

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:

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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
Monday, November 25, 2002
9:42 a.m.

(Jane M. Williamson, Registered Merit Reporter)

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1 P R O C E E D I N G S
2 THE WITNESS: I'm still under oath.
3 MARIA LOPEZ, Previously Sworn
4 CROSS EXAMINATION, Resumed
5 BY MR. EGBERT:
6 Q. Just last Friday when we were looking over
7 the transcript and I was pointing to parts, I
8 recognize from the transcript that you were talking
9 faster than I was writing. So I'm going to ask you
10 to take a look at this transcript again at Page 149.
11 And do you see the area where you were discussing
12 what you had in this particular area?
13 A. Right, "except in some circumstances."
14 Q. Then I'm going to ask you to look at the
15 transcript at Page 153. And in this section here
16 you said something should come out after "solely,"
17 correct?
18 A. Right.
19 Q. And what did you have?
20 A. "Factors that would be considered by judges
21 in determining the appropriate level of sentencing
22 guidelines."
23 Q. "Factors that would be considered by judges
24 in determining the appropriate level of the

1 sentencing guidelines"?

2 A. Right.

3 Q. And when you agreed or issued this press
4 release, did Chief Justice DelVecchio know that it
5 was being issued?

6 A. Yes.

7 MR. WARE: Objection.

8 HEARING OFFICER DAHER: Sustained.

9 Q. Did you discuss with Chief Justice
10 DelVecchio the substance of this press release?

11 A. Yes.

12 Q. And did you -- strike that. Do you have
13 that exhibit book in front of you?

14 A. Yes, I do.

15 Q. Would you turn to Exhibit 50.

16 A. Yes.

17 Q. Could you tell us what that is.

18 A. That's a fax memo.

19 Q. From?

20 A. From Joan Kenney to Chief Justice
21 DelVecchio.

22 Q. And the date of it?

23 A. The date of it is 9/7/00, September 7th,
24 2000.

1 Q. And it reads, "Chief, could you please
2 review this draft statement I wrote for Judge Lopez.
3 There have been many media calls today. Thank you.
4 Joan." Correct?
5 A. Correct.
6 Q. And does that comport with your
7 understanding that Ms. Kenney and Judge DelVecchio
8 had been speaking with regard to the press release?
9 A. Yes.
10 Q. And does it comport with your understanding
11 that Joan Kenney wrote the press release?
12 A. That's right, yes.
13 Q. Would you now turn to Exhibit 51. And what
14 is that?
15 A. And that is the Chief Justice's response to
16 Joan Kenney concerning the draft of the press
17 release.
18 Q. And is that dated September 7th, 2000?
19 A. Correct.
20 Q. And in it does it say, "Joan, I revised
21 your original draft after a telephone consultation
22 with Justice Lopez. Thank you for all of your help
23 in this. S. DelV"? Right?
24 A. Right.

1 Q. Do you understand "S. DelV" to be Suzanne
2 DelVecchio?

3 A. Yes.

4 Q. And "Joan" to be Joan Kenney?

5 A. Correct.

6 Q. And does that fax statement comport with
7 your memory of the events?

8 A. Yes.

9 Q. Now, on this issue of releasing information
10 concerning a pending case, No. 1, did you believe
11 this Horton case to be pending as of September 7th
12 of 2000?

13 A. I did not believe it was pending. It was a
14 disposed of case.

15 Q. And did Judge DelVecchio, the Chief Judge
16 of the Superior Court, in any way indicate to you at
17 any time that a press release would be inappropriate
18 under the canons of ethics?

19 A. No.

20 Q. Did Joan Kenney -- by the way, Joan Kenney
21 works for the Supreme Judicial Court, doesn't she?

22 A. Right. She runs the Public Information
23 Office of the Supreme Judicial Court.

24 Q. And did Joan Kenney at any time indicate to

1 you that issuance of a press release on September
2 7th of the Year 2000 would be a violation in any way
3 of the canons of ethics?

4 A. No.

5 Q. Now, during the course of your deposition
6 with the Commission, you were asked a number of
7 questions concerning the meaning of the press
8 release, correct?

9 A. That's right.

10 Q. And you were asked a number of questions
11 concerning whether or not a particular line was
12 accurate or not, correct?

13 A. That's right.

14 Q. Was there some confusion going on at that
15 deposition in your mind?

16 A. Well --

17 MR. WARE: Objection.

18 HEARING OFFICER DAHER: Sustained.

19 Q. Well, is there -- let me start with this
20 proposition.

21 Is there a difference in your mind as to
22 what is appropriate to release in a press release
23 versus what is appropriate to release in a
24 sentencing memorandum?

1 A. Of course; absolutely there is.

2 Q. And there were occasions during your
3 testimony before the Commission -- strike that --
4 deposition before Commission counsel where you made
5 references to facts and matters you could and could
6 not speak about, correct?

7 A. That's right.

8 Q. And on occasions you said you could talk
9 about anything, was one quote you were shown by Mr.
10 Ware; is that correct?

11 A. That's right.

12 Q. And on others you said you were restricted
13 to certain matters, correct?

14 A. Correct.

15 Q. Can you describe what the discrepancy is
16 there? What your understanding of what you were
17 able and unable to do under the canons was?

18 A. Well, I was making a distinction between
19 what could be commented on under the canons by a
20 judge in the course of adjudicative responsibilities
21 and what could be commented on by a judge in a press
22 release.

23 Q. And when you say "adjudicative
24 responsibilities," give me the parameters of what

1 you're talking about.

2 A. Well, I am talking about the process where
3 a judge comes to make -- reach a conclusion,
4 basically. Um...

5 Q. Well, is there any restriction on what a
6 judge says in open court while discussing the case
7 with the parties, for example?

8 A. There's absolutely no restriction in what
9 you can do in open court concerning discussing
10 matters involving a case.

11 Q. And is there any restriction on what you
12 might include in a decision on a motion with regard
13 to matters pending on the case?

14 A. No. With regards to anything that I would
15 do as a judge in the course of my judicial
16 responsibilities, the canons do not apply to that.

17 Q. And so, for example, in a sentencing
18 memorandum, had you chosen to write one, you could
19 have released or referenced any fact you wished,
20 which was a matter that you considered at
21 sentencing, correct?

22 A. That's right.

23 Q. Could you do the same in a press release?

24 A. No.

1 Q. Why not?

2 A. Well, there was information that had not
3 become part of the public record that I knew of and
4 some information I probably -- I mean, I even have,
5 at least, given the confidential private nature of
6 it in a sentencing memorandum. But there was
7 information that I had knowledge of that could not
8 be referenced in a press release.

9 Q. And would that relate to whether or not the
10 case was pending or not?

11 A. No.

12 Q. Well, would it matter -- the statement that
13 you just made, in other words, the dichotomy between
14 what you say in court and in a sentencing memorandum
15 and what you say in public, would it matter whether
16 or not the case were pending or not?

17 A. No, it wouldn't matter.

18 Q. And so what you're saying is there are
19 certain matters that whether the case --

20 MR. WARE: Objection to counsel's summary.

21 HEARING OFFICER DAHER: Overruled. I want
22 to hear it.

23 Q. Whether the case was pending or not, some
24 matters don't go into press releases as far as you

1 understand?

2 A. That's right; that would not be appropriate
3 or should not go in or can't go in.

4 Q. And tell me -- in this case tell me some of
5 the things that you felt were inappropriate to put
6 in a press release, but could well have gone into a
7 sentencing memorandum.

8 A. All of the information that I had
9 concerning Ebony Horton in the psychosocial
10 assessment --

11 Q. Let me stop you there for a minute. The
12 fact that Ebony Horton was suffering from a gender
13 identity disorder had already been made public; is
14 that correct?

15 A. That's correct.

16 Q. So what else in that memorandum was it that
17 you felt an inability to disclose to the public
18 outside of a sentencing memorandum?

19 A. Outside of a sentencing memorandum, all of
20 the details about her history, her emotional and
21 psychological history, that she was considered
22 almost preopt -- preoperative in the sense that she
23 was on hormones; there was private stuff in there
24 that I could not release in this press release that

1 I could have made factual findings about in a
2 memorandum.

3 Q. Well, for example, could you have released
4 in a press release that she was suicidal?

5 A. No.

6 Q. Could you have released in a press release
7 the various information you received concerning her
8 abuse as a child?

9 A. No.

10 Q. Could you have released in a press release
11 the opinion and findings of the author of the report
12 that she was not a recidivist?

13 A. No, and I couldn't do it in a press release
14 given the status of this case. If I had put that in
15 the public record in the course of my judicial
16 responsibilities, it could have then been given out
17 as a press release. But given the state that this
18 case was on, where findings had not been made, I
19 could not release that in a press release.

20 Q. When you say given the state of this case,
21 again, I want to make sure your words are clear.

22 A. Yes.

23 Q. When you say the state of the case, are you
24 talking about pending or not pending?

1 A. No, no.

2 Q. What are you talking about?

3 A. What I'm talking about is that no
4 sentencing memorandum had been issued; nothing had
5 been put on the record concerning some of this
6 confidential private information. The criminal
7 record information is also confidential. Since it
8 had not been made part of the public domain in the
9 course of my adjudicative responsibilities, it could
10 not be commented on in a press release. However, if
11 I had issued a sentencing memorandum --

12 Q. That's where you make the mix.

13 A. Okay.

14 Q. And we're going to get to that.

15 Now, were there matters put before you
16 during the plea conferences which were not a matter
17 of record in the case?

18 A. Yes.

19 Q. And again, would you give me the types of
20 things that were put before you in the plea
21 conference that were not a matter of record in the
22 case?

23 A. Again, the psychosocial evaluation, the
24 defendant's criminal record, the police reports, the

1 defendant's statement to the police at the time of
2 arrest. There were disputed facts that were
3 represented to me by the attorneys during this lobby
4 conference that were not part of the public record.

5 Q. And would you have felt it appropriate to
6 release those facts in a press release?

7 A. It would have been inappropriate for me to
8 do that.

9 Q. Would it have been appropriate for you to
10 do it in a sentencing memorandum?

11 A. It would have been absolutely appropriate
12 for me to include all of that in a sentencing
13 memorandum, especially.

14 Q. And you said a number of times in a number
15 of different ways when asked at the deposition about
16 the use of the term "sentencing guidelines," and you
17 said, words to the effect of, I wasn't thinking of a
18 sentencing guideline in my head when I said the word
19 "low level," correct?

20 A. That's right; the generic sentencing
21 guidelines that are out there.

22 Q. When you said "low level," what were you
23 thinking of?

24 A. I was thinking in terms of sentencing. We

1 were at the sentencing phase of this case. And I
2 had asked Mr. Deakin to rate the case for purposes
3 of sentencing on a scale of 1 to 10. Now, clearly,
4 1 to 10 does not refer to any one of those generic
5 sentencing guidelines, proposed guidelines, that are
6 out there. So I wasn't thinking, you know, a
7 sentencing guideline that goes 1 to 10. I was
8 thinking about the same factors that would be
9 considered by judges, by lawyers in a criminal case
10 in trying to put forth an appropriate sentence in a
11 case.

12 Q. Are those the same factors that are
13 considered in something called sentencing
14 guidelines?

15 A. Absolutely. And Mr. Deakin began to
16 respond to my question using those kinds of factors.

17 Q. And although there's no statutorily-imposed
18 sentencing -- let's just make it clear.

19 There was something called a Sentencing
20 Commission that was established by the legislature;
21 is that correct?

22 A. Yes.

23 Q. And they were charged with creating
24 sentencing guidelines, correct?

1 A. Yes. They had proposed guidelines.

2 Q. And they did make proposed guidelines,
3 correct?

4 A. They did.

5 Q. And have they been adopted by the
6 legislature?

7 A. They have never been adopted.

8 Q. So they are not a part of the Superior
9 Court -- of a mandated Superior Court sentencing
10 scheme.

11 A. That's right; they are not.

12 Q. Do you use the guidelines that are proposed
13 before the legislature in your sentencing?

14 A. Not consistently, but I use -- I mean, I
15 would use the same considerations, severity of the
16 crime, injury to the victim, prior record, those
17 kinds of things, which is what they use in the
18 sentencing guidelines out there. There's at least
19 two that I'm familiar with.

20 Q. You've mentioned one that's a proposal
21 before the legislature. Is there another?

22 A. There's another one that was done by Judge
23 Ronan sometime ago, and they're called the Superior
24 Court sentencing guidelines.

1 Q. And are those something which you consider
2 also during sentencing?

3 A. Yes, but it's all the same thing.

4 Q. What do you mean by that?

5 A. Because they all address the same factors.

6 Q. And those are the factors you just
7 discussed?

8 A. That's right.

9 Q. Do all the sentencing guidelines as a mix,
10 do they also consider or permit the Court to
11 consider exceptional circumstances as they relate
12 either to the victim or the defendant?

13 A. Yes, that's always in the mix.

14 Q. And are those the considerations you were
15 thinking about when you said the words "low level"?

16 A. That's correct; low level for purposes of
17 sentencing: What is the appropriate sentence in
18 this kind of a case.

19 Q. And that was based on all the factors in
20 the case; is that correct?

21 A. Correct.

22 Q. You clarify the statement here by saying,
23 "I do think it is necessary to clarify media reports
24 that suggest I was insensitive to the victim and his

1 family." Is what you meant by that by using the
2 word "low level"?

3 A. Yes.

4 Q. And had there been some, for lack of a
5 better word, media hype of your use of the word "low
6 level"?

7 A. Yes. It had been taken out of context. It
8 was being depicted in the media as though I was
9 referring to the crime as low scale, low level,
10 when, in fact, I was referring to what an
11 appropriate sentence would be in this case.

12 Q. The level of sentencing?

13 A. The level of sentencing.

14 Q. Having in mind all of the factors?

15 A. That's right.

16 Q. Is that what you were trying to impart by
17 that press release?

18 A. That's right.

19 Q. As you look at that press release, would
20 you say that it is, in hindsight, artfully drawn?

21 A. No.

22 Q. Is it accurate, in your opinion, for
23 purposes of a press release?

24 A. For purposes of a press release it's

1 accurate and it conveys what was intended by it.

2 Q. Now, on this issue of pending case and a
3 judge's ability to speak or not speak publicly or
4 otherwise, do you know whether or not the law in
5 that area is subject to many interpretations?

6 A. Well, there are different views on it.
7 There's a minority view and an overwhelming majority
8 view.

9 Q. And when you say there's a minority view
10 and a majority view, how have you come to learn
11 that?

12 A. During the recent Superior Court conference
13 this was a major topic for us.

14 Q. And what would you say is the majority
15 view?

16 A. The majority view is that the case is
17 disposed of upon the taking of a plea.

18 Q. And what's the minority view?

19 A. The minority view is that the case is never
20 disposed of. You literally have to wait for the
21 defendant to die before you can talk about the case,
22 because there's always the possibility of a motion
23 for a new trial.

24 Q. And was that view -- the view that you've

1 just described, was that espoused by anyone related
2 to the Judicial Conduct Commission?

3 MR. WARE: Objection.

4 A. Which view?

5 HEARING OFFICER DAHER: Sustained.

6 Q. I want you to take a look at Exhibit 2, I
7 believe it is. Is that the docket in the Horton
8 case?

9 A. Yes.

10 Q. Would you look to the right-hand side of
11 the upper section of that docket and tell me what
12 the docket reflects as to the nature of that case?

13 A. The docket reflects that it is a disposed
14 case.

15 Q. And does that mean to you that it's over?

16 A. It's over for purposes of adjudicative
17 proceedings. It's out of the clerk's office.

18 Q. To your understanding, did the Defendant
19 Horton have a right of appeal from your sentence?

20 A. No, he did not.

21 Q. Did the Commonwealth have a right of appeal
22 from your sentence?

23 A. No, they did not. It was a legal sentence
24 and there's no right to appeal a legal sentence by

1 the Commonwealth.

2 Q. And did Ebony Horton in fact get the
3 sentence in essence that his attorney had advocated
4 for?

5 A. In essence, yes.

6 Q. Did you believe that there was any
7 adjudicatory matter left in the Horton case?

8 A. No. The case was over. The defendant had
9 pled. There would never be a trial in this case.
10 There would never be any witnesses. There would be
11 no testing of what the facts, the real facts were in
12 the case.

13 Q. Now, by the way, you understand that the
14 canon relating to pending cases doesn't simply mean
15 comments on pending cases of your own; isn't that
16 right?

17 A. That's right.

18 Q. The rule relates to pending or impending
19 cases that may ever come in your court system,
20 correct?

21 A. Anywhere in the country, some people would
22 argue.

23 Q. So some theorists say that you can't
24 discuss any case, no matter where it is, right?

1 A. That's right.

2 Q. And others at least say that you can't
3 discuss a pending case that may be pending in your
4 own court system.

5 A. That's right.

6 Q. Whether it be district, superior, appellate
7 or the like, right?

8 A. That's right.

9 Q. And do you consider your Chief Justice
10 DelVecchio to be a well respected and astute member
11 of the judiciary?

12 A. Yes. I have the highest regard for her.

13 Q. And did she participate in drafting and,
14 therefore, issuing this press release?

15 A. That's right.

16 MR. WARE: Objection.

17 HEARING OFFICER DAHER: What's the
18 objection?

19 MR. WARE: Justice DelVecchio can speak for
20 herself in terms of her role. And the Court has
21 whatever evidence before it to draw --

22 HEARING OFFICER DAHER: Sustained.

23 Q. Did you rely, in part, in Justice
24 DelVecchio's conduct as to whether or not issuance

1 of a press release would be appropriate?

2 A. Of course I did.

3 Q. Did you rely, at least in part, on the
4 participation of Joan Kenney from the Supreme
5 Judicial Court as to your understanding as to
6 whether or not the issuance of a press release would
7 be appropriate?

8 A. I did. I relied on Joan Kenney and the
9 Chief Justice with regards to the content and the
10 issuance of the press release, yes.

