

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
Tuesday, December 3, 2002
9:37 a.m.

(Jane M. Williamson, Registered Merit Reporter)
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(At side bar)

MR. EGBERT: As to yesterday's allegations by Mr. Braceras as it relates to Mr. Mindich, I have investigated the matter. Mr. Mindich denies it vociferously. More importantly, because I recall the events, I and Mr. Mindich had happened to go to the men's room at the same time yesterday. I left. When I left, present in the men's room was a photographer from Channel 7, Alan McNaughton. Mr. McNaughton apparently stayed and chatted with Mr. Mindich as they were leaving the men's room. Mr. McNaughton informs me that he followed Mr. Mindich out of the bathroom. He was within a body's length of him on the way out and at no time did he ever hear Mr. Mindich say anything like, "You're a piece of shit" to Mr. Braceras.

HEARING OFFICER DAHER: Anything else?

MR. EGBERT: No.

HEARING OFFICER DAHER: I tried to revisit my notes, and this bothered me. Page 133, when Ms. Joseph was asked about the judge and some judge told her something and you objected on the grounds it would be hearsay, I would like to revisit that

1 question and hear argument on it. I may allow it if
2 the other judge is going to be subpoenaed to
3 testify.

4 MR. WARE: Well, I can make --

5 HEARING OFFICER DAHER: I'll try to revisit
6 my ruling, but that bothered me last night.

7 MR. WARE: As an offer of proof, I would
8 say what the witness was going to say was that when
9 she came back from her maternity leave of several
10 months --

11 HEARING OFFICER DAHER: That would be whom?

12 MR. WARE: When Ms. Joseph came back from
13 her maternity leave --

14 MR. EGBERT: Why don't we speak at a
15 level --

16 MR. WARE: If Ms. Joseph had been permitted
17 to answer the question, my representation is she
18 would have said that she was out of the district
19 attorney's office for a period of months after
20 Calixte and Estrada; and that when she came back,
21 she had a conversation with Judge --

22 MR. EGBERT: Is this a side bar or is it
23 broadcast journalism?

24 HEARING OFFICER DAHER: Tone it down.

1 MR. WARE: She had a conversation with
2 Judge Ball, in which Judge Ball advised her
3 Judge Lopez remained quite angry with her, and
4 that was one of the factors which caused her to
5 feel --
6 HEARING OFFICER DAHER: Is she being
7 subpoenaed?
8 MR. WARE: No.
9 MR. EGBERT: They know Judge Ball says that
10 didn't occur. They've interviewed Judge Ball.
11 Judge Ball told them that that conversation didn't
12 take place as they represented.
13 MR. WARE: That's absolutely flatly
14 incorrect.
15 MR. EGBERT: That's correct.
16 MR. WARE: But I do not intend to drag a
17 bunch of judges in here.
18 HEARING OFFICER DAHER: So the ruling
19 stands.
20 Do you want to add anything?
21 MR. WARE: No, Your Honor.
22 HEARING OFFICER DAHER: The ruling
23 stands.
24 (End of side bar)

LEORA JOSEPH, Previously Sworn
CROSS EXAMINATION, Resumed

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BY MR. EGBERT:

Q. Good morning, Ms. Joseph. I have a cold and so if you have trouble hearing me or understanding me, I want you to feel free to stop me and tell me. Would you do that?

A. Okay.

Q. I want to go back to the Estrada and Calixte cases in a general sense.

A. Okay.

Q. You were counsel for the Commonwealth in those cases?

A. That's correct.

Q. And as to each of those cases they were lobbied so called or a lobby?

A. There were separate conferences on both of those cases, yes.

Q. Can we refer to those as lobby conferences or plea conferences? We're talking about the same thing?

A. Yes.

Q. So both of those were in the First Session of the court?

1 A. Yes.

2 Q. Now, at each of those -- and let's start
3 with Calixte -- you understood that by the time the
4 Calixte case came around, that Judge Lopez was or
5 had a custom of conducting lobby conferences at the
6 side bar, correct?

7 A. Yes.

8 Q. And that that custom was throughout her
9 First Session tenure; is that correct?

10 A. That was my experience with her.

11 Q. And you didn't learn of any other procedure
12 that she had, correct?

13 A. No.

14 Q. And you knew before you went in on Calixte,
15 because you obviously prepared for a lobby
16 conference on that day, didn't you?

17 A. Yes.

18 Q. So you had made preparation on what to do
19 and what to present at this lobby conference in
20 order to present the most or the best position for
21 the Commonwealth in regard to Commonwealth versus
22 Calixte, right?

23 A. Yes.

24 Q. So you prepared yourself on the facts,

1 correct?
2 A. Correct.
3 Q. And you prepared yourself on the law,
4 correct?
5 A. Correct.
6 Q. And you prepared yourself on sentencing and
7 sentencing alternatives, correct?
8 A. Correct.
9 Q. So when you got there that day, you went up
10 to side bar in a prearranged fashion with defense
11 counsel, correct?
12 A. Yes.
13 Q. In order to discuss the Calixte case and
14 what the Court would do about it on a pleading.
15 A. Correct.
16 Q. And that's something that's done, to your
17 knowledge, every day throughout the Superior Court
18 system, correct?
19 A. Correct.
20 Q. Nothing unusual about it at all.
21 A. Correct.
22 Q. Some judges have it in their chambers,
23 correct?
24 A. Correct.

1 Q. Some have it at the side bar, correct?
2 A. Yes.
3 Q. Some have it -- I suppose that's about the
4 only two places. Can you think of another?
5 A. I can't.
6 Q. Some have court reporters take it down,
7 correct?
8 A. Yes.
9 Q. Some don't.
10 A. That's correct.
11 Q. And that's been the process in the Superior
12 Court since you've known it.
13 A. That's what I've known, yes.
14 Q. Now, on the Calixte matter, you came and
15 the process was, wasn't it typical, that the Judge
16 asked the Commonwealth, Tell me what the case is
17 about, correct?
18 A. Yes.
19 Q. And then the Commonwealth then through you
20 provides the Court with factual underpinnings of the
21 case, the charges, and anything about the case that
22 the Commonwealth thinks is appropriate for
23 consideration in determining the appropriate
24 sentence, correct?

1 A. Yes.

2 Q. And you did that in Calixte.

3 A. Yes.

4 Q. And you laid out for Judge Lopez during the
5 Calixte conference everything you wanted to say
6 about the possible plea, the Commonwealth's
7 position, and what the Commonwealth thought ought to
8 happen.

9 A. I don't have a clear memory of every single
10 thing I said the day of the lobby conference. I
11 don't know if there may have been some facts that
12 were nonmaterial that I omitted, but I tried to be
13 as thorough as possible in laying out the facts that
14 support the charges and in presenting any other
15 evidence in the Calixte case that would support the
16 Commonwealth's recommendation.

17 Q. So you don't remember if you left out some
18 nonmaterial facts, right?

19 A. I don't remember.

20 Q. But it's fair to say, isn't it, that you
21 were given a full and fair opportunity by Judge
22 Lopez to discuss your recommendation, to discuss the
23 facts, and to tell her anything you chose to tell
24 her which may be informative as relates to the

1 Calixte sentence?
2 A. Yes.
3 Q. You weren't stopped in your presentation at
4 any time?
5 A. I don't remember being stopped, no.
6 Q. And you would remember that, wouldn't you?
7 A. I think I would.
8 Q. You weren't inhibited or prohibited from
9 presenting any information to her at all.
10 A. Not that I remember.
11 Q. And, in fact, you've testified in the past
12 at depositions that you were provided a full -- full
13 and fair opportunity to discuss the matters in the
14 Calixte case before Judge Lopez.
15 A. I remember being given an opportunity to
16 advocate the Commonwealth's position.
17 Q. You testified previously -- listen to the
18 question, if you can.
19 You were given a full and fair opportunity
20 to discuss your recommendation, the reasons for it,
21 and all of those types of considerations at the
22 lobby conference with Judge Lopez. That's your
23 prior testimony, is it not?
24 A. I said that?

1 Q. Is it not your prior testimony?

2 A. If I could see what you're reading from,
3 that would be very helpful.

4 MR. EGBERT: Sure. And, in fact, if I may,
5 Judge, to save some time -- may I approach, Judge?

6 HEARING OFFICER DAHER: Yes.

7 Q. I'm going to hand you up three volumes.
8 I'll identify them in a minute with you.

9 MR. EGBERT: Your Honor, I have a set for
10 the Court for identification only.

11 THE CLERK: It will be C for ID.

12 (Documents marked as Exhibits C-1, C-2
13 and C-3 for identification)

14 Q. Let's just identify the volumes, if we
15 could, so we're all dealing from the same deck.

16 The first volume is --

17 MR. EGBERT: And you've labeled the first
18 one what, Mr. Chopp?

19 THE CLERK: C-1.

20 Q. The first volume, which is now C-1 for ID,
21 that is your interview before the Commission on
22 Judicial Conduct, actually before Mr. Ware; is that
23 correct? Or some lawyer, correct?

24 A. I don't believe it was Mr. Ware.

1 Q. But some other lawyer?

2 A. Yes.

3 Q. And that occurred on Tuesday, August 21st,
4 of the Year 2001, correct?

5 A. Yes.

6 Q. And then C-2, that is the first volume of
7 deposition that was given by you at my office on or
8 about August 20th of the Year 2002; is that correct?

9 A. Yes.

10 Q. And then C-3 is Volume II of your
11 deposition, which occurred in my office on September
12 17th of the Year 2002; is that correct?

13 A. Yes.

14 Q. Now, I want to ask -- I asked you a few
15 minutes ago a question about full and fair
16 opportunity. Do you recall that?

17 A. Yes.

18 Q. Would you turn to Page 69 of Exhibit C-2.

19 A. Yes.

20 Q. And do you see there you were asked the
21 following question: "And at Calixte, were you given
22 a full and fair opportunity to discuss your
23 recommendation, the reasons for it, and all of those
24 types of considerations at the lobby conference or

1 the lobby conference with Judge Lopez?" Do you see
2 that question?

3 A. Yes, I do.

4 Q. And what's your answer?

5 A. "I believe so."

6 Q. Do you have any reason to disbelieve that
7 now?

8 A. No.

9 Q. So as we stand here today, you were given
10 such opportunity as described in your previous
11 statements, correct?

12 A. I believe so.

13 Q. And in the time you've had to think about
14 it, there's nothing that's come to your mind to
15 indicate otherwise; is that correct?

16 A. Not at this moment.

17 Q. Well, you've had a bunch of time to think
18 about it. You've testified about it three times
19 under oath, you're here for a fourth, you've been
20 prepared for a number of hours by the Judicial
21 Conduct Commission. Is there anything that you
22 could think of now that would make your statement
23 inaccurate?

24 A. There's nothing that I can think of now

1 that would make my statement inaccurate.
2 Q. Now, after you were given that opportunity
3 in Calixte, the lawyer for the defendant was given
4 an equal opportunity to make a presentation; is that
5 correct?
6 A. Yes.
7 Q. And who was that lawyer, do you recall?
8 A. I don't remember his name. I don't
9 remember his name. I'm sorry.
10 Q. During the course of that presentation on
11 Calixte, was there some discussion or reference to
12 Mrs. Calixte having a previously undiagnosed mental
13 illness?
14 A. There was a discussion by the defense
15 attorney that the defendant did suffer from some
16 type of mental illness, yes.
17 Q. Do you recall what type of mental illness
18 you're talking about?
19 A. I don't recall.
20 Q. Does schizophrenia ring a bell?
21 A. I really don't recall.
22 Q. And during that side-bar conference, was
23 there a discussion of the fact that Ms. Calixte was
24 undergoing treatment at McLean Hospital, part of the

1 Massachusetts General Hospital, for this previously
2 undiagnosed schizophrenia?

3 A. I remember that during the plea conference
4 there was discussion of the defendant undergoing
5 treatment. I don't remember if it was at McLean's
6 or Mass. General or where specifically it was.

7 Q. Were you provided that information by
8 defense counsel before that plea conference?

9 A. Yes.

10 Q. And did you investigate it?

11 A. I don't have a clear memory of
12 investigating that information. I know that that's
13 the kind of information that I would discuss with my
14 supervisors.

15 Q. Your supervisors don't have any personal
16 knowledge as to Ms. Calixte's mental condition, do
17 they?

18 A. No, but they --

19 Q. Answer my question. Do they?

20 A. No, they don't.

21 Q. So when I talk about investigation with
22 you, did you seek to subpoena Ms. Calixte's medical
23 records from the hospital?

24 A. I don't remember.

1 Q. Well, do you ever remember doing something
2 like that?

3 A. Doing something like what?

4 Q. In other words, in Calixte, do you have any
5 recollection at all, as you search your memory, of
6 having subpoenaed or sought to subpoena Ms.
7 Calixte's medical records which the defense was
8 relying on in presenting to the Judge a sentencing
9 recommendation?

10 A. I don't remember.

11 Q. Do you have any record of doing such a
12 thing?

13 A. If there would be a record of it, it would
14 be at the district attorney's office in the file.

15 Q. Go into your mind's eye for a moment and
16 think back and see if you can see in your eye ever
17 looking at these medical records of Ms. Calixte from
18 various hospitals in the Commonwealth.

19 A. This was about four years ago. I'm sorry,
20 I don't have a clear memory of looking at specific
21 medical records on the Calixte case.

22 Q. Because the truth of the matter is, you
23 never did it; isn't that fair?

24 A. I don't know.

1 Q. Did you seek an independent medical
2 examination of Ms. Calixte?

3 A. I don't believe we did.

4 Q. Do you know?

5 A. I don't have an independent memory.

6 Q. That's not something you've done very often
7 in your career as a prosecutor, seeking an
8 independent psychiatric examination, is it?

9 A. There have been numerous times, both when I
10 was an assistant district attorney in the District
11 Court, as well as in Superior Court, where the
12 defendant was sent to Bridgewater or one of those
13 types of institutions for criminal competency or
14 responsibility evaluations, and in that capacity,
15 especially in the District Court, that was something
16 that happened quite frequently.

17 Q. But that's quite different than seeking an
18 independent examination when a defendant seeks to
19 have medical records used in a sentencing procedure,
20 correct? That's a very different thing, isn't it?

21 A. It's different.

22 Q. Because in talking about -- you were asked
23 yesterday, for example, about criminal
24 responsibility and the like. Well, that's got

1 nothing to do with sentencing, does it?

2 A. Well, except for the fact that if a
3 defendant isn't criminally responsible, then I don't
4 believe they can plead guilty to the charges.

5 Q. They can't be sentenced.

6 A. They can't have a sentence.

7 Q. So when I say it has nothing to do with the
8 sentencing, people who are not criminally
9 responsible never get to a sentencing phase, do
10 they?

11 A. Until they're deemed responsible, yes.

12 Q. While they're not criminally responsible,
13 they can't be sentenced, can't be tried, can't be
14 pled guilty or the like, correct?

15 A. Correct.

16 Q. And criminal responsibility and -- strike
17 that. And equally so, competence -- you were asked
18 about competence yesterday, competency. That's also
19 much different than something involving a plea and
20 sentencing and medical records being used in
21 furtherance thereof, isn't it?

22 A. There are different stages of competency as
23 being an issue versus, yes, if medical records are
24 being offered to somehow mitigate a sentence. Is

1 that what you're asking?
2 Q. In other words, people who are incompetent
3 can't be sentenced, can they?
4 A. That's right.
5 Q. They cannot be tried, can they?
6 A. That's right.
7 Q. They cannot plead guilty, can they?
8 A. Correct.
9 Q. So the medical records relative to
10 sentencing, the psychiatric records relative to
11 sentencing, aren't on issues of competence or
12 criminal responsibility, are they?
13 A. Which psychiatric records?
14 Q. Records which are used with relation to
15 sentencing are generally not on the issue of
16 criminal responsibility and competency, are they?
17 A. No, they're not.
18 Q. Usually what it is is one or the other side
19 has sought medical attention or psychiatric
20 attention to bring that information before the Court
21 insofar as that may affect the sentence imposed.
22 A. That's right.
23 Q. And that's what was done in Calixte, wasn't
24 it?

1 A. I remember the defense attorney talking
2 about the defendant's mental condition, yes.

3 Q. Don't you remember the defense attorney
4 submitting letters from medical doctors?

5 A. I don't know if there were letters or a
6 report -- I really don't have a clear memory.

7 Q. You knew that the defense in the Calixte
8 case -- you knew that they were going to make a
9 pitch that their client had suffered a previously
10 undiagnosed mental condition, that that mental
11 condition was currently being treated, and that that
12 was reason for the Judge to impose a sentence more
13 in line with what the defense was asking; isn't that
14 correct?

