

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  
Wednesday, December 4, 2002  
    9:35 a.m.

(Jane M. Williamson, Registered Merit Reporter)

\* \* \* \*

1		I N D E X	
2	WITNESS	DIRECT	CROSS
3	Leora Joseph		
	(By Mr. Egbert)	8-3	
4			
	David Deakin		
5	(By Mr. Braceras)	8-146	

6 \* \* \*

7 E X H I B I T S

8	EX. NO.	FOR ID	IN EVID.
9	23 Massachusetts sentencing		8-169
10	guidelines		

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1 P R O C E E D I N G S  
2 HEARING OFFICER DAHER: We have an  
3 outstanding motion for a continuance. We'll take  
4 that up at one o'clock. Let's see how far we  
5 progress today.  
6 LEORA JOSEPH, Previously Sworn  
7 CROSS EXAMINATION, Resumed  
8 BY MR. EGBERT:  
9 Q. Good morning, Ms. Joseph.  
10 A. Good morning.  
11 Q. Would you turn in the exhibit book to  
12 Exhibit No. 3, please.  
13 A. Yes.  
14 Q. This is the -- strike that. Do you know  
15 what this document is?  
16 A. Yes.  
17 Q. And how do you know what it is?  
18 A. It says at the top it's a psychosocial  
19 assessment and dispositional plan for Charles Ebony  
20 Horton.  
21 Q. Do you recall ever seeing it before?  
22 A. Yes, I do.  
23 Q. Do you recall seeing it on August 1st of  
24 the Year 2000?

1 A. Yes, I do.

2 Q. And is this the document that was provided  
3 to Judge Lopez by Anne Goldbach?

4 A. It is.

5 Q. Now, with regard to this document, do you  
6 agree with everything that's said in it?

7 A. I don't know enough to agree with every  
8 single thing that's said in it. For example, it  
9 says that, "Ebony has not had surgical castration.  
10 This procedure is expensive and infrequently  
11 performed in this country." I don't know if that's  
12 the case, if it's expensive, and I don't know if  
13 it's infrequently performed. It says here, "Ebony  
14 has friends who had surgery, with results  
15 controversial." I don't know enough about the  
16 surgical castration to know whether or not Ebony  
17 Horton had friends who were castrated or not.

18 Q. Did you on August 1st of the Year 2000 seek  
19 time from the Court to investigate any of these  
20 matters, or didn't you care?

21 MR. WARE: Your Honor, I'm going to object.  
22 We've been over this for two days now.

23 HEARING OFFICER DAHER: Sustained. "...or  
24 didn't you care" is stricken.

1 Q. Did you investigate it?  
2 MR. WARE: Objection.  
3 HEARING OFFICER DAHER: Overruled.  
4 A. Did I investigate the issue of surgical  
5 castration?  
6 Q. Any of the matters you --  
7 HEARING OFFICER DAHER: Very simple  
8 question. Yes or no?  
9 A. No.  
10 HEARING OFFICER DAHER: Move on.  
11 Q. Is there anything else in this report you  
12 disagree with?  
13 A. Well, I didn't say that I disagreed with  
14 that. I just said --  
15 Q. Or that you can't form an opinion?  
16 A. (Witness reviews document) The part under  
17 the "Clinical Impressions" where it says, "The  
18 social worker writes that she finds it highly  
19 unlikely that Ebony will repeat the behavior that  
20 brought her to court in this case. Further  
21 incarceration will be a disaster for Ebony." I  
22 don't know enough about the defendant to say if the  
23 defendant would be a repeat offender.  
24 Q. So you don't disagree. You just don't know

1 whether to agree with it or not.

2 A. That's correct.

3 Q. Is that right?

4 A. That's correct.

5 Q. But --

6 A. Most of the things in this report, even if  
7 taken for the truth, I don't have any -- in the  
8 context of the plea negotiations, I would have no  
9 reason to think that there was any lie in this  
10 report.

11 Q. That's not my question. My question is a  
12 simple one. For you to point out for me those  
13 matters which you didn't agree with or didn't have  
14 enough information to form an opinion on.

15 A. Obviously I disagree with the  
16 recommendation section.

17 Q. Let's go to the one -- did you say you  
18 disagree or don't have enough information with  
19 regard to "I find it highly unlikely that Ebony will  
20 repeat the behavior that brought him to court in  
21 this case"?

22 A. I suppose that I disagree with that  
23 comment.

24 Q. Did you discuss that with Judge Lopez on

1 August 1st of the Year 2000?  
2 A. Disagree with that specific comment?  
3 Q. Yes.  
4 A. No, I don't think I did.  
5 Q. Did you tell Judge Lopez that you wanted to  
6 have -- provide her information on the subject of  
7 reoffending?  
8 A. No, I don't believe I did.  
9 Q. So you didn't seek to provide her any  
10 further information.  
11 A. On reoffending?  
12 Q. Right.  
13 A. No.  
14 Q. So you agree with me that the only  
15 professional opinion that was before the Judge at  
16 that time was the opinion of Ms. Katz on the issue  
17 of whether or not Mr. Horton was a likely  
18 reoffender.  
19 A. The only psychosocial opinion.  
20 Q. Well, the only opinion, period.  
21 A. Yes.  
22 Q. Isn't that right?  
23 A. Yes.  
24 Q. In your understanding and experience as a

1 prosecutor --

2 A. Yes.

3 Q. -- is one of the major factors considered  
4 by courts the likelihood of reoffending by a  
5 particular defendant?

6 A. At what point do you mean that they should  
7 consider?

8 Q. At the point of sentencing.

9 A. At the point of sentencing, the primary  
10 goal of sentencing is to punish for the crime that's  
11 already been committed, and the factors that go into  
12 that and the serious nature, I don't know that --  
13 I'm sure that courts do consider at some point the  
14 likelihood of reoffending. And a lot of that  
15 depends, for example, on a defendant's prior record.  
16 There's been a pattern of certain types of crimes  
17 and then again the defendant appears before the  
18 Court. That would be an indication of a predictor.  
19 But those -- you know, obviously no one can tell the  
20 future, and the primary goal of the sentence is to  
21 punish the defendant for the crimes that have been  
22 committed to that point in time.

23 Q. Have you heard of punishment deterrence?

24 A. Yes.



1 Q. What's deterrence?

2 A. Deterrence is -- there's a twofold meaning  
3 to that. One is societal deterrence, which is to  
4 convey a message to society that this type of  
5 behavior isn't tolerated and the consequence that if  
6 you kidnap and rape a child, you will be punished  
7 for that so that that message would go out to other  
8 potential child rapists that they would be punished.

9 And the other aspect of deterrence is to  
10 show the particular defendant in that case that they  
11 can't get away with that kind of behavior, that it's  
12 unacceptable in our society, that for the period of  
13 time that they would be imprisoned, for sure they  
14 wouldn't be able to commit those crimes, but also  
15 hopefully in the future they would realize that if  
16 they did attempt again to kidnap somebody or rape  
17 someone, that they would be punished. So the  
18 experience of having gone to prison would help focus  
19 the person on --

20 Q. The sentence is to cover deterrence,  
21 correct? The sentence that's imposed, one of its  
22 factors is deterrence, correct?

23 A. Yes.

24 Q. And it doesn't have to be prison to deter,

1 does it?

2 A. It doesn't have to be prison.

3 Q. You keep talking about sending to prison.  
4 Deterrence is a part of sentencing. And one of the  
5 issues with deterrence is whether or not the  
6 defendant would reoffend?

7 A. That's correct.

8 Q. And whether or not the defendant has taken  
9 steps in his or her life to rehabilitate themselves  
10 such that they are unlikely to reoffend.

11 A. That's a consideration in sentencing, yes.

12 Q. Not necessarily for the DA's office,  
13 however.

14 A. No. We would consider whatever positive  
15 steps would be taken. But again, each case has to  
16 be judged on the merits. A car thief or a drunk  
17 driver or a child rapist, all of those are different  
18 types of crimes, and I don't think we can make  
19 blanket statements about when the DA's office would  
20 evaluate what steps the defendant has made,  
21 depending on specifics of the crime.

22 Q. Exactly. So what it is is it's an  
23 individualized sentencing based on the crime, the  
24 seriousness of the crime, the characteristics of the

1 defendant, the likelihood of the offending,  
2 deterrence and the like, rehabilitation --  
3 A. Strength of the case, the ability --  
4 Q. Strength of the case relates to the  
5 Commonwealth's recommendation.  
6 A. Right.  
7 Q. Judges don't care about the strength of  
8 your case, do they?  
9 A. I understand, but your question was in the  
10 DA's office.  
11 Q. No. I'm talking about sentencing. We're  
12 talking about sentencing with judges?  
13 A. That's right.  
14 Q. Judges consider things like deterrence,  
15 rehabilitation, the seriousness of the crime --  
16 MR. WARE: Objection, Your Honor.  
17 HEARING OFFICER DAHER: What's your  
18 objection?  
19 MR. WARE: We're just repeating things that  
20 have already been said, and now we're talking about  
21 what judges do.  
22 HEARING OFFICER DAHER: Go ahead. You can  
23 have it. Overruled.  
24 A. I'm sure those are all things that judges

1 consider, yes.