11 Q. After the sentence and what you've
12 described as the enormous media attention and what
13 you've described as the personal attention and some
14 attacks on you and your family, which you've already
15 discussed in some detail, at or about that time
16 you've indicated that you had a conversation with
17 first Anne Goldbach and later William Leahy,
18 correct?

19 A. Yes, I believe that's the order. That
20 appears to be my recollection, but I...

21 Q. And do you know whether or not those
22 conversations took place before or after the
23 issuance of this press release?

24 A. After the issuance of the press release.

1 Q. And after the issuance of this press
2 release, can you describe -- you've already done so
3 a bit on your direct examination, but give us a
4 general discussion of your conversations with Ms.
5 Goldbach and then Mr. Leahy.

6 A. With Ms. Goldbach, we talked about -- I
7 emoted about, you know, the media frenzy and the way
8 my family was under siege and what was going on in
9 my life with regards to the unprecedented press
10 attention of this case. Did you ask me about both
11 or just Ms. Goldbach?

12 Q. Yes, both.

13 A. And with Mr. Leahy, I specifically wanted
14 to talk to him about whether or not it would not be
15 in the institutional interest of CPCS to take a
16 position on this particular -- the way it was being
17 handled in the press on the case.

18 Q. Now, at the time that you spoke with Mr.
19 Leahy, do you know whether or not the district
20 attorney's office was giving regular inflammatory
21 statements to the press?

22 MR. WARE: Objection.

23 A. Yes, they were.

24 HEARING OFFICER DAHER: Sustained.

1 Q. Did you consider them to be inflammatory?

2 A. From the very beginning I believed they
3 were inflammatory, yes.

4 Q. And to your knowledge, was the district
5 attorney's office regularly participating in
6 providing statements and quotes and press
7 conferences to the media --

8 HEARING OFFICER DAHER: Are you objecting,
9 Mr. Ware?

10 MR. WARE: Yes, your Honor.

11 HEARING OFFICER DAHER: Sustained.

12 Q. Did you observe in the media statements of
13 the district attorney's office relating to these
14 matters?

15 A. Many.

16 Q. And were they confined to the facts of the
17 case?

18 MR. WARE: Objection. The statements are
19 out here. They've been offered in evidence.

20 HEARING OFFICER DAHER: Overruled. You can
21 have that.

22 A. They were not confined to the facts of the
23 case. They were often -- they were personal attacks
24 on me. And some of it was a presentation of a fact

1 that was a mischaracterization of the facts.

2 Q. During one of those press releases or press
3 statements did the district attorney or their
4 surrogate -- strike that -- or their representative
5 indicate that you had sentenced Ebony Horton
6 leniently and that Ebony Horton was a predatory
7 pedophile?

8 A. I believe that's what the DA at the time is
9 quoted as saying; that I had released a predatory
10 pedophile, yes.

11 Q. Without regard to people's -- statements of
12 counsel for a moment, what was the only information
13 in the whole of the Ebony Horton case that related
14 to whether or not Ebony Horton was a predatory
15 pedophile?

16 A. Are you saying, what was available to the
17 public?

18 Q. No. Let me ask it again. Not available to
19 the public.

20 Without regard to counsel's statements to
21 the press or otherwise, what was the only
22 information before you during the whole of the Ebony
23 Horton case on the issue of whether or not Ebony
24 Horton was a predatory pedophile?

1 A. There was no information before me that
2 would even suggest that Ebony Horton was a predatory
3 pedophile.
4 Q. What was the only information you had that
5 discussed that issue?
6 A. The only document I had that discussed that
7 issue was the psychosocial evaluation.
8 Q. And the psychosocial evaluation indicated
9 to you that Ebony Horton was not a predatory
10 pedophile, correct?
11 A. Correct.
12 Q. And what's meant by that is not a person
13 who has an impulse for children, correct?
14 A. Uncontrollable impulse, has a fixation --
15 Q. For children?
16 A. Yeah, for children.
17 Q. And who is likely to reoffend?
18 A. Yes, very likely.
19 Q. And the psychosocial report specifically
20 made findings that that was not the case; isn't that
21 correct?
22 A. That's correct.
23 Q. And was that the only information before
24 you on that issue --

1 A. Yeah --

2 Q. -- when you sentenced Ebony Horton?

3 A. Yeah, and the criminal record, which
4 showed, again, no indicia of this kind of behavior.

5 Q. Did any prosecutor ever put any -- in the
6 Horton case, during the pendency of that case, ever
7 put any information before you from any source that
8 Ebony Horton was a predatory pedophile?

9 A. No, they didn't. And the fact that they
10 didn't even seek a dangerousness petition spoke to
11 that very issue; that they couldn't have possibly
12 have considered this defendant predatory in any way,
13 because otherwise, they would have attempted, at
14 least, to have this defendant held without bail.

15 Q. So as September 6th and 7th and 8th rolled
16 around and the prosecutors were in the press saying
17 the kinds of things they were saying, at that very
18 time were you able in your mind to go to the press
19 and say, "Look, the prosecutors here are wrong. The
20 only information in this file is that Ebony Horton
21 is not a predatory pedophile"?

22 A. I could not go and deal with that issue
23 with the press.

24 Q. And why is that?

1 A. Because I hadn't made findings concerning
2 that issue. I hadn't done this in the course of my
3 judicial responsibilities. The only thing that was
4 out there was a finding that the defendant suffered
5 from a sexual identity disorder.

6 Q. And the information in that psychosocial
7 report which you relied on concerning this lack of
8 predatory pedophile was not public information; is
9 that right?

10 A. It was not public information.

11 Q. At any time that you spoke with Ms.
12 Goldbach or Mr. Leahy, did you speak to them about
13 future cases?

14 A. No.

15 Q. Did you speak to them about any cases that
16 were pending before you?

17 A. No, I did not.

18 Q. Did you speak to them about any matters to
19 be adjudicated by you?

20 A. There was nothing for me to adjudicate.

21 Q. Did you speak to them about any matters
22 that were to be adjudicated by you on any case?

23 A. No.

24 Q. Did you speak to them about any matters

1 which they would be coming before you upon?

2 A. No.

3 Q. And, by the way, in the event that a judge
4 and a lawyer have a conversation which sometime
5 later may be seen as in any way affecting that
6 judge's ability to sit, what does a judge do?

7 A. Well, there's various things that I could
8 have done. One was I could have fully disclosed
9 that I had had these conversations unrelated to
10 whatever matter was before me, and if either party
11 had indicated that they were not comfortable with
12 that, I would have recused myself. Or I could have
13 on my own just recused myself because of an
14 appearance issue after all of this press stuff
15 happened.

16 Q. None of that has come to be; is that right?

17 A. Nothing has come to be, no.

18 Q. Now, do you speak to probation ex parte all
19 the time concerning cases?

20 A. Yes.

21 Q. And is that something you do with
22 regularity?

23 A. Regularly when we supervise a probationer,
24 yes.

- 1 Q. And at those conversations do you invite
2 defense counsel and/or the prosecutor?
- 3 A. No.
- 4 Q. Are they excluded?
- 5 A. They are excluded.
- 6 Q. And, finally, on what will be a very
7 telling matter, you were asked all kinds of
8 questions about how Anne Goldbach could get to call
9 you, correct?
- 10 A. Right.
- 11 Q. And whether or not you gave her your phone
12 number, you did this and you did all these things,
13 right?
- 14 A. Right.
- 15 Q. If someone calls the Suffolk Superior Court
16 and asks for you, what happens?
- 17 A. They would probably connect them to my
18 lobby or my clerk.
- 19 Q. And in your lobby, if you don't answer the
20 phone, what happens?
- 21 A. The voicemail picks up.
- 22 Q. And do you check your voicemails?
- 23 A. Of course.
- 24 Q. And you've indicated that when you checked

1 your voicemail on one occasion, Ms. Goldbach was
2 there providing some information concerning Jay
3 Greene, correct?
4 A. That's right, yes.
5 MR. EGBERT: Can I have a minute, Your
6 Honor?
7 HEARING OFFICER DAHER: Sure.
8 (Pause)
9 Q. Now, after you received this call from Anne
10 Goldbach leaving Jay Greene's beeper number, was it?
11 A. That's correct.
12 Q. Did you actually beep him or --
13 A. I did. I called the number, the beeper
14 number.
15 Q. And left a call-back message?
16 A. Number.
17 Q. Call-back number?
18 A. Yes.
19 Q. Did you know Jay Greene before that date?
20 A. I had known Jay Greene from my days as a
21 district court judge, yes.
22 Q. And did you have respect for Jay Greene?
23 A. I did.
24 Q. And, by the way, did you also -- strike

1 that.
2 Did you have a conversation with Jay
3 Greene?
4 A. I did.
5 Q. And what was the conversation?
6 MR. WARE: Objection, Your Honor.
7 HEARING OFFICER DAHER: What's your
8 objection?
9 MR. WARE: Earlier, Your Honor, the Court
10 excluded --
11 HEARING OFFICER DAHER: I understand. I
12 recall that at the side bar.
13 MR. WARE: If they want to call Detective
14 Greene, I have no objection --
15 MR. EGBERT: Judge, respectfully, he asked
16 her about her conversations with Jay Greene and she
17 testified to them. What wasn't permitted was what
18 did you read in his deposition.
19 HEARING OFFICER DAHER: Overruled. Go
20 ahead. I want to hear it.
21 A. His initial conversation with me was he
22 felt badly about the way this was being handled and
23 how I was being attacked and maligned in the press
24 and that he thought it was unfair for me to be being

1 treated this way. He then also told me that he was
2 a regular cop in that area.

3 Q. What area?

4 A. In the area where Ebony Horton and the
5 victim were that day, the day of the incident; that
6 he was familiar with Ebony Horton; she was well
7 known in that neighborhood; she was flamboyant; she
8 attracted attention, and he said that he didn't
9 believe she would be a pedophile.

10 Q. And what did you then do with that
11 information?

12 A. Well, what I said is, would you be willing
13 to talk to the Public Information Office that's
14 handling press issues for me.

15 Q. What did he say?

16 A. He said "Yes."

17 Q. Did you ask him to go to the press and say
18 anything himself?

19 A. No.

20 Q. Did you ask him to give a press release
21 himself?

22 A. No.

23 Q. Did you ask him to speak on your behalf?

24 A. No.

1 Q. You simply asked him to go and talk with
2 Joan Kenney and see if there was information that
3 she wanted or you could use.

4 A. Right; if there was anything that Joan
5 Kenney believed she would be able to use from him,
6 yes.

7 Q. And did you have any further conversations
8 with him in that regard?

9 A. No.

10 Q. And did you have any further conversations
11 with him after that?

12 A. No.

13 Q. Did you have conversations with Joan Kenney
14 about that?

15 A. Yes, I did.

16 Q. And do you remember what those
17 conversations were?

18 A. Initially I called the Public Information
19 Office and I -- I can't recall if I spoke to her
20 directly or not or I left a message for her that I
21 had spoken to the detective that had been
22 represented during the lobby conference as having
23 conflicting information, and that he had called me
24 and, you know, here's his number. He would talk to

1 her if -- if she was interested, he would talk to
2 her.

3 Q. And did you have any further contact on
4 that subject with Joan Kenney?

5 A. No, not that I recall.

6 Q. Judge, I'd like you to tell us a bit about
7 yourself, if you would. The age-old question that
8 I'm going to get in trouble for: Could you tell us
9 how old you are, to start with?

10 A. How old I am. Forty-nine.

11 Q. And where were you born?

12 A. I was born in Havana, Cuba.

13 Q. And how much of your life did you spend in
14 Havana?

15 A. I spent the first eight years of my life in
16 Havana.

17 Q. Under what circumstances?

18 A. Under the circumstances that my father was
19 a cardiologist. My whole family was there.
20 Generations of my family are from Cuba.

21 Q. And you left when you were eight years old?

22 A. I left in 1961 when at the age of eight the
23 family left because of the Cuban revolution.

24 Q. Tell me about that. When you say because

1 of the Cuban revolution, what caused your family to
2 have to leave?

3 A. My parents did not want to live in a
4 communist country, and they didn't want to live
5 under that kind of a regime.

6 Q. When you say your family left, what members
7 of your family left and came to the United States?

8 A. My immediate family; my parents and my two
9 brothers and myself.

10 Q. How old --

11 A. Eventually they all came, but that's who
12 left that day.

13 Q. How old were your brothers at the time?

14 A. I had a brother that was seven and a
15 brother that was nine. There's three of us.

16 Q. Then you came to the United States?

17 A. Yes.

18 Q. And where did you immigrate to?

19 A. Well, like all Cubans, we stopped in Miami
20 for a few months, and then we moved to New Britain,
21 Connecticut, where my dad had a friend who was chief
22 of medicine at the hospital there at New Britain
23 General Hospital.

24 Q. And then did you grow up in New Britain?

- 1 A. I did.
- 2 Q. Spend --
- 3 A. From third grade through high school.
- 4 Q. And when did you graduate high school?
- 5 A. You know, I'm not good at math. I
- 6 graduated high school on the regular schedule, never
- 7 staying back a year. I think it was probably --
- 8 let's say 1971, because that's when I entered
- 9 college.
- 10 Q. And where did you go to college?
- 11 A. I went to Smith College.
- 12 Q. Where is that?
- 13 A. Northampton, Massachusetts.
- 14 Q. And how long were you there?
- 15 A. Four years.
- 16 Q. And what major did you graduate?
- 17 A. I majored in government.
- 18 Q. And after Smith College what did you do?
- 19 A. I went to BU Law School.
- 20 Q. Directly from Smith?
- 21 A. Yes.
- 22 Q. Did you graduate from Boston University?
- 23 A. I did, in 1978.
- 24 Q. What did you do after you left Boston

1 University?

2 A. My first job was as an attorney with
3 Greater Boston Legal Services.

4 Q. What did that entail?

5 A. That entailed representing indigent
6 defendants in civil matters, a lot of
7 landlord-tenant issues and consumer issues,
8 immigration issues. I did a variety of different,
9 you know, legal issues on the civil side.

10 Q. And how long did you spend at Greater
11 Boston Legal Services?

12 A. About two years.

13 Q. Where did you go from there?

14 A. I went to the Attorney General's Office. I
15 became an assistant attorney general in the Civil
16 Rights Division of then Attorney General Frank
17 Bellotti's office.

18 Q. How long did you remain in that position?

19 A. Eight years and two children.

20 Q. And what types of matters did you handle in
21 the Civil Rights Division?

22 A. I did a variety of things. The state civil
23 rights law had just been enacted in 1980, and so I
24 was amongst the group of civil rights lawyers

1 involved in its initial enforcement activity in
2 defining in what kind of circumstances it would be
3 enforced.

4 I also represented state agencies in
5 certain civil rights-related matters, the Department
6 of Education in a number of matters relating to
7 special education and enforcement of certain
8 educational laws.

9 I was also on a number of occasions loaned
10 to district attorneys' offices. I think there was a
11 budget problem back then and Essex County and
12 Norfolk County needed assistance and Frank Bellotti
13 arranged to have some of his assistant attorneys
14 general be prosecutors for different DAs' offices;
15 so I did some of that.

16 Q. And did you actually prosecute criminal
17 cases?

18 A. I did in Essex County and Norfolk County.

19 Q. For how long a period did you do that?

20 A. There would be maybe six months at a time
21 and certain days during that six months that you
22 would go and schedule the matters for days that you
23 were assigned to go. It wasn't a full-time thing.

24 Q. Would those be in District or Superior or

1 both?

2 A. They were mostly in District, just a little
3 bit in the Superior Court.

4 Q. And after you left -- strike that. You
5 stayed in the Civil Rights Division for eight years
6 you said?

7 A. Eight years.

8 Q. And then what did you do?

9 A. Then I went to become general counsel to a
10 newly-created office, the Office for Refugees and
11 Immigrants.

12 Q. And what was that?

13 A. That was -- this is when we were having the
14 influx of Vietnamese and Southeast Asia immigrants
15 and there was an office which was federally and
16 state funded that provided assistance to refugees
17 and immigrants. It was a newly-created office. I
18 was the first legal counsel to it.

19 Q. And who appointed you to that position?

20 A. Michael Dukakis.

21 Q. And was that a state agency?

22 A. It was a state agency, yes.

23 Q. And what were your responsibilities as
24 general counsel?

1 A. Basically we were developing regulations
2 for the agency. Again, it was sort of defining what
3 the mission would be and defining how the agency
4 would operate. It was brand-new.

5 Q. And how long did you stay in that position?

6 A. Actually, not even a year, I think.

7 Q. And what happened then?

8 A. I was appointed to the district court, to
9 the Chelsea District Court in 1988 by Governor
10 Dukakis.

11 Q. And that was the Chelsea District Court?

12 A. That was the court I was appointed to, but
13 I sat all over what they call Region 2, which
14 involves district courts from as far south as Quincy
15 and to as far north as Peabody and Salem.

16 Q. During the time that you were in the
17 district court, did you handle both bench and jury
18 trials?

19 A. Yes.

20 Q. Would it be possible to estimate the amount
21 of trials that you handled in the district court?

22 A. In five years? I don't know. I am
23 terrible about that. I could say many hundreds. I
24 could say well over a thousand.

1 Q. Quite a few?

2 A. Quite a few. I mean, when they were jury-
3 waived -- I remember we had a de novo system at one
4 point during that period of time that has since been
5 eliminated. But you could try in the first instance
6 jury-waived two cases a day.

7 Q. And also you presided over jury trials at
8 that time, too?

9 A. I did.

10 Q. When were you appointed to the Superior
11 Court Bench?

12 A. In February of 1993.

13 Q. Who appointed you to the Superior Court
14 Bench?

15 A. Governor William Weld.

16 Q. And when Governor Weld appointed you to the
17 Superior Court Bench, was that to a particular
18 position or just as an associate judge?

19 A. No. Superior Court are circuit judges, so
20 you just get appointed to that court.

21 Q. By the time you were in the Superior Court,
22 can you tell us from, say, 1993 until the present
23 approximately how many trials you have presided
24 over?

