

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

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

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

Harvey Chopp, Clerk

APPEARANCES:

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

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

Held at:
Edward W. Brooke Courthouse
24 New Chardon Street
Boston, Massachusetts
Monday, December 2, 2002
9:34 a.m.

(Jane M. Williamson, Registered Merit Reporter)

P R O C E E D I N G S

1
2 (At side bar)

3 HEARING OFFICER DAHER: I received this
4 communication. It went to another court department.
5 I don't know who delivered it. I don't know whether
6 it's been photocopied.

7 MR. WARE: I say we ought to mark it for
8 identification.

9 HEARING OFFICER DAHER: I intend to mark it
10 for ID and put it in the file.

11 MR. WARE: That should be fine.

12 MR. EGBERT: Can we get a copy?

13 HEARING OFFICER DAHER: Yes.

14 MR. EGBERT: Front and back?

15 HEARING OFFICER DAHER: Yes. I did X,Y, Z.

16 MR. EGBERT: (Inaudible.)

17 HEARING OFFICER DAHER: The answer is, No,
18 I don't know whether it's fruitful or not.

19 MR. EGBERT: The question --

20 HEARING OFFICER DAHER: The answer is, No.
21 It doesn't affect me one way or the other.

22 MR. WARE: Perhaps Mr. Egbert should put
23 his question on the record. We have an answer, but
24 we have no question. You anticipated the question.

1 MR. EGBERT: My question only was, Judge,
2 for you to make a determination whether or not this
3 particular item would have any impact or effect --
4 HEARING OFFICER DAHER: None whatsoever.
5 It will be marked X, Y, Z.
6 (Documents marked as Exhibits X, Y
7 and Z for identification)
8 (End of side bar)
9 MR. WARE: The Commission calls Leora
10 Joseph.
11 LEORA JOSEPH, Sworn
12 DIRECT EXAMINATION
13 BY MR. WARE:
14 Q. Good morning.
15 A. Good morning.
16 Q. Would you like a cup of water just to keep
17 you going here? You're going to be doing some
18 talking this morning.
19 A. I'm okay. Thank you.
20 Q. Will you state your name, please, for the
21 record.
22 A. Yes. My name is Leora Joseph.
23 Q. And, Ms. Joseph, you were the assistant
24 district attorney assigned to the case of

1 Commonwealth against Horton at some time in the Year
2 2000; is that correct?

3 A. Yes, I was.

4 Q. Before I talk to you about the case itself,
5 I wonder if you could tell us a little bit about
6 your background. First of all, what are you doing
7 now, at least generically speaking? Are you
8 practicing law?

9 A. I'm not practicing law. I'm currently
10 employed at my son's school. The official title is
11 executive vice president. I oversee the budget,
12 fund-raising development, safety and security
13 personnel, benefits, that kind of thing.

14 Q. And for what period of time have you had
15 that position as vice president of the school?

16 A. I've been there for a little over a year
17 now.

18 Q. Is this a private school?

19 A. It is.

20 Q. In the Boston area?

21 A. It is.

22 Q. Now, could you tell us a little bit about
23 your education, beginning with college and law
24 school, and I'd like to ask you a little bit about

1 your background.

2 A. Sure. I graduated from Barnard College of
3 Columbia University in Manhattan in 1990, and
4 following that, I went straight to law school at
5 McGill Law School in Montreal, and I graduated
6 there, from McGill, in 1993.

7 Q. Where were you born?

8 A. I was born in New York, but I grew up in
9 Montreal.

10 Q. And during your time at Barnard College,
11 did you work during college in New York City?

12 A. I did. I had a number of different
13 internships and jobs. I worked with emotionally
14 disturbed children and abused children as a
15 teacher's aide. I did an internship in my junior
16 and senior year under Mayor Koch's office for
17 teenage pregnancy and programming where I worked
18 with teenage mothers in the inner cities, doing a
19 combination of helping them in some of the
20 residential homes that they lived in and also doing
21 career counseling, helping them get their resumes in
22 order and things like that. So those are some of
23 the activities I did in college.

24 Q. And at some time did you do some teaching

1 or assisting at Fordham University in New York City?

2 A. Yes, I did. That was through the mayor's
3 office as well. That was with the teenage mothers,
4 either ones who were expecting or who had recently
5 had young children and were looking to have jobs at
6 The Gap or whatever it would be. And they wanted
7 some interviewing techniques and help filling out
8 applications and things like that. So I did that.

9 Q. Now, while you were at Barnard at an
10 undergraduate level, could you tell us what your
11 major was, what your field of interest was.

12 A. I majored in cultural anthropology. I did
13 my thesis, in fact, on teenage motherhood, growing
14 up in the inner cities, and my focus was really on
15 that area of social studies dealing with urban
16 environments.

17 Q. And at the time, I take it, you lived in
18 New York City?

19 A. I did.

20 Q. And did you also live in the City of
21 Montreal during your childhood?

22 A. I did.

23 Q. During your law school -- where did you go
24 to law school?

1 A. I went to McGill Law School in Montreal.

2 Q. And following law school did you hold some
3 positions locally here in the Boston area before you
4 went to the district attorney?

5 A. Yes. We moved here right after I graduated
6 from law school, and I took the bar. While I was
7 waiting for my bar results I worked for Alan
8 Dershowitz at Harvard doing paralegal-type stuff for
9 him for a few months until I was offered a position
10 by District Attorney Martin.

11 Q. During what period of time did you work for
12 Professor Dershowitz at Harvard Law School, roughly?

13 A. It was very part time. I began in August
14 and I worked there until I began in the DA's office,
15 so probably about January of '94. From August of
16 '93 until January of '94.

17 Q. Did you begin at the district attorney's
18 office for Suffolk County in January of 1994?

19 A. I believe it was February of '94 that I
20 started there.

21 Q. And when did you resign from the district
22 attorney's office?

23 A. In June of 2001.

24 Q. So you were there roughly for seven-plus

1 years; is that correct?

2 A. That's correct.

3 Q. Can you give us a rundown of the positions
4 you held in the district attorney's office as a
5 prosecutor?

6 A. Yes. I began as a line ADA at the Boston
7 Municipal Court, and I then was promoted to
8 supervisor of the DAs in the Boston Municipal Court.
9 I think there were about 10 assistant or 12
10 assistant DAs that I supervised. I did that for a
11 year. And then I was able to go to the child abuse
12 unit, the felony unit in the Superior Court towards
13 the end of '97.

14 Q. And what were your duties with the child
15 abuse unit, beginning in 1997?

16 A. When I began there, I had a mixed case load
17 of those cases, some of whom which were district
18 court cases that seemed a little bit more serious.
19 And then I began indicting cases as well.

20 Our jobs as assistant DAs in that unit is
21 to do -- most of our cases are investigations. We
22 work with DSS and the police, and we bring forward a
23 certain percentage of those cases through the grand
24 jury process, indictment, and Superior Court trial

1 or whatever it would be.

2 Q. On an annual basis, on average, can you
3 estimate the number of child abuse cases for which
4 you had responsibility either in a supervisory
5 capacity or as a line trial lawyer for the district
6 attorney's office during the period 1997 to 2001?

7 A. Annually, including cases that don't get
8 indicted, but just get investigated, I would say my
9 case load was about 80 or so a year.

10 Q. And of those, approximately what number of
11 cases are indicted felonies, order of magnitude?

12 A. Fifteen cases a year would be indicted,
13 something like that, out of the 80.

14 Q. When did you first take over responsibility
15 for Commonwealth against Horton on behalf of the
16 district attorney's office?

17 A. Shortly after the defendant was arrested in
18 November of '99, my supervisor, David Deakin,
19 assigned the case to me for Superior Court
20 investigation and grand jury presentment.

21 Q. Did you handle the initial arraignment in
22 the BMC prior to indictment?

23 A. The defendant I don't believe was arraigned
24 in the BMC, but I did not handle his arraignment at

1 the District Court level. I think he was arraigned
2 in Dorchester District Court.

3 Q. Now, when you initially took over
4 responsibility for the case, was Mr. Horton in
5 custody?

6 A. He was.

7 Q. And for what period of time was he in
8 custody, roughly?

9 A. I don't remember exactly. I believe that
10 he posted bail either right before or right after
11 his Superior Court arraignment.

12 Q. Which occurred in January of 2000?

13 A. That's correct.

14 Q. So during the period from roughly November
15 20th to January 2000, he was in custody?

16 A. Correct.

17 Q. There has been reference in this court
18 proceeding to a dangerousness hearing. Did you give
19 consideration to a dangerousness petition in this
20 case?

21 A. Dangerous petitions would be something that
22 would only be available to us at arraignment,
23 according to the statute. And the preference of the
24 child abuse unit is not to -- when there are

1 traditional reasons that can hold a defendant on
2 regular bail, the preference of the district
3 attorney's office is to allow those conditions to
4 hold the defendant, as opposed to move for
5 dangerousness, which would require a full-blown
6 hearing and necessitate the child to testify. And
7 the preference of the child abuse unit is for
8 children victims to only have to testify once at
9 trial. And they don't even go before the grand
10 jury.

11 Q. At some time later in the Year 2000,
12 specifically in August of that year, did you attend
13 a plea conference representing the district
14 attorney's office?

15 A. I did.

16 Q. And will you tell us when that occurred?

17 A. I believe that date was August 1st of the
18 Year 2000.

19 Q. And where did that conference occur and
20 before whom?

21 A. That was a lobby conference before Judge
22 Lopez in the First Session of the Superior Court.

23 Q. And at that time was the Superior Court
24 sitting in the old Federal Post Office here in Post

1 Office Square?

2 A. Yes, it was.

3 Q. When you say the First Session, can you
4 give us a general description of the First Session
5 and what its function is?

6 A. The First Session is one of the busiest
7 sessions that there is in Superior Court. Typically
8 there's over 20 cases a day, and it's a session both
9 where lawyers -- some dates that are given there are
10 simply status dates. Lawyers will report on certain
11 discovery issues and ask for another date before a
12 judge. Some discovery motions that are easy are
13 argued in front of a judge, nothing that's very
14 substantive. Much of the session is spent with both
15 lobby conference in advance of a plea, as well as a
16 plea colloquy that would occur in the First Session
17 as well.

18 Q. When you use the term "lobby conference,"
19 you're including side-bar conferences, which are
20 also termed lobby conferences; is that correct?

21 A. Yes. Yes.

22 Q. And in the Horton case, the lobby
23 conference was in fact at a side bar, not in the
24 lobby?

1 A. That's correct.

2 Q. Approximately how long did this lobby
3 conference in the Horton case last at the side bar?

4 A. Five or six minutes, something like that.

5 Q. Prior to that lobby conference, had you had
6 discussions with counsel for the defendant with
7 respect to a possible plea and sentence?

8 A. Yes.

9 Q. And as a result of those discussions, were
10 you able to come to any kind of agreed-upon
11 disposition?

12 A. No. Ms. Goldbach and I had spoken a few
13 times. She had approached me and asked if I would
14 consider probation on a case. And I said that it
15 was not within the range of possibilities, given the
16 serious nature of the charges.

17 Q. Prior to attending the lobby conference on
18 August 1st, had the district attorney's office made
19 a decision with respect to recommendation?

20 A. We did. The process by which a
21 recommendation is made is that the assistant
22 district attorney handling the case has to seek
23 approval from his or her supervisor. In this case
24 it was Mr. Deakin. And we would have to explain to

1 the supervisor what our reasons for recommending a
2 particular sentence would be, and then the two of us
3 would discuss together what an appropriate sentence
4 would be, taking into consideration all the relevant
5 factors, the serious nature of the charge, the
6 strength of the Commonwealth's case, the defendant's
7 prior record.

8 In this case David Deakin and I had met and
9 decided that, from the Commonwealth's perspective,
10 an 8 to 10 sentence would be an appropriate
11 recommendation for the DA's office to make.

12 Q. And what were the considerations of the
13 district attorney in making that recommendation?

14 A. We had a number of different factors that
15 we weighed. This was a very serious case from our
16 perspective, where the defendant was a stranger to
17 the child and where a weapon was used in order to
18 force the child to simulate a sex act. The child
19 was kidnapped. And that's a very serious felony as
20 well.

21 The case was extremely strong. The family
22 of the boy had been very cooperative with the
23 district attorney's office and were prepared to
24 follow through to trial. The defendant had made a

1 confession, essentially. We recovered from the car
2 that the boy was kidnapped in the weapon that was
3 used to force him to simulate this sex act.

4 We felt that this case was extremely
5 serious, and had the police basically not come onto
6 the scene by happenstance, we were concerned about
7 what would have happened had the child not been
8 rescued.

9 Q. At some time is it part of the procedure of
10 the district attorney's office to videotape an
11 interview with the victim?

12 A. Absolutely.

13 Q. And the victim was how old in this case?

14 A. When the incident -- when the crime
15 occurred, the victim was 11-1/2. He was in sixth
16 grade. By the time we indicted the case, I believe
17 he had turned 12 already. And these videotapes are
18 for -- we use only in the child abuse unit and
19 they're for all child victims. As soon as an arrest
20 is made, that's how we try and interview them,
21 rather than have them -- that we preserve their
22 testimony, instead of having them speak to numbers
23 of different people as the process goes through.

24 Q. And is part of the consideration there the

1 fact that you're dealing with a victim and a child?

2 A. Absolutely. That is the consideration.

3 MR. WARE: Your Honor, at this time I would
4 like to play part of the videotape of the victim for
5 which purpose I would like to ask that the session
6 be conducted confidentially.

7 HEARING OFFICER DAHER: I agree. Mr.
8 Egbert?

9 MR. EGBERT: I object on the grounds of
10 relevance, Judge. The victim's statement on a
11 videotape has never been seen by Judge Lopez,
12 apparently, according to all the people who were
13 involved in this case, and does not go to any fact
14 being charged in this case with regard to Judge
15 Lopez.

16 HEARING OFFICER DAHER: Mr. Ware?

17 MR. WARE: I think it's relevant because
18 much has been made of the decision making in this
19 case by the Judge. And part of the basis for the
20 recommendation made by the district attorney's
21 office was indeed the victim. The pleas of guilty
22 to kidnapping, assault with intent to rape, assault
23 and battery with a dangerous weapon are all premised
24 upon the victim, and I think we ought to have the

1 victim's statement in the record of this proceeding
2 for whatever weight the Court believes is
3 appropriate to give it.

4 MR. EGBERT: Judge, quite frankly, I'm
5 thinking that we ought to have it in the
6 proceedings. There's not a standard of relevance
7 that I know about. There is not an issue that Mr.
8 Ware has pointed to that is before you that the
9 victim's statement on videotape has any relevance
10 to. I can guess it's attractive to the Judicial
11 Conduct Commission in terms of trying to influence
12 this Court, but it must be relevant to some issue in
13 this case. The Judge's sentence is not an issue in
14 this case. The JCC has admitted that --

15 HEARING OFFICER DAHER: Didn't you question
16 the fact whether there was any DNA testing of the
17 screwdriver during your examination of Judge Lopez?
18 And I think you made -- and whether she had
19 conducted -- and the reason why she didn't have a
20 hearing on it was because she felt that she didn't
21 want the boy to come back where the child could be
22 subjected to examination during the Court.
23 Overruled. You may have it in camera.

24 MR. EGBERT: Your Honor --

1 HEARING OFFICER DAHER: Your objection is
2 noted.

3 MR. EGBERT: In that case, I object to it
4 being done confidentially. And here are my reasons:
5 The Commonwealth of Massachusetts has
6 already in a public proceeding put before the public
7 and the press this young man's name and address.
8 The Commonwealth, through the district attorney's
9 office, has released that information to the press
10 already, and, therefore, there is no longer a reason
11 for confidentiality.

12 HEARING OFFICER DAHER: Mr. Ware?

13 MR. WARE: Your Honor --

14 HEARING OFFICER DAHER: The name was
15 mentioned during --

16 MR. WARE: Yes, that's true. The victim's
17 name was mentioned. I think it's fair to say that
18 that shouldn't have happened, but it did happen.
19 And so obviously since the date of the sentencing,
20 September 6th, 2000, the name has been out there.

21 This is something different; namely, a
22 visual representation of the child. Among other
23 things, he identifies the school he goes to. And I
24 think it's inappropriate to exacerbate the situation

1 by having his visual image available to the press
2 and the public. I think we ought to do whatever we
3 can remaining to provide some confidentiality for
4 this child.

5 MR. EGBERT: The problem with that, Judge,
6 is that this is a court of law, and it is not a
7 court of Mr. Ware's sensitivities. The
8 Commonwealth, through the district attorney's
9 office, released the name and the address. They had
10 the right, pursuant to statute, to go back to the
11 court and seek to expunge the court records under
12 the statute so that any mention of the name or
13 address or likeness of the alleged victim be
14 stricken and not made public. They opted not to do
15 that.

16 This is now the Year 2002. A great deal of
17 time has gone by. All these matters have become a
18 matter of public knowledge. And that matter has now
19 been waived. It is not for the Judicial Conduct
20 Commission to take up the obligations and duties of
21 the district attorney's office.