15 A. That actually wasn't the defense I thought
16 they were going to be using.

17 Q. At sentencing?

18 A. By the time we got -- that is something
19 that came up towards the end of the case, as we were
20 getting closer to the lobby conference. When I was
21 preparing the case for trial --

22 Q. Ma'am, I'm not talking about trial --

23 MR. WARE: Objection, Your Honor.

24 HEARING OFFICER DAHER: Sustained.

1 MR. EGBERT: I would like to have an answer
2 to my question, Judge.

3 HEARING OFFICER DAHER: Again, she's
4 attempting to answer the question. Go ahead.

5 A. When I was preparing the case for trial, up
6 until the end, when ultimately there was a plea, my
7 understanding of what the defense in that case was
8 going to be was to attack the primary victim in that
9 case, who was the defendant's eldest daughter, and
10 she at that point was living in a treatment home.
11 She was diagnosed with some underlying mental
12 illnesses. And my understanding was that they were
13 going to attempt to discredit the girl and use her
14 mental illnesses as a way to argue at trial that the
15 defendant was not guilty. And also at a plea to say
16 that there's more going on here; this was a child
17 who suffers from whatever it was she was suffering
18 from at the time. That was the frame of mind I was
19 operating under.

20 Q. So when you were provided before -- you
21 said well before the plea conference you were
22 provided with evidence of the defendant's medical
23 condition and psychiatric condition, correct?

24 A. Yes. I don't remember if it was a

1 psychiatric condition, but --

2 Q. Schizophrenia is something called a
3 psychiatric condition, isn't it?

4 A. I believe it is, but I just don't have a
5 memory that it was schizophrenia. That's all.

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

7 HEARING OFFICER DAHER: Please.

8 Q. I've shown you a letter. Do you recognize
9 it?

10 A. Yes, I do.

11 Q. And what do you recognize it as being?

12 A. This is a letter that was -- I believe this
13 was a letter that was produced to the Court about
14 the defendant's psychiatric issues.

15 Q. In the case of Commonwealth versus Calixte?

16 A. Yes.

17 Q. And, in fact, this letter was given to you
18 also, wasn't it?

19 A. I believe it was.

20 Q. And it was given to you prior to any plea
21 conference on the Calixte case, correct?

22 A. It was definitely given to me prior to the
23 actual plea. I don't know how much prior it was
24 given to me prior to the lobby conference.

1 Q. Do you know whether it was or not?
2 A. I don't have a clear memory, but I have no
3 reason to think that it wasn't or it was.
4 Q. You don't know one way or the other.
5 A. I don't have a clear memory.
6 Q. There's no doubt that the letter was
7 offered during that Calixte proceeding, correct?
8 A. It was definitely offered during the plea,
9 yes.
10 MR. EGBERT: Your Honor, I would offer that
11 as the next defendant's exhibit.
12 HEARING OFFICER DAHER: Any objection?
13 MR. WARE: No objection.
14 HEARING OFFICER DAHER: Exhibit D.
15 (Document marked as Exhibit D
16 moved into evidence)
17 Q. Now, Exhibit D is a letter from a
18 psychiatrist at the Harvard Medical School, McLean
19 Hospital Associated Entity; is that correct?
20 A. It says here that he's an assistant
21 professor of psychiatry and he's a doctor.
22 Q. Well, is the heading of the letter "Harvard
23 Medical School, Department of Psychiatry"?
24 A. Yes, it is.

1 Q. And to the right of that does it say
2 "McLean Hospital"?

3 A. Yes.

4 HEARING OFFICER DAHER: What do we have?

5 THE CLERK: I notice that the exhibit
6 list -- the one that I was given by the former clerk
7 has a different list ,and I've been going by this
8 list and not the defendant's list.

9 MR. EGBERT: I'm not sure I understand what
10 the problem is.

11 THE CLERK: I didn't see that you had --
12 the clerk's exhibit list --

13 MR. EGBERT: I'm satisfied to use whatever
14 lettering is easiest for you, and at the end of the
15 day we'll make it up.

16 THE CLERK: For now this will be D, and
17 later on we'll revise it.

18 HEARING OFFICER DAHER: Let's go.

19 Q. Does it also describe -- the person writing
20 the letter is Franca Centorrino, M.D., correct?

21 A. Correct.

22 Q. And does it describe his position as
23 Director of Bipolar and Psychotic Disorders -
24 Outpatient Clinic?

1 A. Yes, it does.

2 Q. And also as an Assistant Professor of
3 Psychiatry at the Harvard Medical School?

4 A. Yes.

5 Q. Now, when you received this letter, you
6 knew that the defense was using this letter in an
7 attempt to convince the Judge that a probationary
8 sentence was appropriate, correct?

9 A. I suppose so, yes.

10 Q. You've been a prosecutor for seven years,
11 correct?

12 A. Yes.

13 Q. Defense lawyers are advocates, aren't they?

14 A. Yes.

15 Q. And they're there to advocate a position
16 for their client.

17 A. Absolutely.

18 Q. And here comes this letter saying that this
19 particular person suffered a mental disorder,
20 correct?

21 A. Yes.

22 Q. And who's under treatment and responding
23 well.

24 A. Correct.

1 Q. Well, you certainly understood that the
2 defense lawyer was going to use that in an attempt
3 to persuade the Court that an appropriate sentence
4 is to continue on with treatment, continue this
5 advancement, and permit this person not to go to
6 jail, correct?

7 A. Yes.

8 Q. Did you do anything at all to investigate
9 the bona fides of these allegations?

10 A. As I said earlier, I really don't remember.

11 Q. So nothing at all?

12 A. I don't remember.

13 Q. Would a proper response by a prosecutor in
14 such a case where the prosecutor is representing the
15 citizens of the Commonwealth of Massachusetts, as
16 you described it, make an attempt to determine the
17 bona fides of these allegations?

18 A. I suppose that would be a proper response,
19 yes.

20 Q. You have been saying from the beginning of
21 these proceedings, and in newspaper articles and the
22 like, that you thought these sentences were too
23 lenient, starting with Calixte, correct?

24 A. I don't know if I said that I thought the

1 sentences were too lenient either in the paper or in
2 any of my testimony. I've said repeatedly that the
3 sentences were disaggrieved from the Commonwealth's
4 perspective, and I don't remember specifically, but
5 it's possible that I did.

6 Q. Well, when you say it's possible, you don't
7 remember telling people, including Eileen McNamara,
8 that you thought these sentences were too lenient?

9 A. If I could see the exhibit, maybe I used
10 the word "lenient." It's possible.

11 Q. There's no exhibit to see. The exhibit
12 you're talking about is a newspaper article,
13 correct?

14 A. Isn't that the one you're talking about?

15 Q. You don't think that everything you said to
16 Ms. McNamara ended up in that article, do you?

17 A. I don't remember.

18 Q. Do you even remember what you told her?

19 A. I remember speaking to her for a period of
20 time and then -- again, this was four years ago --
21 and an article appeared shortly after that.

22 Q. Do you remember what you told her?

23 A. I don't remember all of what I told her.

24 Q. Do you remember any of what you told her?

1 A. I remember telling her the things that I
2 saw in the article --
3 Q. The answer is no, isn't it?
4 A. I don't remember all the things I told her,
5 no.
6 Q. And we'll get to that article momentarily,
7 but let's not run around with this.
8 Isn't it your opinion, stated on a number
9 of occasions, that these sentences were too lenient?
10 A. It is my opinion that these sentences were
11 lenient, yes.
12 Q. And it also was your job as a prosecutor
13 with the Commonwealth of Massachusetts to present
14 every fact, every piece of evidence, challenge every
15 allegation to achieve the recommendation which you
16 sought because you thought it was appropriate,
17 correct?
18 A. It was our job to advocate for the
19 Commonwealth.
20 Q. And part of advocating is checking out the
21 facts; isn't that right?
22 A. Yes, it is.
23 Q. And investigating allegations, correct?
24 A. That's correct.

1 Q. And determining whether or not information
2 that's being provided to the judge upon which that
3 judge makes a decision is accurate?
4 A. That's correct.
5 Q. Did you do anything in the Calixte case to
6 investigate the accuracy, bona fides, or reliability
7 of the statements being made to the Judge with
8 regard to these mental conditions?
9 A. Mr. Egbert, I don't remember.
10 Q. Well, there's a file back at the office,
11 isn't there?
12 A. I would assume so.
13 Q. You have access to that file, don't you?
14 A. I don't work at the office anymore.
15 Q. Do you have access to that file?
16 A. I'm sure I could get it.
17 Q. I invite you, Ms. Joseph, to do whatever
18 you can to find out whether or not you did any such
19 thing, and we'd be happy to hear back from you.
20 MR. WARE: I object. If counsel wants to
21 subpoena, he can subpoena.
22 MR. EGBERT: Judge?
23 HEARING OFFICER DAHER: Do you want a
24 subpoena?

1 MR. EGBERT: Do you want to give me
2 permission to subpoena? As counsel knows, this is
3 not like other courthouses -- courtrooms. I need
4 the permission of the Judicial Conduct Commission.

5 HEARING OFFICER DAHER: Do you want
6 permission?

7 MR. EGBERT: I do.

8 HEARING OFFICER DAHER: You've got the
9 permission. Let's move on.

10 MR. EGBERT: For both the Estrada and
11 Calixte files.

12 HEARING OFFICER DAHER: You've got it.

13 MR. EGBERT: Thank you.

14 BY MR. EGBERT:

15 Q. After the Calixte hearing, sometime shortly
16 after that was the Estrada hearing in point of time
17 in chronology in your dealings with Judge Lopez; is
18 that correct?

19 A. Correct, yes.

20 Q. And in the Estrada case you had sought a
21 particular recommendation, correct?

22 A. That's correct.

23 Q. And the defendant had sought some lesser
24 recommendation, correct?

1 A. That's correct.
2 Q. And the same process occurred as we
3 described in the Calixte case as Estrada. You had a
4 lobby conference, correct?
5 A. Yes.
6 Q. You were given a full and fair opportunity
7 to present your side.
8 A. Yes.
9 Q. No one stopped you from presenting
10 anything.
11 A. No.
12 Q. You advocated on behalf of the
13 Commonwealth.
14 A. Yes.
15 Q. Thereafter, the defense did the same in
16 their interests for their client, correct?
17 A. That's correct.
18 Q. And during that process, the defense
19 brought forward to Judge Lopez certain information
20 concerning, one, the defendant's current treatment
21 in a sexual offender program, correct?
22 A. That's correct.
23 Q. Let me stop there. Did you look into that
24 sexual offender program?

1 A. Yes. I remember looking -- trying to get
2 information about that program. This was a
3 situation where the defendant was a sheriff, a
4 deputy sheriff at Nashua, and I remember there had
5 been some discussion that he had been receiving
6 treatment with some of the inmates in some type of a
7 sexual offender's program there. I don't remember
8 the specifics of the treatment. I know also that
9 the defendant had made a number of admissions about
10 raping his stepdaughter --

11 MR. EGBERT: Judge, respectfully, my
12 question was whether she looked into the sexual
13 offender's program.

14 HEARING OFFICER DAHER: Sustained.

15 Q. Let's get back to the sexual offender's
16 program.

17 A. Yes.

18 Q. Did you do anything to check it out?

19 A. I remember looking into it. I don't
20 remember the specifics of what I did to check it
21 out.

22 Q. Did you subpoena the records?

23 A. I don't remember.

24 Q. Do you remember doing anything?

1 A. I don't have a clear memory of
2 investigating that case.

3 Q. The fact of the matter is, Ms. Joseph, you
4 didn't do anything. You didn't look into any part
5 of that sexual offender's program, did you?

6 A. I don't think that's correct.

7 Q. Do you recall ever seeking his records?

8 A. I remember speaking with a therapist, who
9 was actually going to be a Commonwealth witness, to
10 whom the defendant had made a number of admissions.

11 Q. Was that therapist in the sexual offender's
12 program?

13 A. I don't remember if it was in that program
14 or if it was through a DSS program that was
15 involved.

16 Q. Let's get back to the sexual offender
17 program which the defendant had proffered to the
18 Court that he was in that program, maintaining that
19 program, making progress in that program, and it was
20 good for him and his likeliness to repeat offend,
21 correct? That's basically what was on the table?

22 MR. WARE: Objection. That's at least six
23 questions, and I didn't understand it.

24 HEARING OFFICER DAHER: Sustained.

1 Q. Was the defendant proffering to the Court
2 that he was in a sexual offender's program?

3 A. Yes.

4 Q. That he was receiving treatment for --

5 A. Yes.

6 Q. Let me finish -- for being a sexual
7 offender.

8 A. Yes.

9 Q. That that treatment was good for him,
10 meaning that this kind of sexual offender treatment
11 was good for his progress to overcome that problem?

12 A. Yes.

13 Q. And that he was -- that that treatment was
14 good for society ,obviously; that it was stopping
15 him or prohibiting him from being a sexual offender
16 recidivist.

17 A. I don't remember anyone advocating that
18 that treatment was good for society, but the
19 defendant claimed that the treatment was helping
20 him.

21 Q. Do you recall now doing anything to
22 investigate those statements being made by the
23 defense to the Court? Those statements; not some
24 others. Those.

1 A. I have a memory of investigating the issue
2 of the defendant receiving sexual offender
3 treatment. I don't have a clear memory of what
4 specific steps I took, if anything was subpoenaed,
5 who, if anyone, I spoke with about that.

6 Q. It would be in the file, I take it, if you
7 did.

8 A. Some of it may be in the file, yes.

9 Q. Well, if you subpoenaed records, they'd be
10 in the file, wouldn't they?

11 A. Hopefully, yes.

12 Q. In any event, Mr. Estrada also proposed to
13 the Court or proffered to the Court the fact that
14 his stepdaughter, I believe it was, and wife were
15 there not on his behalf to condone his conduct, but
16 to seek not having him put in jail for various
17 reasons, correct?

18 A. I believe I actually told the Court that.

19 Q. I'm sorry?

20 A. I believe I told the Court that; that both
21 the victim and the defendant's wife were not seeking
22 a jail sentence.

23 Q. And obviously the defendant and his counsel
24 knew that.

1 A. Yes.
2 Q. They had them there in court that day?
3 A. Yes. I just want to make it clear that I
4 believe there are two different dates that we're
5 talking about, both in the Calixte and the Estrada
6 case. One is the date of the lobby conference and
7 the other would be the date of the actual plea. And
8 I doubt that the family was there, especially the
9 victim, on the day of the lobby conference.
10 Q. They were there on the day of the plea.
11 A. That's correct.
12 Q. And testified.
13 A. They gave their impact statements, yes.
14 Q. Well, they testified, didn't they?
15 A. Yes.
16 Q. Wasn't it proffered to Judge Lopez that
17 both the mother and the child were seeking to have
18 Mr. Estrada not go to jail?
19 A. That's correct.
20 Q. And Judge Lopez had those people sworn.
21 A. Absolutely.
22 Q. And she brought them up and had them
23 testify as to their desires.
24 A. That's correct.

1 Q. So in the Estrada case you had this
2 treatment program going on, and then the two -- at
3 least the victim and her mother indicated they did
4 not want a jail sentence?

5 A. That's correct.

6 Q. Now, in each of those cases you advocated
7 for a position in favor of the law, correct?

8 A. Correct.

9 Q. Is it fair to say you were upset about
10 that?

11 A. I wasn't upset personally. It was
12 disappointing.

13 Q. Were you upset professionally?

14 A. I don't know that "upset" is the word I
15 would use. I was disappointed professionally that
16 these cases, which our office deemed to be strong
17 cases and cases which merited incarceration, didn't
18 result in that.

19 Q. Do you recall being asked at Page 96,
20 Exhibit C-2, on a prior occasion, "And that bothered
21 you professionally as a member of the DA's office,
22 right?"

23 "Answer: Right."

24 Do you recall that?

1 A. Yes.
2 Q. And that's the case.
3 A. It bothered me professionally.
4 Q. Now, back to the process of the plea for a
5 moment.
6 A. Yes.
7 Q. Once Judge Lopez made a decision as to the
8 sentence to be imposed, you knew, as a matter of
9 course, that was it. It was over, except for the
10 formalities of taking the plea.
11 A. Well, I knew that her decision had been
12 made and that nothing was going to change that, but
13 I wouldn't necessarily refer to the plea as just a
14 formality. But that's what we had to do. We had to
15 put the plea on the record, and that's the job.
16 Q. But the advocacy for sentencing took place
17 at the lobby conference.
18 A. Well, the advocacy for sentencing took
19 place at the lobby conference. But the advocacy on
20 the record is what takes place at the plea.
21 Q. Let's talk reality versus formality for a
22 moment.
23 A. Okay.
24 Q. Once -- you've already indicated once the

1 lobby conference ended and Judge Lopez announced her
2 decision, that it was over as far as what the
3 sentence was going to be, correct?

4 A. It was over --

5 Q. It was over as far as what the sentence was
6 going to be.

7 A. Yes.

8 Q. And so the place to advocate and get her to
9 go your way was at the lobby conference.

10 A. The place for her, to get her to go my way
11 absolutely was at the lobby conference.

12 Q. Because once the lobby conference was over,
13 there was no advocating on sentencing, because the
14 decision had been made.

15 A. There was no advocating to Judge Lopez.
16 There was still -- we still have an important job to
17 advocate the position of the Commonwealth on the
18 record.

19 Q. Creating a record of your position.

20 A. That's correct.

21 Q. But it was not there to convince the Judge
22 of anything. That was over, right?

23 A. That's correct.

24 Q. So once the lobby conference was done,

1 convincing the Judge of anything was over, and this
2 was just for putting it on the record or for the
3 public or whatever, correct?