1 A. Again, I spent a year on Demoulas, so
2 that's one. But I've done others. I mean, hundreds
3 of them. Jury trials, jury-waived trials. It's
4 hard for me to come up with -- it's a total
5 guesstimate.

6 Q. And is it fair to say that you have
7 conducted plea conferences in a number of criminal
8 cases in both the District and the Superior Court?

9 A. In hundreds of criminal cases.

10 Q. Now, during the course of all of those
11 proceedings that you've described to us in the
12 District and the Superior Courts, has there ever
13 been a complaint made against you to the Judicial
14 Conduct Commission with regard to your conduct on
15 the bench that has been in any way sustained?

16 A. None.

17 Q. And other than the so-called Demoulas/Trios
18 complaint which you've previously described, have
19 there been complaints made?

20 A. They have with return addresses of
21 Bridgewater State Hospital and things like that,
22 yes. But they have never been substantiated. They
23 were dismissed immediately.

24 Q. There's never been any that have been

1 docketed; is that correct?

2 A. No, none docketed.

3 Q. Judge, can you tell us whether or not you
4 have received over the years any awards or honors in
5 your community?

6 A. I have received a number of awards and
7 honors.

8 Q. Can you give me a smattering of them.

9 A. Okay. I've received a Woman of Achievement
10 Award by the YWCA. I've gotten awards from Girls,
11 Inc., Boys and Girls Club, from the College Club,
12 from a number of agencies or institutions that have
13 honored me as a role model for women, for girls, for
14 Latinas, yes.

15 Q. And have you participated in any charitable
16 endeavors in the course of the past number of years?

17 A. Many.

18 Q. Can you give me a smattering of those.

19 A. Well, most recently I've become very
20 involved in charitable work in Cuba, and I have
21 done, both in the legal education and cultural
22 areas, invested a lot of time and energy and money
23 on that. I have also been involved with hospital
24 boards with -- let me see -- trustees of different

1 institutions, like the Boston Ballet. Over the
2 years there's been a number of different -- WGBH; a
3 number of different institutions I've participated
4 with.

5 Q. Judge, you were asked by Mr. Ware a number
6 of times earlier whether you thought this and that
7 was appropriate for a Superior Court judge. Do you
8 recall those questions?

9 A. I do.

10 Q. Other than the fact that you yelled at Mr.
11 Deakin and used a poor choice of words with Ms.
12 Joseph in that "suburbs" statement, do you believe
13 that you acted appropriately as a Superior Court
14 judge in the matters pending before this case?

15 A. Absolutely. I believe I acted
16 appropriately.

17 Q. And, Judge, I take it you realize that it
18 would have been easy for you after the hearing,
19 after the press arrived on August 4th and the bit of
20 a stir that it started to cause with regard to the
21 Horton case -- would you agree with the proposition
22 that it would have been easier for you from a public
23 relations standpoint to sentence Mr. Horton to jail
24 and get it all over with?

1 MR. WARE: Objection.
2 HEARING OFFICER DAHER: I'm going to allow
3 it. Go ahead.
4 A. It certainly would have played better in
5 Peoria, yeah.
6 Q. Why didn't you do it?
7 A. Because I didn't think it was a fair
8 sentence. I imposed what I considered a fair
9 sentence for the particular situation I had in front
10 of me.
11 Q. And do you believe that now as much as you
12 believed it then?
13 A. Absolutely.
14 MR. EGBERT: No further questions.
15 HEARING OFFICER DAHER: Do you want to take
16 a short recess here, Mr. Ware?
17 MR. WARE: It's up to you, Your Honor.
18 HEARING OFFICER DAHER: We'll take a five-
19 minute break.
20 (Recess)
21 REDIRECT EXAMINATION
22 BY MR. WARE:
23 Q. Good morning, Judge Lopez.
24 A. Good morning, Mr. Ware.

1 Q. Judge, I don't want to retrace everything
2 you and I talked about a week ago, but let me begin,
3 if I may, with a few questions about the press
4 release, meaning your statement issued on September
5 7th, 2000. You recall that, do you not?

6 A. Yes, I do.

7 Q. Now, I take it the substance of your
8 testimony here today and late last week is that
9 indeed there are inaccuracies if we literally read
10 your statement; is that correct?

11 A. Well, no, no, I don't think there are any
12 inaccuracies for the purposes of a press release.

13 Q. Yes, Judge, you've adopted the phrase for
14 purposes of your direct testimony or cross
15 examination by Mr. Egbert with the tag line that
16 says "For a press release." You're saying that it's
17 accurate for a press release; is that right?

18 A. That is exactly what I'm saying.

19 Q. You're not saying it is literally accurate,
20 correct?

21 A. Not in terms of full explication of what
22 the law is; not in terms of a full explication of
23 certain things in there, yes.

24 Q. You agree that for that statement of yours

1 to mean what you now say it means, additional words
2 would have to be added, correct?

3 A. No.

4 Q. Well, in fact you added a number of phrases
5 and words and explanations to the press release here
6 in court, did you not?

7 A. To characterize it, to put it into context,
8 yes.

9 Q. That's context and characterization which
10 was not provided to the press on September 7th,
11 2000; isn't that correct?

12 A. It was mostly so that you would understand,
13 Mr. Ware, what I meant in my deposition.

14 Q. Judge, on September 7th, 2000, I was not a
15 consideration, I hope; is that correct?

16 A. You certainly were -- no, not in September
17 of 2000, no.

18 Q. And what you're telling us is if you had it
19 to do over again, you'd add the language that you've
20 indicated in order to make that statement by you
21 clear to the press.

22 A. That's not what I'm saying.

23 Q. You did in fact add words and phrases to
24 the release as we've seen here in court, correct?

1 A. In order to explain my testimony.
2 Q. Judge, did you add words?
3 MR. EGBERT: She's answering the --
4 HEARING OFFICER DAHER: She's not being
5 responsive, Mr. Egbert. You may have that question.
6 Go ahead.
7 Q. Did you in fact add words here in court
8 which you say would better explain what you meant on
9 September 7th? Yes or no?
10 A. No.
11 Q. You didn't do that?
12 A. I meant to explain what I said during my
13 deposition to you.
14 Q. Now, Judge, you'd agree, would you not,
15 that, if anything, the statement to the press is
16 important in terms of clearly explicating what you
17 intended because you knew that that was going to go
18 out to the media; isn't that correct?
19 A. This is my first press release, Mr. Ware.
20 I really don't know how to convey it all in the
21 press release.
22 Q. Are you saying that on September 7th, 2000,
23 you were naive about the importance of precision in
24 a statement by you being issued to the media

1 regarding a criminal case?

2 A. I was deferring to my Chief Justice and the
3 head of the Public Information Bureau, yes.

4 Q. That deferral notwithstanding, you were
5 certainly aware, were you not, that the statement
6 was going to go out to the media, correct?

7 A. Yes, I was.

8 Q. That was the whole idea, wasn't it?

9 A. Absolutely.

10 Q. And the idea was further that the statement
11 would in some way deflect public criticism from you
12 and the sentence; isn't that so?

13 A. And the judiciary as an institution.

14 Q. Very well. But at least you hoped it would
15 deflect some criticism from you and the sentencing;
16 isn't that so?

17 A. I hoped to explain what was meant by "low
18 level," yes.

19 Q. Well, you certainly weren't sending the
20 statement out in order to increase the temperature
21 around the sentencing; isn't that so?

22 A. Absolutely, we did not want that increased.
23 We wanted it to subside.

24 Q. You wanted it to subside, and the goal of

1 your statement, you hoped, was to help put this into
2 context and to reduce the inflammation around the
3 sentence; isn't that so?

4 A. Yes.

5 Q. You would agree with me, would you not,
6 that at no time when you testified under oath before
7 a Commission counsel 13 months ago did you adopt the
8 phrase "for purposes of a press release" as
9 modifying "accuracy"; isn't that correct?

10 A. I don't know. I'd have to go through my
11 entire deposition. I'm sure I made reference to a
12 distinction between press release and sentencing
13 memorandum.

14 Q. But the descriptive phrase "good enough for
15 government work"; that is, accurate enough for a
16 press release, is something which you've adopted for
17 purposes of this proceeding; is that correct?

18 MR. EGBERT: Objection. Move to strike.

19 HEARING OFFICER DAHER: That portion "good
20 enough for government work" I will allow to be
21 stricken. Go ahead.

22 Q. The phrase "accurate enough for purposes of
23 a press release" is something you've adopted for
24 this proceeding; isn't that correct?

1 A. I don't know. I'd have to read my
2 deposition as to whether -- I believe I made a
3 distinction concerning press releases and sentencing
4 memorandum during my deposition.

5 Q. I'm asking you specifically and
6 unambiguously --

7 MR. EGBERT: Again, I object to the
8 qualifications. He's asking specifically --

9 HEARING OFFICER DAHER: I think, Mr.
10 Egbert, he's been forced to so phrase his question.
11 Overruled. You may have it.

12 MR. WARE: Thank you, Your Honor.

13 Q. You have adopted the phrase "for purposes
14 of a press release" specifically for this
15 proceeding, right? That phrase.

16 A. I don't think that's true, no.

17 Q. You believe that somewhere in your sworn
18 testimony we will find that phrase; is that what
19 you're saying?

20 A. I don't know if you'll find exactly those
21 words, but that idea is certainly contained in the
22 distinctions that were made during my deposition.

23 Q. And if we don't find your description "for
24 purposes of a press release," would you agree with

1 me then that that's been adopted by you for purposes
2 of your testimony here in court?

3 A. I wouldn't say adopted. Used to clarify.

4 Q. Now, Judge, let me take up with you a
5 couple of odds and ends here before I talk to you a
6 little bit further about your decision-making.

7 You have made the point a couple of times
8 that you view it as indicative of a lack of
9 seriousness of the case that there was no
10 dangerousness hearing sought by the district
11 attorney back in 2000 in the Horton case; isn't that
12 so?

13 A. The lack of seriousness with regards to the
14 defendant. The defendant does not pose a danger to
15 anyone in particular or to the public at large, yes.

16 Q. Isn't it a fact -- excuse me. Did you
17 finish?

18 A. Yes. I don't think that was your question.
19 You said the case, but it relates to the defendant
20 in this case only.

21 Q. Isn't it a fact, Judge, that Mr. Horton was
22 indeed held in custody for about a month and a half
23 just on the basis of the bail that was set on him?

24 A. On bail, yes.

1 Q. And so you would agree, would you not, that
2 the Commonwealth sought and received a high enough
3 bail to keep the Defendant Horton in custody; isn't
4 that correct?

5 A. Mr. Ware, that's not the purposes of bail.

6 Q. Judge, please. I'm asking you --

7 A. Bail is to --

8 Q. I understand the purposes of bail. I think
9 we all do. My question to you is, isn't it a fact,
10 dangerous hearings or not, that the defendant was in
11 custody? Yes or no?

12 A. The defendant was in custody.

13 Q. All right. And if the defendant was in
14 custody by virtue of the conditions or terms of
15 bail, it would have been redundant and worthless for
16 a dangerousness hearing to occur, would it not?

17 A. No; that's wrong.

18 Q. Do you agree, Judge, that a dangerousness
19 hearing would have required the testimony of the
20 11-year-old?

21 A. I think it could have come in -- maybe it
22 could have, or it could have come through the sexual
23 assault unit -- no, not necessarily, Mr. Ware, would
24 I agree with that.

1 Q. Well, without regard to exceptions that may
2 occur in one thousandth of one percent of cases --
3 MR. EGBERT: Objection.
4 HEARING OFFICER DAHER: Sustained.
5 MR. EGBERT: Objection. Move to strike.
6 HEARING OFFICER DAHER: The question is
7 stricken. Rephrase.
8 Q. In the usual dangerousness hearing the
9 victim testifies; isn't that so?
10 A. I think in the usual one, yes.
11 Q. So certainly a consideration for the
12 district attorney was whether or not it was
13 appropriate to have an 11-year-old testifying; isn't
14 that correct?
15 A. That should not have been a consideration
16 if Mr. Horton was a true danger to anybody.
17 Q. You mentioned, Judge, that you reviewed Mr.
18 Horton's criminal record, among other things; is
19 that so?
20 A. That's right.
21 Q. And I'd like to show you, if I may, what's
22 been marked as Exhibit 18 for identification.
23 MR. WARE: And in fact, I'd like to offer
24 this as Exhibit 18. It's not in the book.

1 HEARING OFFICER DAHER: Show it to Mr.
2 Egbert, please.
3 Q. That is Mr. Horton's criminal record, is it
4 not?
5 A. Yes. It includes his juvenile record.
6 MR. WARE: I offer that, Your Honor.
7 HEARING OFFICER DAHER: Any objections?
8 MR. EGBERT: My objection, Judge, is that I
9 don't believe that certainly a juvenile record is
10 admissible in any court. I don't have any problem
11 with this witness being examined, but I think there
12 is an issue as to whether or not a CORI record of
13 Mr. Horton can be put into a public domain without
14 him having counsel or being permitted to argue the
15 position to the Court. That's CORI.
16 HEARING OFFICER DAHER: Do you want to
17 address that issue, Mr. Ware?
18 MR. WARE: This is not a criminal
19 proceeding against Mr. Horton, and, accordingly,
20 this document is being offered for a different set
21 of purposes.
22 HEARING OFFICER DAHER: Let's go.
23 MR. EGBERT: It doesn't matter, Judge. The
24 CORI record, the CORI criminal recordkeeping statute

1 is a confidential statute. Mr. Horton has certain
2 rights. I am not prepared, nor do I wish, to
3 exercise his rights. I raise it to you only so that
4 this proceeding doesn't violate any other statute
5 without giving the appropriate parties a reason or
6 right to respond.

7 HEARING OFFICER DAHER: Overruled. Mark
8 it. Let's go.

9 (Document marked as Exhibit
10 18 moved into evidence)

11 BY MR. WARE:

12 Q. Several times in your testimony last week
13 you made a point of the child's age and the fact
14 that, as you understood it, the child's age at the
15 time of this crime was 12; is that correct?

16 A. That's what I understood the age to be,
17 yes.

18 Q. You now know, but did not know then, that
19 the child was 11 at the time of the crime?

20 A. Just learned that about two weeks ago.

21 Q. But you now agree that that's the case
22 and we have the birth certificate?

23 A. Today I do agree with that.

24 Q. Now, Judge, in your testimony you used the

1 phrase "six weeks short of his 13th birthday," as
2 opposed to saying he was 12 years old; isn't that
3 correct?

4 MR. EGBERT: I believe I used it.

5 MR. WARE: I believe you both used it.

6 Q. But do you recall having used it?

7 A. Yes, something to that effect, yes.

8 Q. And in fact at the time of sentencing in
9 the Horton case, the victim would have been 12 years
10 old; isn't that so?

11 A. On August --

12 Q. In September of 2000, having been 11 in
13 1999 when the offense took place.

14 A. I don't know what the date of birth is.
15 What is the date of birth? Twelve, 13. I don't
16 know.

17 Q. Let's not get bogged down. You thought he
18 was 12 years old and that's what was represented to
19 you by the district attorney.

20 A. Right.

21 Q. It makes no difference from a legal
22 standpoint whether the child was 11 or 12 or 13;
23 isn't that correct?

24 A. That's true.

1 Q. And so that the crimes of which he now
2 stands convicted, as to which there's been an
3 adjudication, none of those crimes is affected in
4 any way by the child's age, isn't that so --

5 A. No.

6 Q. -- unless he were at least 14?

7 A. Yeah, I think they have the "under 14" and
8 "under 16" in there. But no; the age is irrelevant
9 for purposes of the pleas in this case.

10 Q. And you're not suggesting, are you, that
11 the seriousness of the crime would have been
12 different if the child was 11 as opposed to 12 as
13 you thought he was; isn't that correct?

14 A. Not the seriousness of the crime, no.

15 Q. You agree that whether he was 11 or he was
16 12, the seriousness of the crime is the same.

17 A. Yeah. And even if he was 13.

18 Q. And you're not saying that the effect on
19 the child would have been materially different if he
20 was 12 as opposed to 11; isn't that correct?

21 A. It could be materially different.

22 Q. But you certainly didn't consider it to be
23 different simply because you thought the child was
24 12, correct?

1 A. No, I did not.

2 Q. Mr. Horton at this time was 21 or 22 years
3 old; isn't that right?

4 A. Right; something like that.

5 Q. About twice the child's age.

6 A. Yes.

7 Q. You have mentioned a number of times in
8 your testimony with Mr. Egbert the social worker's
9 report. And let me direct you, if I may, to Exhibit
10 3. And I'm going to put the cover of the report on
11 the monitors as well. So I'd like to talk with you
12 for a few minutes, Judge, about what this is and
13 what it isn't and what you believed it to be at the
14 time that you used it.

15 First of all, the heading on this document
16 has the heading "After Pleading," doesn't it?

17 A. Yes.

18 Q. And it is prepared by the Committee for
19 Public Counsel Services, correct?

20 A. I don't know that to be the case, no.

21 Q. Let's look at the last page.

22 A. Yes.

23 Q. As you can see on the monitor or on the
24 last page in hard copy, it's signed by a social

1 worker who apparently, at least at the time, had the
2 title "Director of Social Services, Committee for
3 Public Counsel Services," correct?

4 A. That's right.

5 Q. And you knew then, did you not, that this
6 was a document prepared by a social worker who in
7 effect worked for the defense lawyer's firm or
8 organization; isn't that correct?

9 A. There clearly was some relationship there.
10 I don't know what the relationship would be. I
11 mean, she could be a consultant, she could be -- I
12 have no idea.

13 Q. Well, when you say you have no idea, Judge,
14 she represented herself in the document you saw at
15 the lobby conference as the Director of Social
16 Services for the Committee for Public Counsel
17 Services; isn't that right?