2 Q. Now, once the Judge on August 1st of  
3 2000 -- strike that.

4 At some point you and Ms. Goldbach were  
5 done advocating your positions; is that correct?

6 A. That's correct.

7 Q. You weren't shut off; you weren't cut off.

8 A. No, I wasn't.

9 Q. You weren't treated badly.

10 A. No.

11 Q. Normal everyday plea conference.

12 A. That's correct.

13 Q. And the Judge announced what her decision  
14 would be.

15 A. That's correct.

16 Q. And that decision was that she would give  
17 probation, with certain conditions that we don't  
18 have to get into, but a number of conditions which  
19 we've talked about earlier; is that right?

20 A. That's correct.

21 Q. Once she announced that, you knew, as you  
22 said before, that as far as sentencing goes, the  
23 case was over.

24 MR. WARE: Objection. This was all done

1 yesterday. We're just repeating.  
2 MR. EGBERT: It was done as to Estrada and  
3 Calixte.  
4 HEARING OFFICER DAHER: Overruled. Go  
5 ahead.  
6 A. Well, the sentence still needed to be  
7 imposed, but the Judge's decision had been made.  
8 Q. And the Judge's decision had been made.  
9 And as far as what the sentence was going to be in  
10 the case, that was concluded?  
11 A. Yes.  
12 Q. And any advocacy that was going to be done,  
13 as you testified yesterday in the Horton case, was  
14 going to be done basically to put the --  
15 HEARING OFFICER DAHER: Mr. Ware, an  
16 objection?  
17 MR. WARE: Yes.  
18 MR. EGBERT: I asked yesterday as to  
19 Calixte --  
20 HEARING OFFICER DAHER: Overruled. I'll  
21 give you some latitude. Go ahead.  
22 THE WITNESS: Can you repeat the question?  
23 Q. And as you testified yesterday in Calixte  
24 and Estrada, now the Commonwealth -- after this

1 sentence was announced, the Commonwealth's advocacy  
2 basically was to put on the record for the public  
3 its position with regard to this case at a future  
4 sentencing hearing.

5 A. At the plea, yes.

6 Q. Is that right?

7 A. Yes.

8 Q. Now, when you left or just before you left  
9 the August 1st conference, you indicated your  
10 dissatisfaction with the Court's position, correct?

11 A. I said -- yes, I did.

12 Q. And you told the Court -- after expressing  
13 your dissatisfaction, you said to the Court, "and  
14 the press is following this case," right?

15 A. I don't believe that those were the words I  
16 used.

17 Q. What words did you use?

18 A. I think I said something to the effect of,  
19 "Your Honor, the Commonwealth is seriously objecting  
20 to that sentence. This is something that -- this is  
21 a case that we've been taking very seriously. I  
22 believe there's been some attention or coverage in  
23 the case, and we will object, to make -- to make it  
24 perfectly clear, we will object to this probationary

1 sentence." That was still part of the advocacy at  
2 that point for the sentencing.

3 Q. When you told the Judge that it received  
4 attention or coverage --

5 A. Yes.

6 Q. -- you were talking about press coverage,  
7 weren't you?

8 A. Yes. Well, I was talking about -- yes,  
9 press coverage.

10 Q. And what press coverage had there been of  
11 the Horton case?

12 A. My memory is that there had been an article  
13 at the defendant's arraignment in the District Court  
14 in one of the Dorchester weekly-type papers. And I  
15 know that my office had -- the press office in the  
16 district attorney's office had expressed an interest  
17 in the case and that I had been updating through the  
18 channels the press office in our office about the  
19 attention that this case had received.

20 Q. Well, your internal office -- strike that.

21 Your internal press office getting  
22 information from you doesn't mean there's press  
23 attention, correct?

24 A. Well, it means that our internal press

1 office is following the case. I don't know what the  
2 logical conclusion of that would be, but I felt the  
3 need to be up front with the Judge about that.

4 Q. Didn't you feel the need to say to her,  
5 after she was given the sentence that you didn't  
6 like, there was going to be press attention to this  
7 and she better look out?

8 A. No. That's exactly not the case.

9 Q. The only press attention this case had  
10 gotten was a single article in a local paper in  
11 Dorchester some year or so before or some year and a  
12 half or so before the date that you were appearing  
13 before the Court; is that right?

14 A. I think it was only about six months  
15 before.

16 Q. Six months? Was it November of '99?

17 A. Correct. The plea was August of 2000.

18 Q. So you're talking about ten months.

19 A. Between November of '99 and August of 2000  
20 it's about eight months or so.

21 Q. Eight months to August, two months,  
22 November, December; that's ten, right?

23 A. Yes.

24 Q. And that was a single article in some



1 Dorchester weekly, correct?

2 A. Yes.

3 Q. Nothing in major newspapers in the  
4 Commonwealth.

5 A. Not that I know of.

6 Q. Nothing on any television station, on any  
7 radio station anywhere, and you felt compelled,  
8 based upon that article in the Dorchester weekly  
9 some ten months before, to tell the Judge at the end  
10 of the conference there's attention or coverage to  
11 this case?

12 A. I felt compelled to let the Judge know that  
13 our press office -- that there had been some  
14 coverage, that our press office was interested,  
15 because I know from my past experience with the  
16 Judge that she didn't like media coverage of these  
17 cases and I wanted her just to not be blind-sided.  
18 I wanted her to have all that in her head, not in  
19 terms of part of my advocacy for the sentence, but  
20 simply so that she's aware of all the factors, just  
21 like you would tell the Judge things like the  
22 victim's family will be here and they would like to  
23 make an impact statement. That is not a piece of  
24 advocacy, per se, in terms of making a sentence

1 recommendation, but it is a factor that judges, I  
2 believe, should hear so that they're not taken aback  
3 or surprised by any proceeding that would happen in  
4 the courtroom.

5 Q. So you wanted to get it so that she  
6 wouldn't be surprised.

7 A. That's correct.

8 Q. That's your testimony under oath?

9 A. Yes.

10 Q. And you and your supervisor, Mr. Deakin,  
11 have engaged in the past with other judges with  
12 threats of going to the press, have you not?

13 A. Not at all.

14 Q. And you're sure of that, too?

15 A. Yes.

16 Q. And you live by that answer?

17 A. Yes.

18 Q. And also let me ask you with regard to your  
19 candor towards judges. Do you recall the case of  
20 Commonwealth versus Jermaine Gilmore in the Boston  
21 Municipal Court before Judge Johnson?

22 MR. WARE: I'm going to object to this.

23 There is no evidence that Judge Lopez was aware of  
24 anything of this nature, so how can it be an excuse

1 for whatever action the Judge took?  
2 HEARING OFFICER DAHER: I'll hear you.  
3 MR. EGBERT: It's on the question of  
4 whether or not she has a pattern of lying to  
5 judges --  
6 MR. WARE: Your Honor, the pattern of a  
7 witness is not relevant and not admissible.  
8 HEARING OFFICER DAHER: Finish your  
9 argument.  
10 MR. EGBERT: -- a pattern of lying to  
11 judges in serious cases in an attempt to get her own  
12 way, in an attempt to get judges to do things that  
13 they otherwise wouldn't do.  
14 HEARING OFFICER DAHER: To get a judge to  
15 do something that he or she wouldn't do?  
16 MR. EGBERT: By their lies. There is  
17 evidence --  
18 MR. WARE: Objection. Objection to counsel  
19 making a speech, now attacking a witness. We've  
20 been through the victim. Now we're turning to the  
21 district attorneys here. This is an irrelevant  
22 third-party red herring, and --  
23 HEARING OFFICER DAHER: Finish it up.  
24 MR. EGBERT: I'll make an offer of proof.

1 HEARING OFFICER DAHER: I'm going to  
2 sustain the objection.

3 MR. EGBERT: I'm going to make an offer of  
4 proof.

5 MR. WARE: Let it be made at side bar.

6 MR. EGBERT: Judge, I don't know why, when  
7 the Judicial Conduct Commission's lawyers always  
8 want to have little speeches for the press, they  
9 make sure and ask you to have them done out here.  
10 If they want these transcripts and these matters to  
11 be out in the public domain, then that's where they  
12 ought to be.

13 MR. WARE: No one's a more practiced speech  
14 maker than Mr. Egbert. This is a matter that's  
15 utterly irrelevant to the proceeding.

16 HEARING OFFICER DAHER: Side bar.

17 (At side bar.)

18 MR. EGBERT: My offer of proof. In the  
19 case of Commonwealth versus Jermaine Gilmore,  
20 9601CR001114, which was dismissed on August 14th of  
21 1996, the attorney of record is Ms. Joseph, who was  
22 the prosecutor on the case and had made indications  
23 to a judge on three prior occasions that the witness  
24 in the case was too afraid to come in and testify,

1 and, therefore, needed continuances and the like.  
2 On a fourth occasion, when the lawyers were  
3 coming in because they doubted what she had to say,  
4 they brought the witness into the courtroom and had  
5 the witness standing there. When Ms. Joseph came  
6 into the courtroom before Judge Johnson, she  
7 informed Judge Johnson she had just got off the  
8 phone with the witness, Tyesha Busby, who was  
9 petrified and would not come to court, and,  
10 therefore, the case couldn't go forward, at which  
11 point Tyesha Busby stood up in the courtroom and  
12 addressed the Judge, and the case was dismissed.