4 A. I wouldn't say it's just for, but that is
5 the purpose of a plea conference and the advocacy
6 that goes along with that.

7 Q. After Calixte and Estrada, you spoke to
8 Eileen McNamara, correct?

9 A. That's correct.

10 Q. And at the time you were mad at Judge
11 Lopez, right?

12 A. At that time I was upset about what had
13 happened towards the end of the Estrada case.

14 Q. You were terrified, in your words, by Judge
15 Lopez yelling and screaming at you as we heard on
16 tape yesterday, correct?

17 A. Well, I used the word "terrified" to
18 describe how I felt about reappearing in front of
19 her, given both what happened in the Estrada case
20 and the subject -- and conversations I had
21 subsequent to that about how Judge Lopez felt about
22 me.

23 Q. Ms. Joseph, you are not without any
24 emotions, are you?

1 A. I don't think so.

2 Q. Well, you told us yesterday that you had
3 gone through an experience that you perceived --
4 your perception was that you had been screamed at,
5 yelled at, humiliated and the like during the
6 Estrada hearing, correct?

7 A. Yes. I testified --

8 Q. Now, as a person, were you angered by that?

9 A. I don't remember if I was angry or just sad
10 or humiliated. I don't remember the degree of
11 emotion I was showing then, four years ago, about
12 how she treated me in Estrada. I may very well have
13 been angry. More likely I was upset.

14 Q. Well, you had gone through this process of
15 having two cases before her; failed in your mission
16 in each of those, correct?

17 A. Correct.

18 Q. And then you perceived that she yelled at
19 you and humiliated you in the Estrada case, correct?

20 A. Correct.

21 Q. And now you get a chance to go sit with
22 Eileen McNamara, right, on the QT, right?

23 A. What do you mean by "QT"?

24 Q. Just what I said. You went and sat with

1 Eileen McNamara, correct?

2 A. No. I didn't meet with her. She called
3 me --

4 Q. Talked with her on the telephone?

5 A. That's correct.

6 Q. Anyone else present?

7 A. I believe so.

8 Q. Who?

9 A. I don't have a clear memory if it was
10 either a colleague or a victim witness advocate or
11 someone from the press office in our office, but I
12 do have a vague memory of someone being with me in
13 the room when I spoke with Ms. McNamara.

14 Q. As a witness?

15 A. I don't know if the word "witness" is what
16 I would use. We had always been cautioned to be
17 careful when speaking with the press. And it was my
18 preference to have somebody with me during all my
19 time at the DA's office whenever those opportunities
20 would happen.

21 Q. Can you tell us who that person was, this
22 witness?

23 A. This person that was with me at the --

24 Q. Right.

1 A. It may have been Dave Falcone. It may have
2 been the advocate in the case or a colleague. I
3 really don't remember.

4 Q. So you have no idea what the answer is. It
5 may have been any number of people, but you can't
6 tell us anybody, who it is.

7 A. Right. That's what I said a few minutes
8 ago. I don't remember who it was.

9 Q. When you met with Eileen McNamara, you at
10 that time were looking to get back at Judge Lopez.

11 A. No, that's not correct.

12 Q. Didn't have the slightest feeling of trying
13 to give her a little zing?

14 A. No, that's not correct.

15 Q. After all you've testified about the way
16 you felt about the Estrada case and the like?

17 A. I was more upset than I was angry at that
18 time. And I just also want to clarify that I didn't
19 meet with Ms. McNamara. I spoke with her on the
20 telephone, absolutely.

21 Q. In content of information being passed,
22 whether it was on the telephone or otherwise, you
23 spoke with her at some length.

24 A. Yes. I don't remember how long it was, but

1 yes.
2 Q. And you don't remember what you said to
3 her?
4 A. I don't remember all the things I said to
5 her, no.
6 *Q. But you testified yesterday that in this
7 conversation with Eileen McNamara about the Estrada
8 and Calixte sentences you never mentioned the name
9 "Judge Lopez".
10 A. I don't remember exactly what I said
11 yesterday about specifics about Judge Lopez. When
12 Ms. McNamara --
13 Q. Please. Did you testify --
14 MR. WARE: Objection, Your Honor.
15 HEARING OFFICER DAHER: What's your
16 objection?
17 MR. WARE: The witness ought to be allowed
18 to respond to the question.
19 HEARING OFFICER DAHER: Sustained. Go
20 ahead. Finish.
21 THE WITNESS: Can you repeat the question?
22 *(Question read)
23 A. I don't think I said I never -- I don't
24 think that I said yesterday that I never said the

1 words "Judge Lopez." I do know that the article
2 that Ms. McNamara was writing, she wasn't asking me
3 my personal opinions about the Judge. She was
4 talking about the cases. I --

5 Q. Are you done? Do you want to see your
6 transcript of what you said yesterday?

7 A. Sure.

8 MR. EGBERT: May I approach?

9 HEARING OFFICER DAHER: Please.

10 Q. Let's see if we can read aloud together.
11 Page 88. This is Mr. Ware's question of you.

12 A. Okay.

13 Q. Can you see it?

14 A. Yes.

15 Q. "Question: At no time during the course of
16 this interview did you mention Judge Lopez's name;
17 is that correct?

18 "Answer: No, I didn't mention her name."

19 Now, was that your testimony yesterday or
20 wasn't it?

21 A. That was my testimony yesterday about the
22 article that was appearing. Mr. Ware was having me
23 read that on the screen yesterday --

24 Q. Ma'am, let's listen to the question.

1 MR. WARE: Your Honor, again, I object.
2 The witness is entitled to answer the question.

3 HEARING OFFICER DAHER: Sustained. Go
4 ahead, if you would.

5 A. At that point yesterday, Mr. Ware was
6 having me read some exhibits off of a screen and was
7 asking me to read out loud certain quotations. In
8 none of those quotations did I mention Judge Lopez's
9 name.

10 Q. Now, were you asked the following question
11 and give the following answer? Listen carefully.
12 "At no time during the course of this interview did
13 you mention Judge Lopez's name; is that correct?"
14 Did I read that correctly?

15 A. You did.

16 Q. Was that the question that was asked of you
17 yesterday?

18 A. It was.

19 Q. Did you understand it when it was asked of
20 you?

21 A. Yes, I did.

22 Q. You've been around -- you've been a lawyer
23 for how many years?

24 A. Since '93.

1 Q. Did you mention Judge Lopez's name during
2 the course of the interview --
3 HEARING OFFICER DAHER: That's my memory.
4 I was searching for it. You picked it up. It's on
5 Page 88. Let's move on.
6 Q. And did you testify truthfully yesterday?
7 A. Excuse me?
8 Q. Did you testify truthfully yesterday?
9 A. Of course.
10 Q. So it's your testimony, then, that during
11 the interview with Eileen McNamara you never
12 mentioned Judge Lopez's name.
13 A. I have no memory of mentioning Judge
14 Lopez's name in my discussion with Eileen McNamara.
15 Q. What did you talk about?
16 A. First of all, she was asking me about the
17 facts of the two cases that were before the Court,
18 and that took some time to talk about them. One of
19 the cases, the Calixte case, was being co-prosecuted
20 by the Middlesex County district attorney's office.
21 That was something that I mentioned. And she asked
22 what the basis of our sentencing recommendation was
23 from the DA's office, and I explained to her some of
24 the key points of evidence that we felt were very

1 strong points, leaning towards incarceration.
2 She never asked me what I thought about the
3 Judge or any of those types of comments. That
4 wasn't what the article was about. It was about the
5 sentences.

6 Q. The sentences imposed by Judge Lopez.

7 A. That's right.

8 Q. And were you not attempting to be critical
9 of Judge Lopez's sentence during the course of this
10 interview?

11 A. I was attempting to answer the questions
12 the best that I could.

13 Q. Well, did you make the statement to Eileen
14 McNamara that, as far as Mr. Estrada, you were
15 wondering who then is a public menace if Mr. Estrada
16 is not?

17 A. I remember saying that.

18 Q. Is that right?

19 A. Yes.

20 Q. And was that meant to convey to the public
21 that Judge Lopez had let a public menace go on
22 probation?

23 A. That was meant to convey my impression and
24 that of my office that the defendant was a public

1 menace.

2 Q. And a public menace is someone who, I take
3 it, you consider to be a substantial danger to the
4 community; is that right?

5 A. Yes.

6 Q. And did you present any evidence to Judge
7 Lopez or seek to present any evidence to Judge Lopez
8 in the Estrada case that Mr. Estrada would be a
9 repetitive pedophilic offender?

10 A. The facts in the Estrada case spoke for
11 themselves in terms of the repetition. He had been
12 consistently raping his stepdaughter over a period
13 of time. Even during the treatment, she came back
14 to us and said he would grab at her breast, he would
15 make comments to her. There was no indication in
16 the facts that he was cured or nonrepetitive.

17 There was more than one charge of rape for
18 more than one day. It had been something that had
19 been going on for quite some time. And it was
20 repetitive to the daughter, the stepdaughter.

21 Q. The daughter that was asking that he not be
22 sent to jail.

23 A. That's right.

24 Q. And the mother was asking that he not be

1 sent to jail.
2 A. That's right.
3 Q. And it wasn't your intent to convey to the
4 public that Judge Lopez had leniently sentenced a
5 public menace, correct?
6 A. I don't know that I was conveying it to the
7 public. It was more a characterization of the
8 defendant in the Estrada case that he is in fact a
9 menace.
10 Q. Ma'am, when you made these statements to
11 Ms. McNamara, you recognized that those statements
12 were being made with the intention of having them go
13 into a newspaper article, correct?
14 A. I recognized that.
15 Q. And that that's going to go to the public.
16 A. Yes.
17 Q. And you understand your ethical obligations
18 as it relates to discussions with newspaper
19 reporters.
20 A. Yes, I do.
21 Q. When did you learn them?
22 A. The ethical obligations?
23 Q. Yes.
24 A. Those are obligations that we are taught at

1 different points in our work at the DA's office,
2 both when we first come on board in terms of office
3 policies and guidelines, and then the training that
4 we get day to day about what to do and what not to
5 do and how to do it. All those things together form
6 part of our training.

7 Q. Well, when you were in my office for a
8 deposition, you didn't even know what ethical rules
9 related to lawyers speaking with the press; isn't
10 that correct?

11 A. That's not my memory. My memory of that
12 day is I wasn't sure it if it was 3.6 or 3.8 or what
13 exactly was the number on the statutory --

14 Q. Do you recall being asked in my office
15 whether or not you knew whether or not lawyers were
16 required under the rules to take reasonable
17 precautions to make sure that public statements were
18 not made by employees and personnel in their office?
19 Do you remember that discussion?

20 A. I remember that general discussion.

21 Q. And do you remember saying you never heard
22 of that?

23 A. I don't remember that.

24 Q. Have you read the depositions recently?

1 A. Yes, I have.

2 Q. When?

3 A. I read some on Wednesday before
4 Thanksgiving and again on Sunday night two days ago.

5 Q. And have you discussed this area of inquiry
6 with Mr. Ware and Mr. Braceras, these ethical rules?

7 A. I have.

8 Q. And when is the last time you discussed it
9 with them?

10 A. It wasn't on Wednesday. I believe it may
11 have been the week before when we met.

12 Q. And did you put out the actual rules and
13 talk about them with Mr. Ware and Mr. Braceras?

14 A. I don't know if we had actual copies of the
15 rules or -- I think we did.

16 Q. And you studied them together, did you?

17 A. We looked at them together, yes.

18 Q. And to kind of bone up for your
19 presentation here?

20 A. As part of preparing, yes.

21 Q. When you said to Eileen McNamara in the
22 article -- and you did say this, didn't you -- "If
23 you say he's not a threat because he just raped a
24 girl in his own household, then can't you also look

1 at the car thief and say this guy's not a threat to
2 me because he only steals cars in poor
3 neighborhoods, or that guy's not a threat to me
4 because he only breaks into houses in rich
5 neighborhoods? Is that how we're going to mete out
6 justice?"

7 A. Correct. Yes.

8 Q. Would you tell me what you were talking
9 about there?

10 A. Yes. Ms. McNamara told me during our
11 interview that her theme of the article was about
12 economic issues as they related to justice, and that
13 in that situation, her point being that do children
14 of different backgrounds receive different types of
15 treatment based on their economic status. My point
16 there that I was trying to analogize to is a car
17 thief. Similarly, someone who steals a car in a
18 better neighborhood or a worse neighborhood, that
19 fact of where the crime is committed shouldn't
20 matter in terms of sentencing. That was the point
21 that I was trying to make at that point.

22 Q. Did Judge Lopez sentence Mr. Estrada based
23 upon the economic position -- strike that. The
24 economic status of Mr. Estrada?

1 A. I believe that in her sentencing, she
2 indicated that because of the family's dependence on
3 the defendant's financial ability and his economic
4 status, she didn't -- that was one of the reasons
5 she didn't want to send him to state prison.

6 Q. One of the reasons, right?

7 A. That's correct.

8 Q. And in fact, the people who espoused those
9 reasons were in fact the victim and her mother who
10 came in and said to the Judge, "Please don't send
11 him to jail. We need the support that he provides
12 and we think that you can develop and have developed
13 a sufficient other kind of sentence to protect us
14 under these circumstances." Isn't that basically
15 what they said to her?

16 A. Yes. I don't think they said that second
17 part of your question about devising a sentence, but
18 they did ask her not to send him to jail.

19 Q. Didn't they talk about devising a sentence
20 where they wouldn't come in contact with him?

21 A. They said they would abide by a stay-away
22 order.

23 Q. And that that was being imposed for their
24 protection.

1 A. Yes.
2 Q. And the Judge would take into consideration
3 their thoughts and their desires in that regard.
4 A. Yes.
5 Q. As you sit here today, do you think the
6 Judge was sentencing differently based upon whether
7 someone was rich or poor?
8 A. I don't know what you mean by "sentencing
9 differently." I think that that economic argument
10 was persuasive to the Judge, and that is one of the
11 reasons she did not send him to state prison.
12 Q. It's equivalent to this guy's not a threat
13 to me because he only steals cars in poor
14 neighborhoods?
15 A. What --
16 Q. That's what you were trying to convince the
17 public was going on in this sentencing.
18 A. I was saying that in the same way that a
19 car thief should be sentenced, independent of the
20 neighborhood in which he commits a crime. A child
21 rapist should face a similar equilibrium independent
22 of economic status.
23 Q. So in your opinion, then, sentencing ought
24 to be done wholly in a vacuum.

1 A. No, I didn't say that.

2 Q. In your opinion, should Judge Lopez have
3 taken into consideration the statements of the
4 victim and her mother saying "Please don't send him
5 to jail"?

6 A. Should she take them into consideration?

7 Q. Yes.

8 A. Absolutely.

9 Q. And should she take into consideration
10 their pleas that he not go to jail so that they not
11 end up out on the street --

12 A. Yes.

13 Q. -- as a judge in the Superior Court?

14 A. I think she should take those things into
15 consideration.

16 Q. And then you say that -- you go on in the
17 article, at least, and say, "Brief jail time sends a
18 message to everyone, especially the victim, that
19 society does not condone the rape and beating of
20 children, even in your house," correct?

21 A. That's correct.

22 Q. Now, that message is to go to who? Who's
23 that message for?

24 A. That was what I said to Ms. McNamara.

1 Q. Who's that message for? Who are we sending
2 a message to in that case?
3 A. We sent a message both to the victim and to
4 the public at large that when you rape a child, you
5 go to jail.
6 Q. Period.
7 A. Yes.
8 Q. Is that the law in this Commonwealth?
9 A. No, it isn't.
10 Q. Is there any such law in existence in the
11 Commonwealth of Massachusetts that says, for
12 example, that a rape of a child is a mandatory
13 sentence?
14 A. There may be -- I don't recall -- a rape of
15 child second offense --
16 Q. You know what we're talking about, don't
17 you? You just said that you want to send a message
18 to everyone, under any circumstance, no matter what,
19 that the rape of a child, you go to jail in this
20 Commonwealth, correct?
21 A. Yes.
22 Q. Is that the law of this land?
23 A. The law of the land is that a child rape
24 case can face a range of from life to probation.

1 That's the statutory guidelines.
2 Q. So it is not the law of this land that
3 every person charged with rape of a child under any
4 circumstance go to jail, is it?
5 A. That's correct.
6 Q. The Estrada case was heard before Judge
7 Lopez on February 10th of '99, the actual plea; is
8 that correct?
9 A. That's correct.
10 Q. And after that, did you leave the DA's
11 office for a period of time?
12 A. I gave birth on March 25th to my daughter.
13 Q. And did you leave the DA's office for a
14 period of time?
15 A. Yeah. I took a four-month,
16 four-and-a-half-month maternity leave.
17 Q. And when did you return?
18 A. I don't remember. It was probably the end
19 of August of '99, maybe the beginning of September,
20 something like that.
21 Q. When did you come upon or begin your
22 association with the Horton case?
23 A. I received that case from my supervisor at
24 some point after the defendant's arrest --

1 arraignment in District Court. So that would be
2 November of '99, shortly after I came back from
3 maternity leave.