18 A. That's what this says.

19 Q. And did you not draw the inference when you
20 saw this on August 1, 2000, that this social worker
21 was employed by CPCS?

22 A. I didn't draw that conclusion, no.

23 Q. You thought maybe she was an independent,
24 freestanding social worker hired by CPCS and paid on

1 a consulting basis?

2 A. Anything could have been -- I didn't think
3 about that, Mr. Ware.

4 Q. Well, in making a judgment whether this was
5 a credible document for your purposes or not in
6 sentencing, you naturally wanted to evaluate whether
7 the social worker's views were or were not
8 independent; isn't that right?

9 A. The social worker was not on trial here.

10 Q. The data, the information provided by the
11 social worker you took into account and you valued
12 that information, did you not?

13 A. Yes.

14 Q. All right. You knew at the time that this
15 social worker appeared to work for CPCS, right?

16 A. Yes, that it was prepared at the request of
17 the Committee for Public Counsel Services, an
18 evaluation, and that they obtained funds from the
19 state to have this evaluation conducted, yes.

20 Q. Are you telling us that you thought that
21 this social worker was not employed by CPCS, but was
22 somehow hired by the defense lawyer?

23 A. I have no idea how this person gets paid.

24 Q. Are you saying it was not important to you

1 whether or not this was an independent opinion or
2 the opinion of a social worker who worked for the
3 defense lawyer?

4 A. I believed that an officer of the court
5 would not give me a document that they did not think
6 was something legitimate for me to consider.

7 Q. You did not yourself evaluate whether or
8 not this was an independent opinion; is that
9 correct?

10 A. I did not ask for a CV or -- no, I didn't.

11 Q. The title of the document says,
12 "PSYCHOSOCIAL ASSESSMENT AND DISPOSITIONAL PLAN."
13 Do you see that?

14 A. Yes, I do.

15 Q. It does not say that it is a psychological
16 report. It does not say that it's a psychiatric
17 evaluation; isn't that so?

18 A. Well, it says "PSYCHOSOCIAL." So it's
19 psychological social evaluation.

20 Q. You knew this was not a psychologist's
21 report, didn't you?

22 A. It's a licensed social worker BCD.

23 Q. You knew this was not a report from a
24 psychologist; isn't that so?

1 A. A licensed social worker, yes; not a
2 psychologist with a Ph.D. in psychology, if that's
3 what you're asking, but someone versed in
4 psychology, someone with that background, yes.
5 Q. You knew that this was not a report from a
6 Ph.D. psychologist; is that correct?
7 A. That's right.
8 Q. And you knew it was not a report from a
9 psychologist. It was from a social worker, correct?
10 A. That's right.
11 Q. And you knew that it was not a report from
12 a psychiatrist; isn't that correct?
13 A. I knew that.
14 Q. And so whatever information it had, that
15 information you understood to be coming from a
16 social worker, correct?
17 A. Yes.
18 Q. And if I could direct you to I think it's
19 the third page that says "Clinical Impression," you
20 understood that to be in effect the diagnosis, if
21 you will, of this social worker, although not using
22 the word "diagnosis"; isn't that right?
23 A. Yes.
24 Q. So that the section entitled "Clinical

1 Impression," as you understood it, was the social
2 worker's conclusion about the condition of Mr.
3 Horton; isn't that so?

4 A. The conclusion, yes.

5 Q. And what the social worker concludes by way
6 of any kind of evaluation of this defendant is that,
7 first, he is transgendered, isn't that correct, as
8 it says in Line 1?

9 A. Yes.

10 Q. And the only other thing he concludes or
11 she concludes begins in Line 3 where it says that
12 Mr. Horton is socially and emotionally immature;
13 isn't that correct?

14 A. Yes.

15 Q. The report goes on, does it not, in -- let
16 me ask you to go back to the first page of the
17 report.

18 You made a finding on August 4th, in a
19 document that responded to the motion for
20 continuance by the district attorney, that Mr.
21 Horton had a sexual identity disorder; isn't that
22 right?

23 A. I don't know what's on this screen.

24 Q. I'm coming to that in a moment. I'm just

1 asking independent of the screen for a moment --

2 A. Okay.

3 Q. -- do you recall that in your order of
4 August 4th you made a finding that the Defendant
5 Horton had a sexual identity disorder?

6 A. Yes, I did.

7 Q. And you also made a finding that he had a
8 psychological disorder.

9 A. Yes.

10 Q. Now, in this document -- going back to the
11 screen, to the slide you just saw -- this document
12 never describes in any way the defendant's conduct
13 that's the subject of the plea conference that
14 you've conducted on August 1; isn't that right?

15 A. I don't think there's any reference to the
16 incident, no.

17 Q. So the social worker's report never deals
18 with and never describes as a basis for her clinical
19 judgment what the facts are that were at issue;
20 isn't that so?

21 A. In the case, in the criminal case.

22 Q. Yes.

23 A. No, she does not.

24 Q. And never describes in any way what the

1 alleged crimes are; isn't that correct?

2 A. That's correct.

3 Q. Never describes any of the events that gave
4 rise to these five indictments and ultimately the
5 convictions; isn't that so?

6 A. Not the specific events, no.

7 Q. It doesn't describe any events, does it?

8 A. It could explain -- there's information
9 here that could explain the events, but it doesn't
10 directly address the events.

11 Q. In an independent psychiatric or
12 psychological evaluation -- that is, a report from
13 an independent professional -- the very first thing
14 that professional does is describe the problem at
15 issue and the facts; isn't that right?

16 A. It depends on what the purpose of the
17 consult is.

18 Q. In any expert report you've ever seen from
19 a Ph.D. psychologist or a psychiatrist in a criminal
20 case, there is always a detailed explanation of
21 what's alleged and the circumstances of the alleged
22 crime, isn't that so, in order to set a backdrop for
23 the evaluation?

24 A. It depends on what question is posed to the

1 clinician to evaluate.

2 Q. In any event, this clinician -- one can't
3 even tell whether this clinician knew what Mr.
4 Horton was accused of; isn't that right?

5 A. That's right. Well --

6 Q. There's no evidence in this report in which
7 she identifies in any way that she knows what the
8 crimes are that have been charged or what the facts
9 are as the defense lawyer or the prosecution have
10 argued them; isn't that so?

11 A. That's right. There's no specific
12 reference to the facts of the...

13 Q. The closest this report comes to describing
14 the events which result in five felony convictions
15 here is in Line 3, where the social worker describes
16 those events as "showing poor judgment being
17 involved with a minor child"; isn't that it?

18 A. The reference -- excuse me. Ask the
19 beginning of the question again. I missed it.

20 Q. Yes. The closest the social worker ever
21 comes to describing the conduct which is the subject
22 of the plea conference and the five indictments is
23 this phrase "showing poor judgment being involved
24 with a minor child"; isn't that it?

1 A. I disagree.
2 HEARING OFFICER DAHER: What's your
3 objection?
4 MR. EGBERT: I'm going to ask that she be
5 permitted to read the document before opining that
6 that's the only place in this in which something
7 like that is written.
8 MR. WARE: Fine. I'm amenable to that.
9 Q. You read this document in excruciating
10 detail, did you not?
11 MR. EGBERT: It's on Page 4 on the clinical
12 impression, second paragraph.
13 Q. Why don't you take all the time you want
14 and point me to any language in this report other
15 than the highlighted language on the screen now
16 which you say describes the conduct of Mr. Horton.
17 A. Well, I think it's right there. "I find it
18 highly unlikely that Ebony will repeat the behavior
19 that brought her to court in this case. Jail has
20 been a chilling experience for her. Further
21 incarceration will be a disaster for Ebony and place
22 her at considerable risk."
23 HEARING OFFICER DAHER: Judge, do you want
24 time to read the entire document so that you

1 could deal with the --
2 THE WITNESS: Yes.
3 HEARING OFFICER DAHER: Did you get us a
4 copy on CD-ROM?
5 MR. EGBERT: No.
6 HEARING OFFICER DAHER: Weren't you going
7 to give Mr. Egbert the CD, a copy of the CD?
8 MR. WARE: Yes, if they want it at some
9 point.
10 MR. EGBERT: It wasn't at some point. We
11 had asked for it last week.
12 HEARING OFFICER DAHER: Sometime today,
13 that would be great.
14 THE WITNESS: Shall I proceed?
15 HEARING OFFICER DAHER: Are you ready?
16 THE WITNESS: I am. I can go through it.
17 BY MR. WARE:
18 Q. Let me be clear with the question here. I
19 want you to point me to any language in there which
20 you say describes the facts that lead to these five
21 indictments.
22 MR. EGBERT: That wasn't the original
23 question.
24 MR. WARE: I believe it was.

1 MR. EGBERT: Could the court reporter --

2 Q. Let me put another question if there's
3 ambiguity. Show me in the report, other than what's
4 on the screen, any description of the facts which
5 lead to the indictments which were before you on
6 August 1.

7 A. There is mention -- there's language here
8 that implicitly refers to the facts of the
9 indictments.

10 Q. Let's eliminate things that are implicit.
11 I would like references to the facts as you saw them
12 in this report, Judge.

13 A. As I saw them, I will tell you. Second
14 sentence, "There is a marked difference in her
15 outlook that describes accepting responsibility for
16 showing poor judgment being involved with a minor
17 child."

18 Q. Do you see any language there which
19 describes the facts which underlie these
20 indictments?

21 A. "Being involved with a minor child."

22 Q. Now point us to any further language in the
23 report.

24 A. "This is behavior that will not occur

1 again." Clearly the clinician had focused on the
2 behavior at issue.

3 Q. What behavior? Does the social worker ever
4 describe the behavior?

5 A. I imagine the social worker would have
6 known the behavior, because how would she refer to a
7 behavior that she had no clue what she was
8 evaluating?

9 Q. But the point is when you read this report,
10 you had no way of knowing what the social worker
11 knew or didn't know; isn't that correct?

12 A. I knew it from the report only.

13 Q. Because the social worker never describes
14 in the report the facts that underlie these
15 indictments; isn't that correct?

16 A. Well, since the --

17 Q. Please, Judge. Does the social worker ever
18 describe the fact?

19 A. Not specifically in this assessment, no.

20 Q. And in point of fact, the social worker saw
21 Mr. Horton only on two occasions; isn't that right?

22 A. December '99 and July 31, 2000, yes.

23 Q. And there's no indication in the report how
24 long those sessions were, whether they were an hour

1 or they were 20 minutes each; isn't that right?
2 A. That's right.
3 Q. There is in this report no diagnosis of
4 sexual identity disorder; isn't that correct?
5 A. Transgendered means that.
6 Q. You're equating transgendered with gender
7 identity disorder?
8 A. It's the same thing.
9 Q. That was your view when you saw this
10 report; is that correct?
11 A. It's my view today.
12 Q. Do you think that the social worker was
13 competent to give a psychiatric diagnosis of gender
14 identity disorder?
15 A. Absolutely.
16 Q. You would agree with me, will you not, that
17 the social worker never in fact does that in the
18 report; isn't that correct?
19 A. She says she's transgendered.
20 Q. Right. The social worker never alludes in
21 any way to the DSM-IV or to the criteria for sexual
22 or I should say gender identity disorder; isn't that
23 correct?
24 A. There are facts in her family history that

1 address specifically the characteristics of someone
2 with a sexual identity -- gender identity disorder,
3 yes.

4 Q. The social worker never says this person
5 suffers from gender identity disorder; is that
6 correct?

7 A. Does not use that terminology, no.

8 Q. And in fact gives no diagnosis of sexual
9 identity disorder or gender identity disorder, isn't
10 that true?

11 A. Being transgendered means that, so that is
12 the diagnosis.

13 Q. The closest the social worker comes to
14 saying "gender identity disorder" is the language
15 that's highlighted and which appears on the first
16 page of the report which says, if you look midway
17 down the second paragraph, "Still struggling with a
18 variety of psychological and social issues around
19 her sexual identity." Do you see that?

20 A. I see that, but there's a lot more in this
21 report that goes to the gender identity disorder,
22 Mr. Ware.

23 Q. There is no other language, Judge, in which
24 the social worker purports to be diagnosing the

1 defendant; isn't that true?

2 MR. EGBERT: Objection.

3 A. "She's on hormones, considered castration."

4 MR. EGBERT: That's unfair, Judge, and he
5 knows it. There's statements in this report like
6 "Ebony is a transgendered individual."

7 HEARING OFFICER DAHER: Mr. Egbert, the
8 question was -- she can answer no and point out the
9 extras in the document. Take your time, Judge.

10 A. The answer is that there's a lot of
11 information that goes specifically to that
12 diagnosis: That she was on female hormones, that
13 she had considered castration, but rejected it as a
14 result of certain fears concerning the operation,
15 that she has been dressing as a female since a --
16 from a young age. These are all issues associated
17 with a gender identity disorder.

18 Q. And those are all issues which may be
19 associated with other disorders or social problems;
20 isn't that correct?

21 A. I don't know of any. I couldn't say yes.
22 I wouldn't know of any that had those specific
23 issues involved, wanting to change your sex.

24 Q. Nonetheless, isn't it true that other than

1 the phrase "struggling with a variety of
2 psychological and social issues around her sexual
3 identity," there is no diagnosis here of gender
4 identity disorder; isn't that correct?

5 A. There is. I've already testified that
6 there is nothing in this document that refers to
7 gender identity or sexual identity disorder,
8 correct.

9 Q. And in fact in the clinical impressions
10 section of the report, the only finding, if you
11 will, or opinion that's proffered by the social
12 worker is that Mr. Horton is transgendered, correct?

13 A. The only opinion?

14 Q. Yes.

15 A. No. There's several other opinions in the
16 report --

17 Q. The only clinical opinion in which he
18 purports to describe the problem is his
19 characterization of Mr. Horton as transgendered;
20 isn't that right?

21 A. No.

22 Q. Now, the social worker in fact herself
23 recommends a psychiatric consultation, does she not?

24 A. Ongoing counseling, yes.

1 Q. Well, one of the things that the social
2 worker suggests at the top of the third page is a
3 psychiatric consult; isn't that so?

4 A. "She needs to return for counseling to
5 help deal" is that where you're referring to?

6 Q. If you go down to about the fifth line, it
7 suggests that she return for counseling and "a
8 psychiatric consult."

9 A. Yes, yes.

10 Q. You understood that to mean that the social
11 worker was recommending that she get qualified
12 psychiatric help; isn't that correct?

13 A. No. I understood it to mean that she
14 probably needed to get some prescription medication
15 to deal with her depression.

16 Q. Your reading of this report is that the
17 recommendation from the social worker that she see a
18 psychiatrist was just to get a prescription?

19 A. They're the only ones that can administer
20 drugs, antidepressants and things like that, I
21 thought.

22 Q. My question to you, Judge, is whether, when
23 you read the report, the inference you drew was that
24 psychiatric consult was only for purposes of writing

1 a prescription. Is that what you're telling us?

2 A. It goes on to say --

3 Q. Judge, please. Would you stick with my
4 question. My question is, I hope, straightforward.
5 Did you draw the inference, when the social worker
6 recommended psychiatric consultation, that was just
7 for purposes of getting a prescription? Yes or no?

8 A. Pretty much, yeah. Pretty much.

9 Q. As you point out, the social worker also
10 recommends that Mr. Horton return for counseling;
11 isn't that correct?

12 A. Yes.

13 Q. And if you look at the top of Page 3, the
14 social worker's findings here or observations are,
15 first, that Mr. Horton needs to return to
16 counseling; isn't that so? In the first line?

17 A. Yes.

18 Q. And in the third line she observes that
19 he's off his medication, correct?

20 A. It doesn't say that this person was ever on
21 medication. She was frightened off medication by
22 some horror stories from friends and acquaintances.
23 This does not say that she was off medication. It
24 implies to me that this person has never been on

1 antidepressants.

2 Q. You read the report where it says, "She was
3 frightened off about medication" --

4 A. "By some horror stories."

5 Q. And you read that as meaning that she was
6 never on medication?

7 A. That's right.

8 Q. But read it as well as saying she needed
9 medication; is that correct?

10 A. Also -- that's not the only area that clued
11 me into the need for medication; chronic depression,
12 suicidal thoughts.

13 Q. In the next paragraph the report makes a
14 number of observations about Mr. Horton's
15 associations. Do you see that in the first line
16 where it indicates that Mr. Horton or "Ebony should
17 be spending time with individuals closer to her age
18 group"?

19 A. Yes.

20 Q. Do you see that?

21 A. Yes.

22 Q. And it goes down on the fourth line and
23 says that, "She's been volunteering in educating
24 teens"; isn't that correct?

1 A. Yes.
2 Q. In the next line, "She's been working with
3 young people about transgender concerns"?
4 A. Yes.
5 Q. And then if you jump down into "Education
6 and Employment" to the fourth line, it says, "She
7 would like to be a counselor for troubled gay
8 teenagers," correct?
9 A. Yes.
10 Q. Now, each of those statements in this
11 report were of concern to you because you did not
12 think this defendant should be around teenage
13 children; isn't that right?
14 A. No, I did not think that at all.
15 Q. You did not think that?
16 A. No.
17 Q. You thought it appropriate for Mr. Horton
18 to be around teenagers?
19 A. What do you mean by a teenager?
20 Q. I mean someone under 17, let's say.
21 A. Given her maturational level, I think she
22 was probably at that age of a teenager. So was it
23 appropriate -- I mean, are you talking about what I
24 imposed as a probationary condition?

1 Q. Well, didn't you in fact impose as a
2 condition that Mr. Horton not associate with anyone
3 under the age of 17?

4 A. Sixteen.

5 Q. And you did that because you had concern
6 that it was inappropriate for him to be associating
7 with younger teenagers; is that correct?

8 A. Given the particular crime at issue, I
9 thought it was appropriate to have that kind of a
10 restriction, yes.

11 Q. The reason you imposed the restriction was
12 to prevent Mr. Horton from dealing with teenagers
13 below the age of 16 or 17; isn't that right?