22 HEARING OFFICER DAHER: Your point --
23 finish it off. Last comment.

24 MR. WARE: My point is the same one I made.

1 That is to say, one thing that was never exposed was
2 the child's image. And that's what we're dealing
3 with here. It's true that his name is out there. I
4 can't do anything about that. But we can protect
5 his public image, picture of this child at this
6 point, and I'd like to do that if we can.

7 HEARING OFFICER DAHER: Overruled. Go
8 ahead. In camera proceedings.

9 MR. WARE: Your Honor, I think we need to
10 clear the courtroom at this point.

11 MR. EGBERT: I thought that your ruling was
12 that the cameras would be taken out of the
13 courtroom. Are you excluding the public?

14 HEARING OFFICER DAHER: I am. Objection
15 and exception noted.

16 MR. EGBERT: My objection. And you should
17 know, we are entitled to a public trial under the
18 statute and under the Constitution. And every time
19 a child testifies in a criminal proceeding, the
20 press is excluded, but the public is not.

21 HEARING OFFICER DAHER: He has a good point
22 there.

23 MR. WARE: Your Honor, this is not a
24 criminal proceeding, No. 1. No. 2, I will not ask

1 any questions while the tape is being played. I'll
2 reserve my questioning until such time as the public
3 and the cameras are readmitted.

4 MR. EGBERT: No.

5 HEARING OFFICER DAHER: Mr. Egbert has a
6 fine point there. The camera is solely excluded.
7 The public can come back in.

8 MR. WARE: Your Honor, at this time I offer
9 the videotape as Exhibit 9.

10 MR. EGBERT: I've already made my objection
11 to it.

12 (Document marked as Exhibit 9
13 moved into evidence)

14 MR. WARE: At this time, Your Honor, I'd
15 like to go ahead and play selections from the
16 videotape. I have excised delays in it.

17 MR. EGBERT: I object.

18 MR. WARE: I've put the whole tape in
19 evidence. I don't intend to play it all.

20 MR. EGBERT: Hold it for a moment. I
21 object to this kind of a creation of a document or
22 photograph or tape --

23 HEARING OFFICER DAHER: Mr. Egbert, that's
24 his way of presenting his case. You can play it

1 when --

2 MR. EGBERT: -- without me being provided
3 in advance what it is he's done. It is never
4 permitted in that fashion. If someone wishes to
5 create an exhibit, by excerpt or otherwise, for
6 showing in a courtroom, at all times it is provided
7 to counsel ahead of time so I can make an objection
8 of how I think it is unfair, incomplete, if it
9 leaves things out or the like. I'm simply not being
10 given the advanced knowledge of the use of these
11 types of exhibits in order for me to make
12 appropriate objections.

13 MR. WARE: Your Honor, it's simply too time
14 consuming to play all of the tape. Mr. Egbert can
15 rack up the tape and play it to his heart's content
16 on cross examination.

17 HEARING OFFICER DAHER: Overruled. You can
18 play it back again. This is Mr. Ware's way of
19 putting in his prima facie case. Mr. Egbert, if you
20 want to rack up the type and put it in, put it in.

21 MR. EGBERT: I object to the lack of
22 notice, and you can be assured it will all be
23 played.

24 HEARING OFFICER DAHER: No problem. We'll

1 look forward to it.
2 (Videotape playing.)
3 Q. How did you all get here?
4 A. A ride. We took the train.
5 Q. It's cold out today, isn't it?
6 A. Yes.
7 Q. It feels like it's winter, maybe some snow?
8 A. Yeah.
9 Q. Do you like the snow?
10 A. A little bit.
11 Q. What do you like to do when it snows?
12 A. I like to take the sled and go down hills
13 and stuff.
14 Q. Yeah. What hills do you sled?
15 A. Like the basketball court. When it gets
16 snow, like, it covers the stairs and it's slippery.
17 We can easily go down fast.
18 Q. Really. You don't even have to go far from
19 where you live?
20 A. No. It's only up the street.
21 Q. So remind me of your whole name.
22 A. (Edited)
23 Q. And how old are you?
24 A. Eleven.

1 Q. And when is your birthday?
2 A. January 4.
3 Q. So you'll be 12?
4 A. Right.
5 Q. And what grade is that for you?
6 A. Sixth.
7 Q. And what school do you go to?
8 A. Joseph W. McCormack.
9 Q. Is that a middle school?
10 A. Yes.
11 Q. And is this your first year in middle
12 school?
13 A. Yes.
14 Q. And how do you like it?
15 A. Hmm, it's okay.
16 Q. Yeah?
17 A. Yeah. Basically every day there's a fight,
18 but...
19 Q. So that's not okay?
20 A. (Shakes head.)
21 Q. How about your teachers?
22 A. The one teacher I don't like is Mr.
23 Guilderson. He gives too much homework, almost like
24 every day.

1 Q. What subject?

2 A. Science, sixth period.

3 Q. Uh-hum. What's a day like? Can you tell
4 me from the beginning to the end?

5 (Tape stopped.)

6 MR. EGBERT: Your Honor, as we're coming to
7 where the alleged victim is going to give evidence
8 concerning what happened on these events, I would
9 object on the grounds of hearsay. I take it that
10 it's being offered for the truth of what happened.

11 MR. WARE: It's not being offered for the
12 truth of what happened, Your Honor.

13 HEARING OFFICER DAHER: What's it being
14 offered for?

15 MR. WARE: It's being offered as evidence
16 that the district attorney had on the basis of which
17 they made a recommendation. It's being offered as
18 the videotape which Judge Lopez had available to her
19 if she wanted to look at it, and it's being offered
20 for purposes of confirming the child's age and the
21 circumstances on the basis of which the district
22 attorney's office proceeded.

23 MR. EGBERT: Your Honor, the basis of the
24 district attorney's office proceeding is not at

1 issue here. It is not something that's on trial
2 here or is relevant to anything you have to decide.
3 The defendant's age is his age. I don't know what
4 this tape does about it. They've already produced a
5 birth certificate, which has been uncontested by
6 anyone in this case. And obviously what he says on
7 here can only, as far as the incident, can only be
8 of interest to the Court, if at all, if it is in
9 fact being used for the truth of the statements
10 being recorded. Classic hearsay.

11 MR. WARE: Your Honor, it is every bit as
12 relevant as Mr. Egbert's cross examination of Judge
13 Lopez with respect to what she was told by Detective
14 Greene or what she was told by Anne Goldbach. And
15 this is simply the same kind of testimony, only it's
16 direct from the victim. The entire cross
17 examination --

18 HEARING OFFICER DAHER: How do you
19 distinguish that?

20 MR. EGBERT: The difference is that Judge
21 Lopez never saw this tape, and so it could not have
22 been something which affected her state of mind,
23 which is at issue here.

24 MR. WARE: The point is she had it

1 available.
2 MR. EGBERT: Mr. Ware's understanding of
3 criminal practice is so far deficient and so naive.
4 Just because it's in the DA's file doesn't make it
5 available to the Court. It was never introduced to
6 the Court, provided to the Court or offered to the
7 Court, and there's never been a hint by anyone in
8 this case that that was so, not that that would
9 change its character from hearsay, quite frankly.
10 HEARING OFFICER DAHER: Anything else?
11 MR. WARE: No, Your Honor.
12 HEARING OFFICER DAHER: Overruled. Let's
13 go. Your objection is noted.
14 MR. EGBERT: Your Honor, would the Court
15 then issue a subpoena for Mr. Suarez at the end of
16 the day?
17 HEARING OFFICER DAHER: For Mr. who?
18 MR. EGBERT: For the alleged victim.
19 HEARING OFFICER DAHER: I don't see any
20 reason why not. Mr. Ware, any objections?
21 MR. WARE: Yes, of course I object.
22 HEARING OFFICER DAHER: What's the
23 objection?
24 MR. WARE: Your Honor, this is typified by

1 counsel's remark that this is an alleged victim.
2 It's not an alleged victim. The defendant pled
3 guilty to five felonies in this case. That's
4 established. The Court accepted representations of
5 the district attorney. This is yet another effort
6 by Judge Lopez to retry the victim and to victimize
7 the victim. The child is not going to add anything
8 on cross examination.

9 HEARING OFFICER DAHER: That we don't know,
10 and that's the reason that he wants the subpoena.
11 You can't have it both ways, Mr. Ware.

12 MR. WARE: Fine, Your Honor.

13 HEARING OFFICER DAHER: Sustained. You'll
14 have that subpoena. Let's go.

15 (Videotape playing.)

16 Q. Do you know why you're here today?

17 A. Yes.

18 Q. Why is that?

19 A. Because of something that happened.

20 Q. Do you think you could tell me in your own
21 words from the beginning to the end about what it is
22 that happened?

23 A. Yeah. I was walking to my friend's house,
24 because I just got dropped off from UMass. And I

1 was like at the corner of the second street from my
2 house, and this lady said, "Oh, I know you from
3 somewhere. Will you help me look for my son?" I
4 was like, What? I ignored her. I kept walking.
5 The second time she was like, "Oh, I know you. Can
6 you help me find my son?" I was like, "I don't even
7 know you."

8 Q. Where was the lady?

9 A. Well, she was at the corner of the same
10 street that I was at.

11 Q. Was she standing on the street?

12 A. Hm-um, a car.

13 Q. She was in a car. And then what happened?

14 A. Then after that she said, I'll offer
15 somebody \$100, whoever helps me find my son. So I
16 was like umm, I know where he was. She's like, Can
17 you show me? At first I started walking, and then
18 she was like come in. And then she grabbed my hand
19 and sort of pulled me in.

20 Q. Into where?

21 A. The car. Then after she pulled me in the
22 car, she drove around and stopped. She locked the
23 doors and windows.

24 Q. How did she do that?

1 A. Like on her side of the car there's like a
2 lock thing that locks the doors and the windows.

3 Q. How do you know that she did that?

4 A. Because I tried to unlock the window and
5 run out, but it was locked. And then she took me to
6 some specific place I don't even know. Then she
7 said, "You can suck on my private part." I was
8 like, "No. I want to go home." She said, "You're
9 going to go home." I'm like, "I want to go home
10 now." And I started crying. Then after that she
11 was like -- oh, she grabbed my head, pulled me down
12 like this and said, Suck on my finger. And then
13 after that, she told me to suck on a screwdriver.

14 I was about to yell, and then she had that
15 same exact screwdriver up to my neck like this. And
16 then she was like, Oh, you're going to be quiet or
17 else I'll tell my husband to come out and kill you.
18 I was like, I want to go home. And then she
19 unbuttoned her pants.

20 Then after that the police came. Then they
21 seen what she was doing, and then after that they
22 seen my head pop up like and they took me out of the
23 car and asked me what happened. And I told them
24 what happened. And then after that they took me in

1 a car -- they arrested her. Then from there, I went
2 to a hospital and they did some like tests on me to
3 make sure I was all right.

4 Q. And did you talk to anybody there?

5 A. Yes, some detectives came.
6 (Pause in tape.)

7 Q. You just told me what happened, and I'm
8 going to back up and ask you a couple of more
9 questions about it. Okay?

10 A. Uh-hum.

11 Q. First of all, do you know when this was?

12 A. It was on a Saturday, about 8:00.

13 Q. In the evening?

14 A. Yes.

15 Q. You said you had just come from UMass?

16 A. Yeah.

17 Q. From a friend's house?

18 A. Yes, because I was coming from swimming. I
19 came from there. Then my coach dropped me off at
20 his house.

21 Q. I see.

22 A. Then --

23 Q. What's his name?

24 A. Domingos. Then from there, I kept walking

1 from his house because I was going to call my house
2 and then tell my mom I was on my way. So then after
3 that -- then I seen her.

4 Q. So what street were you actually on? Do
5 you know?

6 A. First I was on Holiday. I kept walking.
7 Then I got on Corona.

8 Q. Corona?

9 A. Yes.

10 Q. And is that when you saw her?

11 A. Yes.

12 Q. You said she asked you two different times
13 to help her find her son?

14 A. Yes.

15 Q. And could you see what kind of car she was
16 in?

17 A. It was a Toyota. It was like a gold -- I
18 don't really know what color it was, but it was sort
19 of like a goldish color.

20 Q. And how did you know it was a Toyota?

21 A. Because I seen the thing that said Toyota.

22 Q. Do you like to look at cars? Do you know
23 anything about cars?

24 A. Yes.

1 Q. So the first time -- was she on your side
2 of the street or the other side of the street in the
3 car?
4 A. She was on this side of the street.
5 Q. So when she asked you, were you next to the
6 driver window, or --
7 A. The passenger side. She was on the
8 driver's side, but she like leaned over.
9 Q. So she was speaking through the passenger
10 window?
11 A. Yes.
12 Q. So the first time what did you do?
13 A. I ignored her and kept walking.
14 Q. Okay. And then how far did you walk before
15 she asked you again?
16 A. Not that far. Like at least two -- seven
17 steps away.
18 Q. So not very much. And she asked you again?
19 A. Yes.
20 Q. And she said what?
21 A. She was looking for her son. And then she
22 said she had an award for \$100.
23 Q. Did this person look familiar to you, this
24 lady? Had you ever seen her before?

1 A. No.
2 Q. So you didn't know if she had a son or who
3 her son was?
4 A. No. She lied and said she was a dentist.
5 Q. So she said she would give you \$100, and
6 then what did you do after she said that?
7 A. Then I was like, I can help you look for
8 him, but at the time I didn't want to get in the
9 car. So she grabbed my hand and pulled me in the
10 car.
11 Q. Do you want some water?
12 A. Yes. Thank you.
13 Q. Does that help a little bit?
14 A. Yes.
15 Q. So you said you didn't want to get in the
16 car?
17 A. No. And then she like grabbed my hand and
18 started pulling me in the car. I tried to scream,
19 but nobody was around at the time.
20 Q. And she said she was --
21 A. Yes.
22 Q. So you got in the car?
23 A. Yes. And I tried to get out. She like
24 locked the windows.

1 Q. Did you say anything to her when she locked
2 the windows or when you were trying to get out?
3 A. No.
4 Q. And then what happened? How far did she
5 drive? For how long do you think?
6 A. At least down the street.
7 Q. And then what happened?
8 A. And then after that, she stopped the car.
9 I still tried to get out, but she locked the doors.
10 And then after, she took me to some place that I
11 don't even know, which was past the bowling alley.
12 Q. Do you know the name of the bowling alley?
13 A. It's called Two Strike.
14 Q. Had you been there before?
15 A. Yes.
16 Q. And she took you to a place --
17 A. Past it.
18 Q. And was the car still moving or did she
19 stop it?
20 A. She stopped -- well, after she took me, she
21 took me around like the place and then she stopped
22 the car.
23 Q. And when she stopped the car, where were
24 you?

1 A. I looked around, and I didn't even know
2 where I was.
3 Q. What did you say to her?
4 A. Like in front was these boxes and there was
5 a trailer-tractor.
6 Q. Then what happened?
7 A. Then she said, "While we're waiting, you
8 can suck on my private part." I was like "No. I
9 want to go home." She said, "Oh, you're going to go
10 home." I said, "No. I want to go home." She said,
11 "Oh, you're going to go home." Then I cried, and
12 then she put my head down and was, like, Oh, suck on
13 my finger.
14 Q. When she said suck on her finger, how do
15 you know it was her finger?
16 A. Because it was like rough.
17 Q. What else did you notice about it?
18 A. It had like a long nail. And I'm not
19 really sure if it was a girl or boy.
20 Q. Why do you say that?
21 A. Because she had like this deep voice.
22 Q. And you said that she said she wanted you
23 to suck on her finger?
24 A. Uh-hum.

1 Q. Did you suck on her finger?
2 A. Like she put her finger in my mouth. She
3 moved my head up and down like that.
4 Q. And was she saying anything to you when she
5 did that?
6 A. No.
7 Q. Do you know where her other hand was?
8 A. No.
9 Q. Was she making any noises or sounds at all?
10 A. Hm-um.
11 Q. How long do you think that was going on
12 for?
13 A. At least a minute. And then she told me to
14 suck on the screwdriver.
15 Q. What part of the screwdriver?
16 A. The part that you hold, the end.
17 Q. And what did you do with that screwdriver?
18 A. I was about to scream, but she put the
19 screwdriver up to my neck like that.
20 Q. But when she told you to suck on it, what
21 did she do with it?
22 A. She put my head back down and then she put
23 it in my mouth.
24 Q. And then what did she do?

1 A. Then after that, she --
2 Q. Did she move your head like she did with
3 her finger?
4 A. Yeah, she did the same thing.
5 Q. And did you hear her make any noises or
6 sounds or say anything while that was happening?
7 A. No.
8 Q. And then what happened?
9 A. Then she unbuttoned her pants. And then
10 like three minutes after that, the police came. And
11 then after that, she gave me \$50 and told me to be
12 quiet.
13 Q. When she pulled down her pants --
14 A. She unbuttoned her pants.
15 Q. She unbuttoned her pants. Okay. Did she
16 pull them down or just unbutton them?
17 A. Unbutton them.
18 Q. And could you see her pants unbuttoned?
19 A. Yes, because I --
20 Q. And what did you see when her pants were
21 unbuttoned?
22 A. Just the unbuttoned part. That's it.
23 Q. Did you see any part of her body?
24 A. No.