4 Q. And when you received that case, was the
5 defendant on bail, Horton?

6 A. I believe when I had received the case, he
7 was still in custody.

8 Q. Do you know that for a fact?

9 A. I believe he was still in custody. I know
10 at some point he did post bail. And I believe that
11 he was in fact summonsed into court for his Superior
12 Court arraignment. He had already posted the
13 \$10,000 cash bail by that moment.

14 Q. 10,000?

15 A. I believe that was what the bail was.

16 Q. I'm sorry?

17 A. I think that's what the bail was.

18 Q. Do you have the exhibit book in front of
19 you?

20 A. Yes, I do.

21 Q. Could you turn to it, please?

22 A. Yes. Which exhibit?

23 Q. Go to Exhibit 2, if you would.

24 When did the defendant post bail, if you

1 can tell from these docket entries?

2 A. He had already posted bail, I believe.

3 Q. So one thing we can agree on is that he
4 came to the arraignment in Superior Court on bail,
5 on release.

6 A. Yes.

7 Q. Not in custody.

8 A. That's correct.

9 Q. Right?

10 A. That's my memory.

11 Q. Now, at the time that he was arraigned in
12 the Superior Court, you had available to you a
13 statute which permitted a court to hold a person
14 without bail or on substantive conditions if in fact
15 that person was a danger to the community; am I
16 correct?

17 A. I don't remember if once a defendant -- the
18 statute says that upon a defendant's first
19 appearance in court, a dangerousness hearing can be
20 held. And there's been some discussion -- and I
21 don't know what the ultimate case law has been --
22 whether or not at your new arraignment on the same
23 charges in Superior Court, you were entitled to that
24 hearing. So I don't know legally --

1 Q. So the answer is, then, when you arraigned
2 Mr. Horton on or about, what, January of the Year
3 2000 --
4 A. That's correct.
5 Q. -- you didn't even know the law as related
6 to dangerousness hearings, right?
7 A. I don't remember what it was at that time.
8 I know that --
9 Q. Did you know the law at the time on
10 dangerousness hearings?
11 A. Yes, I did.
12 Q. What was it?
13 A. I don't have a clear memory today.
14 Q. Do you have a vague memory?
15 A. I know that that was something that we were
16 discussing in the office. That there were
17 discussions being held amongst supervisors and line
18 ADAs about whether or not a dangerousness hearing
19 could apply at a Superior Court arraignment. I know
20 that it was the practice of the child abuse unit not
21 to have dangerousness hearings --
22 Q. We're going to get to that. We're talking
23 about the law for a minute, not the practice.
24 So my question to you once again is, do you

1 know what the law was in January of 2000 as it
2 relates to dangerousness hearings. And if you do,
3 please tell us what it was.

4 A. My memory is that in January of 2000, there
5 was not a clear decision yesterday rendered as to
6 whether a dangerousness hearing can be held on a
7 Superior Court arraignment. The dangerousness
8 statute was relatively new and that that was
9 something that hadn't worked itself out either from
10 our office's perspective or in the case law. That's
11 simply my memory.

12 MR. EGBERT: May I have a moment, please?

13 (Pause)

14 BY MR. EGBERT:

15 Q. Now, this relatively new statute in the
16 Year 2000, would you agree with me that it was
17 passed in 1994?

18 A. Yes, I believe that's when it was passed.

19 Q. So that's about six years to figure it out,
20 right?

21 A. That's correct.

22 Q. And it was still pretty new to you and you
23 couldn't quite figure it out?

24 A. It was something that the District Courts

1 were doing regularly, was the dangerousness
2 hearings. The office hadn't completely adopted that
3 practice at that time in the Superior Court.

4 Q. I'm not talking about the practice. All
5 I'm trying to figure out is if, as January of 2000
6 came around, you knew what the law was.

7 A. My memory is that it was unclear still from
8 a legal perspective as to whether or not a
9 dangerousness hearing can be conducted at the
10 Superior Court level when the charges are the same
11 as they were in the District Court.

12 Q. And were the charges the same as they were
13 in the District Court in this case?

14 A. I believe so.

15 Q. Well, you know they weren't, don't you?

16 A. I don't have the original police report in
17 front of me right now.

18 Q. The police report?

19 A. Yeah. Or a docket sheet from the District
20 Court would be helpful.

21 MR. EGBERT: Judge, would this be a good
22 time for a morning break so I can find the District
23 Court documents?

24 HEARING OFFICER DAHER: We'll take five.

1 (Recess)

2 BY MR. EGBERT:

3 Q. Ms. Joseph, with regard to the answers you
4 gave yesterday concerning the dangerousness hearing,
5 do you recall being asked about that yesterday?

6 A. Yes, I do.

7 Q. Yesterday you said that it was the policy
8 of your office to not have dangerousness hearings in
9 child sexual abuse cases because you didn't want the
10 child to testify more than once, correct?

11 A. That's correct.

12 Q. Now, first of all, let me ask you at the
13 outset, is it a requirement under the dangerousness
14 statute that the child testify?

15 A. It isn't a requirement, but defense
16 attorneys would have subpoena powers to present
17 evidence that they wanted, and there would be no
18 reason why they wouldn't be able to subpoena a child
19 victim.

20 Q. And so it's very important, I take it, from
21 the standpoint of your office, that child sexual
22 assault victims -- when we say "child," we mean
23 anywhere from 16 under, correct?

24 A. Yeah.

1 Q. -- that child sexual assault victims not be
2 subjected to the trauma of testifying in open court,
3 correct?

4 A. We try and minimize the trauma as much as
5 we can.

6 Q. And you consider that to be a major trauma
7 for a child sexual assault victim.

8 A. I think that for any witness, testifying is
9 very difficult. And I think for children --

10 Q. Let's stick with child sexual assault
11 victims.

12 A. I think it's very difficult to testify,
13 yes.

14 Q. And so you would consider that -- you and
15 your office, and in fact experts that you've
16 consulted over the years, agree that that is an
17 extremely traumatic experience.

18 A. It's very difficult, yes.

19 Q. And in fact, it is -- it often -- that
20 consideration often drives in some ways the manner
21 in which the DA's office conducts these cases.

22 A. Yes, it does.

23 Q. Out of a consideration for avoiding that
24 kind of testimony, if at all possible.

1 A. Absolutely.

2 Q. It's a very important consideration.

3 A. Yes.

4 Q. Now, coming up to the Horton case, you at
5 least do agree with me that the Commonwealth never
6 sought a dangerousness hearing, right?

7 A. That's correct.

8 Q. And Mr. Horton was free on bail within the
9 community without restriction, except for some
10 curfew, I think it was?

11 A. Right. There were a few stay-away type
12 orders, stay away from the victim, that type of
13 thing, and the bail that he had to post.

14 Q. But generally he was in the community, out
15 and about, so to speak?

16 A. That's right.

17 Q. And there was no further restriction in
18 that regard.

19 A. Right.

20 Q. At the time of his arraignment, Mr.
21 Horton's arraignment, did you have any information
22 that Mr. Horton was a pedophile?

23 A. I knew that he was sexually attracted to a
24 prepubescent boy from the facts of the case. I

1 didn't have any document in front of me that said he
2 was a pedophile. I knew that he, himself, in his
3 statement to the police, indicated that he did have
4 some types of relationships with other teenagers --

5 Q. He said adults -- teenagers, but over the
6 age of 16, didn't he?

7 A. I thought he said 15 and 16, but it may be
8 that they were 16 and 17. So I knew that from his
9 own statement. Um --

10 Q. Well, have you done some studying in the
11 area of pedophilia?

12 A. I've never studied the issue of pedophilia
13 from a -- you mean like psychology classes?

14 Q. From a forensic legal standpoint.

15 A. I have read articles about that in the
16 course of being an assistant DA in the child abuse
17 unit, but it's nothing that I had ever studied,
18 specifically the topic of pedophilia.

19 Q. And in fact would you agree with me, at
20 least, that pedophilia, from your understanding,
21 relates to an uncontrollable impulse to commit
22 sexual acts with children?

23 A. I'm not comfortable -- I don't know exactly
24 what the legal definition or the psychiatric

1 definition of "pedophilia" is.
2 Q. If you don't know, you don't know.
3 So, then, on the date of arraignment --
4 A. Yes, in Superior Court.
5 Q. -- in Superior Court -- that's where you
6 were present, correct?
7 A. Yeah.
8 Q. -- did you seek to have Mr. Horton's bail
9 adjusted in any way from the Superior Court bail?
10 A. From the District Court bail?
11 Q. From the District Court bail.
12 A. I had no basis to seek --
13 Q. My question only was, did you do it.
14 A. No, I didn't. I didn't.
15 Q. So now we come to the Horton case, and it's
16 going along in accordance with typical procedures in
17 Superior Court, discovery and the like, correct?
18 A. Correct.
19 Q. And your obligations during the course of
20 discovery are to not only provide the information
21 that is going to be used at trial, but also to
22 provide something called exculpatory evidence; is
23 that correct?
24 A. That's correct.

1 Q. And exculpatory evidence is evidence which
2 may tend to show that the defendant did not commit
3 the particular crime involved, correct?

4 A. Correct.

5 Q. Or may cast doubt on the Commonwealth's
6 case, to put it another way?

7 A. I would say that exculpatory evidence is
8 the kind of evidence that would -- I mean, it would
9 exculpate the defendant. It would negate a material
10 fact.

11 Q. It would be favorable to the accused,
12 correct?

13 A. Correct. It would be very favorable.

14 Q. And in this particular instance there was
15 an allegation that Mr. Horton required or forced the
16 victim to suck on a screwdriver, correct?

17 A. That's correct.

18 Q. And when we say suck on a screwdriver,
19 we're talking about the handle of the screwdriver,
20 correct?

21 A. Correct.

22 Q. And there were statements from the victim
23 that he actually did that.

24 A. That's correct.

1 Q. Isn't that correct?

2 A. That's correct.

3 Q. Now, the Commonwealth sought to have that
4 screwdriver tested to determine whether or not there
5 was the residue of saliva or DNA by Mr. Horton on
6 the screwdriver; isn't that right?

7 A. That's correct.

8 Q. And that was done very early on in the
9 case; isn't that correct?

10 A. I don't remember exactly when it was done,
11 but it would have been routine that the police
12 seized that and it would be sent to the crime lab
13 for analysis.

14 Q. And you know that was done in this case.

15 A. Yes.

16 Q. Now, prior to August 1st of the Year 2000,
17 did you ever report to the defendant or the Court
18 that the tests on that screwdriver were negative for
19 the kinds of things to be expected if in fact Mr.
20 Horton had sucked on that screwdriver?

21 A. I reported it to the defendant's attorney
22 -- not the defendant -- Ms. Goldbach, that the
23 results from that lab were negative; that there was
24 no saliva found on the screwdriver.

1 Q. And how did you report that?

2 A. I told her that -- I don't remember if it
3 was a telephone conversation or I told her that at a
4 hearing, one of the status dates, but I told her
5 that, and at some point I also gave her the lab
6 report.

7 Q. Isn't it true that you did not notify the
8 defense of that lab report until August 14th of the
9 Year 2000?

10 A. No, that's not true.

11 Q. And so it's your statement that you gave
12 Ms. Goldbach that report?

13 A. That's correct.

14 Q. Before August 1st of the Year 2000?

15 A. I know that I spoke to her about the
16 report.

17 Q. You gave her the contents of the report?

18 A. Absolutely.

19 Q. Before August 1st of 2000?

20 A. (Witness nods head.)

21 Q. And there's simply no doubt in your mind
22 about that.

23 A. No.

24 Q. Is that correct?

1 A. Yes.

2 Q. Now, when you're coming up to the Horton
3 case on August 1st --

4 A. Yes.

5 Q. -- there was a planned plea conference in
6 that case, correct?

7 A. Yes.

8 Q. In other words, like we talked about
9 before, you and the defense attorney had scheduled a
10 date to go before the Judge and to discuss the
11 possible disposition of this criminal case.

12 A. That's right.

13 Q. Now, leading up to that, you had already
14 had experience with Judge Lopez in the Calixte case.

15 A. That's correct.

16 Q. And the Estrada case.

17 A. That's correct.

18 Q. And you had given interviews to Eileen
19 McNamara, which at least you'll agree with me could
20 be perceived as your complaining that the sentences
21 were too lenient.

22 A. I gave an interview to Eileen McNamara
23 about the sentences in the case and the office's
24 perception of those sentences, yes.

1 Q. The office's perception as being too
2 lenient; is that right?

3 A. That's correct.

4 Q. And you also had experience with Judge
5 Lopez having an interest and listening to arguments
6 concerning mental illness as they were related to
7 defendants, correct?

8 A. My experience was similar to that of other
9 judges who take that into consideration. I don't
10 know that she showed any particular interest.

11 Q. Nor did I ask you about particular
12 interest, did I? What I'm trying to do is to get
13 the facts with regard to you and Judge Lopez. What
14 other judges do or don't do is not my question.

15 A. Okay.

16 Q. My question is that from the Calixte case,
17 certainly, you knew that Judge Lopez, in sentencing,
18 considered and received evidence of mental illness
19 as it related to her sentence.

20 A. That's correct.

21 Q. And also as it relates to treatment in
22 relation to her sentence.

23 A. Yes, that's correct.

24 Q. Same in Estrada?

1 A. Yes, that's correct.

2 Q. So you were armed with all of this
3 information before August 1st of the Year 2000,
4 correct?

5 A. Yes.

6 Q. On August 1st of 2000 you arrive in court.
7 Are you prepared to argue about disposition in the
8 Horton case?

9 A. Yes.

10 Q. Have you done your homework?

11 A. Yes.

12 Q. Have you gotten the information you needed
13 to put your best foot forward with the Court?

14 A. Yes.

15 Q. At least in your opinion.

16 A. Yes.

17 Q. Now, let's start with the facts that you
18 describe to the Court -- in fact, all of the
19 information you gave the Court about the offense,
20 would you please tell us that now.

21 A. Yes. I told the Court that this was a
22 serious case and that the --

23 HEARING OFFICER DAHER: Speak louder,
24 please.

1 A. -- that the facts were as follows. That
2 the boy -- the victim in this case was walking home
3 from a friend's house, that the defendant approached
4 him and asked him to help her look for her son, that
5 at some point the boy got into the car with the
6 defendant --

7 Q. Voluntarily?

8 A. That the boy -- I don't remember at that
9 point if I said that the boy went in voluntarily to
10 help look for the son under that pretense or if in
11 fact the defendant pulled the boy's arm.

12 Q. Well, which did you tell the Judge?

13 A. I'm not sure which one I told the Judge.

14 Q. Well, let's stop you there for a moment.

15 Would you have told the Judge the same
16 thing that Mr. Deakin told the Judge on September
17 6th when he described the facts with regard to that
18 incident?

19 A. It was probably very similar to what Mr.
20 Deakin said.

21 Q. Well, would you turn to Exhibit 22 in your
22 book, and turn to the bottom of Page 12 and to the
23 top of Page 13. Do you see that?

24 A. Yes.

1 Q. And Mr. Deakin says -- do you see on Line
2 24 -- "The defendant told the boy that the defendant
3 was searching for a missing son named Michael and
4 that the defendant would pay \$100 to anyone who
5 found the missing boy. The defendant asked the
6 victim to get into the car, and the boy agreed."

7 Do you see that?

8 A. Yes, I do.

9 Q. Now, is that what you told Judge Lopez on
10 August 1st of the Year 2000?

11 A. I believe that that is what I told her. I
12 may have also added that the boy said that he was at
13 some point pulled into the car --

14 Q. You may have? Do you know?

15 A. I don't remember exactly what I said about
16 the boy getting into the car on --

17 Q. Well, wouldn't it be important in a
18 rape/kidnap case to show that there was force used?

19 A. It would.

20 Q. And doesn't it strike you as interesting
21 that when Mr. Deakin provided the facts to Judge
22 Lopez, he doesn't say a word about force being used
23 to get the boy in the car?

24 A. There was no specific charge that

1 related --

2 Q. I asked you if you found it interesting.

3 A. Is it interesting?

4 Q. Yeah.

5 A. I suppose it's interesting.

6 Q. Well, if you're trying to convince a Judge
7 to give a substantial sentence in a case, you want
8 to bring the facts to bear before that judge which
9 may persuade that judge that this conduct, no matter
10 what the other factors were, ought to be punished in
11 the way you want it punished, correct?

12 A. Correct.

13 Q. An important fact would be, "Judge, this
14 boy was pulled in through a window of the car by the
15 arm," correct?

16 A. Well, I don't think there was ever a
17 factual basis for saying he was pulled in through
18 the window.

19 Q. Well, what did you understand the facts to
20 be?

21 A. I understood the facts to be that the boy
22 was approached by the defendant to get into the car,
23 that the defendant said she was looking for her son,
24 that the defendant offered the boy money to get into

1 the car, and at some point the boy got into the car.
2 I don't know if he was at that point helped by a
3 little pull. I do know that, in the scheme of all
4 the other facts, how the boy got into the car wasn't
5 the most serious of the issues before me.