14 A. 16, yes.

15 Q. And you did that because you had a concern
16 that, given his past and given indications in this
17 report and elsewhere, that wasn't a good idea,
18 correct?

19 A. Given his past and given the indications in
20 this report, yes, I would agree with you there.

21 Q. The report also observes at the bottom of
22 that same page that Mr. Horton is not likely to gain
23 employment "in the mainstream" or "in a mainstream
24 job"; isn't that correct?

1 A. Right.

2 Q. And what you understood that to mean was
3 because of his characteristics or his situation, he
4 was not going to be able to get a job, in all
5 likelihood?

6 A. In fact, she was on SSI, supplemental
7 security income, so she was receiving income as a
8 result of some disability. So the employment issue
9 is probably a nonissue for an individual getting
10 those benefits.

11 Q. At the time Mr. Horton was sentenced he was
12 not employed, correct?

13 A. Not employed, nor could be, I think, if he
14 was getting SSI.

15 Q. So you believed he was unemployable,
16 correct?

17 A. Yes.

18 Q. Let me go back to some language on the
19 fourth page which you alluded to earlier with Mr.
20 Egbert. The social worker says at the bottom of the
21 clinical impression, "I find it highly unlikely that
22 Ebony will repeat the behavior that brought her to
23 court in this case."

24 I think we've now agreed that that behavior

1 is not described in this report; is that correct?

2 A. Not explicitly, no.

3 Q. And it goes on to say, "Jail has been a
4 chilling experience for her. Further incarceration
5 will be a 'disaster'." Do you see that?

6 A. Yes, I do.

7 Q. You would agree that that's not typical
8 professional language for a psychiatrist or a
9 psychologist, saying that incarceration will be a
10 disaster; isn't that so?

11 A. The specific word "disaster"?

12 Q. Yes.

13 A. Yeah, they've couched it in many other
14 different ways when they think that it would be very
15 harmful to someone to be incarcerated. But
16 "disaster," I don't recall ever hearing that before.

17 Q. More typically, a psychiatrist or a
18 psychologist would give the pros and cons of an
19 incarceration, would describe the downside, would
20 describe the benefits, and would let you, as the
21 Court, make a decision; isn't that so?

22 A. Typically.

23 Q. But here this social worker says it will be
24 a disaster and then gives her opinion about the

1 future. "I do not believe that Ebony would survive
2 the prison system. She is who she is, not by
3 choice, but by birth." Do you see that language?

4 A. Yes.

5 Q. You understood, when you read that, that
6 that is an emotional description by the social
7 worker; isn't that right?

8 A. Yes.

9 Q. Not exactly a dispassionate clinical
10 diagnosis, correct?

11 A. I mean, the last sentence I think is the
12 one that "she is who she is, not by choice, but by
13 birth" is the sort of personalization, but not the
14 sentence before that.

15 Q. Earlier I asked you about the term "gender
16 identity disorder." In fact, the term "gender
17 identity disorder" was never used anywhere in this
18 case until we all came into the courtroom; isn't
19 that correct?

20 A. Well, we've used "sexual identity." It's
21 synonymous.

22 Q. Let me just be precise here.

23 Until this court proceeding, you've never
24 used the term "gender identity disorder"; isn't that

1 so?

2 A. I don't know that to be the case. I've
3 used it many times in my life. Now, whether I used
4 it in these proceedings before, I don't know. I
5 would have to review everything. I'm sure I've
6 discussed it with my lawyers. You know...

7 Q. What you did use as a term beginning on
8 August 4th was "sexual identity disorder," correct?

9 A. That I did.

10 Q. And you also used "psychological
11 disorder" --

12 A. Yes.

13 Q. -- in your August 4th findings; isn't that
14 correct?

15 A. That's correct.

16 Q. But the term "gender identity disorder"
17 literally is something that we've used here in the
18 testimony; is that correct?

19 A. Well, I know we have used it here in the
20 testimony. I agree with that, yes.

21 Q. Would you agree that no psychological tests
22 were taken or done on Mr. Horton?

23 A. I would not agree with that.

24 Q. Were you ever told of any psychological

1 tests; Rorschach test, anything else?

2 A. Not those kinds of tests, no.

3 Q. So there were no tests performed by a
4 qualified Ph.D. psychologist which were brought to
5 your attention by the social worker; isn't that so?

6 A. None of those kinds of tests were done.
7 Nothing was brought to my attention with regards to
8 those kinds, yeah.

9 Q. You know that in this case the defense
10 counsel received authorization for funds to hire an
11 independent psychiatrist; isn't that correct?

12 A. And this is who they hired, I believe.

13 Q. You think this is the independent
14 psychiatrist that was the subject of the motion?

15 A. Yeah.

16 Q. Are you now saying that this report --

17 A. I don't know if it said "psychiatrist." I
18 would have to go back and look at the motion. Did
19 it say "psychologist" or "psychological assessment"?
20 I'm not sure what the motion said.

21 Q. Let me get it in front of you. Let's take
22 a look at Exhibit 16.

23 A. Psychologist or psychiatrist.

24 Q. This was a motion by defense counsel, as

1 you understood it, to be given funds to hire an
2 independent expert, correct?

3 A. Yes.

4 Q. To your knowledge, isn't it the case that
5 that expert was never hired?

6 A. To my knowledge, the money they got from
7 here, the \$1,500, could have been used to pay the
8 social worker, Katz.

9 Q. You really mean to tell us that you
10 understood Exhibit 3, the social worker's report
11 which indicates that she's employed by CPCS, you
12 believe that to be the report of an independent
13 psychologist or psychiatrist hired by the defense
14 counsel? Yes or no?

15 A. I can't believe -- I don't have one way or
16 the other of establishing that or coming to a
17 conclusion about that.

18 Q. You told us during your testimony in
19 response to Mr. Egbert's questions last week that
20 you see these reports all the time. Do you recall
21 that?

22 A. Right.

23 Q. And you said that they're proffered to the
24 court in many, many cases; isn't that so?

1 A. That's so.

2 Q. Are you still in the dark, having reflected
3 on that testimony, whether this individual was
4 employed by CPCS or was hired as an independent
5 psychiatrist or social worker?

6 A. Am I still in the dark about it? I have
7 had no new information that would allow me to make a
8 conclusion one way or the other as to what the
9 relationship -- what the payment relationship is,
10 what the understanding between CPCS and this
11 director -- I mean, no, I can't answer the question.

12 Q. Accordingly, when you used the report on
13 August 1, 2000, you did not know that the social
14 worker was employed by CPCS? You thought it was an
15 independently-hired professional?

16 A. I didn't know that then and I don't know
17 that today.

18 Q. Wouldn't it have been relevant whether or
19 not this was a four-page piece of paper from a
20 social worker who worked for the defense lawyer on
21 the one hand versus an independent psychiatrist's
22 evaluation on the other?

23 A. Mr. Ware, this is uncontested. The DA's
24 office presented nothing in contradiction to this.

1 Q. Well, you have a gatekeeper function, do
2 you not, in considering what you view as expert
3 testimony or expert information?

4 A. Yes; Daubert, we do.

5 MR. EGBERT: Objection. I think it goes
6 beyond the appropriate of a judge into the workings
7 of the court decisions, gatekeepers and alike.

8 The issue here is, it seems to me what
9 facts she had before her, not to try how important
10 or unimportant or good or bad the facts are, but
11 what in fact she had before her.

12 HEARING OFFICER DAHER: Overruled. You may
13 have it, Mr. Ware. Go ahead.

14 A. We have a gatekeeping function when there
15 is some unconventional science being advanced for
16 purposes of evidence in a trial, but we don't have a
17 Daubert-type hearing, where we are being offered
18 psychological assessments or social worker
19 assessments.

20 Q. So you would say there was no such function
21 appropriate to what you were doing on August 1,
22 correct?

23 A. There was no such function, no.

24 Q. No, it's not correct, or no, you do not

1 have that obligation?

2 A. We do not have that obligation when it
3 comes to routine, well-established science.

4 Q. Now, you've characterized this report as
5 un rebutted; isn't that so?

6 A. Yes.

7 Q. You know very well, do you not, that the
8 defense lawyer brought this in on August 1 for the
9 first time, never having served it in advance on the
10 prosecution; isn't that correct?

11 A. I don't know that.

12 Q. You've heard that, have you not?

13 A. I have heard various different things about
14 the DA's access to this report.

15 Q. Well, Ms. Goldbach has never suggested in
16 any way, shape or form at any time that she did
17 anything but produce this report on the day of the
18 lobby conference?

19 MR. EGBERT: Objection.

20 HEARING OFFICER DAHER: Sustained.

21 MR. EGBERT: That's just a
22 misrepresentation of fact and he knows it.

23 HEARING OFFICER DAHER: Sustained.

24 Stricken.

1 MR. EGBERT: Ms. Goldbach testified that
2 she three times tried to get Ms. Joseph this report
3 and she refused to take it. You know it.

4 MR. WARE: An interesting speech, but
5 inaccurate.

6 BY MR. WARE:

7 Q. Prior to August 1 -- you knew on August 1
8 that that social worker's report was being proffered
9 for the first time to the prosecution; isn't that
10 so?

11 A. At the moment that they were at the
12 lobby -- at sidebar with me?

13 Q. Yes.

14 A. I didn't know anything about when that
15 report had been made available, but I did know one
16 thing. As of May 11, 2000, the Commonwealth was on
17 notice that the defense attorney had been given
18 money to have an evaluation of the defendant. So
19 they had the same opportunity to get an evaluation.
20 From May 11, 2000, they were on notice.

21 Q. Specifically, Judge, the exhibit speaks to
22 the hiring of a psychiatrist or a psychologist, does
23 it not?

24 A. That's correct; to evaluate the

1 defendant --

2 Q. And that was never done, was it, so far as
3 you know?

4 A. I believe that the Katz report is in
5 response to this request.

6 *Q. You think the social worker's report was a
7 response to this motion allowing a psychiatrist or a
8 psychologist? Is that what you're telling me?

9 *A. I believe they sought funds to have the
10 defendant evaluated. They had the defendant
11 evaluated, and I'm sure they used the funds that
12 were authorized for that purpose for the evaluation.

13 MR. WARE: May I have just a moment, Your
14 Honor?

15 HEARING OFFICER DAHER: Yes.

16 (Pause)

17 MR. EGBERT: I'd like a five-minute recess.

18 HEARING OFFICER DAHER: Is that okay with
19 you?

20 MR. WARE: Yes. Since the witness is on my
21 examination, I want it clear that the witness should
22 not be conferring with counsel during my
23 examination.

24 MR. EGBERT: I have no problem with that.

1 She can, of course, but I have no problem with that.
2 HEARING OFFICER DAHER: Okay. Thank you
3 very much.

4 (Recess)

5 MR. WARE: Your Honor, could I have the
6 last question?

7 *(Record read)

8 BY MR. WARE:

9 Q. Judge, on the face of the motion, Exhibit
10 16, that you were looking at a moment ago, it
11 indicates that the motion was allowed on May 11,
12 2000; isn't that correct?

13 A. Correct.

14 Q. The social worker's report indicates that
15 the first meeting she had with Mr. Horton was in
16 December of 1999, correct?

17 A. Correct.

18 Q. Does that refresh you at all that a social
19 worker's report or work in this case was not in
20 response to the motion?

21 A. No.

22 Q. Now, is it your view in this case that Mr.
23 Horton is and was mentally ill?

24 A. He suffers from a psychological disorder,

1 known as a sexual identity disorder, gender identity
2 disorder. It's a form of mental illness, yes, of
3 sorts.

4 Q. So is it your testimony that on September
5 6th, 2000, when you took the guilty plea, you
6 understood him to be mentally ill?

7 A. Well, not schizophrenic or hallucinating.
8 Let's define what we mean by "mental illness."

9 Q. In your testimony in response to questions
10 from Mr. Egbert, am I correct that both you and he
11 characterized this as mental illness?

12 A. It is characterized as a mental illness in
13 the DSM-III, yes.

14 Q. And in fact, in your response to the formal
15 charges in this case, you repeatedly refer to Mr.
16 Horton as "mentally ill"; isn't that correct?

17 A. I can't remember whether mental illness --
18 I can't remember what it says, to tell you the
19 truth, but...

20 Q. Passing that for a moment, was it your view
21 that Mr. Horton, because he's transgendered, and for
22 that reason, was mentally ill, as you were using the
23 term?

24 A. Yeah, but I don't think I give the mental

1 illness the kind of connotation that your
2 characterization seems to be giving it.

3 Q. I'm not characterizing it. I'm using what
4 I believe to be your words and Mr. Egbert's words
5 and what you said in response to the formal charges.
6 But I want to understand what that does mean.

7 A. There is a diagnosis. This individual
8 suffers from a diagnosis in the DSM-III, which
9 relates to a psychiatric condition.

10 Q. As a practical matter, no one has ever used
11 the words "sexual identity disorder" or "gender
12 identity disorder" except Judge Lopez; isn't that
13 correct?

14 A. I don't know. I don't remember if Anne
15 Goldbach referred to her client as that. I don't
16 recall.

17 Q. Isn't it the case, Judge, that the first
18 time, and the only time, that the term "sexual
19 identity disorder" has been used was by you in your
20 findings of August 4th, marked Exhibit 17?

21 A. I don't know if that's true. I can't
22 answer that "yes" or "no."

23 Q. In any event, you're not aware of any
24 other -- does anything come to mind, any other

1 individual who's labeled Mr. Horton as having a
2 gender identity disorder?

3 A. Since when? At what point? There have
4 been individuals, but...

5 Q. Well, "gender identity disorder" is a
6 specific term defined by the "Diagnostic and
7 Statistical Manual," is it not?

8 A. Yes.

9 Q. And it relates to specific criteria and a
10 diagnosis of a form of disorder?

11 A. Yes.

12 Q. No one has said that Mr. Horton meets those
13 criteria, except you; isn't that correct?

14 A. And the Katz report supports that.

15 Q. Supports it. Ms. Katz never says this man
16 has "sexual identity disorder" or "gender identity
17 disorder," in those words; isn't that correct?

18 A. Not in those words, no.

19 Q. And no one in this case has referred to Mr.
20 Horton as mentally ill, except you; isn't that
21 correct?

22 A. When did I say he was mentally ill? I
23 think I said he suffers from a psychological
24 disorder. I don't remember the mental illness, but

1 I could have. I'm not denying it. I just don't
2 have a recollection of it.

3 MR. WARE: May I approach the witness, Your
4 Honor?

5 HEARING OFFICER DAHER: Of course.

6 Q. I'm directing you, am I not, to a response
7 to the formal charges filed by you, correct?

8 A. Yes.

9 Q. And do you see at Page 5 in the second
10 paragraph there's reference to "a mentally-ill
11 person"?

12 A. Yes, I see it now.

13 Q. And on Page 6 at the bottom there's a
14 reference to an "ill defendant"?

15 A. Yes.

16 Q. And on Page 7, a reference to Mr. Horton as
17 "mentally ill"?

18 A. Yes.

19 Q. And on Page 8, a reference in Subparagraph
20 E to his having a "mental illness"?

21 A. That's right.

22 Q. And in Paragraph F to his having "a mental
23 illness"?

24 A. Yes.

1 Q. And again, on Page 9, to "Mr. Horton's
2 illness"?

3 A. Yes.

4 Q. Does that refresh you that indeed you have
5 characterized Mr. Horton as mentally ill?

6 A. Yes, now it does.

7 Q. No one else has so characterized Mr.
8 Horton; isn't that correct?

9 A. I don't know what -- no one else has so --
10 I think so. I think Ms. Katz certainly does.

11 Q. You're saying while she doesn't use those
12 words, you can draw some inference that she intended
13 that he be characterized as mentally ill; is that
14 what you're saying?

15 A. Yes. That he has a need for a
16 psychiatrist's counseling, yes.

17 Q. Now, when you took the plea on September
18 6th, did you make any inquiry to assure yourself
19 that this individual whom you've characterized as
20 mentally ill was competent to plead guilty?

21 A. I certainly did.

22 Q. And would you say that the questions
23 regarding his having been making a knowing and
24 intelligent waiver were sufficient in that regard?

1 A. Absolutely.

2 Q. Following the sentencing when I guess what
3 we've referred to as a firestorm broke in the
4 press --

5 A. Yes.

6 Q. -- you read a good deal of those press
7 accounts, did you not?

8 A. I did.

9 Q. And in fact, some of the decisions you made
10 or actions you took were prompted by that press
11 reaction, were they not?

12 A. They were prompted by my reaction to the
13 press; not the press reaction, but...

14 Q. Are you finished?

15 A. Yeah, I think so.

16 Q. In any event, you informed yourself by
17 reading the press and by listening to what was going
18 on in the media; isn't that so?

19 A. Amongst other things.

20 Q. Yes.

21 MR. WARE: Your Honor, I offer at this time
22 the newspaper articles that have been marked in the
23 case. I previously offered the complaints. I now
24 offer the newspaper articles.

1 MR. EGBERT: That's fine, Judge, if he
2 shows them to her and asks if these are the ones she
3 read. If the basis of offering the newspaper
4 articles is that she read them and based some
5 decisions, then she should look at them and see
6 which ones she's talking about.

7 MR. WARE: I don't plan to do that. And
8 the reason is several-fold. First of all, the Judge
9 may or may not have read some. One of the issues
10 here is what in fact was the public reaction -- to
11 what extent did the public believe that the Judge's
12 conduct tended to promote the integrity and
13 impartiality of the judiciary.

14 And so that public reaction is -- it may be
15 wrong, but it is in fact relevant. So the newspaper
16 articles are among the evidence which tends to shed
17 some light on that question, and they're relevant
18 for that reason.

19 I would add that they are not offered for
20 the truth of the matter. So the same hearsay issue
21 that we discussed with respect to the complaints is
22 at issue here.