1 Q. When she put your head down like that,
2 where on her body were you?
3 A. Like right here (indicating).
4 Q. And where on her body? So where was her
5 finger?
6 A. Her finger was right here (indicating).
7 Q. And what part of her body? Was it closer
8 to the knees or the thigh or closer to the middle
9 part?
10 A. The thighs.
11 Q. The thighs. Can you point on your body how
12 close she was to her own, this part or --
13 A. Like right here (indicating).
14 Q. So her finger was right there, in that
15 part?
16 A. Yes.
17 Q. And when she unbuttoned them, her pants,
18 did she say why she was doing that?
19 A. No.
20 Q. Or what she wanted you to do?
21 A. Basically she wanted me to suck on her
22 private part.
23 Q. How did you know that?
24 A. Because she said, While we're waiting, she

1 can suck -- I can suck on her private part. And I
2 said, "No."
3 Q. That's what you said at the very beginning?
4 A. Yeah, when we stopped.
5 Q. Did she say anything about that again after
6 she had you suck on her finger and screwdriver?
7 A. Hm-um.
8 Q. What word did she use for private part?
9 A. The "p" word.
10 Q. You know what? I know sometimes it's hard
11 to say things, certain words, but it would be
12 helpful for me to know exactly the word she used.
13 It won't be hard for me to hear because I talk to
14 lots and lots of kids about lots of different
15 things. You can even write it down if you want to,
16 but I need to know the word she said.
17 A. (Writing.)
18 Q. Pussy. So that's the word she used?
19 A. Yeah.
20 Q. And she said, "I want you to suck on my
21 pussy"?
22 A. Uh-hum.
23 Q. Did she say that just that one time or did
24 she say it again during the time she had you there

1 in the car?
2 A. She said it one time.
3 Q. And when she unbuttoned her pants, did she
4 say anything to you about why she was unbuttoning
5 them?
6 A. No.
7 Q. And what happened before the police came?
8 A. Well, she got on top of me and told me to
9 be quiet.
10 Q. Why do you think she got on top of you?
11 A. Because she put the seat leaning back.
12 Q. The passenger seat?
13 A. Uh-hum.
14 Q. And when it was leaned back, what happened?
15 A. I sort of fell back, and then she got on
16 top of me right then.
17 Q. And what was she doing when she was on top
18 of you?
19 A. She told me to be quiet before I get my
20 husband to come out here and kill you.
21 Q. What was she doing? Where was her body?
22 A. On top of mine.
23 Q. And what was she doing with her hands and
24 the rest of her body when she was on top of you?

1 A. Her hands were like on the other side of
2 her. She told me to be quiet.
3 Q. Were her pants still unbuttoned?
4 A. Yes.
5 Q. And could you see her pussy or any part of
6 her?
7 A. Hum.
8 Q. And was her body -- what was her body doing
9 when she was on top of you?
10 A. Nothing. Just like --
11 Q. Staying still, moving or what?
12 A. Staying still.
13 Q. Why did she get on top of you?
14 A. Because she didn't want me to scream or
15 nothing like that.
16 Q. How do you know that?
17 A. She was like -- I was moving up and I was
18 trying to scream.
19 Q. And did she say anything about not
20 screaming?
21 A. Yeah. She said, "Be quiet."
22 Q. And had she seen the police yet?
23 A. She seen the car pull by -- behind her.
24 And then she noticed it was the police.

1 Q. Was she on top of you when she saw the
2 police?
3 A. Hm-um. Like three minutes before that, she
4 got on top -- she got off of me.
5 Q. So did anything else happen when she got on
6 top of you?
7 A. No.
8 Q. And then what happened?
9 A. Then the police came. And then they asked
10 me what happened.
11 Q. What door did they come to?
12 A. There were two police officers, so one came
13 on my side and one came on her side.
14 Q. And how did they speak to you? Because you
15 said everything was locked and the windows were up.
16 A. She unlocked the windows and the door, and
17 she rolled it down and asked the police, "What's
18 going on here?"
19 Q. And what did she say?
20 A. She said, "Oh, I'm looking for my son."
21 And they asked, "Who's that?" And she's like, "Oh,
22 that's my son's friend." And then the other police
23 officer told me to get out of the car. And then he
24 took me like where his car was -- where the car was.

1 And she told me to be quiet.
2 Q. Who told you --
3 A. Well, he asked me what happened, and I told
4 him.
5 Q. You told me earlier you had been crying.
6 Were you crying when the police came or had you
7 stopped by then?
8 A. I stopped.
9 (End of tape.)
10 HEARING OFFICER DAHER: Is that it?
11 MR. WARE: Yes, Your Honor.
12 BY MR. WARE:
13 Q. Ms. Joseph, when you were at the side bar
14 on August 1st, had you been -- let me rephrase that.
15 Prior to the side bar, you mentioned you
16 had some discussions about a possible plea by the
17 defendant; is that correct?
18 A. Yes.
19 Q. In advance of August 1st, had you been
20 given any kind of report or document which would
21 mitigate your view of the seriousness of the case?
22 A. No, I hadn't.
23 Q. Had you had any indication that there would
24 be any kind of report of a social worker of CPCS

1 prior to going to court on August 1st?

2 A. No.

3 Q. At some time during the course of the lobby
4 conference a report was produced; is that correct?

5 A. That's correct.

6 Q. And can you tell us what that report was?

7 A. Yes.

8 Q. And I put a cover sheet on the monitor.

9 MR. EGBERT: Before we put a cover sheet on
10 the monitor, I think we have to establish that she
11 had seen the report.

12 BY MR. WARE:

13 Q. Why don't you tell us what occurred with
14 respect to the report on August 1st.

15 A. On August 1st we went to the side bar to
16 discuss with the Judge the case. And I gave a
17 recitation of the facts. Ms. Goldbach then
18 indicated that the defendant was transgendered and
19 was dealing with issues surrounding that.

20 And the Judge then said to me, "Do you know
21 anything about transgendered people," words to that
22 effect, and I said, "Not that much." And then she
23 said -- the Judge said, "Well, I do. I have a house
24 in P-town. They're not violent." And at that point

1 around then Ms. Goldbach said, "I have a report here
2 to show the judge about the defendant." And she
3 said it was a social report or a psychosocial
4 report. And she had one copy of the report and she
5 handed it up to the Judge.

6 Q. Were you given a copy by defense counsel on
7 that occasion?

8 A. I wasn't given my own copy, no.

9 Q. At any time either before or since August
10 1st, have you had occasion to read the report?

11 A. I did not have an opportunity prior to
12 August 1st to read that report, but subsequent to
13 then I have had an opportunity.

14 Q. And let me direct your attention to Exhibit
15 3 --

16 MR. EGBERT: I object. What is of interest
17 is her knowledge at the time of these events, not
18 sometime later.

19 HEARING OFFICER DAHER: That's a good
20 point. Mr. Ware?

21 MR. WARE: Your Honor, I don't think that's
22 all that is relevant. I think the witness can
23 testify to the nature of these reports. She's seen
24 them before and I think that's what she's going to

1 testify to.

2 HEARING OFFICER DAHER: Sustained. Let's
3 go.

4 Q. Tell us what happened with respect to the
5 report on August 1st.

6 A. Anne Goldbach gave the Judge the report,
7 and I was standing at the side bar, kind of up the
8 stairs. So I was able to -- at an angle near the
9 Judge. And the Judge began to read the report
10 quickly. She read out loud a few statements that
11 were contained in the report that I thought
12 supported the Commonwealth's position. And then --
13 you know, she was looking over it. And then -- it
14 wasn't very long. She handed it back to Anne
15 Goldbach.

16 Q. And at any time were you given a copy?

17 A. I wasn't given a copy, no.

18 Q. You understood you could get a copy from
19 the defense counsel, I presume; is that right?

20 A. Yes.

21 Q. At any time did you seek to get a copy
22 following the bench conference?

23 A. No, I didn't.

24 Q. Now, had you seen reports of this kind

1 prior to August 1st? Not in this case, but in other
2 cases?

3 MR. EGBERT: How would she know, if she's
4 never seen this report?

5 HEARING OFFICER DAHER: Sustained.

6 MR. WARE: Your Honor, she's testified that
7 she read portions of the report on that date over
8 the Judge's shoulder. I think she's entirely
9 competent to say that these reports show up in other
10 cases.

11 MR. EGBERT: I don't think that was her
12 testimony at all.

13 HEARING OFFICER DAHER: She said she saw
14 one or two paragraphs and then Judge Lopez kept on
15 reading through it, leafing through it. But, Mr.
16 Ware, would that be sufficient to -- if you read one
17 or two paragraphs of a report, would that be -- you
18 don't know who prepared it...

19 BY MR. WARE:

20 Q. Did you see the signature page at some
21 point?

22 A. At some point when the Judge was flipping
23 through, yes, I did.

24 MR. EGBERT: What?

1 HEARING OFFICER DAHER: She did see the
2 signature at the bottom of the page at some point
3 when Judge Lopez was leafing through it.

4 MR. WARE: And let me have the signature
5 page up, please.

6 MR. EGBERT: Judge, I think we probably
7 ought to have a voir dire. This witness has
8 testified under oath on previous occasions twice
9 that she never saw the contents of the report at any
10 time on August 1st.

11 MR. WARE: I don't believe that's the case.
12 And that can be part of the cross examination, but
13 I'd like to proceed here.

14 HEARING OFFICER DAHER: At this particular
15 time I'm going to take it de bene. Show her the
16 last page and then subject to a motion to strike.
17 Go ahead. Show her the last page.

18 BY MR. WARE:

19 Q. Directing your attention to the signature
20 line, you indicated that you saw that on August 1st?

21 A. I saw it. I don't know that I was focused
22 or memorizing it or any of those things. I did see
23 that there was a signature page attached to the
24 report, yes.

1 Q. And how was this report represented to the
2 Court by Ms. Goldbach?

3 A. She said it was either a social report or a
4 psychosocial report that she was presenting as kind
5 of an aid in sentencing.

6 Q. Had you seen similar reports from CPCS in
7 the past?

8 A. Yes, many.

9 Q. And what did you understand on the basis of
10 that knowledge this report to be?

11 A. My understanding of these types of reports
12 is that they were sentencing recommendations that
13 supported CPCS's arguments in their advocacy that
14 would contain information which would support why a
15 particular defense attorney would request a specific
16 sentence.

17 Q. To your knowledge was there -- or to your
18 recollection was there any discussion about the
19 report dealing in any way with criminal
20 responsibility?

21 A. No, I don't believe criminal responsibility
22 came up at all.

23 Q. Was that a defense in this case, to your
24 knowledge?

1 A. It was not a defense in this case.

2 Q. Did you at any time seek to hire your own
3 social worker or psychologist or psychiatrist to
4 rebut the report?

5 A. No, we didn't.

6 Q. And will you tell us why not.

7 A. Realistically, that wasn't an option that
8 was available to the district attorney's office.
9 And on August 1st the case was still a defendant
10 that was charged with some crimes. He wasn't
11 raising a defense of criminal responsibility or
12 competence. The DA's office doesn't have a right to
13 speak with criminal defendants. They don't have to
14 speak to us or our agents. They don't have to speak
15 to the police, and they definitely wouldn't have to
16 speak to a social worker of our choosing or a
17 psychiatrist -- even an independent one -- at our
18 request.

19 Q. Let me direct you to Exhibit 16.

20 MR. WARE: Your Honor, may I approach the
21 witness?

22 HEARING OFFICER DAHER: Please.

23 Q. I'm going to place an exhibit book in front
24 of you and point out to you Exhibit 16 about which

1 there has been some testimony that it was a motion
2 for supplemental expenses allowed in May of 2000 for
3 funds for a psychiatrist or a psychologist.

4 A. Yes.

5 Q. Was the district attorney's office on
6 notice as a result of that motion that there would
7 be some kind of psychiatric defense?

8 A. At this point in May we were aware that
9 that was a possibility, but that just never went
10 anywhere. After Ms. Goldbach was provided with the
11 funds, there was no discussion of having the
12 defendant evaluated for competency. In fact, Ms.
13 Goldbach indicated that the defendant wanted to
14 plead guilty to the charges and that, therefore, a
15 psychiatric defense wouldn't be applicable.

16 Q. At any time did defense counsel indicate
17 that they were pursuing the psychiatric defense or
18 criminal responsibility defense?

19 A. Other than this motion?

20 Q. Yes.

21 A. No, that was never brought forward.

22 Q. During the course of the lobby conference
23 at the side bar, can you recall whether or not there
24 were any facts that were disputed by defense counsel

1 with respect to your characterization of the events
2 that occurred in November 1999?

3 A. There was no dispute to any of the material
4 facts. Ms. Goldbach mentioned, I believe at the
5 side bar, that Detective Greene had arrived at some
6 point on the scene, and that when he got there, the
7 boy wasn't as upset as I had said that he was when
8 the police found him. She also, I believe, said at
9 some point -- at some point during the facts, during
10 my recitation I said something like, "This was a
11 good boy and he was cooperative and credible." And
12 I think at some point Ms. Goldbach said, "I don't
13 think he's everything you're making him out to be";
14 something like that.

15 Q. What was the conversation with Judge Lopez?
16 That is to say, what did she say and what was the
17 result of the lobby conference?

18 A. On August 1st?

19 Q. Yes.

20 A. Well, I went over the facts of the
21 Commonwealth's case. I went over the reasons that
22 we felt it was a serious case and the strengths of
23 our case, including the defendant's partial
24 confession, the police happening on the crime scene,

1 so to speak, the recovery of the screwdriver, as
2 well as a condom; the strength of the detectives'
3 testimony in the case as well.

4 As I was going through my recitation, Judge
5 Lopez seemed to be looking at Anne Goldbach, saying,
6 "This sounds like a serious" --

7 MR. EGBERT: I object.

8 HEARING OFFICER DAHER: Sustained.

9 Stricken.

10 Q. What was said?

11 A. At that point when Ms. Goldbach began her
12 recitation of her reasons for requesting probation,
13 she brought up the fact that the defendant was
14 transgendered. And at that point is when Judge
15 Lopez said to me, "You don't know anything about
16 transgendered people, do you?" And I said, "Not
17 much." And she said, "Well, I do. I have a house
18 in P-town. They're not violent." And she then read
19 sections of that report -- Ms. Goldbach gave the
20 report and Judge Lopez read certain sections out
21 loud about the defendant's maturity issues, that she
22 was struggling with maturity issues and that she
23 should hang out with people her own age, something
24 like this.

1 And then the Judge indicated that she was
2 likely to -- she would give the defendant a
3 probationary sentence, along with conditions
4 there -- I forget exactly what it was called. It
5 was a community probation program. It was a new
6 program through the probation office where the
7 defendant would have to go to a community center and
8 check in for part of the time that the defendant was
9 on probation.

10 Q. Was there any further conversation at the
11 lobby conference that day?

12 A. Yes. At some point I said, "Judge, the
13 DA's office isn't going to agree to this on any
14 level. This is, in our perspective, a very serious
15 crime. There's been a lot of attention given to the
16 case. The victim's family feels strongly about the
17 case as well." And she said to me, "You can argue
18 and say whatever you want, but that's what I'm going
19 to do." I said, "Okay."

20 Q. Was that the conclusion of the lobby
21 conference?

22 A. Basically, yes.

23 Q. Following that conference did you speak
24 with anyone at the district attorney's office as

1 part of your official duties?

2 A. Yes. At some point I left the courthouse
3 and went back to my office, and I met with my
4 supervisor, David Deakin, to tell him what was going
5 on with my case -- my cases, and this case in
6 particular.

7 Q. What was the conversation with Mr. Deakin?

8 A. I went through just a brief refreshing for
9 him of the facts of the case and reminded him some
10 of the things that he and I had discussed. I told
11 him, "I can't believe this, but Judge Lopez is going
12 to be giving probation on this case." We talked
13 about notifying the victim's family. And as we
14 finished -- notifying the victim's family about what
15 was going to happen. And then when we were wrapping
16 up discussing the case, I said to him, "I don't know
17 if you want to inform Elizabeth Keeley," who was the
18 first assistant at the time, "or Jim Borghesani,"
19 who was the office -- I don't remember his exact
20 title. He was head of the press office -- "about
21 this." I said, "I leave that to you." And I went
22 back to my office.

23 Q. Prior to August 1st, 2000, had the press
24 office been involved in this case, to your

1 knowledge?

2 A. Yes. Shortly after the defendant's
3 arraignment in the Superior Court -- it may have
4 been right before his arraignment in Superior Court
5 -- I had received a call -- either a call or I had
6 seen them in the hallway -- and they asked me to
7 send to them -- that was back in January -- my
8 direct indictment packet and the relevant police
9 reports that go along with the case for their files.
10 And I would briefly update them on that case and
11 other cases as they went through the pipeline.

12 Q. Accordingly, in January of 2000 you sent
13 some basic information to the press office of the
14 district attorney's office?

15 A. Correct.

16 Q. Between the point in January at which you
17 sent that package of information and August 1st, had
18 you had any contact whatsoever with your own press
19 office regarding it?

20 A. Prior to August 1st?

21 Q. Yes.

22 A. I don't really remember. I'm sure that
23 there may have been. I don't have any specific
24 memory, other than giving them the direct indictment

1 packet that they had requested.