13 That's the information I've received from  
14 counsel in the case.

15 MR. WARE: If that's the offer of proof, it  
16 proves my point that there's nothing to this  
17 whatsoever.

18 HEARING OFFICER DAHER: Thank you.

19 (End of side bar.)

20 BY MR. EGBERT:

21 Q. After you left court on August 1st of the  
22 Year 2000, you went back to your office?

23 A. Yes.

24 Q. And spoke with Mr. Deakin?

1 A. Yes, I did.

2 Q. And when you spoke with Mr. Deakin, you  
3 told him that you were shocked and dismayed about  
4 the sentence that was going to be imposed by Judge  
5 Lopez.

6 A. I told him I was shocked. I don't know if  
7 I said "dismayed."

8 Q. I think you said "stupified" on a prior  
9 occasion, didn't you?

10 A. I don't remember saying "stupified." I  
11 believe I said I was shocked.

12 Q. And did you and Mr. Deakin discuss getting  
13 Judge Lopez to reconsider her decision?

14 A. No.

15 Q. When lawyers typically are dissatisfied  
16 with a judge's decision and think that it was wrong  
17 or that maybe they were misled or the like, is it  
18 customary for lawyers to seek reconsideration of  
19 those proceedings?

20 MR. WARE: Objection as to the customary  
21 practice of all lawyers in the Commonwealth.

22 HEARING OFFICER DAHER: Sustained.

23 Q. How about of the DA's office?

24 A. I'm not familiar with the practice of

1 requesting a judge, once they've announced their  
2 sentence, to reconsider the sentence, unless there's  
3 been facts that weren't brought up at the plea  
4 conference. For example, if there's a time period  
5 between a plea conference and the actual plea and  
6 during that time the defendant gets rearrested or  
7 threats are made to the victim or any of those types  
8 of circumstances, I think in those cases we would  
9 petition the Court to reconsider the sentence.

10 Q. So there was nothing like that in this  
11 case, the Horton case?

12 A. Not that I knew of.

13 Q. And from your perspective, no reason or  
14 desire to seek a reconsideration.

15 A. Once Judge Lopez had made her decision and  
16 we left court, it was clear that that was the  
17 decision, and --

18 Q. Just answer my question.

19 A. No, there was --

20 Q. So you had no desire nor reason to seek a  
21 reconsideration at that time.

22 A. Well, I had no reason to seek a  
23 reconsideration.

24 Q. And nothing -- and you did nothing, your

1 office, from August 1st onward to seek a  
2 reconsideration of Judge Lopez's ruling; is that  
3 correct?

4 A. That's correct.

5 Q. Now, when you met with Mr. Deakin back at  
6 the office, after saying that you were at least  
7 shocked or whatever, did you discuss with Mr. Deakin  
8 calling your press office?

9 A. Mr. Deakin and I spoke --

10 Q. Did you discuss with Mr. Deakin calling the  
11 press office?

12 A. We didn't really discuss it. Towards the  
13 end of our discussion I said to him, "I don't know  
14 if you want to tell Elizabeth Keeley," who's not in  
15 the press office, but she's the first assistant --

16 Q. Ma'am, I would like you to just tell me if  
17 you discussed it with the press office.

18 A. It wasn't really a discussion.

19 Q. Was there something said about calling the  
20 press office?

21 A. Yes.

22 Q. Who said it?

23 A. I said to Mr. Deakin, "I don't know if  
24 you'd like to inform Elizabeth Keeley or Jim



1 Borghesani," who was the press secretary, "about  
2 this case. I leave that to you." And that was what  
3 I said to him. I don't know that he responded in a  
4 meaningful way at that point in time. And I went  
5 back to my office.

6 Q. So then let me ask you these questions:  
7 One, was it clear to you from your conversation with  
8 Mr. Deakin that the press office was being notified?

9 A. Not at all.

10 Q. Two, were you, quote, tasked with the --  
11 strike that.

12 Were you, quote, tasked with getting the  
13 information to the press office?

14 A. No.

15 Q. Did you state, quote, that you thought that  
16 the press office should be notified?

17 A. No, I don't believe I stated that I thought  
18 they should be notified. I --

19 MR. WARE: May the witness finish her  
20 answer?

21 A. I left that to the discretion of my  
22 supervisor.

23 Q. Did Mr. Deakin tell you to give the  
24 information to Mr. Borghesani?

1           A.    No, I don't believe he did.  
2           Q.    These "I don't believe he did," do you have  
3 a memory one way or the other?  
4           A.    My only memory about a discussion regarding  
5 notifying the press office was when I said to Mr.  
6 Deakin, "David, I don't know if you want to let  
7 Elizabeth or Jim Borghesani know about this."  
8 That's my only memory.  
9           Q.    So as to the four questions I just asked  
10 you to which you said "I don't believe so" --  
11          A.    Yes.  
12          Q.    -- the answer is that you did not have any  
13 such conversation. That's your testimony; is that  
14 correct?  
15          A.    I do not remember -- if we could re-go over  
16 those questions --  
17          Q.    Is your memory fuzzy about this particular  
18 event?  
19          A.    No.  
20          Q.    Is it clear?  
21          A.    It's clear as to some of the specifics.  
22          Q.    I'll ask you again, and I'd ask for a clear  
23 answer --  
24               MR. WARE: Your Honor, I object. The

1 witness has said she doesn't remember saying other  
2 than what she said she said.

3 HEARING OFFICER DAHER: Overruled. Cross  
4 examination.

5 Q. One, was it clear to you the press office  
6 was being notified?

7 A. No, that was not clear to me then.

8 Q. Two, were you, quote, tasked with getting  
9 information to the press office?

10 A. No, I wasn't.

11 Q. Three, did you indicate that you thought  
12 the press office should be notified?

13 A. I don't believe I did, no.

14 Q. And four, did Mr. Deakin tell you to give  
15 the information to Mr. Borghesani?

16 A. I don't remember David saying that.

17 Q. You don't remember it or it didn't happen?

18 A. I don't know what information there was at  
19 that point to give, and I don't believe --

20 Q. The question is you don't remember or it  
21 didn't happen?

22 MR. WARE: May the witness finish her  
23 answer?

24 HEARING OFFICER DAHER: It's very simple.

1 You don't remember. It didn't happen.

2 A. I don't remember that.

3 HEARING OFFICER DAHER: That's the answer.

4 Let's go.

5 Q. This was your case as the lead prosecutor;  
6 is that correct?

7 A. That's correct.

8 Q. Do you understand yourself to be  
9 responsible under the ethical rules for lawyers of  
10 the Commonwealth of Massachusetts to oversee any  
11 press involvement or public statements in your case?

12 A. I understand my obligation to exercise  
13 reasonable care in making sure that the press office  
14 is adequately notified, both per our office policy  
15 and our ethical obligations about the current cases.  
16 As to actual decisions about press releases, that  
17 was not an area that I would be involved in as a  
18 line ADA.

19 Q. Were you the prosecutor in this case?

20 A. Yes, I was.

21 Q. Are you familiar with Rule 3.8, the special  
22 responsibilities of a prosecutor under the Code of  
23 Conduct for Massachusetts lawyers?

24 A. I am, but if I could see a copy, that would

1 be --

2 Q. I will show it to you in a moment. Are you  
3 familiar with it?

4 A. Yes, I am.

5 Q. And you've seen a number of copies of it  
6 since the deposition where you indicated you hadn't  
7 seen it before; isn't that right?

8 A. That's correct.

9 Q. At the deposition you remember testifying  
10 that you don't remember anything about Rule 3.8?

11 A. I don't remember saying exactly that, no.  
12 I thought I said that I don't remember the  
13 specifics. If you'd like to show me where I said  
14 that, that would be fine. But I do know now what  
15 Rule 3.8 is and how it reads.

16 Q. Did you know about Rule 3.8 back at the  
17 time that the press release was issued by the DA's  
18 office in the Horton's case?

19 A. I knew about the general rules that  
20 obligate prosecutors that we used every day, our  
21 ethical rules, and I knew about our office policies  
22 as well. I don't know that I knew to quote chapter  
23 and verse from each statute.

24 Q. When you testified at the deposition, you

1 testified that you didn't know if you had ever read  
2 Rule 3.8 before the day of the deposition; is that  
3 right?

4 A. Was that before or after you showed me a  
5 copy of the rule at that point during the  
6 deposition?

7 Q. Question -- let me give them to you. Look  
8 on at Page 80 of the first day of your deposition,  
9 which would be C-2. Do you have it?

10 A. Yes.

11 Q. I direct your attention to Page 80, Line  
12 19. The question is put to you, "I've put before  
13 you what I've marked as Deposition Exhibit 1, which  
14 is entitled 'Rule 3.8, Special Responsibilities of a  
15 Prosecutor.' Do you see that?" And you answered,  
16 "Yes, I do."