23 MR. EGBERT: Judge, if we're going to
24 engage in, quote, public reaction to a judge's act

1 by a newspaper, which the Commission says to you
2 they're not offered for the truth of the statements
3 therein, then we are running this judicial system by
4 the Herald and the Globe. It is purely incompetent
5 evidence to put before this Court that some
6 newspapers were writing articles that they didn't or
7 did like the sentence or they were rousing up people
8 to like or not like the sentence.

9 The conduct is what is at issue, and it's
10 an issue from an objective standard as to whether or
11 not that conduct is such as to affect the public
12 confidence, to use a paraphrasing of the canon.

13 It seems to me -- it seemed that the
14 original offer -- did you read these and make some
15 judgments, acted upon them -- is relevant. I didn't
16 argue against that, if in fact she read certain
17 articles and made certain actions based on that.

18 But if newspaper articles are being offered
19 by the Commission to show that the Judge's conduct
20 affected the public's confidence in the judiciary
21 and the like, then that gives to the newspapers a
22 power that is so far beyond anything anticipated by
23 the rules, that I would object to it, particularly
24 because it does not apply to the objective standard,

1 which is the law, not the subjective standard of
2 what one person thinks.

3 HEARING OFFICER DAHER: Last word?
4 Anything else you want to add?

5 MR. WARE: Yes, Your Honor. Obviously in
6 this courtroom press attention, press response has
7 been relevant. Indeed, that's the whole purpose of
8 the statement that the Judge put out on September
9 7th, was to cause a certain type of reaction to
10 occur --

11 HEARING OFFICER DAHER: Mr. Egbert, I'm
12 very much inclined to accept Mr. Ware's
13 representations. What we're dealing with here is
14 the words that have been used, "a media circus,"
15 "firestorm," "media frenzy." The objection is
16 overruled. They may go in. Let's go.

17 MR. EGBERT: Then, Judge, if we're going to
18 do it -- and you've already ruled you're going to --
19 then make him put in all the articles that were in
20 all the press in New England at that time concerning
21 these matters; good, bad and indifferent.

22 HEARING OFFICER DAHER: Mr. Ware, to make
23 that all inclusive, Mr. Egbert's argument is, look,
24 everything that's been out there, you want to put it

1 in, put it all in; not selectively put in what you
2 want to put in.

3 MR. WARE: Your Honor, I've put in certain
4 articles. I don't think they're skewed one way or
5 the other. If defense counsel has other articles he
6 wants to offer, I'm not objecting to that.

7 HEARING OFFICER DAHER: Get them and I'll
8 put them in.

9 THE CLERK: What is it you'll be offering?

10 MR. WARE: The exhibits that I'm offering
11 at this time are Exhibits 10 through 14, Exhibits 20
12 and 21, Exhibit 30, Exhibit 33, Exhibit 34 through
13 Exhibit 40, and Exhibits 43, 44 and 46.

14 THE CLERK: 44 and 46 have already been
15 admitted before.

16 HEARING OFFICER DAHER: What is 44?

17 THE CLERK: 44 is the transcript.

18 HEARING OFFICER DAHER: That's why I'm a
19 little puzzled.

20 MR. WARE: Judge, I would like to hand
21 you --

22 HEARING OFFICER DAHER: Again, if we could
23 just have one moment, Mr. Ware. Exhibit 44 is a
24 transcript. And now you're indicating that it's

1 a --
2 MR. BRACERAS: That's already been
3 admitted.
4 MR. WARE: If I said 44, I was mistaken.
5 That is in evidence.
6 HEARING OFFICER DAHER: So you're going to
7 put in 43. 44 is out --
8 MR. BRACERAS: It's already in.
9 HEARING OFFICER DAHER: I understand, but
10 the offer you just made with regards to a newspaper
11 article, it's already in. I agree with you.
12 MR. WARE: I should have said 43 and 46.
13 HEARING OFFICER DAHER: Okay. That's fine.
14 (Documents marked as Exhibits 10-14,
15 20, 21, 30, 33, 34-40, 43 and 46 moved
16 into evidence)
17 MR. WARE: Could I have this document
18 marked Exhibit 8 for identification.
19 (Document marked as Exhibit 66
20 for identification)
21 BY MR. WARE:
22 Q. Judge, I place before you another excerpt
23 from the "Diagnostic and Statistical Manual of
24 Mental Disorders," a different excerpt which was

1 admitted during the course of your testimony
2 earlier. Do you recognize that?
3 A. I don't have one in front of me.
4 Q. Pardon me?
5 A. Did you place it in front of me already?
6 Q. Perhaps not. It's not in the book.
7 MR. EGBERT: Judge, may we approach?
8 HEARING OFFICER DAHER: Sure.
9 (At sidebar)
10 MR. EGBERT: I object to placing before the
11 Judge the evidence on pedophilia. This is not a
12 case of deciding whether or not there was right and
13 various matters that she decided. It is about
14 looking at information that was before her at the
15 time. Now we're going to put before her the matter
16 out of the DSM on pedophilia, which everybody
17 recognizes was never put before her, was never
18 argued to do her, was never given to her, and have
19 some kind of discussion as to whether or not --
20 HEARING OFFICER DAHER: Go ahead.
21 MR. WARE: The defense put this in issue.
22 HEARING OFFICER DAHER: I'm afraid you did,
23 Mr. Egbert.
24 MR. EGBERT: I put in issue what's in the

1 report. This is not someone who will be a
2 recidivist and not someone who was impulsive in that
3 regard. That was information that was before her on
4 which she drew inferences.

5 MR. WARE: I disagree.

6 HEARING OFFICER DAHER: Let him finish.

7 MR. EGBERT: This is for the press. This
8 isn't anything about this case. It's once again for
9 the press. The Judicial Conduct Commission has
10 tried this case. If you want to put it in, Judge,
11 if you want to have a go-around in this regard, I'll
12 tell you what my next request is. My next request
13 is I wish to call -- to subpoena psychiatrists and
14 psychologists and leave out the long-standing
15 discussion of pedophilia. This information was
16 never put before her.

17 HEARING OFFICER DAHER: I understand what
18 you're trying to tell me. You've benefited from the
19 examination of your client and now you want to bar
20 it --

21 MR. EGBERT: We limited ourselves.

22 HEARING OFFICER DAHER: You may have your
23 psychiatrists and psychologists. Let's go.

24 (End of sidebar)

1 BY MR. WARE:

2 Q. Have you had an opportunity to look over
3 that section of the "Diagnostic and Statistical
4 Manual" that I've placed before you?

5 A. Correct.

6 Q. You have said repeatedly in response to Mr.
7 Egbert's questions that Mr. Horton was not a
8 predatory pedophile, have you not?

9 A. Yes.

10 Q. And you've also said, in effect, that
11 there's not a shred of evidence or indication in the
12 case or in the report of a social worker consistent
13 with pedophilia; isn't that right?

14 A. Correct.

15 Q. Now, looking at Section 302.2 which
16 purports to discuss pedophilia with the "Diagnostic
17 and Statistical Manual," it says in the first
18 paragraph that the focus of pedophilia involves
19 "sexual activity with a prepubescent child
20 (generally age 13 years or younger). The individual
21 with pedophilia must be 16 years or older and at
22 least five years older than the child." Do you see
23 that?

24 A. Yes, I do.

1 Q. Now, Mr. Horton -- or the facts in the
2 Horton case meet those criteria, do they not?
3 A. No, they do not.
4 Q. Let me ask you. You would agree that Mr.
5 Horton was over 16 years of age, correct?
6 A. Yes.
7 Q. And you would agree that he was more than
8 five years older than the 11-year-old?
9 A. Yes.
10 Q. So far he meets those criteria, correct?
11 A. Yes.
12 Q. You would agree that the victim in this
13 case was 13 years or younger, correct?
14 A. Not according to Mr. Horton's perceptions.
15 And that's the key here.
16 Q. So you're saying that you have some basis
17 for concluding that Mr. Horton thought this child
18 was older?
19 A. In his statement to the police I believe
20 the defendant stated that she believed the child was
21 14 or older. I've never seen the child, but I think
22 that is critical to whether or not this defendant
23 was focused on prepubescent children.
24 Q. You knew from the representations made to

1 you by the district attorney's office that at most,
2 the child was 12; isn't that so?

3 A. Correct, but I've had children -- I've had
4 two boys, Mr. Ware, and I know that that's a tough
5 age to gauge sometimes, depending on hormonal
6 activity.

7 Q. So were you making a personal judgment that
8 although this child was represented to you to be 12,
9 that he was not prepubescent?

10 A. No. I was making the judgment that the
11 defendant in this case believed the child to be
12 older.

13 Q. And why, may I ask, would you accept the
14 word of the defense counsel on that in a contested
15 proceeding, as opposed to looking at the tape or
16 inquiring of the victim or his family?

17 A. It wasn't a representation by counsel. It
18 was in the statement the defendant gave to police
19 during the arrest.

20 Q. And are you saying that you are not
21 familiar with the phenomenon that arrested
22 defendants don't always tell the police the truth?

23 A. I am very familiar with that phenomenon.

24 Q. All right. Now, in the real world, you

1 know that arrested defendants commonly lie in their
2 statements, don't you?

3 A. Absolutely.

4 Q. And you knew in this case that, in fact,
5 Mr. Horton had lied, because he admitted doing so
6 when you took the plea; isn't that correct?

7 A. He agreed -- I disagree with that.

8 Q. You will recall your testimony last week in
9 which you and I went over the three, I think we
10 agreed, relatively minor points with which the
11 defendant disagreed when he heard the recitation of
12 facts by the district attorney; isn't that correct?

13 A. That were audible on the tape, yes.

14 Q. And among the things represented by the
15 district attorney with which the defendant did not
16 disagree was that he had made false statements to
17 the police; isn't that correct?

18 A. He agreed with that?

19 Q. Yes.

20 A. I don't think he was ever asked to agree
21 that he made false statements to the police.

22 Q. The district attorney characterized him as
23 having made false statements to the police. The
24 district attorney read to you what his statements to

1 the police were, and the defendant didn't say,
2 "That's incorrect," did he?

3 A. But those were not necessary -- he didn't
4 need to admit to that in order for me to take that
5 plea. Those were irrelevant.

6 Q. We're not talking about what was necessary
7 for you to accept the plea. The point is --

8 MR. EGBERT: I object. The questioning
9 today, or the subject matter, is in a vacuum. It is
10 not in the context of a criminal proceeding. To go
11 round and round on this subject matter is really
12 misrepresentative of what goes on in a criminal
13 plea.

14 HEARING OFFICER DAHER: Mr. Ware, do you
15 want to argue that point?

16 MR. WARE: No, Your Honor.

17 HEARING OFFICER DAHER: Do you want to
18 continue this line of questioning?

19 MR. WARE: Yes.

20 HEARING OFFICER DAHER: Overruled.

21 BY MR. WARE:

22 Q. You agree, do you not, that during the
23 course of the plea which you accepted, there were
24 representations that the defendant had lied to the

1 police?

2 A. Yes, Mr. Deakin made that representation.

3 Q. And when you asked the defendant, "Is there
4 anything that's been said during the course of the
5 factual basis proffered by the assistant district
6 attorney," no issue was taken with what Mr. Deakin
7 said as regards to false statements; isn't that
8 true?

9 A. There was no need to take issue with those.

10 Q. Was any issue taken by the defendant? Yes
11 or no?

12 A. No, there weren't.

13 Q. Let's go back to Section 302.2. The
14 "Diagnostic and Statistical Manual" goes on to
15 describe -- and I've put a section of it on the
16 screen -- certain characteristics of individuals
17 with pedophilia. And those characteristics include
18 precisely the fact pattern of the Horton case, do
19 they not?

20 A. Absolutely not.

21 Q. Let me direct you to the language halfway
22 through --

23 MR. EGBERT: Direct her to the first line.
24 You said those criteria is exactly what this case

1 is. So why don't you direct her to the first line
2 and let her read it.

3 MR. WARE: May I continue?

4 HEARING OFFICER DAHER: Overruled. Go
5 ahead.

6 BY MR. WARE:

7 Q. Do you see the sentence, Judge, that begins
8 towards the bottom of what's highlighted here,
9 "Others, however," and it goes on to say that
10 "consistent with pedophilia is acts which penetrate
11 the child's mouth with their fingers or foreign
12 objects." Do you see that?

13 A. Yes.

14 Q. Those are among the examples given by the
15 DSM-IV, correct?

16 A. Of the sexual activity with children, yes.

17 Q. And you understood that that's exactly what
18 happened here; that the victim's mouth was
19 penetrated allegedly by a screwdriver and by the
20 fingers of the defendant; isn't that correct?

21 A. Mr. Ware, this says "performed fellatio or
22 cunnilingus." The screwdriver is outside of that.

23 Q. It refers, does it not, Judge, to
24 penetration of the child's mouth with fingers or

1 foreign objects? Do you see that?

2 A. Yes, it says "foreign objects."

3 Q. And it goes on to say, the next sentence
4 "these activities are commonly explained with
5 excuses or rationalizations," and then it goes on,
6 correct?

7 A. Yes.

8 Q. And the facts as you understood them in
9 this case were that the Defendant Horton in fact
10 represented that he was looking for his son; and in
11 so doing, he was able to get the child into the car,
12 correct?

13 A. There's a dispute as to how the child got
14 into the car, but those were the facts that the DA
15 represented during the plea and to which the
16 defendant took no issue.

17 Q. All right.

18 The language here goes on to say -- I'm
19 looking two-thirds of the way down the page to a
20 sentence beginning, "Others." Do you see the
21 sentence which reads, "Others, particularly those
22 who frequently victimize children, develop
23 complicated techniques for obtaining access to
24 children..." Do you see that?

1 A. Yes, but -- yes.

2 Q. And one of the things, as you understood
3 it, that happened here was Mr. Horton, dressed as a
4 woman, said that he was looking for his child and
5 offered the victim money; isn't that correct?

6 A. Those were the facts that the defendant did
7 not dispute, yes.

8 Q. The "Diagnostic and Statistical Manual"
9 goes on to say, about five lines down further, with
10 the sentence that begins, "Except in cases," and it
11 goes on to say in part, "The person may be attentive
12 to the child's needs in order to gain the child's
13 interest and to prevent the child from reporting the
14 (sexual) activity." Those two are things as to
15 which the defendant did not disagree when you took
16 the plea; isn't that so?

17 A. I don't think I understand the question. I
18 don't think those were issues in the factual
19 presentation at all.

20 Q. One of the representations made by the
21 district attorney was that the defendant gave the
22 child money and asked him to be quiet; isn't that
23 so?

24 A. That was disputed at the plea, what the

1 purpose of the money was for.

2 Q. Right. That was disputed?

3 A. That was disputed. So that was not a fact
4 that would have been considered for purposes of
5 accepting the plea, nor did it need to be for the
6 charges involved.

7 Q. All right.

8 In your testimony or your responses to
9 questions by Mr. Egbert, you mentioned two letters
10 which you received at some time marked in this case
11 Exhibits H and I. Do you recall that?

12 A. Yes, I do.

13 Q. And those were letters which I understand
14 from your testimony were sent to you at the
15 courthouse, correct?

16 A. That's right.

17 Q. Those letters --

18 MR. WARE: Your Honor, actually I should
19 interrupt myself here. I would like to offer the
20 DSM-IV as Exhibit 8. It's marked for identification
21 at the moment.

22 MR. EGBERT: I object on the same grounds.

23 HEARING OFFICER DAHER: Overruled. Mark it
24 as Exhibit 66. Do you have the two letters now, H

1 and I?
2 MR. WARE: Just so the record is not
3 confused, I indicated marking it as Exhibit 8. Do
4 you want it marked 66?
5 THE CLERK: That was my fault.
6 HEARING OFFICER DAHER: It's already in?
7 CHECK THE CLERK: No, it was intentionally
8 omitted.
9 MR. WARE: I was filling in some of the
10 blanks.
11 HEARING OFFICER DAHER: What is it now for
12 my records?
13 THE CLERK: It's Exhibit 8, but it's not
14 admitted. I didn't hear him say "8."
15 MR. WARE: Exhibit 8 was a blank space in
16 the exhibit numbers. I was filling it in with this
17 exhibit.
18 THE CLERK: So the whole point of Exhibit
19 66 is wrong. It was 8 for ID and will now be
20 Exhibit 8.
21 (Document previously marked as Exhibit
22 66 for identification moved into
23 evidence as Exhibit 8)
24 BY MR. WARE:

1 Q. The letters to which I'm referring,
2 Exhibits H and I, came to you in plain envelopes,
3 I guess, with a return address that you
4 subsequently -- or your court officer subsequently
5 believed was a fictitious address; is that right?

6 A. No, the address was not fictitious. There
7 was such a business. There was no one by the name
8 of the people who signed the letters at that
9 business. So the address was -- the return address
10 was to a legitimate place.

11 Q. But the individual who purported to sign
12 the letters didn't appear to exist --

13 A. They did not exist, no.

14 Q. These letters came in plain envelopes with
15 a return address?

16 A. Yes, with a stamped kind of return address.

17 Q. They did not come, obviously, in a
18 Commission envelope, like the Beaucage complaint,
19 for example?

20 A. No.

21 Q. When you received the Beaucage complaint in
22 October, late October or the first of November
23 2001 -- excuse me -- 2000, you received that, you
24 said, in a Commission envelope; is that correct?

1 A. I did.

2 Q. The letters that you received at court you
3 gave to a court officer, correct?

4 A. Yes.

5 Q. And you told the court officer to try to
6 verify whether or not the individuals who claim to
7 have signed the letters existed at those addresses;
8 is that right?

9 A. That's correct.

10 Q. And so you had the court officer make phone
11 calls to do what he could to verify the existence of
12 those authors, correct?

13 A. Yes.

14 Q. You did not make those calls yourself,
15 correct?

16 A. No, I did not.

17 Q. And you did not ask Mr. Hart or anyone else
18 to make those calls at night, at 11:00, right?

19 A. No. I wouldn't be in court at that time.

20 Q. So at the time you received the Beaucage
21 complaint on November 1, you already had an
22 established mechanism for dealing with what you
23 thought were fictitious complaints, right?