6 Q. You don't think it's serious -- you don't
7 think it's serious and something a judge ought to
8 know if there is a factual basis to say that not
9 only did the defendant cajole and try to con the boy
10 into the car, but when it didn't work, the defendant
11 had to use physical force to pull the boy into the
12 car against his will? You don't think that's a fact
13 that a judge ought to be told when deciding what
14 sentence to give a defendant?

15 A. I do think that is a serious fact. I think
16 I may have said that at the side bar --

17 Q. You may have?

18 A. I don't have a clear memory of every single
19 word that I said at the side bar.

20 Q. Well, when Mr. Deakin gave his statement of
21 the facts in your presence and in front of the press
22 and everybody else on television, did you tell him,
23 "Hey, David, don't forget to put in there that this
24 boy was pulled into a car through a window or

1 through the door against his will"?

2 A. I don't remember having that conversation
3 with David.

4 Q. Do you see anywhere in this recitation by
5 Mr. Deakin where he says that?

6 A. I haven't had a full chance to read over
7 the recitation.

8 Q. Take your time and look at it.

9 A. (Witness reviews document.)

10 Q. Do you see anything in there?

11 A. I don't. I don't.

12 Q. Now, when you went to this lobby conference
13 on August 1st with Ms. Goldbach and yourself --
14 correct?

15 A. Yes.

16 Q. -- finish telling us what facts that you
17 told the Judge of in your presentation.

18 A. After the boy got in the car, the defendant
19 drove the boy to an area that the boy didn't know
20 and ultimately stopped the car. And the boy asked
21 to be able to go back home. The defendant then used
22 some vulgarity to ask the boy to perform a sex act
23 on the defendant. And when the boy refused, the
24 defendant took his hand and put it on top of the

1 boy's head, forcing the boy over the defendant's lap
2 in the driver's seat. The defendant unbuttoned his
3 pants, and the defendant then -- the boy then said
4 that the Defendant then forced him to suck on the
5 defendant's finger, and the defendant then put a
6 screwdriver -- when the boy said "no," the defendant
7 put a screwdriver to the boy's neck. The defendant
8 then made the boy suck on the screwdriver. And the
9 boy was crying. And at that point was about when
10 the police arrived on the scene and saw the boy's
11 head bob up and down in front of -- over the
12 defendant's lap.

13 They approached the car, which was in this
14 secluded area. They went to the car. The boy was
15 crying. They took the boy out of the car. They
16 approached the defendant's side as well. The
17 defendant's pants were down. They found the
18 screwdriver in the console. They found a condom on
19 the floor. The defendant made some statements to
20 the police at that point, saying that they had just
21 kissed, that he thought the boy was older, that
22 there was a likelihood they may have engaged in oral
23 sex; that when the defendant saw the police
24 approaching, he gave the boy \$50 and told the boy

1 not to say anything to the police. And the police
2 actually recovered the money as well from the child
3 when they took him out of the car. Those were
4 essentially the facts that I relayed to the Court.

5 Q. And then what else did you say to the Court
6 concerning the Commonwealth's position?

7 A. I said that this was a serious case. I
8 said that it was a strong case. I said that the
9 victim's family had been cooperative with the
10 district attorney's office, and that they were
11 willing and able to participate in the process. I
12 indicated that -- I may have shown the Court a copy
13 of the defendant's statement to the police at that
14 time. I said that the boy appeared very credible,
15 that he seemed like a good kid. Those were
16 basically the facts. They may have recovered a few
17 other things from the car. Those were basically the
18 facts.

19 Q. Can you remember anything else you told the
20 Judge?

21 A. Those were the facts that I basically
22 outlaid -- at some point the Judge asked me a
23 question about transgendered people --

24 Q. We're going to get to that. I'm asking

1 anything else you said about the facts or
2 recommendation or the reason for the sentence or
3 anything like that.

4 A. I believe I had a copy of the defendant's
5 record and indicated that there was a record, but it
6 wasn't a substantial record.

7 Q. There was a record of convictions?

8 A. There was a -- I don't know if there were
9 convictions. There had been, I believe, a
10 continuance without a finding. There had been a
11 juvenile matter. I showed that record to the Judge
12 for what it was. I can't remember any of the other
13 specific facts that I told the Judge that day.

14 Q. So that's what you told her in advocating
15 your position for the sentence of what?

16 A. I was recommending an 8 to 10.

17 Q. And that was your full advocacy, correct?

18 A. Correct.

19 Q. And you weren't stopped by the Judge?

20 A. No.

21 Q. You weren't prohibited from saying anything
22 you wanted?

23 A. No.

24 Q. You weren't prohibited from arguing

1 anything you wanted?

2 A. No.

3 Q. You were given a full and fair opportunity
4 to present the Commonwealth's position?

5 A. That's correct.

6 Q. And to try to convince the Judge of the
7 appropriateness of your sentence?

8 A. That's correct.

9 Q. Now, did you tell the Judge that --
10 obviously you didn't from what you just said. You
11 didn't tell the Judge that Ebony Horton, according
12 to the victim, threatened to kill the victim.

13 A. I don't remember saying that.

14 Q. That would be an important fact, wouldn't
15 it?

16 A. Yes, it would.

17 Q. To let a judge know that a defendant in a
18 criminal case was threatening to kill a victim?
19 Would that be an important fact, Ms. Joseph?

20 A. You know, I don't remember that fact --

21 Q. No, would it be an important fact?

22 A. Yes, it would.

23 Q. Do you have any doubt that that's what the
24 victim said on a videotape?

1 A. No, I don't have any doubt.

2 Q. In fact, you know from yesterday that what
3 he said was that Mr. Horton threatened to kill him
4 if he opened his mouth, or words to that effect,
5 right?

6 A. That's correct.

7 Q. And you didn't tell the Judge that, did
8 you?

9 A. I don't have a clear memory of telling the
10 Judge that, no.

11 Q. Well, a few minutes ago you knew you
12 didn't.

13 A. I don't think I did.

14 Q. Now, was that just an error on your part?

15 A. An error? It may have been an oversight.

16 Q. An oversight?

17 A. Yes.

18 Q. You prepared for this hearing, right?

19 A. I did.

20 Q. Now, you also didn't tell the Judge, did
21 you, that Mr. Horton, apparently, according to the
22 victim, went over to the passenger's side and laid
23 on the victim, body to body, correct? You didn't
24 tell the Judge that, did you?

1 A. I think I did tell the Judge that at some
2 point, but I don't have a clear memory of that.
3 Q. Well, certainly Mr. Deakin never said
4 anything like that in his presentation to the Court,
5 did he?
6 A. No, he didn't.
7 Q. And you didn't remember it moments ago when
8 you told us the facts that you told the Judge.
9 A. That's right.
10 Q. Now suddenly it may have, might have?
11 A. I don't specifically remember.
12 Q. And you were asked yesterday whether or not
13 the Judge asked to see the videotape. Do you
14 remember being asked, "Did the Judge have access to
15 the videotape?" You answered, "Yes." Do you recall
16 that?
17 A. She didn't ask if she could see it.
18 Q. You said the Judge had access to the tape,
19 right?
20 A. If she wanted to, yes.
21 Q. Did you even tell her there was a tape?
22 A. There were tapes in all child sexual
23 cases --
24 Q. Did you tell her there was a tape?

1 A. I don't know if I began the presentation by
2 saying that in the sane interview -- that's what we
3 call those -- the sane interview, what the specific
4 facts were. There are -- in all child abuse cases
5 we do a tape. That's standard.

6 Q. Ma'am, one, did you tell her that there was
7 a tape?

8 A. I don't remember specifically mentioning
9 the video. I may have begun by telling her that.

10 Q. May have. You have no idea, do you?

11 A. I have no idea.

12 Q. Two, did you ask her to look at it?

13 A. No, I didn't.

14 Q. Did you have it with you that day?

15 A. I don't think so, no.

16 Q. Did you ask the Court to take a recess, so
17 that she could go look at a tape because you thought
18 it was important?

19 A. No, I did not ask the Court --

20 Q. Who was the advocate here? You are, aren't
21 you?

22 A. That's correct.

23 Q. You're there to present the Judge any and
24 all information that you believe she ought to

1 consider during her opinion?
2 A. That's correct.
3 Q. And during her sentencing, right?
4 A. That's correct.
5 Q. You never asked her to look at the tape?
6 A. That's correct.
7 Q. You never asked her to take the tape home
8 with her?
9 A. That's correct.
10 Q. You never asked her to call a recess to
11 look at it?
12 A. That's correct.
13 Q. Period, correct?
14 A. Correct.
15 Q. You never argued to the Judge a reason why
16 probation would be inappropriate in this case, did
17 you?
18 A. My argument was that -- I did. My argument
19 was that an 8 to 10 prison sentence was appropriate
20 because of the extreme serious nature of these
21 charges. And that is inconsistent with an argument
22 that probation would be appropriate.
23 Q. Did you argue to her that this particular
24 defendant was not an appropriate candidate for

1 probation, counseling, and the like for any
2 particular reason other than solely the facts of the
3 case?

4 A. Other than the facts of the case?

5 Q. Other than just the facts of the case.

6 A. Other than the facts of the case -- other
7 than the facts of the case, that was the basis of
8 the Commonwealth's recommendation for the sentence.

9 Q. And you knew the defense was seeking
10 probation, correct?

11 A. That's correct.

12 Q. And so in coming forward on the day of the
13 lobby conference, did you prepare yourself to
14 discuss with the Judge why probation and counseling
15 and electronic monitoring and those kinds of things
16 would be inappropriate for this particular defendant
17 for reasons related to this particular defendant?

18 A. This particular defendant committed very
19 serious crimes, and that is the reason why probation
20 for this defendant was not appropriate. He
21 kidnapped and tried to rape a boy, using a weapon.

22 Q. So, then, other than the facts of the case,
23 which was your rationale -- other than the facts of
24 the case, there was no other rationale why probation

1 would be inappropriate for this particular
2 defendant.

3 A. Why probation would be -- no, there wasn't.

4 Q. And so your reliance was consistently on
5 the facts of the case and that was it?

6 A. The facts of the case and the strength of
7 the case, yes.

8 Q. Well, does the strength of the case mean
9 anything at a plea?

10 A. It does.

11 Q. What does it mean?

12 A. It means that we're able to prove the case.
13 It means that the DA's office is in a situation
14 where we could go forward at trial and prove our
15 points.

16 In some child abuse cases, for example, the
17 children become unavailable, either from having
18 stress or mental illness themselves, and, therefore,
19 even on serious facts we couldn't really proceed at
20 trial. That would be something I would tell a
21 judge. But that wasn't the case here.

22 Q. You would tell a judge, "We can't proceed
23 to trial. Now let's figure out a plea for this
24 defendant"?

1 A. I would probably not be advocating an 8 to
2 10 in that case. I would advocate -- it depends
3 really on the different situations. It depends how
4 traumatized the child is, what the child's
5 therapists are relaying to the Office in terms of
6 their ability to testify at a later date.

7 Q. Let's go back to this case for a moment.

8 A. Okay.

9 Q. On the facts in this case, was it important
10 to you, as you sat there talking about the plea,
11 that the victim be spared testifying at trial?

12 A. It was important to me.

13 Q. And that was a major consideration for you
14 as an advocate for the victim also, correct?

15 A. No, that wasn't a major consideration.
16 This was a case where we felt that the boy was in
17 good shape to be able to testify. And we had a lot
18 of contact with the family that he was doing well.
19 They were supportive of the DA's office's position.
20 And it was a case that would have been not easy, but
21 easyish to prepare for trial, given not only the
22 victim's performance and credibility, but also the
23 strong corroborating facts of the case.

24 Q. You said, the victim's credibility and

1 corroboration. I would like to just talk about a
2 few of those matters.

3 A. Okay.

4 Q. By the way, just as a predicate, in your
5 many years of experience in the DA's office, have
6 you had occasion to determine that police officers
7 sometimes lie?

8 A. I haven't had an experience with a police
9 officer who lied, I don't think.

10 Q. And have you ever had an experience where a
11 police officer exaggerated the facts?

12 A. I can't remember a specific case like that,
13 where --

14 Q. So you in your career have never run across
15 the phenomenon of a police officer lying or
16 exaggerating facts, correct?

17 A. Not in my career, no.

18 Q. Then somebody had to be wrong on certain
19 facts, because you know that the police officers
20 testified to things that the young man in his
21 videotaped statement said were not true; isn't that
22 right?

23 A. I don't know what you're referring to.

24 Q. Well, let's start with the fact that the

1 police said when they came on the scene, Mr.
2 Horton's pants were down around his knees, correct?

3 A. That's right.

4 Q. And the victim on videotape denied that
5 specifically; isn't that true?

6 A. I don't think he denied it specifically.
7 He said they were unbuttoned. And I don't know how
8 much in the dark the victim was able to see of where
9 the pants were. I don't think that those things --

10 Q. The victim was certainly able to see from
11 being next -- sitting next to Horton as much as the
12 police were able to see from outside the car,
13 wouldn't you agree?

14 A. Well, except that the police -- the boy was
15 almost raped. I don't know how much attention he
16 was paying to where exactly the defendant's pants
17 were.

18 Q. He indicated on the tape how much attention
19 it was. He said they absolutely weren't down when
20 asked three times on the tape and said all they were
21 was unbuttoned. Don't you remember that?

22 A. He said they were unbuttoned. I don't
23 believe he said they absolutely weren't down.

24 Q. We'll play the tape in a minute.

1 A. Okay.
2 Q. The police said that when they arrived at
3 the scene, the young man was crying?
4 A. That's correct.
5 Q. The boy denied that, correct?
6 A. No. The boy said he was crying.
7 Q. You're sure of that?
8 A. Yes --
9 Q. When the police came?
10 A. At some point he did stop crying --
11 Q. Not at some point. You understand my
12 question, don't you?
13 When the police arrived, they said the boy
14 was crying at that time, correct?
15 A. Correct.
16 Q. The boy said, "When the police arrived, I
17 was not crying"; isn't that correct?
18 A. The boy said that he stopped crying at the
19 point when the police came. I don't think that
20 those two things are mutually --
21 Q. We're going to watch the tape again.
22 Actually --
23 MR. EGBERT: Your Honor, I'm going to ask
24 to play the videotape in its entirety this time.

1 HEARING OFFICER DAHER: Let's go.
2 MR. EGBERT: Would I be allowed to stop it
3 occasionally?
4 HEARING OFFICER DAHER: Sure.
5 THE WITNESS: May I take a short break?
6 HEARING OFFICER DAHER: Absolutely. We're
7 going to take a short break.
8 MR. WARE: It seems to me the same rules
9 should pertain with respect to cameras during the
10 course of the video.
11 HEARING OFFICER DAHER: I agree.
12 (Recess)
13 (Videotape playing.)
14 "Q. ... and then we can talk about why it's
15 hard and how we can make it easier for you. Okay?
16 A. Yes.
17 Q. Ramon, do you know why you're here today?
18 A. Yes.
19 Q. And why is that?
20 A. Because something happened that shouldn't
21 have.
22 Q. Do you think you could tell me in your own
23 words from the beginning to the end about what it is
24 that happened?

1 A. Yeah.

2 Q. Okay.

3 A. I was walking from my friend's house,
4 because I just got dropped off from UMass. And I
5 was like at the corner of the second street from my
6 house. Then this lady said, 'Oh, I know you from
7 somewhere. Will you help me look for my son?' I
8 was like, 'What?' I ignored her. I kept walking.
9 The second time, she was like, 'Oh, I know you. Can
10 you help me find my son?' I was like, 'I don't even
11 know you.'

12 Q. Where was the lady?

13 A. Well, she was at the corner of the same
14 street I was at.

15 Q. Was she standing on the street?

16 A. Hum-um, a car.

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

18 A. Then after that, she said, Oh, I'll offer
19 somebody \$100, whoever helps me find my son. So I
20 was like, um, I know where he was, but -- she was
21 like, can you show me?"

22 (Videotape stopped.)

23 MR. EGBERT: Let me stop it there for a
24 minute.

1 BY MR. EGBERT:

2 Q. What did you understand Mr. Suarez to be
3 saying at that with regard to what he told Ebony
4 Horton as to knowing where this child was?

5 A. I think that he wanted the money, and so he
6 said he would help her find her son.

7 Q. Well, before that, though, did you hear
8 some discussion where Mr. Suarez says to Ebony
9 Horton, "I know where he was"?

10 A. Yes.

11 Q. Who did you understand that he was talking
12 about at that time?

13 A. The defendant's son.

14 Q. So Mr. Suarez was telling Ebony Horton, a
15 transgendered male --

16 A. Yes.

17 Q. -- that he had seen Ebony Horton's son
18 earlier that day, correct?

19 A. I don't know if he said it earlier, but --
20 he said, "I know where he was."

21 Q. The import was "I know where he was."

22 A. Correct.

23 Q. So in that tense, it's "I know where he
24 was" sometime before they were talking.

1 A. Correct.
2 Q. And what would a boy -- in your dealing
3 with the case, I take it you interviewed Mr. Suarez?
4 A. My only interview with Mr. Suarez was this
5 videotape.
6 Q. No further discussion?
7 A. No.
8 Q. So as a line prosecutor on the case, you
9 heard that statement, "I know where he was." Who
10 did you think he was talking about?
11 A. I thought he was talking about the
12 defendant's son.
13 Q. But the defendant doesn't have a son.
14 A. I know that.
15 Q. So Mr. Suarez was saying to Ebony Horton --
16 and I don't mean to be -- "I know where your
17 fictitious son is"?
18 A. Well, Ebony Horton was saying to the boy,
19 "Come help me look for my fictitious son, and" --
20 Q. Well, he was saying --
21 MR. WARE: May the witness finish, Your
22 Honor?
23 HEARING OFFICER DAHER: Go ahead. Finish.
24 A. And at the point where the defendant

1 offered the boy money to help him look for this son,
2 the child said, Yes, I know where he is, after
3 having denied knowing who the defendant was.