2 MR. EGBERT: Judge, I move to strike "I
3 don't have a recollection" --

4 HEARING OFFICER DAHER: Sustained. Go
5 ahead.

6 Q. Given the fact that you had sent an initial
7 packet of information to Mr. Borghesani's office,
8 did you typically follow a practice of keeping their
9 office updated?

10 A. I did. On cases that they had indicated to
11 me that they were following, either through my
12 supervisor, I would let them know if there was a
13 significant event, through Mr. Deakin in this case,
14 or sometimes I would send an email saying such and
15 such a case is set for trial. Or sometimes I would
16 just see them in the hallway or the elevator and I
17 would say, Oh, by the way, I don't know if you
18 remember such and such a case. That's coming up for
19 a trial date or something like that.

20 Q. Other than your conversation with Mr.
21 Deakin on August 1st -- incidentally, is that kind
22 of conversation with respect to the possibility of
23 press involvement part of your official obligation
24 in discussions with your superior?

1 A. Well, my official obligation is simply to
2 keep my superior updated. And in that situation, I
3 wanted him to remember that Elizabeth Keeley, who's
4 the first assistant, and Jim Borghesani had both
5 expressed an interest in this case at different
6 times. And my obligation is simply to report to Mr.
7 Deakin about these things.

8 Q. Other than reporting to Mr. Deakin on
9 August 1st, as you've described, did you have any
10 involvement whatsoever in press coverage that
11 occurred in this case?

12 A. No, I didn't.

13 Q. Did you, yourself, ever contact the press,
14 formally or informally?

15 A. No, I didn't.

16 Q. Did you ever have any conversation with any
17 member of the press or your press office on a sort
18 of background basis?

19 A. Before --

20 Q. On or after August 1st.

21 A. No, I didn't.

22 Q. Let me direct your attention to Exhibit 7
23 in the book before you, and I'd like to put it on
24 the monitor.

1 Do you recognize Exhibit 7, about which
2 there's been testimony that it was your office's
3 press release issued on August 3rd, 2000?

4 A. I recognize this, that this is the press
5 release, yes.

6 Q. And let me first direct your attention to
7 the upper left corner. And can we put that on
8 there? In the upper left-hand block it indicates
9 "Contact Information"; is that correct?

10 A. That's correct.

11 Q. And what was Mr. Borghesani's position at
12 that time?

13 A. I believe his official title was press
14 secretary to the district attorney.

15 Q. Who was David -- what was Mr. Falcone's
16 position at that time?

17 A. Mr. Falcone also worked in the press office
18 and he was an assistant to Mr. Borghesani.

19 Q. When did you first see Exhibit 7, the
20 Suffolk District Attorney's press release?

21 A. At some point I believe after the defendant
22 pleaded in September, though it may have been prior,
23 but it was definitely after August 4th that I saw
24 this.

1 Q. At the time it was issued on August 3rd,
2 you did not in the ordinary course get a copy of the
3 release even though it was your case?

4 A. No, we didn't.

5 Q. Did you participate in any way other than
6 what you've described in the decision to issue a
7 press release by the Suffolk County District
8 Attorney?

9 A. No, I didn't participate in any decisions
10 about press notification.

11 Q. Were you consulted by Elizabeth Keeley or
12 by Mr. Borghesani with respect to whether to issue a
13 press release?

14 A. No, they didn't consult with me.

15 Q. Directing your attention now to August 4th,
16 you went to court on that date, did you not?

17 A. I did.

18 Q. And will you tell us what you anticipated
19 was going to occur on August 4th.

20 A. That was the day that we had scheduled as a
21 plea date, where the defendant was scheduled to
22 plead guilty to the charges -- to all the charges.

23 Q. And tell us what occurred on August 4th
24 after you arrived.

1 A. I got there in the morning, and it was a
2 relatively slow day. It was a Friday. And I got
3 off the elevator --

4 Q. This is in the summer, obviously, August?
5 A. That's correct.
6 Q. And you're saying it was on a Friday?
7 A. Correct. I believe it was.
8 Q. Tell us what you heard and what you saw.
9 A. And when I got off the elevator, Ms.
10 Goldbach approached me and she was very upset. "How
11 could you do this?" Something like that. I didn't
12 know what she was talking about at all. And she
13 said, "The press is here." I may have said to her,
14 "They're not here for this." I didn't see any press
15 at that point. There was nobody in the lobby. But
16 I opened the courtroom, the session door, and I saw
17 a camera. And then I went to find out why they
18 were -- what the camera was there for. I didn't
19 believe it was for this case.

20 Q. What happened after that?
21 A. Well, I asked somebody in the courtroom,
22 "What are they here for? What case is this here
23 for?" And I don't remember who it was. It may have
24 been the clerk or a court officer who said to me,

1 "They're here for the Horton case." And I was
2 surprised. And then I said, "Oh." And Anne
3 Goldbach said, "I want to see the Judge. I want to
4 go see her before this morning. My client's very
5 upset." I said, "Okay. We can go see her this
6 morning before court starts."

7 Q. And did the two of you have a lobby
8 conference following that discussion with Judge
9 Lopez?

10 A. At some point the clerk or court officer
11 said to us -- I don't remember which one -- "The
12 Judge will see you now" or "You can come see the
13 Judge now."

14 Q. Tell us what occurred during the lobby
15 conference.

16 A. This time the lobby conference was in the
17 Judge's lobby. And we went into the Judge's lobby,
18 and I sat down and Ms. Goldbach sat down.

19 Q. I'm going to ask you to speak a little
20 louder and perhaps somewhat closer to the
21 microphone.

22 A. Sorry.

23 Q. And after you were in the lobby, what was
24 the conversation?

1 A. We went into the lobby. And Ms. Goldbach
2 was very upset. And Judge Lopez started to scream
3 at me. She said to me, "You're mean. You're very
4 mean. You belong in the suburbs." She repeated
5 that a few times. "You belong in the suburbs. You
6 don't get it. You have no credibility with me. I
7 don't want you appearing before me. You called the
8 press. You're mean. You're very young. You belong
9 in the suburbs." She kept repeating that. And Anne
10 Goldbach then said -- was very upset. She said that
11 her client had arrived that morning and got upset
12 when her client and the defendant's mother saw the
13 press, and that they then went to another part of
14 the building, they were so upset.

15 And the Judge just kept screaming at me.
16 And no decision was really reached about what the
17 next step was going to be. But it became clear that
18 it was time to leave the lobby conference. And I
19 began to walk out first with -- I thought Anne
20 Goldbach was right behind me.

21 Q. Before you walked out, did the Judge
22 inquire of you whether or not you had some role in
23 bringing the press to the proceeding?

24 A. She didn't inquire of me. She accused me

1 of calling the press. She said, "You called the
2 press, didn't you?" She was very angry. She was
3 very angry.

4 Q. Did she ask any questions to find out
5 whether in fact that was true?

6 A. She didn't ask any questions, no. She
7 simply accused me of doing it.

8 Q. And then you said you started to leave the
9 lobby. Did you hear the Judge say something else?

10 A. Yes. As we began to leave the lobby, the
11 Judge said, "Well, maybe we'll just continue the
12 case to when Ms. Joseph" -- I was leaving at that
13 point -- "to when Ms. Joseph is on vacation." She
14 said that to Anne Goldbach.

15 Q. And what did you then do?

16 A. I was really -- I was very upset. I had
17 never been spoken to like that in my life. I called
18 Elizabeth Keeley actually. I had never done that
19 either. I just picked up the phone in the courtroom
20 and said, "I need to talk to Elizabeth Keeley right
21 away," and I called her.

22 Q. What was Elizabeth Keeley's position at
23 that time?

24 A. She was the first assistant.

1 Q. Did you understand that this exchange or
2 these comments by Judge Lopez was simply a
3 professional discussion or disagreement between
4 counsel and the Court?

5 A. I didn't feel that that was a professional
6 disagreement at all. She was attacking me
7 personally. She told me I was mean and I belonged
8 in the suburbs. It was very personal. I was very
9 upset.

10 Q. During the course of the lobby conference
11 on August 4th, did the Judge inquire about how the
12 parties might solve what she perceived to be a
13 problem?

14 A. No, we didn't discuss that.

15 Q. What happened after you called Elizabeth
16 Keeley? What did you do?

17 A. I waited there for my supervisor, David
18 Deakin, to come to court.

19 Q. And tell us what happened.

20 A. He came shortly after my phone call to
21 Elizabeth Keeley, 15 minutes or so. And he and I
22 went outside the court -- I think the court still
23 hadn't started officially yet. And I filled him in
24 on everything that had been going on that morning.

1 And we then spoke to Anne Goldbach outside the
2 courtroom.

3 Q. And what was the nature of that
4 conversation?

5 A. Anne Goldbach said to David Deakin that she
6 was very upset, that my sentencing recommendation
7 was out of whack, that my charges were too serious
8 for what had happened. And David Deakin at that
9 point said -- I mean, he's the one who had
10 authorized both the sentencing recommendation and
11 the charges -- and said, you know, "You're barking
12 up the wrong tree with that. You're out of line."

13 And I got very upset at that point and
14 walked away. The Court still hadn't started. At
15 some point then we went back into the courtroom and
16 I went to Anne Goldbach. This was still in the
17 morning part of the day, before the lunch recess.
18 And I said, "Should we choose a date now? If the
19 case is going to get continued, let's get a date."
20 And she said, "Oh, I don't know if the case is
21 getting continued. Let's just see what happens." I
22 said, "Okay, we won't choose a date." And we waited
23 until the lunch recess and the case wasn't called at
24 that point.

1 Q. Following that, at some time on August 4th
2 was the case in fact called?

3 A. Towards the end of the afternoon, Mr.
4 Deakin -- the case was not officially called. Mr.
5 Deakin asked that the case be called. He got up in
6 court and said, "Can you call the Horton case,
7 please," to the clerk.

8 Q. Let me direct your attention to what's been
9 marked as Exhibit 42, which is a transcript of the
10 proceedings.

11 When the proceedings began -- feel free to
12 use that to whatever extent you want -- did the
13 Judge say that she was going to continue the case?

14 A. She said she would continue the case after
15 Mr. Deakin asked that the case be called.

16 Q. Yes.

17 A. Yes.

18 Q. And what did the Judge say as a reason for
19 that?

20 A. She said she had a number of bails to do
21 that afternoon.

22 Q. Specifically she said, I take it, according
23 to the transcript, "I have 16 bails and a lot of
24 other things to take care of"; is that correct?

1 A. That's correct.

2 Q. And what was the result of that? Was the
3 case in fact continued?

4 A. The case was continued.

5 Q. After the case was continued, was there
6 some colloquy between the Judge and your office,
7 specifically Mr. Deakin, with respect to that
8 continuance?

9 A. Yes.

10 Q. Tell us what occurred.

11 A. The Commonwealth at that point filed a
12 motion objecting to the continuance because it was a
13 child abuse case, and the victim's grandmother had
14 been in court all day, and she had been told by our
15 office that there would be a plea on that day. And
16 so we objected to the continuance. And then we
17 filed that motion with the Court. And Mr. Deakin
18 said, "We'd like written findings if you're going to
19 continue the case." And the Judge said, "Oh, you'll
20 get your written findings. You'll get them,"
21 something like that.

22 Q. What was the tone that the Judge used on
23 that occasion? How would you describe the Judge's
24 demeanor and tone?

1 A. She was very angry and her tone was
2 somewhat menacing. She said, "You'll get your
3 findings. You'll get them," something like that.

4 Q. When you objected to the continuance that
5 day, what was the reason for that objection from the
6 district attorney's standpoint?

7 A. In child abuse cases we work very closely
8 with the victim and their family. And the case was
9 on for -- set for a plea. One of the things we were
10 hoping is that even though the plea wasn't the
11 result that neither the DA's office or the victim's
12 family wanted, it would have resolved prior to the
13 boy starting school in the fall by putting it on in
14 August. And we had kind of told the family that was
15 what was going to happen. And that helps the family
16 give closure and be part of the process, allowing
17 them to participate in the process, if you will.

18 Q. In a child abuse case such as this one, who
19 are the victims?

20 MR. EGBERT: Are we talking about
21 statutorily?

22 HEARING OFFICER DAHER: Sustained.

23 Q. Whom did you view in this case as a victim?

24 MR. EGBERT: That's irrelevant.

1 MR. WARE: I don't think it is, Your Honor.
2 HEARING OFFICER DAHER: I'm going to
3 sustain it. The facts speak for themselves. Let's
4 go.

5 Q. What's the importance of the victim's
6 family, as you understood it, in making the
7 objection to the continuance?

8 MR. EGBERT: Is he talking statutorily or
9 in general, Your Honor --

10 HEARING OFFICER DAHER: Sustained.

11 Q. Other than your concern for the child
12 himself, did you have concern for the victim's
13 family in objecting to the continuance?

14 MR. EGBERT: Objection. Relevance.

15 A. I did --

16 MR. EGBERT: Objection.

17 HEARING OFFICER DAHER: That's again -- I
18 think the testimony is already in about her concern.
19 I'm going to overrule that. You can have it. Go
20 ahead.

21 A. I did. The child's grandmother, who was
22 the primary guardian of the boy, had been in court
23 the whole day. She had been told that this was
24 going to happen by our office. Our communication

1 with them, with the families of the children, is
2 something that helps give them some feelings of
3 control over the system and an ability to
4 participate in the system --

5 HEARING OFFICER DAHER: I think we've
6 already been over this. She wanted to bring
7 closure, have the kid start school. Go ahead.

8 Q. Based on your observations on August 4th
9 and the colloquy with the Court, what did you
10 understand the reason for this continuance to be?

11 A. My feelings --

12 MR. EGBERT: Objection. I'm not sure --

13 HEARING OFFICER DAHER: The word
14 "understanding" is somewhat of a generic term. If
15 you would, Mr. Ware, make it more specific.
16 Sustained, Mr. Egbert.

17 Q. What was your understanding of why the case
18 was being continued on August 4th?

19 MR. EGBERT: It's not what her
20 understanding of the matter is. It's what was done.

21 MR. WARE: I think her understanding is
22 highly relevant. It's part of the basis on which
23 the motion was filed in the first instance.

24 HEARING OFFICER DAHER: You mean the motion

1 in opposition to the continuance?

2 MR. WARE: Yes, Your Honor.

3 HEARING OFFICER DAHER: Overruled. Go
4 ahead.

5 MR. EGBERT: She hasn't testified to that.

6 HEARING OFFICER DAHER: He's going to get
7 to it. That was the motion that was filed late in
8 the afternoon, I take it, by the district attorney's
9 office, objecting to the continuance; is that
10 correct?

11 THE WITNESS: That's correct.

12 HEARING OFFICER DAHER: When -- for my
13 edification, when was that filed? Any idea what
14 time that was filed?

15 THE WITNESS: That was filed August 4th,
16 probably at about 2:30 or so, 3:00.

17 HEARING OFFICER DAHER: Go ahead.

18 BY MR. WARE:

19 Q. What did you understand the reason for the
20 continuance to be?

21 A. My understanding is that the case was being
22 continued because the Judge was upset that the press
23 was there. That was my basic understanding.

24 Q. Did the Judge at any time express any

1 concern that the defendant might be provoked by the
2 press attention or that the press attention would
3 somehow jeopardize her ability to get a guilty plea?
4 A. No, she didn't.
5 Q. Was there any conversation of that nature?
6 A. No, there wasn't.
7 Q. Directing your attention to Exhibit 17,
8 there's been testimony that this --
9 MR. EGBERT: Objection as to what there's
10 been testimony about. It's her testimony we're
11 looking for.
12 MR. WARE: The testimony is in evidence.
13 MR. EGBERT: Her testimony is in evidence,
14 but educating the witness is not.
15 HEARING OFFICER DAHER: Sustained.
16 Q. Do you recognize Exhibit 17?
17 A. I do.
18 Q. What is it?
19 A. That's the motion that I filed that
20 afternoon in court objecting to the continuance of
21 the Horton case.
22 Q. And in addition, Judge Lopez's order is
23 handwritten over the motion; is that correct?
24 A. That's correct.

1 Q. When did you first see Exhibit 17, the
2 order of the court?

3 A. It was faxed to the district attorney's
4 office on that afternoon at probably about 4:00 or
5 so.

6 MR. WARE: Your Honor, would this be a
7 convenient time to break for the morning?

8 HEARING OFFICER DAHER: Good idea. We'll
9 take a short recess.

10 (Recess)

11 (At side bar)

12 HEARING OFFICER DAHER: What's on the
13 agenda?

14 MR. WARE: Mr. Braceras had an exchange
15 with Mr. Mindich that I think we should probably put
16 on the record.

17 MR. EGBERT: Judge, I object to putting on
18 the record anything that relates to some exchange
19 between Mr. Braceras and Mr. Mindich.

20 HEARING OFFICER DAHER: I totally
21 understand your position, but I advised you -- I
22 told you, I counseled you last week. You said she
23 would try to have control over Mr. Mindich.

24 MR. EGBERT: What is relevant to these

1 proceedings? I don't know what this kind of
2 exchange supposedly is.