24 A. No, those weren't complaints. Those were

1 letters.

2 Q. They were letters in which there were
3 complaints about your conduct, correct?

4 A. You know, I don't even think they
5 complained about my conduct. They just said nasty
6 things about me. It was nonspecific nastiness.

7 Q. Let me ask you to look at Exhibits H and I.

8 A. I don't have them.

9 Q. They would not be in that book. They were
10 defense exhibits.

11 Why don't we look on together, because I
12 don't have another copy.

13 Directing your attention to Exhibit H, it
14 is specific to what it characterizes as "the child
15 attacker Ebony," does it not?

16 A. Yes.

17 Q. And it goes on to make comments about you
18 and your moral values and so forth; is that correct?

19 A. And my husband, yes.

20 Q. You understood that that was in response to
21 the Horton case, since it says so; is that correct?

22 A. Oh, I knew that the Horton case was the --
23 yeah.

24 Q. And Exhibit I says that people are

1 "disgusted with your work," and it refers to Mr.
2 Horton in the final line, does it not?

3 A. Yes.

4 Q. Both of these, then, were, you understood
5 to be in the nature of, whether crank letters or
6 complaints, resulting from the sentence in the
7 Horton case, correct?

8 A. Yes.

9 Q. And the way you handled them was to give
10 them to a sworn officer of the court and have him
11 check them out, correct?

12 A. Yes.

13 Q. So that prior to the time that you received
14 the Beaucage complaint in an official envelope from
15 the Commission on Judicial Conduct, you had already
16 put in place a mechanism for dealing with crank
17 letters or complaints, correct?

18 A. Well, I guess I had a methodology that was
19 used by my court officer on that occasion. So, I
20 mean, I don't know what you mean, "put in place."

21 Q. Well, your court officer certainly didn't
22 check out those complaints without your telling him
23 to do it; isn't that so?

24 A. That's right.

1 Q. So you're the one who said to the court
2 officer, Take these letters and find out if you can
3 find these people, correct?

4 A. That's right.

5 Q. You certainly could have done that with the
6 Beaucage complaint, couldn't you?

7 A. I mean, yes, in the scheme of things, I
8 could have taken it into court and asked my court
9 officer to call. I could have, yes.

10 Q. Or, as you said last week, you could have
11 given it to your counsel to investigate; isn't that
12 so?

13 A. I could have had my lawyer call that
14 number, yes.

15 Q. Or as another alternative, you could have
16 mentioned it to the Commission on Judicial Conduct,
17 which is supposed to screen complaints; isn't that
18 correct?

19 A. They're supposed to screen them before they
20 even send them to me.

21 Q. So when you received the Beaucage
22 complaint, you knew that it had, at least
23 theoretically, already gone through a screening
24 process, correct?

1 A. I didn't know that. I know that that's
2 what they're supposed to do.
3 Q. Well, two months into the investigation,
4 you certainly had become familiar enough with the
5 process to know that the Commission was supposed to
6 screen complaints, right?
7 A. I know that the rules require them to do an
8 initial screening before they send it to the judge,
9 yes.
10 MR. WARE: If I may have just a moment,
11 Your Honor.
12 (Pause)
13 MR. WARE: I have no further questions at
14 the moment. Thank you, Judge Lopez.
15 HEARING OFFICER DAHER: Mr. Egbert, go
16 ahead.
17 Mr. Egbert, if you need a few minutes -- we
18 can go as long as you want today.
19 MR. EGBERT: No, that's fine.
20 REXCROSS EXAMINATION
21 BY MR. EGBERT:
22 Q. Judge, you were asked about Mr. Horton
23 being held in jail and comparing that to a
24 dangerousness hearing and the like. Do you recall

1 all of those questions?
2 A. I remember that.
3 Q. Let's talk about bail and dangerousness
4 hearings and the like, so we get some understanding
5 of what they're about. Is that okay?
6 A. Yes.
7 Q. Is a Superior Court judge permitted to hold
8 a person on bail because of dangerousness?
9 A. Yes.
10 Q. And when are they permitted to do that?
11 A. When the prosecution establishes that the
12 individual presents a danger to the public-at-large,
13 such as a pedophile, or to a particular individual.
14 Q. And what must a prosecutor do in order to
15 have a judge hold a person on bail because of
16 dangerousness?
17 A. Without bail, you mean?
18 Q. Without bail or on conditions that are --
19 strike that. Let me go back.
20 What must a prosecutor do in order to get a
21 judge to hold a defendant on a finding of
22 dangerousness?
23 A. Must produce evidence from whatever source
24 is available --

1 Q. Let me stop you first. Procedurally what
2 do they have to do first?
3 A. They have to file a petition requesting a
4 hearing --
5 Q. A hearing on what?
6 A. On the dangerousness request, to determine
7 the dangerousness issue.
8 Q. Without a motion by the Commonwealth or on
9 the Court's own motion?
10 A. No. It's got to be on the Commonwealth's.
11 Q. Without that, can a Superior Court judge
12 hold a defendant on the grounds of dangerousness?
13 A. No.
14 Q. Is it constitutionally permissible?
15 A. It would be unconstitutional for the Court
16 to play that role.
17 Q. Is it statutorily permissible?
18 A. No, it isn't.
19 Q. Is there a statute in the Commonwealth of
20 Massachusetts directly on the issue of whether or
21 not a court may hold a defendant because they're a
22 danger to the community?
23 A. There is a statute that allows a court,
24 based on a request in the recitation of evidence, to

1 determine whether someone is a danger and should be
2 held without bail awaiting trial.

3 Q. That is done first at the request and
4 motion of the Commonwealth, correct?

5 A. Right at the very beginning of the case,
6 yes.

7 Q. And then the defendant is entitled to a
8 full hearing, correct?

9 A. Right, an evidentiary hearing.

10 Q. And then the Court has to make findings,
11 correct?

12 A. Correct.

13 Q. Was any of that done in the case of Charles
14 Horton?

15 A. No.

16 Q. Did the prosecutors file a petition that a
17 court hold Mr. Horton because he is a danger to the
18 community?

19 A. No.

20 Q. What is the purpose of bail when danger is
21 not an issue?

22 A. The purpose of bail is to assure that a
23 defendant will show up for trial, for the
24 proceedings. It is not to hold them or to impose a

1 bail that they can't make in order to protect the
2 public.

3 Q. Could a court impose a bail with the
4 purpose of protecting the public from a dangerous
5 person without forwarding that person a hearing
6 where they can produce evidence and the Court must
7 make findings?

8 A. No. It would be unconstitutional for them
9 to do that.

10 Q. The fact that Ebony Horton spent a month in
11 jail on -- strike that.

12 The fact that Ebony Horton spent a month in
13 jail without having made bail, is that in any way a
14 finding by any court that Ebony Horton was a danger
15 to the community?

16 A. Absolutely not.

17 Q. When Ebony Horton was released from jail
18 some month after having accumulated the money to
19 make bail --

20 A. Yes.

21 Q. -- did the Commonwealth seek to have Ebony
22 Horton held because he was a danger to the
23 community?

24 A. No.

1 Q. Now, in your opinion as a judge, is a
2 predatory pedophile a danger to the community?

3 A. Absolutely.

4 Q. And if the Commonwealth had evidence that
5 Ebony Horton was a predatory pedophile, would you
6 have expected that they would have sought a
7 dangerousness hearing?

8 MR. WARE: Objection.

9 HEARING OFFICER DAHER: I want to hear it.
10 Overruled. Go ahead, Mr. Egbert.

11 A. Absolutely.

12 Q. Would you consider it to be their
13 obligation?

14 A. It would be their obligation and
15 responsibility to the public to do that.

16 Q. A predatory pedophile is a person who can
17 not control their impulses to sexually assault
18 children, correct? In short?

19 MR. WARE: Objection.

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

22 MR. WARE: To Mr. Egbert's expert
23 testimony.

24 HEARING OFFICER DAHER: Sustained.

1 Q. Well, describe for me, as you understand
2 it, without getting into the mumbo jumbo of the DSM
3 for a minute, what you understand -- when you talk
4 about a predatory pedophile, what you mean?

5 A. Predatory pedophiles are individuals who
6 have an uncontrollable impulse, a fixation on
7 children. And it varies. Different pedophiles have
8 different focus. But it is an uncontrollable urge
9 and impulse to engage in sexual activity with
10 children, and -- which is mentioned in the DSM --
11 that they engage in all types of justifications and
12 rationalizations for their behavior. They don't
13 acknowledge it as wrong. They never show remorse.

14 So a pedophile would be someone that
15 actually believes it's appropriate -- if not even
16 good -- for the child to be engaged in that way.

17 Q. And that is the type of person who -- not
18 the type of person -- strike that. I didn't mean it
19 like that.

20 A person with such a condition would be,
21 based upon that condition, unable to control those
22 impulses without intervention; is that correct?

23 A. That's correct.

24 Q. That's by definition, isn't it?

1 A. That's correct.

2 Q. Now, if the Commonwealth of Massachusetts
3 through its district attorney's office had
4 information that Ebony Horton was a person who had
5 an uncontrollable impulse to sexually assault
6 children under the age of 14, would you have
7 expected that they would have told you that?

8 MR. WARE: Objection as to what the
9 Commonwealth of this attorney would have done.
10 That's for them to say.

11 HEARING OFFICER DAHER: Overruled. I want
12 to hear it. Go ahead.

13 A. I would have expected to, and at a minimum,
14 if they even had that thought in mind, they should
15 have evaluated the defendant to make that
16 determination.

17 Q. Well, would you have thought that they
18 would have brought it to your attention during a
19 sentencing conference or a sentencing hearing?

20 A. Absolutely.

21 Q. Has any member of the district attorney's
22 staff ever at any time during the proceedings in
23 these cases -- not in press releases; in the
24 proceedings in these cases -- ever informed you that

1 they had evidence that Ebony Horton was a predatory
2 pedophile?
3 A. No.
4 Q. Did they argue it in open court?
5 A. No.
6 Q. Did they provide you with any reports of
7 such information?
8 A. No.
9 Q. Do you have Mr. Horton's criminal record in
10 front of you?
11 A. I do.
12 Q. That was submitted in evidence without
13 comment. Let's see if we should comment on it a
14 bit.
15 A. Okay.
16 Q. The first page of that report indicates
17 one, two, three, four five juvenile entries,
18 correct?
19 A. Yes.
20 Q. And as to each of those five juvenile
21 entries, can you tell the Judge what the disposition
22 was?
23 A. All those cases were dismissed. It appears
24 we had two incidents, one on 11/23/94 -- that's the

1 date of arraignment -- those involving four charges
2 that were dismissed, and then another incident
3 before that that was also dismissed.

4 Q. And as regards to those cases, from the
5 looks of them -- strike that.

6 With regards to those cases, each having
7 been dismissed, are you able to draw any conclusions
8 from those as a judge?

9 A. No.

10 Q. Did anyone from the DA's office ever ask
11 you to draw any conclusions from the juvenile court
12 record?

13 A. No. And I don't think they're included in
14 the Superior Court probation records, in fact.

15 Q. The information provided to you at the
16 time?

17 A. Yeah. They don't provide juvenile records.

18 Q. Now, with regard to the adult record -- do
19 you see that?

20 A. Yes.

21 Q. Let's start -- because chronologically you
22 start at the second page, because that's where it
23 begins; is that right?

24 A. Yes.

1 Q. The first entry on the bottom for
2 3/21/95 -- do you see that?
3 A. Yes.
4 Q. What's the finding on that case?
5 A. "Not guilty."
6 Q. Is that a criminal record?
7 A. No.
8 Q. And then there's an entry above that.
9 What's the result in that case?
10 A. "Dismissed."
11 Q. Is that a criminal record?
12 A. No.
13 Q. And then you have a number of cases -- two
14 cases that were continued without a finding and
15 dismissed, correct?
16 A. Correct.
17 Q. Is that a criminal record?
18 A. No.
19 Q. And then you have just above that a matter
20 that was filed, correct?
21 A. Correct.
22 Q. Is that a criminal record?
23 A. No, it's not.
24 Q. When I say "criminal record," we mean

1 record of conviction; is that correct?
2 A. That's right. There was an adjudication on
3 that. That one was filed clearly by the DA's
4 office.
5 Q. And on the next one above that, what was
6 the disposition?
7 A. Dismissed.
8 Q. Is that a criminal conviction?
9 A. No.
10 Q. And then the next one above that, it was a
11 shoplifting. What is the disposition?
12 A. Dismissed, CWF'd, Continued Without a
13 Finding, and then dismissed.
14 Q. And the one above it, the same?
15 A. Same thing.
16 Q. And is that a criminal conviction?
17 A. No.
18 Q. Then on the first page we have the --
19 starting from the bottom up --
20 A. Yes.
21 Q. -- we have one, two, three, four, five, six
22 entries, the first six entries. Do you see those?
23 A. Yes.
24 Q. Are those all this -- the case that you

1 have before you?

2 A. Only five of them is. The top one --

3 Q. Don't go to the top one yet.

4 A. Okay. Well, no. The Dorchester District
5 Court, that was indicted, so it's dismissed. It's
6 the same case.

7 Q. Judge, slow down.

8 A. Okay.

9 Q. The Dorchester District Court entry was the
10 original arrest on the case that ultimately was
11 before you; is that right?

12 A. Right.

13 Q. And that was dismissed when the indictment
14 was returned; is that right?

15 A. Correct.

16 Q. So the first bottom six entries basically
17 all relate to the matter that was before you, don't
18 they?

19 A. Yes. Yes.

20 Q. And that became, did it not, the first
21 adult conviction of Ebony Horton, correct?

22 A. Correct.

23 HEARING OFFICER DAHER: I have to make a
24 phone call to Chief Justice Okara on a matter for

1 five minutes. I'll be right back.
2 (Recess)
3 BY MR. EGBERT:
4 Q. So having reviewed the record of Ebony
5 Horton, is it true, as a matter of law, that when
6 Ebony Horton appeared before you on September 6th of
7 the Year 2000, that he had no prior criminal
8 convictions at all?
9 A. Correct.
10 Q. Adult or juvenile?
11 A. That's correct.
12 Q. Now, you were asked whether or not at a
13 dangerousness hearing, under the bail statute the
14 victim would be required to testify, correct?
15 A. That's right.
16 Q. And you said, "Generally that's so,"
17 correct?
18 A. Right.
19 Q. If the Commonwealth was so concerned about
20 having the victim testify in a proceeding, then
21 would it be fair for you to infer that a plea was in
22 the juvenile's best interest?
23 MR. WARE: Objection.
24 HEARING OFFICER DAHER: I'm going to allow

1 it. Overruled. You may have it.
2 A. It would be very fair for me to infer that.
3 Q. Now, you were given this social worker's
4 report, which is Exhibit 3, I think?
5 A. Yeah.
6 Q. Now, in the first instance this report was
7 given to you by defense counsel, correct?
8 A. Correct.
9 Q. Who is the party in a criminal case
10 responsible -- who are the parties in a criminal
11 case responsible for presenting evidence to the
12 court?
13 A. The lawyers, the DA's office and the
14 defense attorney.
15 Q. Is it your job, as you understand it, to
16 create evidence on your own?
17 A. No.
18 Q. We engage in what's called an adversary
19 system, correct?
20 A. That's right.
21 Q. And you understand that that permits both
22 parties to put before you, for example, at a plea
23 conference, any and all information that they think
24 is appropriate?

1 A. That's right.

2 Q. If the Commonwealth objected or thought
3 that this report was skewed, what would you have
4 expected them to do?

5 A. Request an opportunity for them to have an
6 evaluation done.

7 Q. Did they do that?

8 A. No.

9 Q. Did the Commonwealth at any time argue to
10 you that the report that was done by Ms. Katz was
11 unreliable?

12 A. No.

13 Q. Unprofessional?

14 A. No.

15 Q. Not based on fact?

16 A. No.

17 Q. Not based on appropriate medical-legal
18 opinion?

19 A. No, that was never suggested to me by the
20 Commonwealth.

21 Q. Was there anything suggested to you by the
22 Commonwealth at all which indicated you should doubt
23 the validity of this report?

24 A. Nothing.

1 Q. Did they ever seek to have you order Mr.
2 Horton to be examined by their in-house experts?

3 A. No.

4 Q. Or any experts at all?

5 A. No.

6 Q. Now, you indicated here that -- you were
7 asked questions about whether or not you knew that
8 the social worker actually discussed with Mr. Horton
9 the events or the behavior -- strike that -- the
10 events in this case, correct? Do you remember those
11 questions?

12 A. Yes.

13 Q. And it's true the report doesn't recite the
14 events in the case, does it?

15 A. Not explicitly, no.

16 Q. And in fact, there hadn't been a plea yet
17 in this case when you got this report; isn't that
18 right?

19 A. That's right.

20 Q. Now, would it be appropriate for defense
21 counsel, for example, in an case where there's not a
22 psychiatric defense, meaning a lack of mental
23 responsibility defense -- would it be appropriate
24 for defense counsel to submit to the Court and the

1 Commonwealth a confession of the defendant made to
2 its expert?

3 A. It would not be appropriate.

4 Q. And have you ever seen that done in
5 circumstances like this?

6 A. No. Only where there's been a waiver of
7 the right; not when they present these reports at
8 plea stages.

9 Q. In other words, when you say "a waiver," in
10 cases where the issue is lack of criminal
11 responsibility?

12 A. Yes.

13 Q. So in this case there were certain indicia,
14 however, which assured you that the social worker
15 had an understanding of the fact that there was a
16 criminal case pending and the generalities or the
17 specifics of what that criminal case was; isn't that
18 correct?

19 A. That's right.

20 Q. For example, the first part -- or the
21 headline, so to speak, says "PSYCHOSOCIAL ASSESSMENT
22 AND DISPOSITIONAL PLAN FOR CHARLES EBONY HORTON"
23 with a heading that says, "Commonwealth versus
24 Charles Ebony Horton," correct?