4 Q. So what did you take from that, is what I'm
5 getting at?

6 A. I took it that the boy was going to get
7 into the car to help the defendant look for his son,
8 so he could get the \$100.

9 Q. So the boy was, in your opinion, making up
10 a story to Ebony Horton in order to get the \$100?

11 A. To the defendant, yes.

12 Q. In English, right?

13 A. Yes.

14 Q. And that's basically what had been reported
15 to you by whatever police officials or the like that
16 you had been dealing with in this case?

17 A. That was consistent with the report. I
18 mean, what was reported to me -- my first line of
19 investigation in this case was this videotape, but
20 before going to the grand jury. So it was before I
21 had in-depth conversations with the police officers.

22 Q. Were you a part of preparing -- that's an
23 inartful question. I'll withdraw it.

24 I notice that the interviewer -- I'm

1 familiar with these tapes -- has an ear piece?
2 A. Yeah.
3 Q. Am I correct that that's connected to some
4 people outside of the room?
5 A. That's right. We sit behind a one-way
6 mirror, and we're able to observe the boy. And we
7 can communicate with a microphone into the
8 interviewer's piece.
9 Q. So the answer to my question is, that ear
10 piece is connected to someplace outside the room?
11 A. That's right.
12 Q. There are DAs or personnel outside that
13 room communicating with the interviewer?
14 A. Correct.
15 Q. And were you the person communicating in
16 this instance with the interviewer?
17 A. I was one of the people, yes.
18 Q. So you were actually witnessing this whole
19 thing firsthand?
20 A. Right.
21 Q. Correct?
22 A. Right.
23 (Videotape playing.)
24 "A. ... sort of pulled me in.

1 Q. In where?

2 A. The car. Then after she pulled me in the
3 car, she drove around, stopped. She locked the
4 doors and windows.

5 Q. How did she do that?

6 A. She -- like on her side of the car, there's
7 like a lock thing that locks the doors and the
8 windows."

9 (Videotape stopped.)

10 BY MR. EGBERT:

11 Q. Let me stop you there. Was there a
12 forensic investigation made of the defendant's car?

13 A. I know at some point I was interested in
14 seeing some aspect of one of the chairs, if it
15 reclined or not, but I don't remember where that
16 went. I simply don't remember.

17 Q. Was the car seized by the Commonwealth?

18 A. I believe it was seized initially. I don't
19 know if at some point it was released back to the
20 defendant.

21 Q. And you don't know whether or not there was
22 any forensic examination of the car?

23 A. I don't remember.

24 Q. Do you recall ever seeing such a report?

1 A. I don't.

2 Q. Do you recall providing that report to the
3 defense?

4 A. I don't.

5 Q. Do you recall providing it to the Court?

6 A. I don't.

7 Q. Did you provide to the Court -- strike
8 that. So you simply have no memory?

9 A. Right.

10 (Videotape playing.)

11 "A. ... because I tried to unlock the window
12 and run out, but it was locked. And I -- and then
13 she took me to some specific place I don't even
14 know. Then she said, 'Oh, well, you can suck on my
15 private part.' and I was like, 'No. I want to go
16 home.' she was like, 'You're going to go home.' I
17 was like, 'I want to go home now.' she said, 'Oh,
18 you're going to go home,' and I started crying.
19 Then after that, she was like -- oh, she grabbed my
20 head, pulled me down like this and said, 'Suck on my
21 finger.' And then after that she told me to suck on
22 a screwdriver. I was about to yell, and then she
23 held that same exact screwdriver up to my neck like
24 this (indicating). And then she was like, 'Oh, you

1 better be quiet or else I'm going to tell my husband
2 to come out and kill you.' I was like, 'I want to
3 go home.' And then she unbuttoned her pants.
4 Then" --

5 (Videotape stopped.)

6 BY MR. EGBERT:

7 Q. You heard him say that the defendant told
8 him that she, Ebony Horton, would have her husband
9 come out and kill Mr. Suarez, correct?

10 A. Correct.

11 Q. And that's not a fact you reported to the
12 Court; is that correct?

13 A. I don't recall reporting that.

14 (Videotape playing.)

15 "A. ... what she was doing. And then after
16 that, then my head popped up like and then after
17 that, they took me out to the car and asked me what
18 happened. And I told them what happened. And then
19 after that, they took me in the car -- they arrested
20 her. Then from there I went to a hospital and they
21 did some, like, tests on me to make sure I was all
22 right.

23 Q. Uh-hum. And did you talk to anybody there?

24 A. Yeah, some detectives came.

1 Q. You just told me a whole lot about what
2 happened. I'm going to back up and ask you a couple
3 more questions about it. Okay?

4 A. Uh-hum.

5 Q. First of all, do you know when this was,
6 Ramon?

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

8 Q. In the evening?

9 A. Yes.

10 Q. You said you had just come from UMass and
11 you were at a friend's house?

12 A. Yeah. Because I was coming from swimming.
13 I came from there, and then my coached dropped me
14 off at his house. Then --

15 Q. What was your coach's name?

16 A. Domingos. Then from there, I kept walking
17 from his house, because I was going to call my house
18 and then tell my mom I was on my way.

19 Q. Uh-hum.

20 A. So then after that, he left, and then I
21 seen her.

22 Q. So what street were you actually on, do you
23 know?

24 A. First I was on Holiday. I kept walking.

1 Then I got on Corona.
2 Q. Corona?
3 A. Yes.
4 Q. And is that when you saw her?
5 A. Yes.
6 Q. And you said that she asked you two
7 different times to help find her son?
8 A. Yes.
9 Q. And could you see what type of car she was
10 in or what color it was?
11 A. It was a Toyota, but it was like a gold,
12 like -- I can't say -- I don't really know what
13 color it was, but it was sort of like a goldish
14 color.
15 Q. And how did you know it was a Toyota?
16 A. Because I seen the thing that said
17 "Toyota."
18 Q. Do you like to look at cars? Do you know
19 anything about cars?
20 A. Yes.
21 Q. Okay. So the first time was she on your
22 side of the street or the other side of the street
23 in the car?
24 A. She was on this side of the street

1 (indicating).
2 Q. So when she asked you, were you next to the
3 driver window or was she --
4 A. On the passenger's side. She was on the
5 driver's side, but she, like, leaned over --
6 Q. To speak to you through the passenger
7 window?
8 A. Yes.
9 Q. And so the first time what did you do?
10 A. I ignored her and kept walking.
11 Q. And then how far did you walk before she
12 asked you again?
13 A. Not that far. Like at least two -- what,
14 seven steps away.
15 Q. So not very much?
16 A. Yeah.
17 Q. And she asked you again?
18 A. Yeah.
19 Q. And she said what?
20 A. She was looking for her son. Then she said
21 she has a reward for \$100.
22 Q. Did this person look familiar to you, this
23 lady? Had you ever seen her before?
24 A. No.

1 Q. So you didn't know if she had a son or who
2 her son was or anything?
3 A. No. And she lied and said she was a
4 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'm like, 'Oh, 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.
13 Q. Someone can get it for you, or would you
14 like me to go get it. What do you want to do?
15 A. Somebody can get it.
16 Q. Do you have a cough?
17 A. Yes.
18 Q. Take your time.
19 (Water handed to Mr. Suarez)
20 A. Thank you.
21 Q. Does that help a little bit?
22 A. Yes.
23 Q. So you said you didn't want to get in the
24 car?

1 A. No. And then she, like, grabbed my hand
2 and started pulling me in the car. I tried to
3 scream, but nobody was around at the time."
4 (Videotape stopped.)
5 BY MR. EGBERT:
6 Q. Did you tell the Judge in this lobby
7 conference that this boy was pulled into the car by
8 the hand forcibly and screaming while it happened?
9 A. I don't remember if I said that.
10 Q. But you know you didn't, don't you?
11 A. I don't remember.
12 Q. Well, don't you agree with me that you
13 can't have it both ways with the Judge? On
14 September 6th you're telling the Judge that the boy
15 got into the car voluntarily pursuant to a ruse,
16 correct?
17 A. I didn't say that to the Judge.
18 Q. Mr. Deakin did.
19 A. That's correct.
20 Q. And you're sitting there?
21 A. That's correct.
22 Q. You're the lead prosecutor in the case?
23 A. Yes.
24 Q. Right?

1 A. Yes.

2 Q. And you wouldn't permit Mr. Deakin to
3 present facts to the Court which were false,
4 correct?

5 A. That's correct.

6 Q. And so which is it, which of the facts that
7 the Commonwealth was relying on? That he was forced
8 into the car or that he wasn't forced into the car?

9 A. Well, first of all, no matter how the boy
10 got into the car, he was forced, either by ruse or
11 by the hand.

12 Q. That's an artful choice of words, but I
13 think you know what I was talking about, don't you?
14 Pulled into the car screaming, right? Do you know
15 about that?

16 A. Do I know about that?

17 Q. My question is, which was the
18 Commonwealth's position with Judge Lopez? That the
19 boy was pulled into the car screaming or that he was
20 brought in on a ruse?

21 A. The Commonwealth's position was that -- on
22 September 6th -- was that he was brought in by a
23 ruse.

24 Q. And was your position different on August

1 1st?

2 A. I don't remember if I mentioned to the
3 Judge that the defendant pulled the boy in as well.
4 As I said earlier, in the scheme of the facts and in
5 the scheme of the charges, we didn't specifically
6 charge for a touching of the hand. In the scheme of
7 what had happened that day, how the boy got into the
8 car wasn't the most serious part of the case.

9 Q. How about telling the Judge the truth?
10 That's pretty important, isn't it?

11 A. Absolutely.

12 Q. Well, the boy had told you that he was
13 pulled into the car against his will, screaming,
14 correct?

15 A. Yes.

16 Q. Not that he had gone in on a ruse, correct?

17 A. The boy I believe said both things; that he
18 had gone in on a ruse and that he was pulled in.
19 And I don't --

20 Q. You have listened to this testimony --
21 statement by the boy, correct?

22 A. He goes into it in more in detail later, I
23 believe.

24 Q. You tell me when to stop when he says that

1 he got in voluntarily and nobody took his hand and
2 pulled him in, okay?
3 A. Okay.
4 (Videotape playing.)
5 "Q. So you got in the car?
6 A. Yes. And I tried to get out, but she,
7 like, locked the windows.
8 Q. Did you say anything to her when she locked
9 the windows or when you were trying to get out?"
10 MS. JOSEPH: Right there.
11 (Videotape stopped.)
12 MS. JOSEPH: He's asked a question by the
13 interviewer, "So you got into the car," and the boy
14 responded, "Yes, I got into the car."
15 MR. EGBERT: Let's go back and watch that
16 in context, all right?
17 (Videotape playing.)
18 "A. "... get out, but she, like, locked the
19 windows.
20 Q. Did you say anything to her when she locked
21 the windows or when you were trying to get out?
22 A. No.
23 Q. Okay. And then what happened? How far did
24 she drive? How long, do you think?

1 A. At least down the street.

2 Q. And then what happened?

3 A. Then after that, she stopped the car. I
4 still tried to get out, but she locked the doors.
5 And then after, she took me to some place that I
6 don't even know, which was by some bowling alley.

7 Q. Do you know the name of the bowling alley?

8 A. Lucky Strike.

9 Q. Had you been there before?

10 A. Yes.

11 Q. Okay. And she took you to a place --

12 A. Past it.

13 Q. Past it, okay. And was the car still
14 moving or did she stop it?

15 A. She stopped -- well, after she took me --
16 she took me around, like, the place, and then she
17 stopped the car.

18 Q. And when she topped the car, where were
19 you?"

20 (Videotape stopped.)

21 MR. EGBERT: I may have gone past the spot,
22 and I don't want to mislead you.

23 HEARING OFFICER DAHER: I think we have to
24 go prior to the cup being on the table.

1 MR. EGBERT: Let me see if I can do that.
2 (Videotape playing.)
3 "(Water handed to Mr. Suarez.)
4 A. Thank you.
5 Q. Does that help a little bit?
6 A. Yeah.
7 Q. So you said you didn't want to get in the
8 car?
9 A. No. And then she, like, grabbed my hand
10 and started putting me in the car. I tried to
11 scream, but nobody was around at the time.
12 Q. And she said she was going to give you
13 \$100?
14 A. Yes.
15 Q. So you got in the car?
16 A. Yes. And I tried to get out, but she,
17 like, locked the windows.
18 Q. Did you say anything to her when she locked
19 the windows or when you were trying to get out?
20 A. No.
21 Q. And then what happened? How far did she
22 drive? How long, do you think?
23 A. At least down the street.
24 Q. And then what happened?

1 A. Then after that, she stopped the car. I
2 still tried to get out, but she locked the doors.
3 And then after, she took me to some place that I
4 don't even know, which was past the bowling alley.
5 Q. Do you know the name of the bowling alley?
6 A. Lucky Strike.
7 Q. Lucky Strike. Had you been there before?
8 A. Yes.
9 Q. And she took you to a place --
10 A. Past it.
11 Q. Past it?
12 A. Uh-hum.
13 Q. And was the car still moving or did she
14 stop it?
15 A. She stopped -- well, after she took me, she
16 took me around like the place, and then she stopped
17 the car.
18 Q. And when she stopped the car, where were
19 you?
20 A. I looked around, and I didn't even know
21 where I was.
22 Q. What did you see?
23 A. Like in front was like these boxes and
24 there was a train track.

1 Q. And then what happened?
2 A. Then she said, 'Oh, while we're waiting,
3 you can suck on my private part.' I was like 'No, I
4 want to go home.' She's like, 'Oh, you're going to
5 go home.' I said, 'No, I want to go home.' She
6 said, 'Oh, you're going to go home.' Then I cried,
7 and she put my head down and like, 'Oh, suck on my
8 finger.'
9 Q. Now, you said you sucked on her finger.
10 How did you know it was her finger?
11 A. Because it was, like, rough.
12 Q. What else did you notice about it?
13 A. It had, like, a long nail. And I'm not
14 really sure if it was a girl or boy.
15 Q. Why do you say that?
16 A. Because she had like this deep voice.
17 Q. Okay. And you said that she wanted you to
18 suck on her finger?
19 A. Uh-hum.
20 Q. Did you suck on her finger?
21 A. Like, she put her finger in my mouth
22 between -- she moved my head up and down like that
23 (indicating).
24 Q. Okay. And was she saying anything to you

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

1 A. Yeah, she did the same thing.
2 Q. And did you hear her make any noises or
3 sounds or say anything when that was happening?
4 A. No.
5 Q. And then what happened?
6 A. Then she unbuttoned her pants. And then
7 like three minutes after that, the police came. And
8 then after that, she gave me \$50 and told me to be
9 quiet.
10 Q. When she pulled down her pants --
11 A. Uh-hum -- no, she unbuttoned her pants."
12 (Videotape stopped.)
13 BY MR. EGBERT:
14 Q. Do you see where the interviewer says,
15 "When she pulled down her pants," and he corrects
16 her and says, "No, she unbuttoned her pants"? Do
17 you recall that?
18 A. Yes.
19 Q. Earlier we talked about that particular
20 fact. Now, the police claim that when they came,
21 Mr. Horton's pants were down around his knees,
22 correct?
23 A. Correct.
24 Q. And did you do anything to reconcile those

1 two pieces of information?
2 A. I don't know -- towards the end of the tape
3 is when we asked questions of the interviewer.
4 Q. So you think he changes it again?
5 A. I don't know if he changes -- I don't know
6 if he clarified that at a later point.
7 Q. What is your best memory now as you sit
8 here?
9 A. I haven't seen the tape in a lot of years.
10 Q. You haven't?
11 A. No.
12 Q. You didn't see the tape when you were with
13 Mr. Ware?
14 A. No.
15 (Videotape playing.)
16 "Q. ... pull them down or just unbuttoned them?
17 A. Unbuttoned them.
18 Q. And could you see that her pants were
19 unbuttoned?
20 A. Yes, because I seen her unbutton them.
21 Q. And what did you see when her pants were
22 unbuttoned?
23 A. Just the unbuttoned part; that's it.
24 Q. Did you see any part of her body?