3 HEARING OFFICER DAHER: Let's hear it.
4 What happened?

5 MR. EGBERT: First of all, I want Mr.
6 Braceras put under oath.

7 HEARING OFFICER DAHER: No problem.
8 Harvey, swear him in.

9 MR. EGBERT: And I want the opportunity to
10 cross-examine at the appropriate time. This running
11 to the Court with every little remark from people in
12 their office and the hallways and the like, this is
13 like third grade.

14 HEARING OFFICER DAHER: Mr. Ware, do you
15 want me to talk to Mr. Mindich?

16 MR. EGBERT: I don't know what happened,
17 but what they should have done, instead of running
18 like little children to you, they should have come
19 to me and told me whatever the problem was.

20 Mr. Braceras in the past, if you want to
21 get into it, has baited Mr. Mindich and his counsel
22 on a number of occasions. He was taken to task for
23 it up in the SJC by Mr. Silverglate and Mr. Good
24 because of his conduct with Mr. Mindich and with

1 them. I don't want to get into this whole back and
2 forth; but if you want to start making records of
3 who does and does not have a big mouth around here,
4 then we'll do it, but it strikes me that unless it
5 has something to do with this case, it doesn't
6 belong in this record.

7 HEARING OFFICER DAHER: Mr. Ware?

8 MR. WARE: I disagree. I think that we
9 need to bring to the Court's attention any incident
10 which might in some way color the fairness of the
11 proceeding. I'm not asking for any ruling. But the
12 Court has repeatedly warned Mr. Mindich --

13 MR. EGBERT: Not about his conduct in the
14 hallway, which supposedly this is. This kind of
15 stuff seems to me is the same kind of stuff, quite
16 frankly, like that note you received where we went
17 around and by unknown people -- she put up with this
18 for two years with these unknown notes. Now, if the
19 Court wants to hear it, fine; but if we start making
20 a record of every comment in every hallway by every
21 person related to this --

22 HEARING OFFICER DAHER: Mr. Ware, listening
23 to Mr. Egbert, this thing could develop into a
24 situation where we're continuously --

1 MR. WARE: I don't think so, Your Honor.
2 His hysteria is overstated. What we're talking
3 about here is preserving for a record what goes on
4 here in the proceedings with the participants.

5 MR. EGBERT: Mr. Mindich is not a
6 participant. He is not a participant. Let's get
7 that straight.

8 HEARING OFFICER DAHER: I don't find him to
9 be a participant. Again, Mr. Ware, help me if it's
10 indicated -- do you want me to talk to Mr. Mindich
11 and try to cool this thing down?

12 MR. EGBERT: Why don't you have them come,
13 instead of like third graders to the teacher, have
14 them come to me and tell me what it is they claim he
15 said, and I'll talk to Mr. Mindich.

16 HEARING OFFICER DAHER: Four to five days
17 ago, Mr. Egbert, the Court advised, and Mr. Ware
18 stated many times, when he would go by Mr. Mindich,
19 Mr. Mindich would make derogatory remarks.

20 MR. EGBERT: Mr. Mindich has told me that
21 Mr. Ware has said the same thing. I was present
22 when Mr. Ware called Mr. Mindich a fucking asshole.
23 So if you want to go around with this, we'll go
24 around.

1 MR. WARE: That's an absolute lie and you
2 know it.
3 MR. EGBERT: It is not a lie and you know
4 it.
5 MR. WARE: (Inaudible comment)
6 MR. EGBERT: What did you say?
7 MR. WARE: I said, That's very
8 unprofessional.
9 MR. EGBERT: That's not what you said. The
10 record will reflect what you said.
11 Did you get that?
12 THE COURT REPORTER: I didn't hear what he
13 said.
14 MR. EGBERT: He said, "You're a weenie."
15 I want Mr. Braceras under oath.
16 (Roberto Braceras sworn)
17 HEARING OFFICER DAHER: Do you want to ask
18 him --
19 MR. WARE: No.
20 HEARING OFFICER DAHER: Your name for the
21 record, sir.
22 MR. BRACERAS: Roberto Braceras. For the
23 record, I would like to object to the statement by
24 Mr. Egbert that I was somehow taken to task before

1 the SJC. I argued before the SJC.
2 Second, it wasn't so much of an exchange.
3 I entered the restroom as Mr. Mindich was exiting
4 the restroom. He called me a piece of shit. That's
5 the sum and substance of it.
6 HEARING OFFICER DAHER: Do you want to put
7 him on the stand to cross-examine him? Do you want
8 to put him on? You're entitled to.
9 MR. EGBERT: I want to put him on. I don't
10 want to delay the case.
11 HEARING OFFICER DAHER: Do you want to put
12 him on right now?
13 MR. EGBERT: No. I want to investigate
14 what happened, because I'm sure there were witnesses
15 there. I was there with Mr. Mindich in the
16 bathroom. I left a moment before him. I want to
17 find out what happened.
18 HEARING OFFICER DAHER: Hopefully -- we
19 have Mr. Braceras' comment as to what transpired
20 between him and Mr. Mindich, and you have the right
21 to examine him at any time that you deem
22 satisfactory. Is that okay, gentlemen?
23 MR. WARE: Yes.
24 HEARING OFFICER DAHER: It's on record.

1 Thank you very much.
2 (End of side bar)
3 HEARING OFFICER DAHER: Do you want the
4 subpoena?
5 MR. EGBERT: I need you to authorize it.
6 HEARING OFFICER DAHER: It's authorized.
7 It's allowed.
8 BY MR. WARE:
9 Q. Ms. Joseph, do you have before you Exhibit
10 17, which is the order and the findings of Judge
11 Lopez?
12 A. Yes, I have it here.
13 Q. And directing your attention to the first
14 few lines of the order, it says in part, "ADA
15 Joseph, unhappy with the Court's disposition, called
16 the press in." Do you see that language?
17 A. I do.
18 Q. Other than what you've told us, did you
19 have any role whatsoever in, quote, calling in the
20 press?
21 A. No, I didn't.
22 Q. Have you ever, under any circumstance,
23 spoken to any member of the press with respect to
24 the Horton case?

1 A. With respect to the Horton case, never.
2 Q. Do you see the reference as the language
3 goes on, "Ms. Joseph has a habit of doing this"? Do
4 you see that?
5 A. I do.
6 Q. Am I correct that there were two cases
7 which preceded the Horton case by the name of
8 Calixte and Estrada in which you were the assistant
9 district attorney; is that correct?
10 A. That's correct.
11 Q. Are you familiar with those cases?
12 A. I am.
13 MR. WARE: Your Honor, I would like to
14 offer as Exhibit 66 the transcript of the Calixte
15 matter. The Estrada transcript is already in
16 evidence, but I have never offered Calixte, and I
17 would like to do that now as Exhibit 66.
18 MR. EGBERT: No objection.
19 HEARING OFFICER DAHER: If there's no
20 objection, we'll mark it now.
21 (Document marked as Exhibit 66
22 moved into evidence)
23 Q. Now, following the Calixte and Estrada
24 cases, there was an interview with you which was

1 written about in the Boston Globe; is that correct?

2 A. That's correct.

3 Q. Prior to either the Calixte case or the
4 Estrada case, did you give any interviews or have
5 any discussion with the press whatsoever?

6 A. About those cases?

7 Q. Yes.

8 A. Not to my memory, no.

9 Q. And had you been involved in any way in the
10 issuance of any press releases in those cases?

11 A. No.

12 Q. Following those two cases and their
13 disposition, what occurred with respect to any
14 publicity?

15 A. This was several years ago. I had two
16 pleas that were unaggrieved disparate
17 recommendations before Judge Lopez. In both of
18 those cases she gave probation over the
19 Commonwealth's objection. And after the plea was
20 over, I received a call from our press office saying
21 that a columnist from the Boston Globe wanted to
22 speak with me about the sentences in those cases and
23 told me that at a certain time I would get a call
24 from Ms. McNamara from the Boston Globe who was

1 doing an article about both of the sentences that
2 were given in those child abuse cases.

3 MR. WARE: Could we have the article?

4 Q. I've put on the monitor Exhibit 43. Do you
5 recognize that as an article written by Eileen
6 McNamara following those cases?

7 A. I do.

8 Q. And in the article you are quoted -- and
9 I'm going to put some language up. The first
10 quotation is as it appears on the monitor and says
11 in part, "If you say he's not a threat because he
12 just raped a girl in his own household, then can't
13 you also look at a car thief and say this guy's not
14 a threat to me because he only steals cars in poor
15 neighborhoods, or that guy is not a threat to me
16 because he only breaks into houses in rich
17 neighborhoods? Is that how we want to mete out
18 justice?"

19 Did you make any reference in there to
20 Judge Lopez or to what she had done?

21 A. No. I was commenting on simply the
22 sentence that we were recommending. In this case
23 this was a situation where the defendant was the
24 stepfather of the young girl, and he was raping her

1 repeatedly in their home. And the Commonwealth's
2 position was that he's a threat even if it was
3 just -- "just" in quotes -- his own stepdaughter;
4 that that is still criminal behavior that deserves
5 imprisonment.

6 Q. Can you tell us how the interview with Ms.
7 McNamara came about?

8 A. I was approached at some point -- I believe
9 it was Mr. Borghesani, but it may have been my
10 supervisor -- who said to me that Ms. McNamara
11 wanted to speak with me about both that case, the
12 Estrada case, as well as the Calixte case, which was
13 another case, both of which had pled out the week --
14 or within two weeks prior to her speaking to me.
15 And they told me that she would call me at a certain
16 time.

17 My memory is that I had someone sit with me
18 during the interview with Ms. McNamara. She asked
19 me a few questions about the facts of the case and
20 the basis for the DA's sentencing recommendation,
21 which I told her. And I did say those things.

22 Q. Were you instructed to give this interview?
23 That is to say, did you follow some procedure in
24 your office?

1 A. We're not allowed to be speaking to the
2 press at all, unless we're given prior clearance or
3 told to about a particular fact -- about particular
4 facts or a case. That's a very strong rule in the
5 district attorney's office.

6 And in this situation I was specifically
7 told by either my supervisor or Mr. Borghesani that
8 to speak to Ms. McNamara -- I mean, it wasn't an
9 order in a negative-type sense. They said, "She
10 wants to speak with you, would like to speak with
11 you, you have to speak with her," and I spoke with
12 her in my office.

13 Q. In addition to the quotation on the
14 monitor, you gave some additional quotation to Ms.
15 McNamara; is that correct?

16 A. I did.

17 Q. I won't read this, but does that appear to
18 be accurate with respect to what you said at that
19 time?

20 A. Yes. This was about my commentary on the
21 Calixte case. That was a situation where a mother
22 had been charged with beating her three children,
23 the most severe of which was the eldest daughter.
24 She had burned her and she had whipped her with

1 electrical cords so severely that it not only led to
2 permanent disfigurement on the child, but one of our
3 key pieces of evidence was the family's leather
4 couch had been completely destroyed by the chain
5 marks.

6 And in this situation the Commonwealth was
7 recommending a 5 to 7. And I commented on the
8 question of whether or not jail is the perfect
9 solution. And it isn't the perfect solution. But
10 the DA's office believes that it sends an important
11 message, and certain crimes need to be punished that
12 way.

13 Q. At no time during the course of this
14 interview did you mention Judge Lopez's name; is
15 that correct?

16 A. No, I didn't mention her name.

17 Q. You mentioned earlier that prior to the
18 Judge's continuance in the case and her issuance of
19 the findings on August 4th, there is no inquiry of
20 you about your role in any press with respect to the
21 Horton case, is that correct, on August 4th?

22 A. On August 4th in the lobby, when she was
23 screaming at me, she's screaming at me and she said,
24 "You called the press." And if I said anything at

1 all, I said, "I didn't call them." I didn't. And
2 she was screaming at me. That was our only -- I
3 didn't say anything in the lobby. It was our only
4 real exchange.

5 Q. Let me next direct you in the August 4th
6 order to language which says that you attempted to
7 embarrass and ridicule Mr. Horton. And I've put
8 that language on the monitor.

9 Did you at any time try to embarrass or
10 ridicule Mr. Horton?

11 A. God forbid, no, I wouldn't do that.

12 Q. Did you take any steps to bring attention
13 to his transgendered status as a way of embarrassing
14 him or creating leverage over the Judge?

15 A. No, no.

16 Q. Let me next direct you to Paragraph 8 of
17 the order, which says in part, "There is little or
18 no impact on the alleged victim." Do you see that?

19 A. I do.

20 Q. And did you agree with that finding?

21 A. No, I don't agree with that finding at all.
22 We had told the victim that this would be over and
23 that it would be over August 4th and that it would
24 be over before he started school.

1 Q. Who was present in court on August 4th on
2 behalf of the victim?

3 A. The victim chose not to come that day, but
4 his grandmother came that day.

5 Q. Was any inquiry made of the grandmother by
6 the Court, to your knowledge?

7 A. No. On August 4th?

8 Q. Yes.

9 A. No.

10 Q. And then let me next direct you to language
11 regarding the proceedings having been turned into a
12 circus.

13 Can you describe what you observed by way
14 of press or media present in the courthouse on
15 August 4th when you arrived.

16 A. Well, when I first got to court, as I
17 testified earlier, I didn't see anybody in the lobby
18 getting off the elevator, but in the courtroom there
19 was one camera, I believe, in the back of the
20 courtroom on the left. And there may have been a
21 few reporters as well.

22 Q. Did you see anything that looked
23 circus-like to you?

24 A. Not at all.

1 Q. Was there any chaos that you observed
2 regarding the press pushing and shoving cameras in
3 people's faces?

4 A. No. There was nothing like that.

5 Q. There was subsequently a representation
6 that the victim and his mother were photographed
7 coming off the elevator.

8 MR. EGBERT: Objection.

9 HEARING OFFICER DAHER: What's the
10 objection?

11 MR. EGBERT: Leading.

12 HEARING OFFICER DAHER: Sustained.

13 Q. Did you hear some representation in the
14 lobby with respect to cameras?

15 A. I did. At some point Anne Goldbach had
16 said that when the defendant and his mother had
17 arrived at court that morning, that the press was --
18 there was some -- I don't know if it was a verbal
19 altercation or -- the defendant got upset when he
20 saw the cameras. I wasn't there.

21 Q. You didn't observe any of that?

22 A. No, I didn't.

23 Q. Did anything occur in the courtroom itself
24 which was disruptive, as you understood the

1 proceedings, or to your observation --

2 A. No.

3 Q. -- at any time that day on August 4th?

4 A. Nothing that was disruptive, no.

5 Q. Did you make any observation of the press
6 acting in an unruly way?

7 A. No. They were there, but there was no
8 activity.

9 Q. Now, at some time this order was sent to
10 the media and published; isn't that correct?

11 A. Yes.

12 Q. And let me show you for a minute a document
13 attached to which, according to the testimony, there
14 was the order.

15 MR. EGBERT: I object to him telling the
16 witness what was according to testimony.

17 HEARING OFFICER DAHER: Sustained.

18 Q. You didn't see the order -- excuse me --
19 the fax in this case, is that correct, the fax
20 to Joan Kenney; is that right?

21 A. I didn't see what's on the monitor, no.

22 Q. Following that, was there indeed press
23 attention in which the order was quoted?

24 A. There was.

1 Q. Let me direct your attention to two
2 documents not yet marked, but which I would like to
3 mark for the moment for identification as Exhibit
4 15 -- that being a Boston Globe article on August
5 5th, 2000 -- and Exhibit 19, which is a Herald
6 article of August 5th, 2000.

7 MR. EGBERT: Do you have copies of those
8 for me, Mr. Ware?

9 MR. WARE: I do, yes.

10 (Documents marked as Exhibits 15 and
11 19 for identification)

12 Q. What are the articles -- let's start with
13 Exhibit 15 for identification. When did that
14 appear?

15 A. Those appeared the day after, on that
16 Saturday morning.

17 Q. Following the Judge's order of August 4th?

18 A. Correct.

19 Q. And Exhibit 19 also appeared that following
20 day; is that correct?

21 A. That's correct.

22 Q. You are identified in the Herald article
23 which quotes literally the findings about you; is
24 that correct?

1 A. That's correct.
2 MR. WARE: I offer those as Exhibits 15 and
3 19, Your Honor.
4 HEARING OFFICER DAHER: Mr. Egbert?
5 MR. EGBERT: My concern with all the
6 newspaper articles is what it's being offered for.
7 If it's being offered for the truth of the matter as
8 asserted in the articles, I object. If it's not,
9 I'd like to know what its relevance is.
10 MR. WARE: It's not being offered for the
11 truth, but it's certainly being offered to show
12 that, in fact, the Judge having issued this order as
13 a press release on August 4th, it had its intended
14 effect when it was published on August 5th quoting
15 the findings against Ms. Joseph.
16 MR. EGBERT: There's been no testimony in
17 this case that Judge Lopez issued this as a press
18 release.
19 MR. WARE: I don't agree with that.
20 HEARING OFFICER DAHER: Tell me.
21 MR. WARE: Well, the testimony was that the
22 Judge gave this to a clerk, at best, and that the
23 clerk was directed to fax it to Channels 4, 5, 7 and
24 56.

1 MR. EGBERT: There's been no testimony at
2 all like that.

3 HEARING OFFICER DAHER: Where did you get
4 this testimony from again? I have a pretty good
5 memory, and I don't recall that.