17 A. Yes.

18 Q. Then I asked you, "Have you ever read that  
19 before?" You said, "I may have," right?

20 A. That's correct.

21 Q. And I said, "Do you know" and you said, "I  
22 don't know."

23 So you didn't know if you had even read the  
24 ethical rules for prosecutors before the deposition

1 was taken in August of 2002.

2 A. I didn't remember reading the specific  
3 statutes that were before me.

4 Q. They're not statutes, ma'am. They're rules  
5 of conduct for lawyers and prosecutors which you're  
6 required to abide by in the conduct of your affairs,  
7 aren't they?

8 A. Yes.

9 Q. And you didn't even know if you had ever  
10 read it before?

11 A. I didn't remember if I had read it, looking  
12 at it in the same way that the paper you handed me  
13 looked. I don't know --

14 Q. You thought I was asking you whether you  
15 had read the exact copy that I was showing you?

16 A. No. I don't know if I had seen it in a  
17 photocopied fashion, in a book, in a summary form,  
18 in a training. I don't remember the specific way in  
19 which those rules were taught to me.

20 Q. Well, you've at least learned about them  
21 now, haven't you?

22 A. Yes.

23 Q. Because you've been going over them with  
24 Mr. Ware and Mr. Braceras; is that right?

1           A.    I don't think Mr. Ware and I went over  
2 those, but you and I went over those at the  
3 deposition at your office.

4           Q.    You haven't gone over them since?

5           A.    I spoke to my attorney about them.

6           Q.    And that's all?

7           A.    I don't remember if Mr. Ware or Mr.  
8 Braceras and I spoke about the rules specifically or  
9 whether we read them all together.

10          Q.    And are you aware of the fact that Rule 3.8  
11 requires a prosecutor to exercise reasonable care to  
12 make sure that no one in the prosecutor's office  
13 makes public comment outside of the rules of  
14 conduct?

15          A.    Yes.

16          Q.    And what care did you take in the Horton  
17 case to assure that no public comment would be made  
18 that was inappropriate?

19          A.    The care I took in the Horton case was to  
20 provide an arraignment to our press office, a  
21 factual background to the case, copies of the police  
22 report and the grand jury minutes, copies of any  
23 other reports that I had. And the care I took in  
24 regulating information to the press was simply to



1 follow the office policies, which was that I  
2 entrusted that job to people who were in superior  
3 positions to mine in the front office, to make those  
4 decisions when they had all the facts that I had,  
5 and to do with them what they will. That was a  
6 decision that was beyond my scope as a line ADA on  
7 the cases.

8 Q. Where in the documents that you gave to the  
9 press office does there appear the word  
10 "transgendered"?

11 A. I don't know if I used in my direct  
12 indictment request the word "transgendered." I did  
13 identify the issue about the defendant appearing as  
14 a woman and undergoing some type of transsexual  
15 transformation. I think I used the word  
16 "transsexual," but I'm not sure.

17 Q. In what document?

18 A. In my direct indictment request.

19 Q. Say that again. Your direct indictment  
20 request?

21 A. Yes.

22 Q. Well, your direct indictment request isn't  
23 public information, is it?

24 A. No, it's not.

1 Q. That's not information that can be  
2 disclosed by the DA's office in a press release, is  
3 it?

4 A. No. It's -- well, that document is an  
5 internal work document that I provide to my  
6 superiors, and they are then able to do with it what  
7 they will.

8 Q. You're the prosecutor in the case, aren't  
9 you? You're responsible for the press -- are you  
10 responsible to make sure that the press takes  
11 reasonable care --

12 HEARING OFFICER DAHER: What's your  
13 objection?

14 MR. WARE: We've been over this. She said  
15 she gave the issue to her superiors, followed office  
16 procedure. Asking her three times isn't going to  
17 change that.

18 HEARING OFFICER DAHER: If you need another  
19 few questions --

20 MR. EGBERT: I do.

21 HEARING OFFICER DAHER: -- I'll give you  
22 another few questions.

23 Q. Is there any document in the public domain  
24 which you have which identifies the defendant as a

1 transgendered person?  
2 A. I don't know what you mean by a document in  
3 the public domain.  
4 Q. Do you know what the public domain is?  
5 A. Yes.  
6 Q. That's things that are filed in court, for  
7 example?  
8 A. Yes.  
9 Q. Things that are spoken about in court, for  
10 example, on the record?  
11 A. Yes.  
12 Q. Not from your private file.  
13 A. That's correct.  
14 Q. Was there any document in the public domain  
15 that identified the defendant as transgendered?  
16 A. I don't know.  
17 Q. Do you know where, then -- you know that  
18 the press release ultimately issued had the word  
19 "transgendered" in it.  
20 A. I learned that, yes.  
21 Q. Do you know where that came from?  
22 A. It came --  
23 Q. Do you know?  
24 A. I don't know for a fact, no, I don't.

1 Q. Now, obviously -- so if you didn't know  
2 about any press and you didn't know about any press  
3 release, right?

4 MR. WARE: Objection. The witness --

5 HEARING OFFICER DAHER: What's the  
6 objection?

7 MR. WARE: The objection is the witness has  
8 testified to the contrary, and we've been over this.

9 HEARING OFFICER DAHER: Go ahead.  
10 Overruled.

11 Q. On August 1st of 2000 it's your testimony  
12 that you didn't know the press office was going to  
13 be notified, correct?

14 A. I didn't know if they would be, no.

15 Q. And you didn't know anything about a press  
16 release, right?

17 A. That's correct.

18 Q. So then I take it you didn't seek the  
19 victim's family's permission to put this matter in  
20 the press.

21 A. We -- when the defendant was arraigned and  
22 I sent the materials on to the press office, there  
23 had already been press coverage in the case. And we  
24 didn't ask for permission --

1 MR. EGBERT: Judge, can I just get an  
2 answer to my question, instead of the long-range --  
3 HEARING OFFICER DAHER: She's instructed to  
4 give you a response.  
5 A. We didn't seek permission at arraignment to  
6 notify our press office about the case, no.  
7 Q. Let's go back to my question. On August  
8 1st of 2000 through August 4 of 2000 --  
9 A. Yes.  
10 Q. -- did you seek from the victim or his  
11 family any permission or authority to notify the  
12 press about his case?  
13 MR. WARE: Objection. It's irrelevant.  
14 Already been in the press --  
15 HEARING OFFICER DAHER: Mr. Ware, that's  
16 the very same question he asked five minutes ago and  
17 he didn't get a response to it. Overruled. Let's  
18 move on. Answer it.  
19 A. I don't remember specifically speaking to  
20 the victim's family about --  
21 HEARING OFFICER DAHER: Let's move on. She  
22 has no memory.  
23 Q. Now, you are very -- one of the issues that  
24 you indicated you were concerned with as we get up

1 to August 4th in your direct testimony was the  
2 impact of various matters on the victim, right?

3 A. Yes.

4 Q. Now, did you consider the impact of  
5 heightened press attention in this case on the  
6 victim?

7 A. Well --

8 Q. Did you or didn't you?

9 A. We considered it.

10 Q. "We"? Who is the "we"?

11 A. The victim witness advocate.

12 Q. I'm asking you. Did you consider it?

13 A. I think it was something that we talked  
14 about. I don't have a specific memory of discussing  
15 the heightened press situation, because there was  
16 none at that point and because the victim's name is  
17 excluded from any press releases or from any  
18 discussions in court, in open court. So that  
19 wasn't -- we were more concerned with helping the  
20 victim through the process --

21 Q. So the answer is you didn't consider it. I  
22 just really want an answer to my question instead of  
23 a lesson in sociology.

24 A. I'm really trying to answer your questions,

1 and --

2 Q. Did you consider it?

3 A. I don't remember having a specific  
4 discussion with anybody about press and the victim,  
5 if that helps your question.

6 Q. That's the answer to my question. Thank  
7 you.

8 HEARING OFFICER DAHER: Mr. Egbert, I've  
9 given you a lot of latitude in this. What's the  
10 relevancy?

11 MR. EGBERT: The relevancy is, Judge, that  
12 one of the issues here is that Ms. Joseph goes into  
13 Judge Lopez's lobby on August 4th of 2000, after  
14 this press attention has been created and after the  
15 defendant is sent off to some room, and his mother's  
16 screaming somewhere and the like and the plea is not  
17 about to go forward. And there is much discussion  
18 in her direct examination that she had, one, nothing  
19 to do with the press; two, didn't know it was going  
20 to occur; three, told Judge Lopez or left Judge  
21 Lopez with the position that she knew nothing about  
22 it. And her credibility in those areas is  
23 extraordinarily important to the findings that were  
24 made by Judge Lopez which are a matter of issue here

1 today, and all of her lack of doings of what one  
2 would expect someone to do in that area go to the  
3 credibility of those statements.

4 HEARING OFFICER DAHER: I think we're going  
5 to have to change the line of questioning in regards  
6 to this. Just move on.