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

1 A. Because she said, 'While we're waiting, she
2 can suck on -- I can suck on her private part,' and
3 I said, 'No.'

4 Q. That's what you said in the very beginning?

5 A. Yeah, when we stopped.

6 Q. Did she say anything about that again after
7 she had you suck on the screwdriver?

8 A. Hum-um.

9 Q. What word did she use for private part?

10 A. The "p" word.

11 Q. You know what? I know sometimes it's hard
12 to say things -- certain words, but it would be
13 helpful for me to know exactly the words she used.
14 It won't be hard for me to hear it, because I talk
15 to lots and lots of kids about lots of different
16 things. You can even write it down if you want.
17 But I need to know the word she said.

18 A. (Writing.)

19 Q. "Pussy." So that's the word she used?

20 A. Yeah.

21 Q. And she said, 'I want you to suck on my
22 pussy'?

23 A. Uh-hum.

24 Q. Did she say that just that one time, or did

1 she say that at all again during the time she
2 wouldn't let you get out of the car?
3 A. She said it that one time.
4 Q. And when she unbuttoned her pants, did she
5 say anything to you about why she was unbuttoning
6 them?
7 A. No.
8 Q. And what happened before the police came?
9 A. Oh, she got on top of me and told me to be
10 quiet.
11 Q. What do you mean, she got on top of you?
12 A. Because, like, the seat was leaning -- she
13 pulled the seat and leaned it back.
14 Q. The passenger seat?
15 A. Uh-hum.
16 Q. And when it was leaned back, what happened?
17 A. Well, I sort of fell back, and then she got
18 on top of me right then.
19 Q. And what was she doing when she was on top
20 of you?
21 A. She told me, 'Oh, be quiet before I get my
22 husband to come out here and kill you.'
23 Q. What was she doing -- where was her body?
24 A. On top of mine.

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

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

1 'Oh, that's my son's friend.' And the other police
2 officer told me to get out of the car, and then he
3 took me to where his car -- where the car was, and
4 she told me to be quiet.

5 Q. Who told you --

6 A. He asked me what happened, and I told him.

7 Q. You told me earlier you had been crying.

8 Were you still crying when the police came or had
9 you stopped by then?

10 A. I stopped."

11 (Videotape stopped.)

12 BY MR. EGBERT:

13 Q. Did you see that statement?

14 A. Yes.

15 Q. She asked whether or not he was still
16 crying when the police came, and he said he stopped.

17 A. Yes.

18 Q. That's really basically the same thing that
19 this whole Jay Greene discussion was about, isn't
20 it? Whether or not this young man was crying at the
21 time? Do you know what I'm talking about?

22 A. I do. I mean, Detective Greene said that
23 he arrived at some point later and the boy wasn't
24 crying, yes.

1 Q. And this was the whole discussion you had
2 had with Anne Goldbach, about how she wanted to talk
3 to Jay Greene and all of that stuff --
4 A. Yes.
5 Q. -- about whether or not -- for whatever
6 reason, about whether or not this boy was crying or
7 not at the time the police came, right?
8 A. Yes.
9 Q. Because you had police reports that said he
10 was crying?
11 A. Yes.
12 Q. You had himself saying he wasn't?
13 A. He said he stopped crying when the police
14 came.
15 Q. When they came?
16 A. Yes.
17 Q. So that's your interpretation?
18 A. Yes.
19 Q. He was crying when they arrived and then
20 stopped --
21 A. He stopped when they came.
22 Q. So that's your interpretation of that
23 event, right?
24 A. Yes.

1 (Videotape playing.)
2 "Q. -- anything else that happened that you can
3 think of?
4 A. No.
5 Q. Was the radio playing in the car at all?
6 A. No.
7 Q. Not the whole time you were there?
8 A. No.
9 Q. Did she have a phone or make any phone
10 calls or anything like that when you were there?
11 A. No.
12 Q. (Inaudible)?
13 A. No.
14 Q. And did she say anything to you before she
15 opened the windows to the police?
16 A. She told me to be quiet.
17 Q. Is that all she said?
18 A. Yes.
19 Q. I'm just going to see if there's other
20 questions, which there probably are. I always
21 forget something.
22 (Pause)
23 Q. There's a couple of things I'm still
24 wondering about. I think you told me that you said

1 you were on Holiday Street when you first saw her?
2 A. Hum-um. I was walking from Holiday Street,
3 and then I was on Corona.
4 Q. When you saw her, you were on Corona?
5 A. Yeah, at the corner.
6 Q. And when you got into her car, were you
7 still on Corona?
8 A. Yes. And then she drove off down the
9 street.
10 Q. What street did she drive down?
11 A. Like, all the way down past the T stop near
12 Field's Corner.
13 Q. Was she still on Corona when she drove past
14 the T stop or did she turn onto another street?
15 A. She rode all the way down.
16 Q. On Corona?
17 A. No. Corona is like here, and then Field's
18 Corner and the station is right here. She drove all
19 the way past my street.
20 Q. Do you know what street she drove on?
21 A. No. It was like down.
22 Q. Okay. Do you know if this person had a
23 son? Had you ever seen her son before?
24 A. No, but I know a Michael. But I'm not sure

1 if it's her son.
2 Q. She said her son was Michael?
3 A. (Nods head.)
4 Q. Did she say how old he was?
5 A. No.
6 Q. (Inaudible.)
7 A. Yes.
8 Q. I think I asked you this before. You had
9 never seen her before?
10 A. No.
11 Q. And you think you know some kid named
12 Michael, but you don't know who she was talking
13 about?
14 A. Yes.
15 Q. Now, you know how you told me about the
16 screwdriver?
17 A. Uh-hum.
18 Q. When was the first time that you saw that
19 screwdriver?
20 A. When she, like, turned on her light and
21 then she was digging for something, and I seen the
22 screwdriver. That's what she was looking for.
23 Q. Where was she digging?
24 A. On, like, the side, on the door, and then

1 there's a pocket like that and --
2 Q. So the screwdriver was in the side of the
3 door?
4 A. Yes; yeah.
5 Q. Did she turn on her light?
6 A. Uh-hum.
7 Q. Which light?
8 A. The light on her roof there.
9 Q. What did you notice when she turned on the
10 light? What could you see?
11 A. I could see that she was over there digging
12 for something and that there was like a locked door
13 over there, that the things were locked, the doors.
14 Q. Did you see her pull the screwdriver out?
15 A. Yes.
16 Q. What color was it, do you know?
17 A. It was black and red; like it had a red
18 line.
19 Q. And what did she do with the screwdriver
20 when she pulled it out?
21 A. She kept it on like -- like in the middle
22 of the, like where you keep your stuff and then you
23 lift that thing up. I can't think of what it is.
24 Q. Is there a space in between the --

1 A. Yeah.
2 Q. -- in between the front seat?
3 A. Yeah, uh-hum.
4 Q. So she put it in there or on top of it?
5 A. On top.
6 Q. And did she do anything with it when she
7 got it out the first time?
8 A. Hum-um.
9 Q. When she got it out the first time.
10 A. No.
11 Q. So when was it that she did something with
12 it?
13 A. I'd say at least ten minutes after.
14 Q. What was the first thing she did with it?
15 A. She stuck it at my neck right here
16 (indicating).
17 Q. Did she cut you?
18 A. No.
19 Q. Did she say why she was getting it, digging
20 it out?
21 A. No.
22 Q. Did you ask her, What that's for, or
23 anything like that?
24 A. Yeah.

1 Q. What did she say?
2 A. She didn't answer.
3 Q. What did you say to her?
4 A. I said, 'Why do you got that for?' She
5 didn't say nothing after that.
6 Q. During this time that she -- this whole
7 time that she got on top of you or any other time
8 that she was having you do this to her, did any
9 other part of her body touch you?
10 A. No.
11 Q. When she was on top of you, did she do
12 anything with her face or her mouth?
13 A. No.
14 Q. Did she do anything else with her hands?
15 A. No.
16 Q. Did she try to?
17 A. No.
18 Q. Do you remember you told me that you knew
19 it was her finger that was in your mouth because it
20 was rough and a nail?
21 A. Yeah. Like, she had nails -- like, you
22 know how you grow nails on her fingers? That was
23 how.
24 Q. Uh-hum. And where was her hand when she

1 had you do that to her finger?

2 A. Her upper hand was on this side
3 (indicating).

4 Q. Uh-hum.

5 A. In her pocket.

6 Q. Remember you had told me she was holding
7 your head?

8 A. Uh-hum.

9 Q. So you just said now her hand was in her
10 pocket. I'm a little confused.

11 A. This hand she told me to put -- she put my
12 mouth in -- she put her finger in my mouth, and her
13 other hand was in her pocket.

14 Q. Okay. Don't you remember you told me she
15 was holding your head?

16 A. Uh-hum. She was doing it -- oh, I'm
17 confused.

18 Q. Maybe you should just put the marker down
19 for a minute and just think for a second. All
20 right?

21 A. Oh, she had this finger in my mouth, and
22 then she was holding it down like that.

23 Q. And just think for a second and listen to
24 what I'm going to ask you.

1 Where was her hand, the one that put her
2 finger in your mouth? Where was that in relation to
3 her body? Was it closer to here or here or here?
4 A. Towards her thigh.
5 Q. How close to her thigh?
6 A. It was like right here (indicating).
7 Q. Was her hand holding anything when she was
8 doing that?
9 A. Hum-um.
10 Q. I may have asked you this, but did she say
11 anything at all when she was moving your head up and
12 down like that?
13 A. No.
14 Q. Ramon, do you have an older brother?
15 A. Yes.
16 Q. And what's his name?
17 A. Seneca -- I have two older brothers and one
18 younger brother.
19 Q. Say that again?
20 A. I have another younger brother named Juan,
21 and then I have two older brothers.
22 Q. Where do they live?
23 A. One lives with my grandmother and one lives
24 in Delaware, but he's coming up.

1 Q. What's the one that lives with your
2 grandmother? What's his name?
3 A. Tyson Jones.
4 Q. Tysine?
5 A. Tyson.
6 Q. And the other brother lives in Delaware?
7 A. Yes.
8 Q. How old is Tyson?
9 A. He's 14 -- no, 15.
10 Q. And how old is Seneca?
11 A. Eighteen.
12 Q. And how long has he lived in Delaware?
13 A. For about a year.
14 Q. Do you know anybody in your neighborhood
15 named Mike or James?
16 A. James? No.
17 Q. How about Mike?
18 A. Yeah.
19 Q. What Mike do you know?
20 A. He lives up the street from my friend.
21 Q. Which friend?
22 A. He lives on Holiday, the one that I came
23 from his house.
24 Q. What's his first name?

1 A. Joseph.
2 Q. And how old is this Mike that you know?
3 A. I think 13 -- no; 12, I think.
4 Q. And how do you know him?
5 A. Because he goes swimming. He's on the swim
6 team, too.
7 Q. I've asked you a lot of questions, Ramon.
8 A. Uh-hum.
9 Q. Is there anything else you can think of
10 that I didn't ask you that you think is important to
11 know?
12 A. No.
13 Q. No?
14 A. Hum-um.
15 Q. Then I want to thank you for coming in. I
16 like the colors you chose here."
17 (Videotape stopped)
18 BY MR. EGBERT:
19 Q. Would you say it's a fair characterization
20 of that young man's testimony that the defendant
21 told him that the defendant was searching for a
22 missing son named Michael and the defendant would
23 pay \$100 to anyone who found the missing boy, and
24 the defendant asked the victim to get into the car

1 and the boy agreed? Would you say that's a fair
2 characterization of his statement?

3 A. Yes.

4 Q. After he repeatedly and repeatedly and
5 repeatedly said that he was pulled in by force,
6 screaming into the car?

7 A. I don't think those two things are mutually
8 exclusive.

9 Q. You think that by telling the Judge he
10 agreed to get in the car is the same thing as
11 telling her that the boy was being pulled into the
12 car, screaming not to go? Is that the same to you?

13 A. They're not the same. But I don't --
14 again, the way the boy got into the car wasn't one
15 of the main factors that we considered in making our
16 sentencing recommendation.

17 Q. But you're talking to a judge who you're
18 trying to give the facts to, a well-rounded set of
19 facts in all fashions, so that she can have a good
20 idea of what went on, correct? Is that a correct
21 statement?

22 A. Yes.

23 Q. And you neglected to tell her -- neglected
24 to tell her that this boy had been pulled into the

1 car, screaming?

2 A. I don't remember if I told her that on
3 August 1st.

4 Q. Well, you certainly know that Mr. Deakin
5 didn't tell her that, right?

6 A. That's correct.

7 Q. And you'll agree with me that you and Mr.
8 Deakin had discussed this case?

9 A. Yes.

10 Q. And that you and he were working from the
11 same set of facts?

12 A. Yes.

13 Q. And, of course, there's no record of your
14 conversation with the Judge, right?

15 A. On August --

16 Q. August 1st.

17 A. Or 4th.

18 Q. On the 1st, at the bench conference --

19 A. That's right; there's no record.

20 Q. -- when you made these representations to
21 the Court.

22 A. That's correct.

23 Q. Now, having discussed all of this, have you
24 exhausted now the matters which you discussed with

1 Judge Lopez on August 1st from your point of view?

2 A. Well, at different points there were
3 different opportunities for me to speak during the
4 few minutes of the lobby conference. There was the
5 recitation of the facts, there was the part where
6 she had inquired of me if I knew about transgendered
7 people, there was the part where I told her that our
8 office is taking this case very seriously, that it
9 was a serious case.

10 Q. Well, your office takes all cases seriously
11 of child sexual abuse, don't they?

12 A. Yes.

13 Q. So that was not a particularly newsworthy
14 piece of information to the Judge. I mean,
15 obviously the DA's office takes crime seriously;
16 isn't that right?

17 A. Yes. Newsworthy or not, I think it was a
18 question of the fact that we perceived this
19 defendant in the scheme of cases to be serious; that
20 this was a serious crime.

21 Q. This defendant or the crime?

22 A. The crime.

23 Q. You said "this defendant."

24 A. I mean the crime.

1 Q. You mean the crime; is that correct?
2 A. Yes.
3 Q. Now, all of -- and we'll get to the rest of
4 your discussion. But again, let me repeat it to
5 you. You made these representations to the Court?
6 A. Yes.
7 Q. And then it was Ms. Goldbach's turn, right?
8 A. Yes.
9 Q. Is that correct?
10 A. Yes.
11 Q. Ms. Goldbach gave her recitation of what
12 she wanted to present to the Judge?
13 A. Correct.
14 Q. And one of the things that she wanted to
15 and did present to the Judge was this psychosocial
16 evaluation or report, correct?
17 A. Correct.
18 Q. Which is Exhibit 3 in this case; is that
19 right?
20 A. Yes.
21 Q. Now, you've testified that Anne Goldbach
22 never told you about this report, gave you this
23 report or offered you this report prior to the
24 August 1st hearing, correct?

1 A. That's correct.

2 Q. But she did offer you a predecessor to this
3 report, didn't she, at an arraignment on -- the
4 arraignment in Superior Court, when bail was going
5 to be a consideration?

6 A. I don't remember if she gave me anything
7 that day.

8 Q. Well, you recall that -- do you know
9 whether or not there was a report prepared for
10 arraignment which included the information up to and
11 including that period of time that Ms. Katz had
12 evaluated?

13 A. I don't remember if there was a report at
14 the Superior Court.

15 Q. Do you remember looking at Ms. Goldbach
16 when she offered you the report at arraignment and
17 looking at her -- telling you to take a look at it,
18 and handing it back to her and telling her, "I don't
19 want this"?

20 A. I don't remember that.

21 Q. Do you now deny that it happened?

22 A. I have no memory --

23 Q. Do you deny that it happened? That would
24 stand out in your mind, wouldn't it?

1 A. As we sit here today, I don't have a memory
2 of being presented anything at the defendant's
3 arraignment. As we discussed earlier, there was no
4 bail issued -- being discussed at the arraignment.
5 He walked in on his own. I don't remember receiving
6 a report or seeing a report from Ms. Goldbach at the
7 Superior Court arraignment.

8 Q. So you lack a memory -- would it refresh
9 your memory if I told you that Ms. Goldbach says
10 exactly that; that she tried to give you that report
11 on more than one occasion -- not that report, but
12 it's predecessor, on more than one occasion, and you
13 turned it down?

14 A. That doesn't refresh my memory.

15 Q. Well, in any event, here you are on the 1st
16 of August before Judge Lopez, and Ms. Goldbach
17 presents the Court a report, correct?

18 A. Correct.

19 Q. You don't know what it is, you've
20 testified?

21 A. I knew what type of report it was.

22 Q. What type?

23 A. Yes.

24 Q. Do you think it competent advocacy to say,

1 I know the type of report and, therefore, I won't
2 ask for a copy?
3 A. No.
4 Q. Did you ask for a copy?
5 A. No, I didn't.
6 Q. Did you ask to read it?
7 A. I had an opportunity to read it alongside
8 with the Judge, to glimpse through it and to hear
9 the Judge read it out loud to me.
10 Q. The Judge read this out loud to you?
11 A. She read parts of it out loud, yes.
12 Q. Parts of it?
13 A. Yes.
14 Q. Did she read all of it to you out loud?
15 A. No.
16 Q. Did it strike you as competent advocacy to
17 say, "Judge, before you consider that report, I'd
18 like to see a copy and read it myself"?
19 A. I didn't say that, no.
20 Q. Did you misunderstand my question? We're
21 talking about competent advocacy.
22 Do you think it's competent advocacy at a
23 sentencing proceeding to simply not even ask to see
24 a report that a judge is relying on and considering

1 in developing a sentence in the case?