6 MR. WARE: Judge Lopez testified that she
7 gave the order to the clerk.

8 HEARING OFFICER DAHER: And instructed him
9 to have it faxed to 4, 5, 7 --

10 MR. WARE: I don't remember whether she
11 said she instructed him. She agreed that the clerk
12 didn't do it on his own.

13 MR. EGBERT: The clerk didn't do it at all.
14 We know from the fax that he sent it to Joan Kenney.

15 HEARING OFFICER DAHER: That's my memory of
16 it, Mr. Ware. You have the transcript here.

17 MR. WARE: Your Honor, a reasonable
18 inference from the testimony and the documents is
19 the Judge wrote the order, gave it to the clerk for
20 faxing to Joan Kenney, with instructions that it be
21 sent to the television stations, and that's what
22 happened. That's the purpose for which it's
23 offered.

24 HEARING OFFICER DAHER: That's an inference

1 that you want us to draw?

2 MR. WARE: Yes.

3 HEARING OFFICER DAHER: Mr. Egbert, it
4 would seem that that part is in. It's already been
5 testified to that Joan Kenney and -- I suspect the
6 inference could be that that's what Judge Lopez
7 expected Joan Kenney to do, to make the document
8 public.

9 MR. EGBERT: Judge, again, my objection is
10 to the hearsay nature of the article. The Court is
11 not -- if the Court is not accepting them for the
12 truth of any of the matters asserted in the
13 articles, then one has to direct one to say what
14 issue is it relevant to that these articles were
15 published.

16 If the Court is accepting it to say that
17 it's relevant to the issue that when someone starts
18 the ball rolling, basically, that it's going to get
19 to the press, I agree wholeheartedly, and,
20 therefore, on that assumption, I would offer them.

21 In other words, that's the reason. That
22 when someone starts the ball rolling with the press,
23 the press is going to get it and it's going to be
24 published.

1 HEARING OFFICER DAHER: Okay. But go
2 ahead. In that regard, these documents -- again, do
3 you have any other objections to it?

4 MR. EGBERT: Again, for that purpose,
5 because that's not for the truth of the documents.

6 HEARING OFFICER DAHER: Mark them. Let's
7 go.

8 (Documents marked as Exhibits 15 and
9 19 moved into evidence)

10 Q. At some time did you in fact attend a plea
11 and sentencing in the Horton case?

12 A. I did.

13 Q. When did that occur?

14 A. On September 6th.

15 Q. And tell us what happened on September 6th.

16 A. On September 6th David Deakin and I, along
17 with Kelly Noonan, who was the victim witness
18 advocate --

19 Q. I'm going to have to ask you to speak up.
20 Perhaps move a little closer to the microphone.

21 A. Okay. On September 6th David Deakin and
22 myself and Kelly Noonan, who was the victim witness
23 advocate on the case, went to the Middlesex Superior
24 Courthouse for plea.

1 And when we arrived at the courthouse,
2 there was a ton of cameras and press in the lobby
3 area. And we had to wait a while before the Judge
4 came on the bench. I didn't see the Judge, nor did
5 I see Ms. Goldbach that morning, nor did I see the
6 defendant at all, until we got into court,
7 eventually. The boy's grandmother was there that
8 day as well. I just don't remember how she got to
9 court that day. I don't remember if she came with
10 us or if she met us at the courthouse.

11 Q. At some time did you see the defendant and
12 Ms. Goldbach?

13 A. At some point, once court started, they
14 appeared.

15 Q. When you say "they appeared," where did
16 they enter or come from?

17 A. They came from a door that I didn't know --
18 I'm not familiar with the Middlesex Courthouse. A
19 back door. I don't know what door it was. They
20 came through a different entranceway into the
21 courtroom than I did or Mr. Deakin did.

22 Q. This was not the entry for the public?

23 A. Correct.

24 Q. And what then happened?

1 A. We then began the proceedings for the plea.
2 David Deakin -- we had a side bar, I
3 believe, just to begin the process rolling. And
4 then David Deakin read the facts into the record.

5 Q. Before Mr. Deakin began the recitation of
6 facts, did you and Mr. Deakin have some
7 understanding with respect to what each of your
8 roles would be on September 6th?

9 A. Yes.

10 Q. And what was your role to be?

11 A. I had asked Mr. Deakin to come and
12 participate in these proceedings with me, and he was
13 going to be the one who read the facts into the
14 record, and my job was going to be to read the
15 victim impact statement into the record.

16 Q. And tell us what happened in the hearing
17 after that, as you began the recitation of facts.

18 A. Mr. Deakin began the recitation of the
19 facts. And when he was done, he motioned to me to
20 read the impact statement into the record. And I
21 began to stand up and read the statement, and the
22 Judge -- I don't remember if she said "No" or if she
23 just looked at Mr. Deakin and said, "You read the
24 statement into the record," and I sat down again and

1 he read the statement into the record.

2 Q. What did you understand the Judge to be
3 telling you?

4 A. She didn't want to hear from me.

5 Q. And following that, was the victim impact
6 statement read by Mr. Deakin?

7 A. It was.

8 Q. I'm not going to go through the proceedings
9 themselves, which have been the subject of
10 videotape, but following September 6th -- the plea
11 was accepted on September 6th, was it not?

12 A. That's correct.

13 Q. And a sentence was imposed?

14 A. That's correct.

15 Q. One of the terms of the sentence had to do
16 with a community center; is that correct?

17 A. Originally, when we discussed this case on
18 August 4th, the terms of probation --

19 Q. Do you mean August 4th or August 1st? The
20 lobby conference or the --

21 A. August 1st, you're right. I'm sorry. On
22 August 1st the Judge had suggested that the form of
23 probation take place with this new -- I believe then
24 it was a newish-type probation program, the

1 community center probation, where the defendant
2 would have to check in to a community center on some
3 type of a regular basis to serve his probation.

4 But on September 6th, when we got to court,
5 that was no longer the condition. When the Judge
6 imposed the sentence, she removed that condition and
7 simply put him on general probation.

8 Q. What was your understanding of the reason
9 for that change?

10 A. The statute doesn't allow defendants of
11 serious violent crimes to participate in that
12 community center type probation. It wasn't an
13 option for him and that they wouldn't accept him.

14 Q. Because of the nature of the crimes to
15 which he had pled?

16 A. Yes.

17 Q. Now, following September 6th, the Judge
18 issued a statement. Did you see that at some time?

19 A. I don't know which statement that is.

20 Q. Let me direct your attention to Exhibit 4,
21 which I've put on the monitor.

22 Did you have occasion to see or read that
23 statement in whole or in part?

24 A. I did.

1 Q. The statement makes reference to "certain
2 facts before me, known by both the prosecutor and
3 defense attorney, that were part of the plea
4 conference and cannot be revealed by me, but which
5 would undoubtedly change the characterization of
6 this case as currently reported by some media
7 outlets." Do you see that language?

8 A. I do.

9 Q. Are you aware or were you in September of
10 2000 aware of any facts which you believed would
11 change the characterization of the case?

12 A. I am not aware of any facts which in any
13 way diminish the serious nature of what happened
14 that day to the boy, nor am I aware of any facts
15 that in any way call into question the defendant's
16 competency or criminal responsibility or ability to
17 make a full plea in this case.

18 MR. EGBERT: Judge, move to strike, and it
19 wasn't responsive to the question.

20 HEARING OFFICER DAHER: Mr. Ware?

21 MR. WARE: I think it was entirely
22 responsive, Your Honor.

23 HEARING OFFICER DAHER: Overruled. It
24 stays in. Go ahead.

1 Q. To your knowledge, were there any facts in
2 the Horton case which could not be disclosed?

3 A. Well, the child's name is supposed to be
4 protected by statute. And I know that that's
5 something that should not be disclosed. Other than
6 that, I don't know of any facts that could not be
7 disclosed to the public or to the Court.

8 Q. In the August 4th order, the Judge herself
9 disclosed what she termed as "psychological
10 disorder"; is that correct?

11 A. That's correct. In the findings she wrote
12 that the defendant suffers from a psychological
13 disorder.

14 Q. And she also disclosed what she termed a
15 "sexual identity disorder"?

16 A. That's correct.

17 Q. At some time did you learn of a Boston
18 Police detective who had come upon the scene at some
19 time after Mr. Horton's arrest?

20 A. Yes, I had.

21 MR. EGBERT: Objection to the conclusion
22 that it was after his arrest.

23 HEARING OFFICER DAHER: Sustained.

24 Q. Let me direct you to Exhibit 27 and

1 specifically to the police report. You had some
2 police report and other documents prior to
3 presentment to the grand jury and after, for that
4 matter; is that correct?

5 A. That's correct.

6 Q. Can you tell us whether the police report
7 identifies who was first on the scene?

8 A. Well, first on the scene were the two
9 police officers that observed the crime to be in
10 progress. And that's Officers Rose and Sweeney.

11 MR. WARE: Can you put up 36, please.

12 Q. The language in the report is, in part,
13 "Officers Rose and Sweeney observed an individual,
14 later identified as suspect Horton, Charles, in the
15 front driver's side of the vehicle, moving up and
16 down quickly"; is that correct?

17 A. Yes.

18 Q. And at the bottom of that page -- or at the
19 bottom of the next page there is reference to
20 Detective Greene having been there at some point; is
21 that correct?

22 A. I believe there is. Towards the end of the
23 report there's a mention of a Detective Greene
24 arriving -- being on the scene.

1 Q. And towards the top of that police report
2 is the reference to whether or not the victim was
3 crying at the time of this arrest?

4 A. There is. There's a mention that when the
5 police --

6 MR. WARE: 37, please.

7 A. There's a mention that when the police
8 approached the car and they saw the boy's head
9 bobbing up and down over the driver's seat, that
10 they then went -- one police officer went to each
11 side, and they saw that the boy was crying at that
12 point when they took him out of the car.

13 Q. And the language, in part, is what I put on
14 the monitor, pulled out of the report, which says,
15 "Victim was crying," correct?

16 A. Correct.

17 Q. About a third of the way down on Page 2?

18 A. Yes.

19 Q. Was there other description by the
20 officers -- incidentally, the report was written by
21 the investigating officer?

22 A. Yes, I believe so.

23 Q. And did you work with specific
24 representatives of the Boston Police Department both

1 during the investigative stage and presentment to
2 the grand jury?

3 A. Absolutely. Officers Rose and Sweeney both
4 testified before the grand jury, but it was, I
5 believe, Detective Keeley from the sexual assault
6 unit that became the detective in charge of the
7 case, and he handled the whole investigation of the
8 case. He was present, for example, at the
9 videotaping of the child.

10 Q. Was Detective Greene involved in the
11 investigation?

12 A. Not at all.

13 Q. At any time to your knowledge did Detective
14 Greene contact you about any information or give any
15 information to the investigating officers?

16 A. Not to my knowledge, no.

17 Q. At some point you mentioned earlier you had
18 conversations with Ms. Goldbach in which Detective
19 Greene was mentioned; is that right?

20 A. That's correct.

21 Q. Did you take account of this purported
22 information in some way?

23 A. She told me at one of the earlier dates of
24 this case, at one of the earlier status dates, that

1 I should speak to Detective Greene. I said, "Who is
2 he?" And she said, "He's a detective." And I said,
3 "Well, what does he have to offer?" And she said,
4 "Oh, he arrived at the scene at some point, and the
5 boy wasn't as upset as you think he was when
6 Detective Greene got there."

7 Q. And what did you do as a result?

8 A. I discussed that piece of information with
9 my supervisor, and we decided that there was nothing
10 there that merited investigating further.

11 Q. What was the basis of that decision?

12 A. The basis of that decision was twofold.
13 First of all, even if taken at 100 percent true
14 value that, in fact, Detective Greene arrived at the
15 scene and the boy wasn't as upset, at some point
16 after the initial arrest, even if that were 100
17 percent true -- and that's what Ms. Goldbach was
18 representing was the facts that Detective Greene
19 would testify to -- so that in no way exculpates or
20 was relevant to the case at all -- it seemed
21 perfectly logical that a detective arriving later on
22 at the scene, that the boy stopped crying at some
23 point. I didn't feel that that in any way bore on
24 the serious nature of the charges that were before

1 us.

2 The other reason is that I found it
3 somewhat strange that there would be a situation
4 where I was working with a number of different
5 police officers on this case and detectives, and
6 that none of them came to me with any other
7 information about a detective, that the detective
8 never tried himself to contact someone in the DA's
9 office, never came to court with Ms. Goldbach,
10 didn't write a memo.

11 Ms. Goldbach didn't provide me with any
12 statements that the detective had written or
13 anything like that. What she was representing,
14 which was probably true, was that at some point the
15 boy stopped crying, and that's when Detective Greene
16 saw him.

17 MR. WARE: May I have just a moment, Your
18 Honor.

19 (Pause)

20 BY MR. WARE:

21 Q. Did any of the Boston police officers, the
22 detective in charge of the investigation or Officers
23 Rose and Sweeney indicate at any time that they had
24 been contacted by this colleague with respect to

1 some information?

2 A. No.

3 MR. WARE: I have no further questions.
4 Thank you.

5 HEARING OFFICER DAHER: Mr. Egbert?

6 CROSS EXAMINATION

7 BY MR. EGBERT:

8 Q. Where do you work?

9 A. I currently work at my son's school.

10 Q. Where?

11 A. It's in Brookline.

12 Q. What's the name of the school?

13 MR. WARE: Objection. May we have a bench
14 conference?

15 HEARING OFFICER DAHER: Absolutely.

16 (At side bar)

17 MR. WARE: Your Honor, what school she
18 teaches at is not relevant. There are issues of her
19 own personal privacy here. It's been in the papers
20 for two years. She's been excoriated in the press
21 by the press quoting Judge Lopez's findings, and the
22 witness would like to have some protection with
23 respect to her identity -- not her identity --

24 MR. EGBERT: It goes to her background --

1 HEARING OFFICER DAHER: How about the
2 address?

3 MR. EGBERT: I want to know what school
4 she's working at. This is a public proceeding. She
5 gets no special treatment here. This is a witness.
6 There's no special treatment. There's no threat or
7 any protective issues. She's a witness. The JCC
8 seems to be perfectly happy to hold Judge Lopez up
9 to public ridicule and the like. The public has to
10 assess her like anyone else. She hasn't got any
11 special benefits here.

12 MR. WARE: This is not a criminal case.
13 It's a hearing before you. You have discretion
14 here. Judge Lopez elected to have this proceeding
15 and understood at the time --

16 MR. EGBERT: Wait a minute. Judge Lopez --

17 HEARING OFFICER DAHER: Let him finish.

18 MR. WARE: So the situation is very
19 different than a third-party witness.

20 MR. EGBERT: I don't know how Judge Lopez
21 elected to have these proceedings. The Judicial
22 Conduct Commission brought this.

23 HEARING OFFICER DAHER: It's probably a
24 repeat of what happened this morning when I wanted

1 to have the in-camera proceedings -- you wanted it
2 open, and I think Judge Lopez in her communication
3 to the JCC wanted a public --

4 MR. EGBERT: After the formal charges were
5 dropped, which by law are public.

6 MR. WARE: Nothing is to be gained by
7 disclosing the school at which this woman works.

8 MR. EGBERT: How do I know she even works
9 at a school?

10 MR. WARE: This is just defense counsel
11 histrionics to embarrass the witness and make her
12 life as difficult as possible.

13 MR. EGBERT: Embarrass her? She works at a
14 school.

15 HEARING OFFICER DAHER: Put it this way,
16 Mr. Ware. He doesn't need a court order in regards
17 to bringing in the victim -- not the victim, but the
18 boy is going to be here, I take it, tomorrow. I've
19 issued a subpoena. And I'm going to allow him to
20 get that from this witness. Everything is open.

21 (End of side bar)

22 BY MR. EGBERT:

23 Q. Where are you employed?

24 A. At a school in Brookline, Maimonides,

1 M-a-i-m-o-n-i-d-e-s.

2 Q. And what is your function there?

3 A. My title is executive vice president.

4 Q. When you left the DA's office to go be
5 executive vice president at the Maimonides School,
6 why was that? Why did you leave?

7 A. I left the DA's office for a number of
8 different reasons. The primary one was that this
9 was an opportunity to work at my son's school where
10 he is and to be involved in his life that way in a
11 professional capacity. That was the primary
12 motivator in terms of leaving the DA's office.

13 Q. Am I correct that there's nothing in your
14 function at the school which requires that you
15 practice law?

16 A. That's correct. I am not practicing law
17 there.

18 Q. In any way?

19 A. No.

20 Q. So at this point in your career you're not
21 utilizing your license to practice law, correct?

22 A. I pay my dues, but I'm not practicing law,
23 no.

24 Q. Now, you have given a number of statements

1 under oath in this matter; is that correct?

2 A. That's correct.

3 Q. And, in fact, you know -- have you ever
4 seen the formal charges in this case?

5 A. At some point, yes, I did. I saw that
6 there were a number of charges.

7 Q. And you know that there is reference in the
8 formal charges to Judge Lopez being biased against
9 you, as exhibited in the Estrada case? Do you
10 recall that?

11 A. I don't know if it was specific to the
12 Estrada case that the bias was being charged.

13 Q. You know that there was some allegation of
14 bias, and part of it included the interactions
15 between you and Judge Lopez in the Estrada case; is
16 that right?