7 MR. EGBERT: With respect to that, I'll  
8 move on and expect objections when they come.

9 HEARING OFFICER DAHER: Noted.

10 MR. EGBERT: But I'm going to have to ask  
11 the questions.

12 HEARING OFFICER DAHER: Fine.

13 BY MR. EGBERT:

14 Q. On August 1st of the Year 2000, you didn't  
15 know whether or not there would be a plea in the  
16 Horton case, did you?

17 A. I knew it would be a plea.

18 Q. How did you know that?

19 A. Well, we set the day for a plea.

20 Q. For a possible plea, correct?

21 A. It was a possible plea.

22 Q. And Mr. Horton -- Ms. Goldbach had not  
23 informed the Court whether or not Mr. Horton had  
24 accepted the offer of the plea, had she?



1           A.    Well, she was advocating what her client  
2 wanted prior to even going to the side bar. So that  
3 was what the defendant wanted. I want probation.  
4 She got probation.

5           Q.    My question to you is, had Ms. Goldbach  
6 informed the Court and you Mr. Horton would accept  
7 the plea.

8           A.    I don't know if she said officially, "My  
9 client will accept this," or she said, "This will  
10 work."

11          Q.    Didn't she tell you and the Judge that to  
12 put it on for August 4th when she had to meet with  
13 her client and she had to talk to her client and see  
14 if her client would accept the plea? Did she tell  
15 you that or didn't she?

16          A.    She suggested that we put the matter on for  
17 August 4th for a plea, and she said she just needs  
18 to go over it with her client. But the  
19 implication --

20          Q.    I want to know what she said, not the  
21 implication. She told you, didn't she, that she had  
22 to go over it with her client?

23          A.    As a formality.

24          Q.    Didn't you call her on August 3rd at her

1 office in the afternoon and ask her whether or not  
2 Mr. Horton was going to accept the plea and she  
3 responded to you he and his family were in her  
4 office at the time and they hadn't yet decided and  
5 they would let you know in the morning?  
6 A. I don't remember that conversation.  
7 Q. Do you deny it occurred?  
8 A. I don't remember, Mr. Egbert.  
9 Q. You don't remember?  
10 A. I don't remember.  
11 Q. Do you have any memory of calling Ms.  
12 Goldbach during that period of time and discussing  
13 whether or not her client was going to accept the  
14 offer or not?  
15 A. I don't remember speaking to Ms. Goldbach  
16 the day before the plea.  
17 Q. Do you know whether or not it's appropriate  
18 to put into a press release under the ethical  
19 guidelines that someone might plead guilty in the  
20 future?  
21 MR. WARE: Objection.  
22 HEARING OFFICER DAHER: Sustained. Move  
23 on.  
24 Q. Did the press release in this case indicate

1 that Mr. Horton would enter a plea on August 4th of  
2 the Year 2000?

3 MR. WARE: Objection. It speaks for  
4 itself. It's in evidence.

5 HEARING OFFICER DAHER: He can have that.  
6 Go ahead.

7 A. Just tell me what exhibit that is, so that  
8 I can answer it.

9 MR. WARE: Seven.

10 A. It said that -- the title is that a "Boston  
11 Man Is Expected to Plead to Child Kidnapping and  
12 Sexual Assault." It was an expectation. That's  
13 what the title of the press release said.

14 Q. Is there anything under the rules of ethics  
15 for lawyers and prosecutors concerning the release  
16 of information of a possible plea?

17 A. I don't believe so.

18 MR. WARE: Objection.

19 Q. You don't believe so?

20 HEARING OFFICER DAHER: It's answered.  
21 Let's go.

22 Q. I want to hand you up a copy of the Rule  
23 3.6 which the Court has already taken judicial  
24 notice of.

1           A.    Thank you.  (Witness reviews document.)  
2                    HEARING OFFICER DAHER:  Do you want a copy,  
3  Mr. Ware?  
4                    MR. WARE:  It would be helpful.  
5                    HEARING OFFICER DAHER:  I'll get it for  
6  you.  
7                    MR. WARE:  I'm all set, Your Honor.  I've  
8  got one.  
9            Q.    Do you have that in front of you?  
10          A.    I do.  
11          Q.    And would you look at Note 5.  Do you see  
12  in Note 5 it says, "There are, on the other hand,  
13  certain subjects which are more likely than not to  
14  have a material prejudicial effect on a proceeding"?  
15  Do you see that statement?  
16          A.    Yes, I do.  
17          Q.    And it goes on to say, "These subjects  
18  relate to..."  
19          A.    Correct.  
20          Q.    And then do you see where it indicates in  
21  Paragraph 2 the possibility of a plea of guilty to  
22  the offense?  
23          A.    Yes.  
24          Q.    And do you understand that to be a

1 recognition that the possibility of a plea in a  
2 criminal case should not be released to the media  
3 under our rules of conduct?

4 A. No.

5 MR. WARE: Objection in any event, Your  
6 Honor. The testimony is clear that these decisions  
7 were made by other people.

8 HEARING OFFICER DAHER: Again, for the last  
9 35, 40 minutes, Mr. Egbert, that's been her  
10 testimony.

11 MR. EGBERT: Judge, that may be her  
12 testimony, but her conduct is at issue here --

13 MR. WARE: No, her conduct isn't --

14 HEARING OFFICER DAHER: Let him finish.

15 MR. EGBERT: She, as the line prosecutor  
16 under the rule, is responsible to see to it that any  
17 press is appropriately done --

18 HEARING OFFICER DAHER: Sustained.  
19 Objection sustained.

20 MR. EGBERT: May I finish?

21 HEARING OFFICER DAHER: Go ahead.

22 MR. EGBERT: And I believe that this  
23 witness would testify and has testified --

24 MR. WARE: I object to Mr. Egbert's

1 soliloquy on what the witness would say. This is a  
2 legal issue of what the canons or what the rules of  
3 conduct require.

4 MR. EGBERT: That she would testify that a  
5 judge has the right --

6 MR. WARE: Objection.

7 MR. EGBERT: If I could finish.

8 HEARING OFFICER DAHER: Mr. Egbert, the  
9 objection has been sustained.

10 MR. EGBERT: If we're going to do it that  
11 way -- I have a great deal of respect for you -- I'm  
12 going to put on the record my statement of reasons.

13 HEARING OFFICER DAHER: Go ahead. I will  
14 tell you right now, Mr. Egbert, that the admiration  
15 is mutual, but go ahead if you want to make your  
16 comment.

17 MR. EGBERT: It's not a comment. This  
18 witness has testified in the past that a judge --

19 MR. WARE: Objection to what a witness has  
20 testified to in the past.

21 MR. EGBERT: It relates --

22 HEARING OFFICER DAHER: Side bar.

23 (At side bar.)

24 HEARING OFFICER DAHER: I'll hear from Mr.

1 Ware first.

2 MR. WARE: My objection is that the  
3 question that's currently on the record is with  
4 respect to an interpretation of the obligation of a  
5 lawyer under the particular rules. That's a matter  
6 for -- it's a matter of law. It's a matter of the  
7 Court's taking judicial notice.

8 Furthermore, the testimony in the case is  
9 absolutely clear that this witness talked to her  
10 superiors, followed office policy, and that's the  
11 state of the evidence. She doesn't have an  
12 obligation as a line assistant to override her press  
13 office, the district attorney, the first assistant.  
14 It's a ludicrous point.

15 MR. EGBERT: Ludicrous. Well, thank you  
16 for your discussion of the law. A couple of things.

17 No. 1, other witnesses will testify in  
18 direct contravention to what she said here. We're  
19 going on the presumption that she's telling the  
20 truth. I have on the record Mr. Deakin under oath  
21 saying you can talk -- he did talk to her about  
22 going to the press.

23 HEARING OFFICER DAHER: Why can't he let it  
24 in if he says he has witnesses who are going to

1 contradict?

2 MR. WARE: Let him put the witnesses on.  
3 It's still an issue of law. It has nothing to do  
4 with the witness' credibility.

5 MR. EGBERT: When I ask for an  
6 interpretation of the rule, I'm asking for her  
7 understanding of the rules of conduct and whether or  
8 not she complied or comported with them.

9 Two things that occurred and I know will be  
10 testified to in this case: One, that they expected,  
11 both Joseph and Deakin, that Judge Lopez would have  
12 the right to rely on the fact that they were  
13 complying with the rules of conduct, No. 1.

14 No. 2, Ms. Joseph came in and indicated  
15 that she had no idea what was going on with the  
16 press, which I'm paraphrasing it, obviously. She  
17 has an obligation under the rule to be responsible  
18 for whatever press comes out of her cases. It's  
19 right in the rule. Judge Lopez relied on that.

20 No. 3, Mr. Deakin has already testified  
21 under oath previously, and I assume will testify  
22 consistent with that here, that he discussed going  
23 to the press with Ms. Joseph. It was clear to him  
24 from his conversation that she knew that the press



1 office was being contacted. He tasked her, in his  
2 words, with the obligation of providing the press  
3 office the information for the press release, and  
4 that they discussed the feasibility of going to the  
5 press office, in direct contradiction to everything  
6 she said.