1 A. Correct.

2 Q. Now, you've been around for a number of
3 years as a judge. Beginning with the heading
4 "Commonwealth versus Ebony Horton," would you
5 believe that that would inform the social worker
6 that there was a criminal case pending?

7 A. Yes.

8 Q. And when that social worker is providing a
9 dispositional plan, would that inform you that they
10 were talking about some disposition of that criminal
11 case?

12 A. That's right.

13 Q. Now, the first paragraph reads, "I
14 interviewed Charles Ebony Horton in December '99 and
15 again on July 31, 2000. There is a marked
16 difference in her outlook that includes accepting
17 responsibility for showing poor judgment being
18 involved with a minor child. This is behavior that
19 will not occur again." Do you see that?

20 A. Yes.

21 Q. Does that indicate to you that there was a
22 change in Mr. Horton's outlook from December of 1999
23 to July of 2000?

24 A. Yes.

1 Q. And that that change was to accept
2 responsibility for his acts with regard to this
3 case?
4 A. Yes.
5 Q. And on Page 3 -- I'm sorry. On Page 4 it
6 reads, "I find it highly unlikely that Ebony will
7 repeat the behavior that brought her to court in
8 this case." Do you see that?
9 A. Yes.
10 Q. Now, in your experience as a judge in the
11 Superior Court, would that indicate to you that this
12 social worker had reviewed the allegations in this
13 case?
14 A. Yes.
15 MR. WARE: Objection. There's no evidence
16 what the social worker --
17 MR. EGBERT: I'm asking her what her
18 impressions are.
19 HEARING OFFICER DAHER: You can have it.
20 Go ahead.
21 A. Yes.
22 Q. And did you have any reason to doubt that?
23 A. None.
24 Q. Did the Commonwealth at any time ask you to

1 determine whether or not the social worker had read
2 the police reports?

3 A. No.

4 Q. Or any other reports?

5 A. No.

6 Q. You were also asked about whether or not
7 this report uses the words "gender identity
8 disorder," correct?

9 A. Correct.

10 Q. And it doesn't, does it?

11 A. No. It does refer to gender issues, but it
12 doesn't say "gender identity disorder."

13 Q. Let's go through the report and see what it
14 does refer to.

15 By the way, you have been on the Bench and
16 have conducted numerous hearings for what's called
17 sexually dangerous persons?

18 A. Yes, I have.

19 Q. And that's a statute under which a person
20 can be committed in the Commonwealth for being
21 sexually dangerous in a civil commitment?

22 A. That's right, from a day in the life.

23 Q. And have you also had proceedings that
24 relate to transgendered persons?

1 A. Yes.
2 Q. And persons with sexual identity
3 disorders -- strike that. Gender identity
4 disorders?
5 A. Yes, but not in the context of STP
6 hearings.
7 Q. But in other proceedings?
8 A. Yes.
9 Q. Do you know of a sexual identity disorder
10 that isn't a gender identity disorder?
11 A. No. You're either a male or female, so
12 you're going to want to be one or the other.
13 Q. So are they synonymous to you?
14 A. Yes.
15 Q. So in the first page the report indicates
16 that Charles Ebony Horton is "a transgendered
17 person," right?
18 A. Yes.
19 Q. What did that mean to you?
20 A. That is a person that wants to be of a
21 gender that they are not. Wants to transfer
22 genders, basically.
23 Q. And it says, "who looks and feels female,"
24 correct?

1 A. Correct.

2 Q. And then it goes on to say, "She goes by
3 the name 'Ebony' and has been treated with female
4 hormones for at least a couple of years," right?

5 A. Yes.

6 Q. Do you know whether or not, when a person
7 seeks to reach the level of using female hormones,
8 that that is characteristic of a gender identity
9 disorder?

10 MR. WARE: Objection.

11 HEARING OFFICER DAHER: Sustained.

12 MR. EGBERT: Could I have Exhibit M.

13 THE CLERK: Exhibit 9.

14 Q. Take a look at that and tell me if you see
15 anything there that would make the statement that
16 she looks and feels female and that she has
17 undergone hormone therapy, whether or not anything
18 in the DSM would make those statements relevant?

19 MR. WARE: I'm going to object. There's no
20 evidence -- in fact, there is evidence that the
21 Judge wasn't looking at this at the time that she
22 made these decisions.

23 HEARING OFFICER DAHER: Overruled. Go
24 ahead. You may have it.

1 A. I'm sorry. Do you want me to compare the
2 report --

3 Q. I just gave you two statements from the
4 report: That she looks and feels female and she's
5 undergone female hormone therapy for a couple of
6 years.

7 A. "To have this disorder, there must be
8 evidence of a strong and persistent cross-gender
9 identification, which is the desire to be or the
10 insistence that one is of the other sex."

11 Q. Go to Page 580, please. Do you see that?

12 A. Yes.

13 Q. And do you see the differential diagnosis?

14 A. Yes.

15 Q. And the differential diagnosis is to
16 distinguish this particular mental disorder with
17 other things; is that correct?

18 A. That's right.

19 Q. And it starts out by saying, "Gender
20 identity disorder can be distinguished from simple
21 nonconformity to stereotypical sex role behavior by
22 the extent and pervasiveness of the cross-gender
23 wishes, interests and activities." Do you see that?

24 A. Yes.

1 Q. Would you say that having female hormone
2 therapy is a fairly extensive cross-gender wish?

3 A. Absolutely.

4 Q. And then if you would read on, it basically
5 describes, does it not, those who wish to dress like
6 a woman for sexual excitement and the like; is that
7 correct?

8 A. I'm sorry. It distinguishes that?

9 Q. I want you to read the part I just gave
10 you.

11 A. Okay. (Witness reviews document) Yes,
12 okay. It distinguishes, not --

13 Q. In other words, the differential diagnosis
14 is to differentiate those who really want to be a
15 woman and those who want to cross-dress; is that
16 right?

17 A. Yes.

18 Q. And the evidence before you as to use of
19 hormone therapy, dressing as a woman since she's
20 been a child, acting like a woman, and all the
21 various things that are contained in this report,
22 are they or are they not indicative to you of the
23 gender identity disorder?

24 A. Absolutely.

1 Q. You were asked about -- go to Page 3 of the
2 psychological report or psycho-assessment.
3 A. Yes.
4 Q. Actually, go to Page 2, if you would.
5 Start at the bottom. "Ebony was in counseling in
6 the Sidney Borum Health Center, a project of the
7 Justice Resource Institute at 130 Boylston Street,"
8 correct?
9 A. Yes.
10 Q. What did that mean to you that she was in
11 counseling?
12 A. That she was attempting to deal with some
13 of the issues concerning her gender identity.
14 Q. And when you hear the word "counseling,"
15 you didn't think she was going to camp, did you?
16 A. No.
17 Q. What did you understand that to mean?
18 A. Some sort of therapy, therapeutic
19 relationship with the counselor.
20 Q. With some form of mental health
21 professional?
22 A. Yes.
23 Q. And then it says, "Her counselor left
24 sometime ago. Ebony is in agreement that she needs

1 to return for counseling to help deal with the major
2 life issues she confronts." Do you see that?
3 A. Yes.
4 Q. What did that mean to you?
5 A. It means that she was in need of further
6 counseling to come to terms with her life situation.
7 Q. What was her life situation, as you
8 understood it?
9 A. That she suffered from the sexual identity
10 disorder.
11 Q. Then it goes on to say that, "Ebony has
12 sought out counseling through the Fenway Community
13 Health Center." Do you see that?
14 A. Yes.
15 Q. What did that mean to you?
16 A. That she had gone to the Fenway Community
17 Health Center looking for counseling.
18 Q. What kind of counseling?
19 A. Mental health counseling.
20 Q. And are those all statements indicative to
21 you of a person with a mental health issue?
22 A. Absolutely.
23 Q. Then it says, "She was frightened off about
24 medication for depression by some horror stories

1 from friends and acquaintances." Do you see that?

2 A. Yes.

3 Q. What did that mean to you?

4 A. That she had never taken antidepressants
5 because she had heard horror stories from friends
6 about it.

7 Q. And then it says, "I have suggested that
8 she return to the agency for both counseling and a
9 psychiatric consult. Ebony has a chronic
10 depression, along with suicidal thoughts that
11 surface when she is under severe pressure."

12 What did you understand that to be about?

13 A. That she was chronically depressed with
14 suicidal ideation and that she should be in
15 counseling and get a consult from a psychiatrist to
16 see if they would prescribe some antidepressants.

17 Q. And now would you go to the last page --
18 sorry -- next to the last page, and under "Clinical
19 Impression," "Ebony is a transgendered individual."

20 A. Yes.

21 Q. That doesn't say Ebony is somebody who
22 likes to dress up like a girl, right?

23 A. No.

24 Q. It doesn't say Ebony is someone who likes

1 to play house with dolls?

2 A. That's right.

3 Q. It says that Ebony is transgendered. What
4 did that mean to you?

5 A. That she has a sexual identity disorder
6 issue. She struggles with her sexual identity.

7 Q. And in fact, it goes on to say, "She's been
8 struggling with gender issues for years," right?

9 A. Right.

10 Q. Then later it says, "Ebony is also being
11 treated with hormone therapy and needs to continue
12 with the medication," right?

13 A. Correct.

14 Q. Who in your understanding or your
15 experience are the people who it's appropriate for
16 to take female hormone therapy? What men?

17 MR. WARE: Objection.

18 HEARING OFFICER DAHER: Sustained.

19 Q. What did that mean to you when it said,
20 "She's being treated with hormone therapy and needs
21 to continue with the medication"?

22 A. That once they embark on this course of
23 hormone therapy, it's very important for them to
24 continue on it, because she had already acquired the

1 characteristics of the female: Less hair, voice
2 changes, different things that go along with taking
3 female hormones by a man.

4 Q. Including physical attributes?

5 A. Including physical attributes.

6 Q. Now, you then have this statement: "I find
7 it highly unlikely that Ebony will repeat the
8 behavior that brought her to court in this case."
9 Do you see that statement?

10 A. Yes.

11 Q. Did you have any contrary evidence produced
12 by the Commonwealth or the DA's office to the
13 statement I just read to you?

14 A. None.

15 Q. Did anyone seek to produce any information
16 to you that Ebony Horton would be a repeat offender?

17 A. No.

18 Q. Now, you were further asked about the
19 words, "Further incarceration will be a disaster for
20 Ebony and place her at considerable risk." And you
21 said that that "disaster" is kind of an extreme
22 word, right?

23 A. Yes.

24 Q. What did you understand from that

1 statement, however?

2 A. Well, what I understood is that what I knew
3 had happened when she was awaiting making bail. I
4 mean, it would have been a disaster because she
5 would have to be separated from the general
6 population, she would be in 23-hour lock-down, and
7 that she would present a risk. I mean, she would
8 have to be treated very differently than a prisoner
9 that we would generally send to a male correctional
10 institution.

11 Q. Now, are there times in your experience as
12 a judge in criminal cases where the Commonwealth
13 will seek to provide you information concerning a
14 defendant's psychiatric status based upon reports of
15 people who were employed by the Commonwealth of
16 Massachusetts?

17 A. Yes.

18 Q. And is that done on a fairly regular basis?

19 A. Not as often as the defense attorneys do
20 it, but it happens regularly.

21 Q. When you say "not as often as the defense
22 attorneys do it," let me see if I can direct you to
23 my question.

24 A. Okay.

1 Q. And that is, the Commonwealth -- have there
2 been occasions when the Commonwealth produces to you
3 psychiatric evidence or psychological evidence based
4 upon an expert who is employed by the Commonwealth?

5 A. Yes.

6 Q. And when they do so, do you discount it
7 because it was one of the experts employed by the
8 same political subdivision that is proffering it to
9 you?

10 A. No.

11 Q. Do you throw it away?

12 A. No.

13 Q. Do you tell the Commonwealth that you won't
14 listen to any evaluations which were performed by
15 people who worked for the Commonwealth?

16 A. No.

17 Q. In the event that the Commonwealth brought
18 that type of information to you by an expert who was
19 employed by the Commonwealth, what would you expect
20 defense counsel to do?

21 A. Request an opportunity to provide an
22 evaluation from some independent expert.

23 Q. From some expert of their own; is that
24 right?

1 A. Correct.

2 Q. And so that's the normal course of
3 give-and-take in a criminal proceeding; is that not
4 so?

5 A. Yes.

6 Q. And once again, as far as the Commonwealth
7 in this case, they did none of that?

8 A. Right.

9 Q. You testified earlier that you think that
10 the authorization for funds which was in Exhibit 16,
11 I believe, may have been used for the Katz report,
12 correct?

13 A. Yes.

14 Q. Do you know one way or the other?

15 A. I don't know one way or the other, no.

16 Q. And in fact, when you were delivering the
17 sentence in this case or having your plea
18 conference, you weren't privy to the whole file in
19 the Horton case, were you?

20 A. No.

21 Q. The whole court file?

22 A. I guess I'm missing the question.

23 Q. Did you have the motion for funds before
24 you on August 1, when you had your plea conference?

1 A. I did not have that. That was allowed
2 months before by the clerk magistrate.
3 Q. You had nothing to do with that, did you?
4 A. Right, right.
5 Q. And in fact, the Commonwealth would have
6 been present for that hearing before the clerk
7 magistrate, correct?
8 A. Yes.
9 Q. And if the Commonwealth thought that the
10 defendant was required or somehow obligated to go
11 and get a psychiatrist report, they certainly would
12 have raised that to you, wouldn't they?
13 A. Yes.
14 Q. Did they do so?
15 A. No.
16 Q. Now, mental disorder or mental illness is
17 something far different from incompetence, isn't it,
18 under the law?
19 A. Yes.
20 Q. You have, I take it, without getting into
21 numbers, many people with mental disorders who
22 appear before you in the courts of our Commonwealth;
23 is that correct?
24 A. Right, and who plead guilty.

1 Q. Do you have many that appear before you
2 with acknowledged mental disorders?
3 A. Yes.
4 Q. And do those disorders prohibit the Court
5 from taking action with regard to those persons?
6 A. No.
7 Q. Do all mental disorders rise to the level
8 of incompetence?
9 A. No.
10 Q. What is incompetence in the law? Not in
11 terms of lawyers, but what is incompetence in the
12 law?
13 A. It would mean an inability due to some kind
14 of mental defect or illness to understand the
15 proceedings and be able to assist counsel in the
16 proceedings.
17 Q. Did you have any information before you
18 whatsoever that Ebony Horton suffered from such a
19 mental disease or defect that she was unable to
20 determine or understand what was going on around...
21 A. No, I had none of that.
22 Q. And did anyone ever seek to have you make
23 such a determination?
24 A. No.

1 Q. Did you have independently any information
2 as to whether or not Ebony Horton was able to
3 understand and comprehend the proceedings?

4 A. Absolutely. That's part of the purposes of
5 going through that colloquy before a judge accepts a
6 plea.

7 Q. And what do you look at and for?

8 A. You look to see that the defendant, before
9 they plead guilty, has a full understanding of the
10 constitutional rights that are being waived, what
11 options a defendant has before they plead guilty,
12 that they understand the charges that are made
13 against the defendant. And that is what a judge
14 tries to establish before a guilty plea is accepted.

15 Q. And did you during your colloquy with Ebony
16 Horton get any information or make any observations
17 which would indicate to you that the defendant was
18 unable to perform the obligations of a defendant at
19 a plea?

20 A. No.

21 Q. And did you in fact make findings on the
22 record that the defendant gave a knowing,
23 intelligent and voluntary plea?

24 A. Yes, I was satisfied that she understood

1 everything.
2 MR. EGBERT: May I have a moment, please,
3 Your Honor?
4 HEARING OFFICER DAHER: Yes.
5 (Pause)
6 MR. EGBERT: I have no further questions.
7 HEARING OFFICER DAHER: Mr. Ware?
8 MR. WARE: Very briefly.
9 HEARING OFFICER DAHER: Take your time.
10 FURTHER REDIRECT EXAMINATION
11 BY MR. WARE:
12 Q. Judge, the social worker's report, Exhibit
13 3, says nothing to challenge criminal
14 responsibility, as that term is meant, correct?
15 A. Correct.
16 Q. It does not create a defense to criminal
17 responsibility of any kind; isn't that so?
18 A. That's so.
19 Q. So that the Commonwealth reading that
20 report would understand no defense is being made to
21 suggest that Mr. Horton was not criminally
22 responsible?
23 A. That's right.
24 MR. WARE: No further questions.

1 HEARING OFFICER DAHER: Mr. Egbert?
2 FURTHER RECROSS EXAMINATION
3 BY MR. EGBERT:
4 Q. The Commonwealth would also be able to read
5 in that report that you were being given information
6 from a certified professional that Ebony Horton was
7 not likely to reoffend; isn't that correct?
8 A. That's correct.
9 Q. And was not a predatory pedophile, correct?
10 A. Correct.
11 Q. And how important in the sentencing
12 scheme -- in your judgment, how important are those
13 two facts as it relates to a Superior Court Judge's
14 sentence in a criminal case?
15 A. They are of the utmost importance, because
16 the protection of the public and public safety is
17 the primary concern one has in sentencing a
18 defendant for a particular conduct.
19 MR. EGBERT: No further questions.
20 HEARING OFFICER DAHER: Mr. Ware?
21 MR. WARE: No, Your Honor.
22 HEARING OFFICER DAHER: At this particular
23 time -- because Mr. Egbert, you have a commitment
24 tomorrow; is that correct?

1 HEARING OFFICER DAHER: -- the proceedings
2 will be suspended until Monday, and we'll see you
3 then. Have a happy holiday.
4 (Whereupon, the hearing was
5 suspended at 1:15 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 V, is a true and
accurate transcription of my stenographic notes
taken on Friday, November 22, 2002.

Jane M. Williamson
Registered Merit Reporter

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