17 A. Yes.

18 Q. And you have testified in the past on a
19 number of occasions that during the Estrada case
20 Judge Lopez screamed at you, correct?

21 A. That is correct.

22 Q. Terrified you, correct?

23 A. Yes.

24 Q. And screamed at you much like she screamed

1 at you in the lobby on August 4th, correct?
2 A. That's correct.
3 Q. Same tone of voice?
4 A. Yes, but very angry.
5 Q. Screaming, angry, out of control, correct?
6 A. She was angrier on August 4th. And she was
7 saying more things that were mean to me on August
8 4th than she did on the Estrada case, but the same
9 general theme --
10 Q. Same tone of voice, correct?
11 A. It was louder and angrier on August 4th.
12 Q. Didn't you testify under oath that in the
13 Estrada case -- by the way, you were prepared for
14 your testimony in this occasion most recently,
15 weren't you?
16 A. For today's hearing?
17 Q. Yes.
18 A. Yes.
19 Q. How many times did you meet with Mr. Ware
20 or his associates in preparing for this hearing?
21 A. I met with Mr. Ware three or four times.
22 Q. For what length of time?
23 A. I don't remember. An hour and a half each
24 time, something like that.

1 Q. And over what period of time?

2 A. I first met Mr. Ware only about a few
3 months ago, maybe two months ago.

4 Q. So in the past couple of months you spent
5 about four occasions with Mr. Ware, about an hour
6 and a half each, preparing for this testimony?

7 A. At the most, yes.

8 Q. And how about other members of his staff?

9 A. I began meeting with other members of his
10 staff a long time ago after this case --

11 Q. Let's deal with the time period after your
12 depositions in preparing for this hearing.

13 A. After the depositions at your office?

14 Q. That's correct.

15 A. Well, the depositions at your office were
16 in September. I don't know how many -- I think -- I
17 don't remember how many times I met with --

18 Q. Approximately.

19 A. Not much more than four or five with Mr.
20 Ware -- not much more than four -- I think Mr. Ware
21 was present other than one time. So maybe a fifth
22 time where I met with the other attorneys on the
23 case.

24 Q. And during those discussions, did you talk

1 about the Estrada case and Judge Lopez's having
2 screamed at you?

3 A. Yes.

4 Q. Now, I notice that you didn't talk about
5 that at all today in your direct examination,
6 correct?

7 A. That's correct.

8 Q. Have you heard a tape of the Estrada
9 hearings?

10 A. No, I haven't.

11 Q. Has anyone told you that they have a tape
12 and have listened to it?

13 A. No.

14 Q. But you agree with me that your testimony's
15 been consistently that Judge Lopez screamed at you
16 during the Estrada hearing, correct?

17 A. That's correct.

18 Q. Screamed at you and told you to sit down,
19 correct?

20 A. Correct.

21 Q. And yelled at you, in your words, in such a
22 way that no Judge has ever yelled at you before;
23 isn't that right?

24 A. She --

1 Q. Please answer my question.

2 A. I don't remember if I said specifically
3 that, "in no way that any other judge has ever
4 yelled at me before." But I know that when she
5 yelled at me about the Estrada case, it was very
6 significant. She was very upset with me, and I was
7 very humiliated by that experience on that day.

8 Q. You were terrified by that, weren't you?

9 A. I was scared of appearing before her and I
10 was terrified, given both what transpired that day
11 on the Estrada case as well as on subsequent issues
12 that had come up.

13 Q. Weren't your words that she screamed at you
14 in the Estrada case, screamed at you in such a way
15 that you were so terrified to appear before her
16 again; isn't that -- weren't those your words?

17 A. I don't believe so. I was terrified to
18 appear before her for a number of reasons, one of
19 them being her treatment of me during the Estrada
20 case. And the other was a conversation I had --

21 Q. Let's see if you can remember these words.
22 Do you recall testifying as follows: "Judge Lopez
23 screamed on the record that I was putting too many
24 details in the plea recommendation, in the

1 recitation of fact for the purposes of a colloquy
2 before the whole courtroom, and she just screamed.
3 I mean, it was awful. I haven't been reprimanded by
4 anyone before and definitely not by a judge in that
5 way or anything like that, never, ever, ever, ever."
6 Were those --

7 MR. WARE: Give us a page, please.

8 Q. Was that your testimony in prior --

9 HEARING OFFICER DAHER: What's your
10 objection?

11 MR. WARE: I would like the page that
12 counsel purports to be reading from.

13 HEARING OFFICER DAHER: Do you have a page?

14 MR. EGBERT: Page 13.

15 Q. Were those your words?

16 A. Yes. I mean, if you have them in a
17 transcript, yes, that's what I said.

18 Q. Well, you were testifying under oath?

19 A. Yes.

20 Q. Did you testify in such a fashion?

21 A. Yes.

22 Q. And that's your memory of it; that she
23 screamed at you on the record "in such a way that
24 she just screamed. I mean, it was awful," right?

1 A. It was awful, yes.

2 Q. And you haven't been reprimanded by anyone
3 before, and definitely not by a judge in that way or
4 anything like that, never, ever, ever, right?

5 A. That's correct.

6 MR. EGBERT: May we take a five-minute
7 recess, Judge?

8 HEARING OFFICER DAHER: Sure.

9 (Recess)

10 MR. EGBERT: Your Honor, at this time I
11 would offer two tape recordings. They are certified
12 copies from the Court as to the proceedings of
13 Commonwealth versus Estrada. They both contain the
14 certificates of authenticity from the Court. I
15 intend to play a portion of the tape. I have asked
16 counsel if he wanted to play the whole thing. He
17 said playing a portion is fine, and I'll provide him
18 with these if you'll release them at the break.

19 HEARING OFFICER DAHER: Mr. Ware, that's
20 your understanding?

21 MR. WARE: Yes, that's acceptable, so long
22 as I can remove them from the courtroom and listen
23 to them after court today.

24 HEARING OFFICER DAHER: Yes, no problem.

1 THE CLERK: Exhibits B and C.
2 MR. EGBERT: We should probably make them
3 one exhibit.
4 THE CLERK: B-1 and B-2.
5 (Documents marked as Exhibits B-1 and
6 B-2 moved into evidence)
7 BY MR. EGBERT:
8 Q. Before I get to the tape, I'd like you to
9 take a look at Exhibit 65, which is before you.
10 A. Yes.
11 Q. And that is a transcript of the proceedings
12 in Commonwealth versus Estrada, correct?
13 A. It is.
14 Q. And during those proceedings you at some
15 point were giving a statement of facts for which the
16 defendant was being asked to accept for purposes of
17 a plea; is that correct?
18 A. That's correct.
19 Q. And you understood at that time that those
20 were facts which you would prove at trial, correct?
21 A. Yes.
22 Q. And at some point in time there was a
23 statement by the Court that she would let you
24 continue to put the hyperbole on the record. Do you

1 recall that?

2 A. Could you just tell me what page that's on,
3 please?

4 Q. Do you recall it happening, first of all?

5 A. I recall you mentioned that once before --

6 Q. Do you recall defense counsel standing,
7 about to object, and the Judge responding that she
8 would permit you to put hyperbole on the record?

9 A. I don't have a memory of defense counsel
10 standing and objecting, but at the deposition at
11 your office you told me that that had happened.

12 Q. In any event -- it's unimportant. In any
13 event, what happened that you claimed was the
14 screaming on the record happened at the end of the
15 proceedings, correct?

16 A. That's correct.

17 Q. And what we're about to hear, as I
18 understand it, is what you claim is Judge Lopez
19 screaming on the record at you before a whole
20 courtroom. Screaming. It was just awful, correct?

21 A. Can you just tell me what page you're
22 reading from?

23 Q. That's your prior testimony, isn't it --

24 A. Could I see that?

1 Q. -- about this event?
2 A. Could I see that?
3 Q. Could you see your testimony?
4 A. Could I see it now?
5 Q. Yes. You'd like to see your prior
6 statements?
7 A. Please.
8 MR. EGBERT: May I approach?
9 HEARING OFFICER DAHER: Please.
10 MR. WARE: Could I have a page number?
11 MR. EGBERT: Page 13, same one.
12 Q. Why don't you read along with me. "Did
13 anything in particular happen during the Estrada
14 case which led you to believe that Judge Lopez was
15 angry with you or your office?" Correct? Did I
16 read that correctly?
17 A. Yes.
18 Q. And you said, "She screamed on the record
19 that I was putting too many details in the plea
20 recommendation, in the recitation of fact for the
21 purposes of the colloquy before the whole courtroom.
22 And she just screamed. I mean, it was awful."
23 Correct?
24 A. Yes.

1 Q. Your words?
2 A. Yes.
3 Q. That's what you say happened during the
4 Estrada case?
5 A. Yes.
6 Q. And then you went on to say, didn't you, "I
7 haven't been reprimanded by anyone before and
8 definitely not by a judge in that way or anything
9 like that, never, ever, ever, ever," right?
10 A. (Witness nods head.)
11 Q. Answer for the record, please.
12 A. Yes.
13 Q. I want you to listen to this tape. And it
14 should pick up on Page 17 of Exhibit 65.
15 (Tape playing)
16 Q. Let me stop you for a minute. You
17 understand that background noise is the interpreter?
18 A. Yes.
19 (Tape playing)
20 THE COURT: Tell me what your name is.
21 DENISE CRUZ: Denise Cruz.
22 THE COURT: Excuse me?
23 DENISE CRUZ: Denise Cruz.
24 THE COURT: And are you -- what's his

1 name -- Mr. Estrada's stepdaughter.
2 DENISE CRUZ: Yes.
3 THE COURT: And what would you like to see
4 happen with Mr. Estrada?
5 DENISE CRUZ: I just want him to have the
6 bracelet and just stay away for five years.
7 THE COURT: And why is it that you don't
8 want him to go to jail?
9 DENISE CRUZ: Because we can't pay the
10 house.
11 THE COURT: You can't pay the mortgage
12 if --
13 DENISE CRUZ: Mm-hmm.
14 THE COURT: -- he is incarcerated, right?
15 DENISE CRUZ: Mm-hmm.
16 THE COURT: Thank you very much.
17 COURT OFFICER: This way.
18 THE CLERK: Come forward, please.
19 Would you raise your right hand, ma'am.
20 Do you solemnly swear that the testimony
21 you're about to give this Court in the matter now in
22 hearing is the whole truth and nothing but the
23 truth, so help you God?
24 CARMEN ESTRADA: Yes.

1 THE CLERK: All right.
2 Take the witness stand and state your name
3 for the record, please.
4 THE COURT: Tell me your name.
5 CARMEN ESTRADA: Carmen Estrada.
6 THE COURT: What's your relationship to Mr.
7 Estrada?
8 CARMEN ESTRADA: I'm his wife.
9 THE COURT: Okay. Were you up here earlier
10 talking to me about what you thought should happen
11 to your husband?
12 CARMEN ESTRADA: Yes.
13 THE COURT: What is it that you think
14 should happen to your husband?
15 CARMEN ESTRADA: Well, we had agreed that
16 you was going to put him on house arrest.
17 THE COURT: That he was going to be placed
18 on house arrest?
19 CARMEN ESTRADA: Yes.
20 THE COURT: I told you at that --
21 CARMEN ESTRADA: And to stay -- yes.
22 THE COURT: -- that he was going to stay
23 away from --
24 CARMEN ESTRADA: From my kids --

1 THE COURT: -- the house --
2 CARMEN ESTRADA: -- and the house.
3 THE COURT: -- that you and your daughter
4 live in; is that right?
5 CARMEN ESTRADA: That's correct.
6 THE COURT: Do you understand that I'm
7 going to have Probation regularly check; and if he
8 is found in there, he'll be found in violation of
9 probation and be sent away to jail?
10 CARMEN ESTRADA: Yes, I understand.
11 THE COURT: Okay. And why is it that you
12 want this particular sentence in this case?
13 CARMEN ESTRADA: Well, Your Honor, we have
14 a house. And -- and like, that he could, you know,
15 keep his job. And it's a big responsibility for me
16 alone to deal with. I mean, I've got my grandson
17 and I have my daughter, and, you know --
18 THE COURT: And where do you work now?
19 CARMEN ESTRADA: I work at Burger King.
20 THE COURT: At Burger King?
21 CARMEN ESTRADA: Yes.
22 THE COURT: And does your daughter work?
23 CARMEN ESTRADA: Yes. She works with me.
24 THE COURT: She works with you?

1 CARMEN ESTRADA: Yes. She only works two
2 days.

3 THE COURT: Okay. All right. Thank you.

4 CARMEN ESTRADA: Okay.

5 THE COURT: He hasn't been sentenced yet.

6 THE CLERK: Right. Edward Estrada, please
7 rise, sir. On 97-11237, having pled guilty to the
8 charge of assault and battery, three offenses --
9 strike that -- four offenses of indecent assault and
10 battery on a child under 14, two offenses of rape of
11 child, the Court, in consideration of these
12 offenses, places you on straight probation for five
13 years under the supervision of the Probation
14 Department.

15 The conditions of your probation is that
16 you wear a bracelet for a period of five years. The
17 cost of that bracelet is \$200 up front and \$50 a
18 week.

19 A further condition of your probation is to
20 stay away from the home where your stepdaughter
21 lives.

22 May I have that address for the Probation
23 Department?

24 MS. JOSEPH: The address has already been

1 provided to the Probation Department.

2 THE CLERK: Okay. Thank you.

3 Further conditions of your probation are
4 that you pay the mortgage on that house, that you
5 continue in the sex offender's program at the New
6 England Medical Center, that you register as a sex
7 offender, that you pay a \$60 victim witness fee and
8 a \$45-a-month probation fee.

9 MR. REGAN: Your Honor, if I could address
10 the probation fee.

11 I don't believe that Mr. -- I think that
12 the \$45-a-month probation fee will just be too much
13 for Mr. Estrada, given all the financial
14 responsibilities. He will be paying \$200 to \$250 a
15 month for the bracelet.

16 THE COURT: Okay. So he can do the
17 alternative community service.

18 THE CLERK: Nine hours of community service
19 a month.

20 MR. REGAN: All right.

21 THE CLERK: Okay. Mr. Estrada, listen to
22 this, please. I'm going to have you sign this form.
23 That you register as a sex offender, and these are
24 your duties.

1 It is your duty to comply with all
2 applicable provisions listed below under General
3 Laws, Chapter 6, Section 178(C) and 1780.

4 If you intend to move to a different city
5 or town within Massachusetts, you must register in
6 person at the police station where you intend to
7 reside five days prior to establishing a new
8 residence.

9 If you intend to change your address within
10 a city or town, you must notify the police
11 department within five days prior to establishing
12 that address.

13 If you intend to move out of Massachusetts,
14 you must first apply with the Probation Department
15 listed below for out-of-state supervision under the
16 Interstate Compact Agreement.

17 If that request is approved by the
18 receiving state, you must notify that police
19 department within five days.

20 If you intend to change your work address,
21 you must notify the police department where you
22 reside in writing within five days to establish a
23 new work address.

24 You are required to appear in person at

1 least once a year at your local police department to
2 verify the registration information on file remains
3 true and accurate.

4 On each anniversary of your initial
5 registration date the Criminal History System Board
6 shall mail by certified mail and non-referable
7 verification form to your last reported address,
8 which you are required to sign and return within
9 five days of receipt of the Criminal History
10 Program.

11 Your duty to register as a sex offender
12 shall end in twenty years from this date.

13 Do you understand that, sir?

14 THE DEFENDANT: Yes.

15 THE CLERK: Okay. I'm going to hand this
16 back to you, sir. You are to sign and date it.

17 THE COURT: Ms. Joseph, let me just state
18 something on the record.

19 Next -- do you want to stand up. Stand up.

20 MS. JOSEPH: Yes, Your honor.

21 THE COURT: Okay. Next time that you are
22 going to recite facts to me on a plea, dispense with
23 hyperbole and subjective characterizations.

24 MS. JOSEPH: Yes, Your Honor.

1 THE COURT: Okay?
2 (End of tape)
3 BY MR. EGBERT:
4 Q. Is that the way you remember it?
5 A. Yes.
6 Q. Pardon?
7 A. Yes, it is.
8 Q. Screaming at you. Never been spoken to
9 like that before in your life. Horrified and
10 terrified from that.
11 A. She reprimanded me in an open courtroom and
12 humiliated me --
13 Q. Humiliated you? She told you to obey the
14 rules of Court. She told you not to provide
15 hyperbole, and she said it in a voice that was no
16 more raised than everything else she said that day;
17 isn't that right?
18 A. That's not how it appeared to me.
19 Q. Well, how it appeared to you, but how about
20 the true facts? You heard the tape, didn't you?
21 A. I did.
22 Q. That's exactly what happened in the
23 courtroom, isn't it?
24 A. Yes, it is.

1 Q. She wasn't screaming at you, was she?

2 A. I felt --

3 Q. You felt -- you've been a lawyer for seven
4 years in the DA's office, tried all these cases, and
5 you considered that to be screaming, intimidating
6 conduct of an Superior Court judge?