7 MR. WARE: I mean, my response to that is  
8 the question of the interpretation of the  
9 prosecutor's obligation is a matter of law. It's a  
10 matter for the Court. It's not a matter for this  
11 witness. The witness has testified. If there's  
12 contrary evidence, there's contrary evidence.  
13 Memories may in fact vary over two years or three  
14 years or four years. That doesn't mean anything.  
15 And it's up to the Court to draw whatever inference  
16 is appropriate.

17 HEARING OFFICER DAHER: I expect you're  
18 going to call Mr. Deakin and you're going to subject  
19 him to cross examination; and if there are any  
20 contradictions, it's going to be before the Court.

21 MR. EGBERT: The Commission on Judicial  
22 Conduct has charged Judge Lopez with making findings  
23 that weren't true.

24 HEARING OFFICER DAHER: I'm going to make

1 findings, too. Obviously anything she has said is  
2 going to be contrasted with any contradictory  
3 testimony offered by Mr. Deakin.

4 MR. EGBERT: I understand. But everything  
5 that leads up to those findings, both her conduct,  
6 what Judge Lopez knew about it, what she expected --

7 HEARING OFFICER DAHER: You've exhaustively  
8 examined her for the past two or three days now.  
9 You're going to bring in Mr. Deakin, who's going to  
10 testify in a certain vein, and I'm going to make  
11 findings --

12 MR. EGBERT: I understand that.

13 HEARING OFFICER DAHER: -- hopefully, if I  
14 live long enough. But again, absolutely it's an  
15 interpretation. It's a legal question.

16 MR. EGBERT: I'll accept your ruling,  
17 Judge.

18 HEARING OFFICER DAHER: Thank you, Mr.  
19 Egbert.

20 MR. EGBERT: I just wanted to put on the  
21 record my reasons.

22 HEARING OFFICER DAHER: Absolutely. I  
23 always enjoy hearing them.

24 (End of side bar.)

1 HEARING OFFICER DAHER: We'll take a short  
2 recess.

3 (Recess)

4 BY MR. EGBERT:

5 Q. Ms. Joseph, when you went to court on  
6 August 4th of the Year 2000 --

7 A. Yes.

8 Q. -- for the potential plea of Mr. Horton,  
9 when you arrived in court, did you see Anne  
10 Goldbach?

11 A. At some point I saw her, yes.

12 Q. Was that the first event of consequence?

13 A. I think the first thing I saw when I got  
14 off the elevator was a victim witness advocate with  
15 the child's grandmother, and Anne approached at that  
16 point.

17 Q. And what was the conversation you had with  
18 Ms. Goldbach at that point?

19 A. Ms. Goldbach was very upset, and she said  
20 words to the effect of, "How could you do this? The  
21 press is here, my client's upset," something like  
22 that.

23 I didn't know what she was talking about at  
24 that time. We were in the lobby before you get to

1 the courtroom. I said, "What are you talking  
2 about?" She said, "I want to see the Judge." I  
3 said, "We can see the Judge, of course." And that  
4 was basically the substance of our conversation.  
5 Q. And you went in to see the Judge?  
6 A. First I went into the courtroom.  
7 Q. You went into the courtroom?  
8 A. Yes.  
9 Q. What did you see?  
10 A. I saw a camera in the courtroom.  
11 Q. A camera?  
12 A. I believe it was one camera.  
13 Q. Did you see a bunch of reporters?  
14 A. I don't remember seeing a bunch of  
15 reporters. I know that there was a man behind the  
16 camera and there was a light-type thing. I don't  
17 know what the technical term is. And I don't  
18 remember seeing any reporters. But I didn't believe  
19 that the press was there for the Horton case at that  
20 point. So I went over --  
21 Q. Did you not believe the press was there for  
22 the Horton case because of the level of the  
23 attention it was getting?  
24 A. I don't know what you mean by that

1 question.

2 Q. By the amount of the press that was there  
3 and the amount of reporters that were there?

4 A. Well, I don't remember seeing any reporters  
5 there, and I don't remember seeing a lot of cameras.  
6 I saw one, and I just didn't think it was there for  
7 the Horton case.

8 Q. Okay. So you go into chambers with Judge  
9 Lopez and Anne Goldbach, right?

10 A. At some point we went into chambers, that  
11 is correct.

12 Q. And tell me the first thing that was said  
13 and by whom.

14 A. The Judge started to scream at me.

15 Q. Right away?

16 A. Well, we sat down. And then she told or  
17 let the court officer or the clerk, whoever had  
18 escorted us in -- she kind of made a motion for them  
19 to leave. And Anne Goldbach was really upset. Anne  
20 may have been crying at that point. And the  
21 Judge --

22 Q. Be clear now. So the Judge is the first  
23 one to speak?

24 A. It may have been Anne Goldbach or it may

1 have been the Judge.

2 Q. Do you know?

3 A. I don't have a clear memory if Anne was  
4 speaking over her tears, or if she was -- if she was  
5 simply just crying. She was very upset. And the  
6 Judge within minutes looked right at me and started  
7 to scream at me and said to me -- she said, "You're  
8 very young, you're very mean, you're very mean. You  
9 belong in the suburbs. You're mean. You don't get  
10 it. I never want you appearing before me. You're  
11 very young. You just don't get it. You belong in  
12 the suburbs. You have no credibility with me. You  
13 called the press. You belong in the suburbs. You  
14 don't get it." She kept repeating those things. It  
15 was awful.

16 Q. Was it worse or better than the screaming  
17 and yelling in the Estrada case?

18 A. It was much worse then.

19 Q. Much worse. Well, in the Estrada case you  
20 said she was screaming and yelling, right?

21 A. I don't think I said "yelling."

22 Q. You didn't?

23 A. I don't remember --

24 Q. Screaming?

1           A.    I said that she screamed at me in open  
2 court.

3           Q.    Right, which we heard that scream on tape,  
4 right?

5           A.    That's correct.

6           Q.    And this screaming was louder than that?

7           A.    It's not so much a question of volume as it  
8 was a question of being personally attacked by a  
9 Superior Court Judge and by --

10          Q.    Screaming doesn't relate to the content.  
11 It relates to the level of voice, right?

12          A.    In my mind it relates to both of those  
13 things.

14          Q.    Okay.  So when you say "screaming," you  
15 mean content was either derogatory or bad for you,  
16 correct?

17          A.    I mean that she was -- on August 4th that  
18 morning she was screaming at me with a raised voice.  
19 She was saying things that personally attacked my  
20 character and my integrity.  She was very angry with  
21 me.  She was humiliating me.  She was just  
22 lambasting me in the chambers.

23          Q.    And that's never happened to you before,  
24 right?

1 A. Not like that, no.

2 Q. Not like that?

3 A. (Witness shakes head.)

4 Q. How about with Judge Johnson at the BMC?

5 A. Judge Johnson?

6 MR. WARE: Objection.

7 HEARING OFFICER DAHER: I want to hear it.

8 She said "like that," and it's cross examination.

9 That would indicate some type of comparison. He's  
10 entitled to examine. Go head.

11 A. First of all, I've never known Judge  
12 Johnson to scream. And, second of all, I've never  
13 known him to reprimand or scream at me in any way.  
14 Especially what was significant about the morning of  
15 August 4th was the personal nature of Judge Lopez's  
16 attacks on my character.

17 Q. Let's --

18 MR. WARE: Could she finish her answer,  
19 please?

20 HEARING OFFICER DAHER: You're entitled to  
21 that. Finish that response.

22 A. And the personal attack that the Judge was  
23 making on my character by saying that I was mean, by  
24 saying that I was young, by saying that I didn't get



1 it, by saying that I belong in the suburbs, those  
2 were things that were very personal to me. And no  
3 one's ever attacked my person in that way, no. I've  
4 never been spoken to like that.

5 Q. Weren't you accused of being a liar in the  
6 case of BMC, where you lied to a judge about the  
7 presence --

8 HEARING OFFICER DAHER: Sustained.  
9 Sustained. Next question.

10 Q. Now, all this happened without Anne  
11 Goldbach saying anything to Judge Lopez; isn't that  
12 right, according to you?

13 A. Again, I don't remember if Anne was  
14 speaking at the onset when we walked into her lobby.  
15 But when the Judge was screaming at me, no, no one  
16 else in the room was talking.

17 Q. Before this screaming you don't recall Anne  
18 Goldbach saying anything to Judge Lopez; is that  
19 right?

20 A. I don't remember if she was upset over her  
21 tears and talking or if she was just saying, "I  
22 can't believe the press is here" or "My client's  
23 upset." I don't remember if she said that the  
24 minute we walked in or a few minutes later, um --

1           Q.    Don't you recall Anne Goldbach telling the  
2 Judge, before she ever said a word to you, that the  
3 press was here, the DA's office would issue a press  
4 release, that the press was there and had an  
5 altercation in the hallway with the defendant's  
6 grandmother, that the defendant wouldn't come  
7 downstairs for the Court, that the plea was in  
8 jeopardy and all of those kinds of discussions?  
9 Don't you recall anything like that?

