35 p.m.)  
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C E R T I F I C A T E

I, Jane M. Williamson, Registered Professional Reporter, do hereby certify that the foregoing transcript, Volume IX, is a true and accurate transcription of my stenographic notes taken on Friday, December 6, 2002.

\_\_\_\_\_  
Jane M. Williamson  
Registered Merit Reporter

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