2 A. I was giving the report --

3 Q. Please answer my question.

4 A. I'm trying to answer.

5 MR. EGBERT: Judge, can I have an answer to
6 my question?

7 HEARING OFFICER DAHER: He's entitled to
8 it. It's a very, very simple question. So if you
9 would.

10 A. Given the circumstances of that day, I
11 think I gave the report the weight that it was due
12 with the Judge.

13 Q. The weight that it was due. You didn't
14 even know what was in it. It could have had a
15 letter to the Judge saying, Here's \$100,000 for
16 taking care of my sentence." How do you know?
17 Isn't it elementary --

18 MR. WARE: Objection. If that's a
19 question, let's have the witness answer it. If it's
20 a speech, I object.

21 HEARING OFFICER DAHER: Sustained.

22 Q. Isn't it elementary advocacy, when a judge
23 is reviewing documents presented by the other side,
24 to seek to see a copy so you know what's in them?

1 A. I was able to see the copy simultaneously,
2 at the same time as the Judge was.

3 Q. You were?

4 A. She didn't keep a copy, I didn't keep a
5 copy. She read parts of it out loud. I've seen
6 many reports like this from CPCS.

7 Q. Are they standard format, transgendered
8 psychological disorder format? Have you ever seen
9 one of those before?

10 A. I don't know if I've ever seen one dealing
11 with a transgendered individual before.

12 Q. Let's ask the questions one at a time.

13 Have you ever seen a CPCS report with
14 regard to a person with transgendered emotional or
15 mental illness?

16 MR. WARE: Objection. The report says
17 nothing about mental illness.

18 HEARING OFFICER DAHER: Sustained.

19 Q. Have you seen any report in the past, other
20 than this one, which discusses transgendered people
21 who look and feel female?

22 A. I don't remember if I had any other cases
23 when I was a District Court ADA where this issue of
24 being transgendered played a role. In the Superior

1 Court I did not have any other cases where there was
2 a transgendered defendant, but I have seen many CPCS
3 reports, psychosocial assessments, talking about
4 sentencing recommendations and the background of the
5 defendant in terms of the life that they've had; if
6 they've had a hard life or if they have any issues
7 or if they're in therapy. Those types of reports
8 are pretty routine.

9 Q. So is it your testimony, then, that you did
10 know the contents of the report at the August 1st,
11 2000 hearing?

12 A. I didn't know every word that was in here,
13 nor did I know all of the specific contents. I knew
14 that this was a report that talked about the
15 defendant's family and that talked about the fact
16 that the defendant was transgendered. The Judge
17 read out loud some of those issues surrounding the
18 transgendered and the fact that the defendant has a
19 tenancy to hang out -- I don't really remember where
20 it was -- but with children or younger people and
21 had some further issues. I remember having the
22 Judge read that out loud.

23 I remember Ms. Goldbach, when she presented
24 the report to the Court, saying that this was

1 something to do with the -- to do with sentencing,
2 that kind of thing; that it was something that she
3 had prepared -- that she had had prepared to
4 advocate her sentence.

5 Q. And so you didn't seek a copy of the
6 report?

7 A. I did not seek a copy of the report.

8 Q. You knew that the Judge was being swayed by
9 the report, didn't you?

10 A. I actually didn't think the Judge was being
11 swayed by the report. That wasn't the impression
12 that I was given. I know that the Judge didn't seek
13 a copy either, that one was never filed, and that
14 the Judge skimmed it for like a minute while we were
15 up at the side bar.

16 Q. Didn't Judge Lopez change her attitude
17 after seeing the report?

18 A. My memory is that Judge Lopez changed her
19 position on the case as soon as Anne Goldbach
20 mentioned that the defendant was transgendered, and
21 that that was the most persuasive advocacy that Anne
22 Goldbach brought to the side bar.

23 Q. Do you recall testifying at Page 40 of your
24 initial interview before the Commission, at Line 8,

1 "She agreed," meaning the Judge, "agreed it was a
2 serious case and she would be hard-pressed to give
3 probation. Then when she heard the defendant had
4 this transgendered issue and she saw the report, I
5 think she was like, well, she was swayed at that
6 point, I think"?

7 A. Yes.

8 Q. Do you remember testifying in that regard?

9 A. Yes, I do.

10 Q. Do you want to change that testimony?

11 A. No, I don't.

12 Q. So after she heard about this transgendered
13 issue and after she saw the report --

14 A. Yes.

15 Q. -- she was beginning to be swayed, correct?

16 A. Correct.

17 Q. Did you at that time say, "Can I see this
18 report, Judge"?

19 A. At that point I had seen as much of the
20 report, basically, as she had.

21 Q. How do you know that? She was reading it
22 to herself, wasn't she?

23 A. I was standing right next to her up at the
24 side bar, similarly to when you've been showing me

1 deposition testimony and you come up here, and then
2 I'm able to read alongside you, some parts out loud,
3 but you'll often read a whole --
4 Q. I do remember a little bit about Suffolk
5 Superior Court.
6 A. Yes.
7 Q. There is a bench in the First Session,
8 correct?
9 A. Yes.
10 Q. Former Federal Court, correct?
11 A. Yes.
12 Q. It's a former Federal Court bench?
13 A. Yes.
14 Q. And the Judge was on the bench?
15 A. Yes.
16 Q. And you were standing down below?
17 A. I'm the one that generally gets to go up --
18 my experience has been that I get to walk up a few
19 stairs to -- there's a few stairs that go up to
20 where the Judge is sitting, and then she comes very
21 close to the parties, because it's off the record,
22 so you need to be huddled. And I'm up the stairs,
23 and then Ms. Goldbach is below me, essentially. And
24 I'm able -- I'm kind of katty-corner with the Judge

1 at that point.

2 Q. Katty-corner, looking over her shoulder?

3 A. Right.

4 Q. Did you say to her, "Judge, before you
5 accept that report and the facts that are in it, we
6 want an independent examination"?

7 A. No, I didn't.

8 Q. Now, you testified yesterday that you had
9 no right to ask for such a thing. That's not true,
10 is it?

11 A. No. I testified yesterday that
12 realistically, it wouldn't be possible to get that.
13 I could have asked for an independent social worker
14 or psychosocial worker, whatever that person was, to
15 do that, but the defendant, prior to a plea, has
16 every right to refuse to speak to an agent of the
17 Commonwealth or an independent worker. And
18 realistically a defense attorney would not have
19 their client speak to the DA's office or to one of
20 our agents in the preparation for sentencing prior
21 to going through the plea.

22 Q. Ms. Joseph, have you ever heard of looking
23 at a judge when the defense presents a report like
24 this and saying, "Judge, I want to make an

1 independent evaluation; and if the defendant won't
2 go along with it, you should reject their report,
3 because we haven't had an opportunity to do an
4 independent examination"? That's done all the time,
5 isn't it?
6 A. I don't know if that's done all the time.
7 Q. Well, you took no action to seek to do your
8 own investigation, right?
9 A. Of the psychosocial report?
10 Q. Yes.
11 A. Correct.
12 Q. So all of those factors were relayed in
13 that report to the Judge, right?
14 A. Correct.
15 Q. One of them being that the defendant was
16 unlikely to reoffend, correct?
17 MR. WARE: Objection to the
18 characterization of that as a fact.
19 HEARING OFFICER DAHER: Sustained.
20 Q. Was it an opinion of the social worker who
21 had provided this information to the Judge that the
22 defendant was unlikely to reoffend?
23 A. That was the opinion, yes.
24 Q. Did you do anything to challenge that

1 opinion?

2 A. There was nothing to challenge. That was
3 the author's opinion.

4 Q. Well, did you do anything to counter it?

5 A. We didn't really discuss the offending
6 issue.

7 Q. Did you even know it was in the report,
8 since Judge Lopez was doing the reading?

9 A. Ms. Goldbach may have mentioned that and I
10 may have seen that.

11 Q. Do you know?

12 A. I don't have a clear memory of discussing
13 the specific issue about reoffending as it relates
14 to the defendant.

15 Q. So here you are faced with a report by a
16 person who's a licensed social worker -- and you
17 knew that at the time, didn't you?

18 A. I knew it was prepared by someone
19 through CPCS, either a social worker or a consultant
20 for CPCS, a psychologist or some type of a
21 therapist. I didn't know the person's official
22 title.

23 Q. Some form of expert?

24 MR. WARE: Objection.

1 A. Some form of a professional.
2 HEARING OFFICER DAHER: What is your
3 objection?
4 MR. WARE: Well, an expert in what? This
5 is a social worker who's doing a dispositional
6 plan --
7 HEARING OFFICER DAHER: Sustained. You
8 have it.
9 Q. Did you argue to Judge Lopez that this was
10 a social worker doing a dispositional plan and she
11 should reject it because she was unqualified to
12 provide the information she got?
13 A. No.
14 Q. Never said such a thing, did you?
15 A. No.
16 Q. Mr. Ware might make that speech, but you
17 never did?
18 A. I didn't.
19 Q. You never looked at the Judge and said,
20 "This report shouldn't be considered by you," did
21 you?
22 A. No. I didn't say that the report shouldn't
23 be considered. I did say that the Commonwealth's
24 position should be considered and that the

1 Commonwealth's position was for a sentence
2 imprisonment. And that the Commonwealth felt that
3 this was a very serious case.

4 Q. We've heard all that. We've heard all of
5 that.

6 Did you challenge any of the assertions
7 made in the report?

8 A. There really didn't seem to me to be
9 anything to challenge. The report stated that the
10 defendant is transgendered. Okay. The report --
11 that seemed to be the main focus of Ms. Goldbach's
12 presentation, was that factor. And that factor,
13 from the Commonwealth's perspective, had no bearing
14 on a sentence recommendation, what the sexual
15 identity of a defendant is.

16 Q. What if that sexual identity is a disorder?

17 MR. WARE: Objection. The report never
18 characterizes anything as a disorder.

19 MR. EGBERT: Judge there's already been
20 testimony in this record from Judge Lopez that when
21 she saw the words, transgendered and counseling in
22 those matters, that she took that --

23 MR. WARE: There was nothing in the
24 report --

1 HEARING OFFICER DAHER: Sustained.
2 Sustained. Sustained.

3 Q. Well, you didn't know what was in the
4 report at the time, in any event, right, with regard
5 to whether or not there was any mention in there of
6 psychological counseling or disorders, correct?

7 A. I knew that it mentioned that the defendant
8 was transgendered and therefore, suffered some
9 issues in coming to that -- in being transgendered.
10 There was nothing specifically to rebut about that
11 issue. It was a given.

12 Q. How about the issue of whether or not the
13 defendant was in need of counseling, for example?
14 Did you know whether or not that was in the report?

15 A. I don't remember if it said that that was
16 in the report, but that's not a factor I would rebut
17 one way or the other. I believe the defendant is in
18 need of counseling. One can get that in state
19 prison. Counseling is very important for all
20 defendants in criminal cases, I think.

21 Q. And how about the issue of whether or not
22 the defendant would suffer serious consequences in
23 state prison, and those types of consequences? Was
24 that discussed in the report?

1 A. Anne Goldbach did mention --
2 Q. Was that discussed in the report?
3 A. I don't -- on August 1st?
4 Q. Yes.
5 A. I don't remember if that was specifically
6 something that was read in the report. I do
7 remember that Anne Goldbach --
8 Q. My question was, was it discussed in the
9 report?
10 MR. WARE: Mr. Egbert, please stop talking
11 for a moment. Let her finish.
12 HEARING OFFICER DAHER: Let her finish.
13 MR. EGBERT: Judge, my question was --
14 MR. WARE: Objection.
15 HEARING OFFICER DAHER: Answer. Complete
16 your response.
17 A. I do remember that Anne Goldbach said that
18 a prison sentence would be difficult for this
19 defendant because of the transgender situation, and
20 that was something she said in introducing the
21 report.
22 Q. But lawyers' statements to the Court are
23 advocacy, correct?
24 A. Yes.

1 Q. Here you had a report by a licensed
2 professional, correct?
3 A. That was part of the advocacy.
4 Q. Here you had a report by a licensed
5 professional, correct?
6 A. That was being --
7 Q. Here you had a report by a licensed
8 professional, correct?
9 MR. WARE: Objection.
10 HEARING OFFICER DAHER: It's a very simple
11 question, Mr. Ware. You're entitled to it. Just
12 answer it.
13 A. Yes, the report was done by a professional.
14 Q. Thank you. And the Judge was taking that
15 report and giving it some credence in relying on it,
16 as you noticed and you testified earlier, correct?
17 A. Yes.
18 MR. EGBERT: Is this a good time, Judge?
19 HEARING OFFICER DAHER: If you want to go a
20 little longer, I don't mind. If you want to break,
21 that's fine.
22 MR. EGBERT: We need to see the Court on a
23 couple of matters, anyway.
24 HEARING OFFICER DAHER: Sure. Let's

1 suspend here.

2 (Discussion off the record)

3 HEARING OFFICER DAHER: Do you want to
4 address the Court?

5 JUDGE LOPEZ: Yes. I understand that my
6 counsel has presented to you --

7 HEARING OFFICER DAHER: Come up to the
8 stand, please.

9 JUDGE LOPEZ: I understand my counsel has
10 already made my request to you that I have this trip
11 that was planned about two months ago on the
12 assumption that this case was going to start on
13 November 4. And I am supposed to meet 20 people in
14 Miami on Sunday, who are counting on me to do this
15 trip.

16 In addition to that, there's actually
17 something even more important to me concerning this
18 trip, which is I have been contacted by the
19 International Section of the American Bar
20 Association. They want to do a trip to Cuba. They
21 have been unable to. I have meetings scheduled with
22 officials in Cuba to see if I can put a program
23 together for them for March. It is very important
24 to the work I have been doing in terms of having a

1 dialogue between the U.S. legal system and the Cuban
2 legal system. I am one of the founding members of
3 what is known as the U.S. Cuba Legal Forum, a very
4 recent organization, and it's a very important
5 project for me and for a lot of people that are
6 involved in the long-term involvement in this
7 situation in the hopes of transition to democracy
8 and a number of other things that we're working for.

9 HEARING OFFICER DAHER: How long are you
10 going to be in Cuba?

11 JUDGE LOPEZ: For a week.

12 HEARING OFFICER DAHER: Mr. Ware?

13 MR. WARE: Yes, Your Honor. As I said at
14 the side bar, I oppose any continuance or
15 interruption in this trial. This is, in effect, a
16 trial proceeding before the Hearing Officer. There
17 are a great many people's lives affected here, not
18 just Judge Lopez. There is importance in terms of
19 the witnesses who are prepared to come here. There
20 is the importance of continuity in this proceeding.
21 We are all being pushed up against the Christmas
22 season with all of our attendant responsibilities to
23 family and friends, and I am very much opposed to a
24 hiatus for the purpose of an American Bar

1 Association liaison trip or some group that was
2 planned two months ago, at which point the Judge
3 agreed to this schedule. Moreover, Your Honor, the
4 defense of this case gave you a list of no less than
5 33 witnesses they intend to call.

6 MR. EGBERT: Potential witnesses.

7 MR. WARE: Now they're potential. In any
8 event, there is a list in my hand of 33 witnesses.
9 There could have been no expectation that this case
10 would be done in 8 or 10 trial days, which is where
11 we'll be. So I think, Your Honor, it's unreasonable
12 in terms of the effect on everyone, including
13 counsel for both sides, the Court personnel, the
14 witnesses involved, to interrupt this case for
15 purposes of a trip to Cuba.

16 HEARING OFFICER DAHER: The matter is being
17 taken under advisement. I'll give you an answer
18 tomorrow morning.

19 MR. EGBERT: A couple of facts. You should
20 know that I discussed this matter with Mr. Ware
21 sometime last week to apprise him of the
22 possibility. I didn't know how far we were going to
23 go and basically the speed of this thing.

24 And I also want to put on the record that

1 no one thinks it more important than Judge Lopez in
2 these proceedings. Mr. Ware may think it affects
3 other people's lives; it certainly has affected her
4 life. But these are matters that she has been
5 involved in intricately over the years and more
6 recently, and I believe she's traveled on these
7 missions, so to speak, with congressmen and court
8 officials and various people over the past year to
9 build this bridge. And it's not one that's
10 easily -- and I think, quite frankly, if she doesn't
11 take the group that's going now, they probably can't
12 go and achieve their purposes.

13 HEARING OFFICER DAHER: I'll give you an
14 answer tomorrow morning. Let me think about it.

15 (Off the record)

16 HEARING OFFICER DAHER: They're talking
17 about redesigning the courthouse and the big move
18 from P.O. Square, et cetera. Okay. I'll let you
19 know tomorrow morning.

20 MR. EGBERT: Thank you.

21 (Whereupon, the hearing was
22 adjourned at 1:03 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 VII, is a true and
accurate transcription of my stenographic notes
taken on Tuesday, December 3, 2002.

Jane M. Williamson
Registered Merit Reporter

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