10          A.    I remember -- first of all, I don't  
11 remember her ever saying that the district  
12 attorney's office issued a press release or that the  
13 plea was in jeopardy.  No, I don't remember her  
14 saying those specific things.  She did say at some  
15 point -- and I'm really not sure on the sequence --  
16 that yes, her client was very upset, that her client  
17 and her client's mother had some type of verbal  
18 situation with the press when they had gotten there  
19 earlier this morning, and that her client was  
20 somewhere in the courthouse being upset.  That was  
21 the sum and substance --

22          Q.    And that she wanted to continue the case  
23 because of that; isn't that right?

24          A.    No, I don't believe Ms. Goldbach at that

1 point was asking for a motion for continuance at  
2 all. She was simply saying, you know, "I don't know  
3 what to do. What should we do?" In that morning in  
4 the lobby there was no conclusion as to whether what  
5 we're going to have is a continuance or not.

6 Q. Anne Goldbach's request for a  
7 continuance --

8 A. She did not request a continuance.

9 Q. Your testimony under oath is that Anne  
10 Goldbach didn't mention the fact that she wanted a  
11 continuance because of what had gone on in the court  
12 earlier?

13 A. She may have said something like, "I don't  
14 know if we should continue the case. I don't know  
15 what to do now."

16 Q. Let's get rid of the "may haves" for a  
17 moment. Do you recall whether or not Anne Goldbach  
18 said "I want a continuance"?

19 A. I don't believe she said --

20 Q. It's your testimony she didn't, right?

21 A. That's correct.

22 Q. And did Judge Lopez say to you, "You belong  
23 prosecuting cases in the suburbs"?

24 A. No. She said, "You belong in the suburbs."

1 Q. So she did not say to you, "You belong  
2 prosecuting cases in the suburbs"?  
3 A. No.  
4 Q. And you wouldn't have told David Deakin  
5 that's what she told you?  
6 A. No. She said, "You belong in the suburbs."  
7 Q. So you never told David Deakin that Judge  
8 Lopez said, "You belong prosecuting cases in the  
9 suburbs"?  
10 A. No, I didn't.  
11 Q. And it was clear to you, wasn't it, from  
12 Judge Lopez's comments that she thought you were  
13 responsible for the press being there?  
14 A. That was clear to me, yes.  
15 Q. Did you say anything?  
16 A. I was pretty speechless at that point.  
17 Q. Did you say anything?  
18 A. If I said --  
19 Q. Not "if." Did you?  
20 A. I'm really trying to answer your questions,  
21 Mr. Egbert.  
22 HEARING OFFICER DAHER: Take your time.  
23 A. If I said anything at all --  
24 MR. EGBERT: Judge, I --

1 HEARING OFFICER DAHER: She's thinking.  
2 She's thinking.  
3 MR. EGBERT: But "if" answers don't count.  
4 MR. WARE: Truthful answers do count, and  
5 you have to live with the truth.  
6 HEARING OFFICER DAHER: Gentlemen, let's  
7 cool it.  
8 MR. EGBERT: I'm entitled to an answer from  
9 her memory, not hypothetical.  
10 HEARING OFFICER DAHER: Why don't you  
11 reflect if you have a memory. Take your time.  
12 THE WITNESS: Thank you.  
13 A. My memory is that if I said anything at  
14 all, I said, "Judge" --  
15 MR. EGBERT: Judge --  
16 MR. WARE: Objection, Your Honor.  
17 MR. EGBERT: -- I move to strike that  
18 answer.  
19 HEARING OFFICER DAHER: Again, obviously  
20 that's not responsive, Mr. Ware: "If." Did she or  
21 did she not say?  
22 A. My memory is that I said, "Judge, I didn't  
23 call the press." That's my memory.  
24 Q. So your memory is you said, "Judge, I

1 didn't call the press."  
2 A. I don't know if I said, "Judge, I didn't  
3 call the press," or if I simply said, "I didn't call  
4 the press." I didn't call the press. I think I  
5 said, "I didn't call the press." I don't know if I  
6 said, "Judge, I didn't call the press."  
7 Q. Now, when you gave your statement to the  
8 Commission on August 21st of the Year 2001, you were  
9 asked the following question --  
10 HEARING OFFICER DAHER: Do you want to  
11 direct us?  
12 MR. EGBERT: Page 48.  
13 HEARING OFFICER DAHER: Go ahead.  
14 Q. Question at the bottom, "Did Judge Lopez  
15 ever ask you whether you had called the press to  
16 alert them to the case?"  
17 "Answer: No. I didn't speak at all during  
18 this time, at all during the lobby conference."  
19 Do you recall giving that answer?  
20 A. Yes, I do.  
21 Q. Was it the truth when you gave it?  
22 A. Yes.  
23 Q. And that was under oath in August of 2001?  
24 A. Yes, it was.

1 Q. Now your testimony is you told her, "I  
2 didn't call the press"?

3 A. I have a vague memory of -- my primary  
4 memory is being very speechless because of the tone  
5 that the Judge took with me that morning. There may  
6 have been a point at which I shook my head.

7 MR. EGBERT: I move to strike that.  
8 "Mays," "ifs" --

9 HEARING OFFICER DAHER: Stricken.

10 Q. Now, did you say it or didn't you?

11 A. I don't have a clear memory of speaking  
12 that morning on August 4th.

13 Q. Fine. And you accept that some year ago  
14 under oath you said that you didn't say a word.

15 A. Yes.

16 Q. Now, how long did this lobby conference  
17 take?

18 A. It seemed like a very long time.  
19 Probably --

20 Q. I think you know what the question asked  
21 for. A time.

22 A. I wasn't timing it, Mr. Egbert.

23 Q. Well, give me your best estimate of the  
24 time.

- 1 A. Probably about ten minutes or so.
- 2 Q. And did Anne Goldbach -- strike that.
- 3 When you left the lobby conference, was
- 4 there any statement about a continuance?
- 5 A. We got up to leave the lobby conference,
- 6 and I was the first one to leave. And at that point
- 7 the Judge said, "Maybe we'll just continue this case
- 8 until Ms. Joseph is on vacation." She said that to
- 9 Ms. Goldbach, who was behind me. I had already
- 10 basically walked out of the chambers. And that was
- 11 the only comment at that point that I had heard
- 12 about a continuance.
- 13 Q. And how did Judge Lopez know you were going
- 14 on vacation?
- 15 A. I don't know if she did know.
- 16 Q. If she was going to continue it until you
- 17 were on vacation, when was that going to be?
- 18 A. Well, it was the summer. And this was a
- 19 Friday in the summer. She may have assumed that I
- 20 had a scheduled vacation. I don't know if she knew
- 21 I had a vacation or not.
- 22 Q. And you're also clear on that remark?
- 23 A. Yes, I am.
- 24 Q. But you agree with me that you never



1 provided any information to Judge Lopez that you  
2 were going on vacation.  
3 A. That's correct.  
4 Q. And this was her last day in the criminal  
5 session in Suffolk County?  
6 A. I don't remember that fact.  
7 Q. Well, do you know, was it a Friday?  
8 A. It was a Friday.  
9 Q. It was a Friday, August 4th?  
10 A. That's correct.  
11 Q. Is that the end of the Suffolk County  
12 session?  
13 A. It may have been the end of that month. I  
14 don't know --  
15 Q. And do you know that on that same day she  
16 told you in open court later on that if you were  
17 going to continue it, it had to be in Middlesex  
18 because she was going to Middlesex?  
19 A. She didn't say, "If we're going to continue  
20 it, it has to be Middlesex." She said, "I'm  
21 continuing the case until I go to Middlesex."  
22 Q. August 21st was her first statement?  
23 A. That's right.  
24 Q. Now, knowing the court system, if a judge

1 is in Suffolk on Friday, the last day of the  
2 session, and in Middlesex on August 21st, do you  
3 know whether or not they were leaving after August  
4 4th?

5 A. I think that was a fair assumption. I  
6 wasn't really --

7 Q. That's what judges do. They change?

8 A. Yes.

9 Q. So you leave the lobby conference and you  
10 go outside and you talk to Anne Goldbach.

11 A. No. I called Elizabeth Keeley, the first  
12 assistant, at that point.

13 Q. Did you at some point talk to Anne  
14 Goldbach?

15 A. Later on that morning, yes.

16 Q. And did you ask her to give you a date, an  
17 agreeable date for a continuance?

18 A. I did.

19 Q. Why did you do that if the case wasn't  
20 going to be continued?

21 A. Well, I knew that it was a possibility that  
22 the case would be continued, and I don't like coming  
23 up to the podium and shuffling through calendars or  
24 whatever it is to choose a date. So I like speaking

1 with defense attorneys ahead of time to schedule a  
2 date so that when you get up to the podium and the  
3 clerk calls the case, we can say at that point we  
4 have an agreed-upon date for a plea.

5 Q. For a continuance.

6 A. For a continuance, yes -- or an agreed-upon  
7 date for anything.

8 So in this situation I wanted just to be  
9 organized before we got up to the podium in case  
10 that was what was going to happen.