7 A. I do.

8 Q. Is that why you left to go to the
9 Maimonides School, because you couldn't handle it?

10 A. No.

11 Q. You didn't belong in those courtrooms?

12 A. No. I had an opportunity to work at my
13 son's school and to be with him on a regular basis
14 with hours that were much more friendly to being a
15 working mother. I was offered a significant salary
16 increase to take the position at the school.

17 And there was an impending election in the
18 office. That's not always a pleasant thing to be
19 around when you're working and there's an election
20 going on. It seemed like an opportunity for me at
21 that point to take an interesting career change.
22 And I learned a lot in my new job and benefited from
23 being with my children that way.

24 Q. But as we leave this subject for the

1 moment, on that day, before that judge in that case,
2 you considered that conduct by Judge Lopez
3 terrifying to you?

4 A. No, Mr. Egbert. I've tried to explain that
5 what I found terrifying was a combination of this
6 conduct, as well as conversation I had at some point
7 when I returned -- this was prior to my maternity
8 leave with my daughter. And --

9 Q. Now, you testified --

10 MR. WARE: Objection.

11 HEARING OFFICER DAHER: Let her finish.

12 Q. Conversation with whom?

13 A. I had a conversation when I returned, long
14 after this case, with another judge, who indicated
15 to me --

16 MR. EGBERT: Well, I object to conversation
17 with some other judge.

18 HEARING OFFICER DAHER: Sustained.

19 A. And those factors together --

20 MR. WARE: Defense counsel opened the door
21 twice on this issue, and I think the witness is
22 entitled to state why she believed that she was --
23 why she was overwrought by this exchange with the
24 Judge.

1 MR. EGBERT: She was pretty clear in her
2 prior testimony, Judge. It was all about that tape
3 and that event.

4 MR. WARE: We don't need Mr. Egbert's
5 testimony; we need the witness's testimony.

6 HEARING OFFICER DAHER: Again, I'm going to
7 sustain the objection. Go ahead.

8 MR. WARE: Are you permitting her to finish
9 the answer, Your Honor?

10 HEARING OFFICER DAHER: She can finish the
11 answer.

12 MR. EGBERT: As to her conversation with
13 another Judge?

14 HEARING OFFICER DAHER: Yes.

15 A. It was a combination of factors that made
16 me scared to appear before Judge Lopez, both how she
17 treated me that day on the Estrada plea, but also
18 another Judge informed me a few months later that
19 Judge Lopez was very mad at me about the media
20 coverage on this case. And because of that --

21 HEARING OFFICER DAHER: Mr. Ware, I'm going
22 to strike that part as to the media coverage. If
23 we're talking about something that -- she was angry
24 at her because -- I'm going to strike that.

1 MR. WARE: This goes to the witness' state
2 of mind. It's not offered for the truth.

3 HEARING OFFICER DAHER: We're going through
4 her state of mind during the course of the
5 proceeding which she tells her, avoid hyperbole and
6 subjective characterizations. Now we're talking
7 about a time thereafter. I have to be relevant.
8 I'm going to strike it. Go ahead, Mr. Egbert.

9 BY MR. EGBERT:

10 Q. Now, after the Estrada case and the Calixte
11 case, which by the way, as to both of those cases,
12 it's your opinion, isn't it, that it could go either
13 way; there was rationale basis to give probation; is
14 that correct?

15 A. I guess I don't know what you mean by the
16 question when you say it could go either way.

17 I think that there are a variety of
18 different options available, from probation to house
19 time to different amounts of imprisonment. And in
20 that sense, a judge obviously has discretion to
21 impose a sentence that he or she believes is fair
22 and just, given the circumstances.

23 The DA's position and my personal position
24 was that both on the Calixte case and the Estrada

1 case, that some form of imprisonment was merited.

2 Q. Well, does your position and the DA's
3 position, for that matter, take into account the
4 fact that you are an advocate on one side of the
5 equation?

6 A. The DA's office understands that we
7 advocate for certain aspects of justice and we take
8 into consideration a number of different factors --

9 Q. Please answer my question. Are you on one
10 side of the equation? Do you know something about
11 what's called the adversary system of justice?

12 A. Yes.

13 Q. Do you know what that is?

14 A. Well --

15 Q. Do you know what it is?

16 A. I understand that litigation in court
17 involves opposing parties with a judge making
18 rulings.

19 Q. And do you understand that your position as
20 a district attorney or assistant district attorney
21 is to present the position of the Commonwealth
22 through the DA's office?

23 A. Yes, we represent the people.

24 Q. You represent the people.

1 The defense counsel's position is to
2 represent their client, correct?
3 A. Absolutely.
4 Q. And various factors go into all of the
5 judgments that get made, correct, and then a judge
6 makes the call?
7 A. Correct.
8 Q. Oftentimes judges disagree with you; is
9 that right?
10 A. Of course.
11 Q. Oftentimes they disagree with defense
12 counsel?
13 A. Of course.
14 Q. It doesn't make you right or them wrong,
15 correct?
16 A. That's correct.
17 Q. It just makes your opinion that they're
18 wrong; isn't that correct?
19 A. No.
20 Q. Well, do you ever recommend sentences that
21 you think are inappropriate?
22 A. No.
23 Q. So every time a judge goes against what you
24 do, you think they've done something that's

1 inappropriate; isn't that right?

2 A. No, that's not the case. I think that
3 sentencing is an area where educated and reasonable
4 people can disagree on some of the numbers. And I
5 think that that happens regularly. It doesn't make
6 someone wrong and someone right.

7 Q. Well, is it, in fact, -- was it, in fact,
8 your testimony on previous occasions that you could
9 see how the Calixte case could end up with just
10 probation?

11 A. I understood why the Judge chose probation,
12 given -- I understood that. I don't see how it
13 happened.

14 Q. Pardon me?

15 A. It wasn't the recommendation of the DA's
16 office.

17 Q. Well, just because it wasn't the
18 recommendations of the DA's office doesn't mean that
19 you couldn't see the rationale behind it, correct?
20 You weren't that closed-mind?

21 A. No, I understood there was a rationale
22 behind the decision.

23 Q. And you have testified in the past that
24 when the Calixte case is reviewed, you could see the

1 reason for giving Ms. Calixte probation, correct?
2 A. Can you please show me where that is.
3 Q. I'm talking as a general concept for the
4 moment. Do you have any memory of saying things
5 like that?
6 A. If you could show me, that would be
7 helpful.
8 Q. You just met with your counsel during the
9 break -- by the way, you have counsel present here,
10 don't you?
11 A. Yes, I do.
12 Q. Your own lawyer, right?
13 A. Yes.
14 Q. Not one from the Judicial Conduct
15 Commission?
16 A. That's correct.
17 Q. You have your own lawyer, Mr. Kiley,
18 present?
19 A. That's correct.
20 Q. Mr. Kiley sat here and told you to make
21 sure you read all these transcripts we talked about
22 before you answer a question, correct?
23 MR. WARE: Objection.
24 HEARING OFFICER DAHER: Overruled.

1 Q. He said it right out in the open, didn't
2 he?

3 MR. WARE: This has to be the subject of a
4 privilege between the lawyer and Ms. Joseph.

5 HEARING OFFICER DAHER: Overruled. Go
6 ahead. Very simple question.

7 Q. Is that right?

8 A. He told me to think before I answered.

9 THE COURT: That part is in.

10 Q. Do you have a memory of saying the
11 following words: "Like in the Calixte case, for
12 example, one could say, well, first of all, it's the
13 mother of the child. Women generally don't get
14 state prison sentences. It's more men. Just a fact
15 of life. And she didn't have a record and it's her
16 mother and that kind. She has some mental issues or
17 whatever it is. So I could see an argument being
18 made for no jail time. I could see it."

19 Do you recall testifying in that fashion
20 under oath in the past?

21 A. Yes, I do.

22 Q. And then do you also recall testifying as
23 follows: "In Estrada, you could argue, Well, the
24 girl herself got up and said, 'I don't want him to

1 go to jail.' Even there there's a hook for her to
2 hang her hat on in that sense," correct?

3 A. Yes.

4 Q. And when you say "her hat," you were
5 talking about Judge Lopez's hat, correct?

6 A. Correct.

7 Q. Because in Estrada, in fact, in the case
8 you were just referring to, in Estrada, in fact, the
9 alleged victim or the victim in the case actually
10 asked the Judge not to put him in jail?

11 A. That's correct. The 12 year old
12 child asked the judge --

13 Q. Whatever the age was, the alleged victim
14 asked that he not be put in jail?

15 A. The victim asked the Judge not to place him
16 in jail.

17 Q. And the victim's mother asked that the
18 defendant not be put in jail?

19 A. That's correct.

20 Q. And the defendant had been receiving
21 therapy for a mental illness or a mental condition
22 with regard to sexual offenders, correct?

23 A. I don't know if it was a mental condition.
24 I know he was in a group setting, receiving

1 counseling for being a pedophile of some sort or
2 being attracted to young girls.
3 Q. He was receiving counseling for that,
4 wasn't he?
5 A. Therapy, yes.
6 Q. Sexual therapy --
7 A. I don't really know the nature of the
8 therapy. If it was sexual therapy, I don't really
9 know --
10 Q. Did you investigate that therapy --
11 A. Yes.
12 Q. -- before you -- strike that.
13 Did you investigate what therapy he was
14 receiving before you decided what sentence to seek?
15 A. Absolutely. A number of the people that we
16 had planned to call as witnesses were somehow --
17 Q. My question is, first of all -- did you
18 investigate? That's my question.
19 A. Therapy --
20 Q. What therapy he was receiving?
21 A. In the Estrada case?
22 Q. Yes.
23 A. Yes, we did.
24 Q. So you understood what it was?

1 A. At the time, yes.

2 Q. And you understood that the victim was
3 asking Judge Lopez not to send Mr. Estrada to jail?

4 A. That's correct.

5 Q. As was the victim's mother?

6 A. Correct.

7 Q. And you indicated, as you said in that
8 transcript, that you could understand the basis for
9 that or the hook, as you described it, correct?

10 A. I believe what I said is that I could
11 understand an argument being made to support
12 probation, yes.

13 Q. And in fact, on the two cases that you had
14 with Judge Lopez before the Horton case, you
15 advocated strongly on behalf of the Commonwealth for
16 the position you thought was appropriate, correct?

17 A. Correct.

18 Q. And on each of those occasions you and the
19 Commonwealth sought substantial jail time, correct?

20 A. In the Estrada case we were recommending an
21 eight to ten, and I think that is substantial jail
22 time. The five to seven on the Calixte case -- I
23 don't know if five to seven is considered
24 substantial. It's jail time.

1 Q. Have you ever done five to seven years in a
2 state prison?
3 A. No, I haven't.
4 Q. Most people might consider that
5 substantial?
6 A. I believe that might be the case.
7 Q. In any event, you were recommending or
8 advocating on the behalf of your client a particular
9 position, correct?
10 A. We don't have a client.
11 Q. You don't? Aren't the people who elect the
12 district attorney your client?
13 A. I think the DA's office represents all the
14 people in the Commonwealth.
15 Q. The common good?
16 A. The public.
17 HEARING OFFICER DAHER: Let her finish.
18 A. We represent the public, yes.
19 Q. You represent the public as you see it?
20 A. Yes.
21 Q. And as you determine what's good or bad for
22 the public?
23 A. The DA's office takes into a number of
24 factors what would be good in a given sentence when

1 a crime is committed.

2 Q. One of those factors is getting elected,
3 correct?

4 A. I don't believe that that plays a role in
5 sentencing recommendations.

6 Q. You don't think that the DA's office
7 considers their electability and re-electability in
8 making judgments as to what kinds of sentence to
9 seek in criminal cases?

10 A. The line ADAs and their supervisors who are
11 making the sentencing recommendations -- and in
12 fact, all the way up to the first assistant, aren't
13 elected officials. We're appointed.

14 Q. Appointed by whom?

15 A. By the district attorney.

16 Q. Who is what? Elected, correct?

17 A. That's correct.

18 Q. In any event, this common good that you all
19 represent in the DA's office, you advance positions
20 to judges, correct?

21 A. That's correct.

22 Q. And at least you've admitted that many
23 judges disagree many times with the statement of
24 common good that you bring to them on behalf of the

1 DA's office, correct?

2 A. Many judges disagree with our sentencing
3 recommendations.

4 Q. Which you think is for the common good?

5 A. Which we believe represents -- yes.

6 Q. And so these judges disagree with you on
7 what is for the common good, correct?

8 A. They agree generally -- they agree in part
9 with the Commonwealth's position that they can
10 understand what our basis of a recommendation is.
11 And they can make assessments based on that. I
12 don't know that a judge has ever said, "I disagree
13 with your opinion of the common good."

14 Q. By their adopting the recommendation other
15 than yours or lesser than yours, they are in fact
16 stating that they think in a particular case your
17 recommendation is not as appropriate as the one they
18 are going to impose?

19 A. That's correct.

20 Q. That happens all the time?

21 A. Absolutely.

22 Q. In courts throughout the Commonwealth,
23 correct?

24 A. Yes.

1 Q. And you would expect that to happen,
2 wouldn't you?
3 A. Yes.
4 Q. And in fact, defendants and defense
5 attorneys also make recommendations from their
6 points of view in criminal cases; is that correct?
7 A. Of course.
8 Q. And many times those are rejected or at
9 somewhere some compromised position is brought by
10 many judges in many cases every day in our criminal
11 courtroom, correct?
12 A. Absolutely.
13 Q. But in this particular instance with Judge
14 Lopez, you had two cases before her where your
15 recommendations were rejected?
16 A. That's correct.
17 Q. Your advocacy did not work, correct?
18 A. That's correct.
19 Q. You did not achieve what you hoped to
20 achieve?
21 A. That's correct.
22 Q. And you, at least as far as your function
23 as a DA, you considered yourself to have failed in
24 that regard as to accomplishing what you wanted to

1 accomplish; isn't that right?

2 A. No, because I believed that I --

3 Q. Is it right? Yes or no?

4 A. It's not right.

5 Q. And when you perceived Judge Lopez talking
6 to you -- strike that -- screaming at you in the
7 Estrada case, do you think that might have been the
8 subject of you personalizing a little bit as to what
9 was going on?

10 A. At the end of the day she humiliated me by
11 reprimanding me in open court. There was a
12 defendant who plead guilty to raping his
13 stepdaughter, and he wasn't in any way reprimanded
14 or anything. And she was motioning to me -- she was
15 yelling at me in court --

16 Q. Yelling at you?

17 HEARING OFFICER DAHER: Let her finish.
18 You asked the question.

19 A. That's how it felt.

20 Q. So in other words, she was talking to you
21 about your conduct as a lawyer, as an officer of the
22 Court, correct?

23 A. Yes.

24 Q. And she was talking to you about

1 appropriate court procedures; is that correct?
2 A. She was talking to me about -- she wasn't
3 giving a class about appropriate court procedures --
4 Q. She was telling you in her courtroom not to
5 use hyperbole when discussing a statement of facts
6 which a defendant has to agree to for purposes of a
7 plea, correct?
8 A. She was being critical to my --
9 Q. Can't you take any criticism?
10 MR. WARE: Objection.
11 HEARING OFFICER DAHER: Wait a minute, Mr.
12 Egbert. You've asked her three times, and every
13 time she tries to respond you interrupt her.
14 Finish. Go ahead.
15 A. She was being critical of what I believed
16 was doing my job by putting the facts on the record
17 which she didn't like to hear. And she reprimanded
18 me to not put the facts on the record.
19 Q. Let me ask you a question. She reprimanded
20 you to not put the facts on the record or hyperbole
21 on the record?
22 A. Well, she called it hyperbole. I believe
23 that I was -- the factual part of a plea
24 recommendation at that point serves two purposes.

1 One is to supply the facts for the purposes of the
2 defendant to plead guilty. And the other is to
3 allow the district attorney's office to advocate
4 their position in why they felt certain sentences is
5 important.

6 Q. You know that's not true, don't you? You
7 just made that up, didn't you?

8 A. No.

9 Q. So you think when a judge says, "Mr.
10 District Attorney" or "Ms. District Attorney, put on
11 the record the facts which the Commonwealth intends
12 to prove at trial, because I'm going to ask the
13 defendant whether or not he admits or denies those
14 facts," that you have then the right to put on
15 opinion, hyperbole, and the like, as if it was a
16 sentencing argument?

17 A. I believe that in plea colloquies, the DA's
18 office has an opportunity when we put the facts on
19 the record to also use that opportunity that the
20 facts speak for themselves in some cases as the
21 basis for a sentencing recommendation, and that
22 those two things can be commingled in our advocacy.

23 HEARING OFFICER DAHER: Mr. Egbert, how
24 much longer do you have with this witness?

1 MR. EGBERT: A long time, Judge.
2 HEARING OFFICER DAHER: Do you want to
3 break? It's 1:00.
4 MR. EGBERT: Sure.
5 HEARING OFFICER DAHER: Mr. Ware, is that
6 okay with you?
7 MR. WARE: Yes, Your Honor.
8 HEARING OFFICER DAHER: See you tomorrow
9 morning.
10 (Whereupon, the hearing was
11 adjourned at 1:00 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 VI, is a true and accurate transcription of my stenographic notes taken on Monday, December 2, 2002, 2002.

Jane M. Williamson
Registered Merit Reporter

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