11 Q. You didn't tell Anne Goldbach you objected  
12 to a continuance, did you?

13 A. I said to her, "In case this case is being  
14 continued, can we get some dates together?"

15 Q. The question is really a simple one. Did  
16 you tell Anne Goldbach that you objected to a  
17 continuance?

18 A. I don't know if she asked me if I was going  
19 to object or if we had that discussion.

20 Q. Ms. Joseph, please listen. Did you tell  
21 Anne Goldbach you objected to a continuance?

22 A. I don't think I did at that time.

23 Q. And you told her that you'd like to pick a  
24 mutually-agreeable date, correct?

1           A.    I said, "Let's look at some dates so that  
2 we can get a date," yes.

3           Q.    Now, after that, Mr. Deakin came over at  
4 some point, right?

5           A.    That's correct.

6           Q.    And you had a conversation with Mr. Deakin?

7           A.    That's correct.

8           Q.    And at least at some time in those  
9 conversations you all decided that you were going to  
10 file a motion to object to the continuance that was  
11 proposed?

12          A.    That's correct.

13          Q.    But according to you ,there was no  
14 continuance proposed yet?

15          A.    I knew that there was a possibility of a  
16 continuance. As I was leaving the lobby she said,  
17 "Let's continue this case until Ms. Joseph is on  
18 vacation." I knew that Anne Goldbach was very upset  
19 that morning. I knew that she had represented that  
20 her client was very upset that morning. Anything  
21 was possible in terms of a continuance. I simply  
22 just wanted to have some dates so that we would be  
23 prepared.

24          Q.    You prepared a motion objecting to the

1 continuance, which, according to you, no one had  
2 even suggested was going to occur?  
3 A. Judge Lopez suggested --  
4 Q. According to you she made the remark,  
5 "Let's continue it until you're on vacation."  
6 A. That's correct.  
7 Q. So you understood that to mean that the  
8 case was being continued?  
9 A. I understood that that was a possibility  
10 that the case may get continued, yes.  
11 Q. And then you and Mr. Deakin decided you  
12 were going to file a motion pursuant to the statute  
13 relating to child victims; is that correct?  
14 A. Correct.  
15 Q. And that's 278, 16F, is it?  
16 A. I don't remember the exact statute.  
17 Q. Are you familiar with Chapter 278, Section  
18 16F?  
19 A. I was then.  
20 Q. Pardon?  
21 A. I was then.  
22 Q. Have you looked at it in a while?  
23 A. Only insofar that I've seen the motion that  
24 we've prepared. I haven't reviewed the statute

1 since then.

2 Q. Let me first give you -- actually, look in  
3 your book at No. 17. This is the Commonwealth's  
4 motion that was filed, correct?

5 A. That's correct.

6 Q. Now, as a beginning point, does this comply  
7 with the statute, in your opinion?

8 A. At the time I believe I thought it did,  
9 yes.

10 Q. Let's take a look at it. Where in there  
11 does it tell the Judge what the impact on the child  
12 will be by a continuance?

13 MR. WARE: Objection, Your Honor.

14 HEARING OFFICER DAHER: What's your  
15 objection?

16 MR. WARE: It doesn't make any difference.  
17 What's the relevance of whether this legally  
18 followed the statute or didn't follow the statute?  
19 Furthermore, there was an argument before the Court,  
20 which is on the record and in evidence.

21 MR. EGBERT: There certainly was.

22 HEARING OFFICER DAHER: Tell me why. Mr.  
23 Ware's objection is going to be sustained.

24 MR. EGBERT: Whether or not they complied

1 with the statutory obligations --

2 HEARING OFFICER DAHER: Sustained. The  
3 objection is sustained.

4 MR. EGBERT: I'm not finished with why --

5 HEARING OFFICER DAHER: Go ahead. You can  
6 continue.

7 MR. EGBERT: The competency of counsel in  
8 their representations to the Court, the competency  
9 of counsel throughout this proceeding and whether or  
10 not they have an axe to grind and a bias in this  
11 case in the testimony, all of their conduct in this  
12 case is to whether or not they have an axe to grind  
13 in the bias in their testimony.

14 The fact of the matter is you have seen in  
15 the past this woman claiming that she was screamed  
16 at and screamed at. Fortunately, we had a tape that  
17 showed what really happened. And their bias and  
18 their testimony here today is a reflection on their  
19 virtual incompetency as it related to the leakage of  
20 the Horton case; the facts they didn't provide the  
21 Judge, the motions they filed which were not in  
22 compliance with the statute, which is nothing more  
23 than press releases, and the way in which they  
24 handled this case impacted the way Judge Lopez

1 handled this case and the manner in which she dealt  
2 with matters in this case and these counsel.

3 HEARING OFFICER DAHER: Mr. Ware?

4 MR. WARE: Your Honor, this is just another  
5 red herring, another excuse trumped up at this point  
6 to derail this case from what is in fact important.  
7 It doesn't matter whether this motion did or didn't  
8 comply with the statute. The Judge certainly raised  
9 no issue with respect to that. The Judge made  
10 findings on account of the motion.

11 HEARING OFFICER DAHER: Last word, Mr.  
12 Ware?

13 MR. EGBERT: The Judge testified that she  
14 did rely on the statute and she did rely on the fact  
15 that these people did not comply with the statute or  
16 provide her information under the statute. And that  
17 relates to her findings in this case. Everything  
18 she has in front of her and their conduct relate to  
19 the findings she ultimately made in this case.

20 HEARING OFFICER DAHER: If my memory serves  
21 me accurately, there was talk of a continuance.  
22 That was the impression that was left with Ms.  
23 Joseph. She contacted the hierarchy at the district  
24 attorney's office. They came in about 2:30 in the



1 afternoon, believing that the Judge would continue  
2 the matter.  
3 Sustained. The objection is sustained.  
4 You've made your argument. Move on.  
5 BY MR. EGBERT:  
6 Q. Did you put in this motion or anywhere on  
7 the record that the child was promised that the case  
8 would be over before he went to school?  
9 MR. WARE: Objection.  
10 HEARING OFFICER DAHER: Same argument?  
11 MR. WARE: Same argument.  
12 MR. EGBERT: Judge, on direct examination  
13 they asked her, what was the impact upon the victim  
14 by this continuance. She testified it was because  
15 we promised him he was going to go to school before  
16 August, it would be concluded before he went to  
17 school, all of these factors, and they never told  
18 the Judge any of these things.  
19 HEARING OFFICER DAHER: Mr. Ware? Mr.  
20 Egbert's argument is on the money on this one. He  
21 states that she did that. That was one of the  
22 considerations. They did not want to continue it.  
23 They wanted the child to start on the September  
24 starting date.

1                   MR. WARE: On direct examination the  
2 witness was asked the DA's basis for having imposed  
3 the motion. That's all.

4                   HEARING OFFICER DAHER: But the fact is  
5 that once you open that door, Mr. Egbert has a right  
6 to explore that. Overruled.

7                   MR. WARE: Your Honor, there was a  
8 transcript here of the hearing and the argument with  
9 respect to the victim. This is just another red  
10 herring.

11                   HEARING OFFICER DAHER: Overruled. You can  
12 cross.

13                   BY MR. EGBERT:

14                   Q. Let's start with this Exhibit 17. Is there  
15 anything in there that indicates to the Judge that  
16 the victim was assured that this case would conclude  
17 before he went back to school? Yes or no?

18                   MR. WARE: Objection. The document's in  
19 evidence. We can all read it. There's a transcript  
20 of the argument before the Judge. There are  
21 findings made by the Judge. There was no testimony  
22 here that there was a conversation with the victim.

23                   MR. EGBERT: Judge, with all due respect,  
24 she was asked under direct examination why they

1 imposed it and what was the impact on the victim by  
2 this continuance, to show, I take it, that Judge  
3 Lopez's finding that there would be little or no  
4 impact on the alleged victim, as this is a plea, was  
5 erroneous.

6 HEARING OFFICER DAHER: Go ahead. You have  
7 it. Overruled. Go ahead.

8 Q. Now, can you answer my question yes or no?

9 A. The motion indicates that we promised the  
10 child that we would resolve the case that day.

11 Q. I'm sorry? What does it say?

12 A. It says that we told the child and his  
13 guardian that we would resolve that case today.

14 Q. Where does it say that?

15 A. On the third line of the motion. It says,  
16 "As reasons thereof, the Commonwealth states that  
17 the child victim in this case and his family was  
18 made aware that the case would be resolved today" --

19 Q. Right. By a plea, right?

20 A. That's correct.

21 Q. Where does it say in there that they were  
22 promised that the case would end before he went back  
23 to school?

24 A. It doesn't say anything about the boy going

1 back to school.

2 Q. And you said --

3 MR. WARE: Your Honor, I object. "Today";  
4 August 4th is before September. It's not a big leap  
5 here.

6 Q. Where in this do you tell the Judge that  
7 the boy was promised that this would end before he  
8 went back to school?

9 HEARING OFFICER DAHER: The document speaks  
10 for itself.

11 A. I don't mention it.

12 Q. And you don't mention it in your argument  
13 to the Judge either, do you?

14 A. I don't argue that issue -- the motion  
15 before the Judge.

16 HEARING OFFICER DAHER: It wasn't argued.  
17 Next question.

18 Q. In your motion for opposition to have a  
19 continuance, you indicate that the child's guardian,  
20 his grandmother, his maternal grandmother, has been  
21 present in the courtroom since early this morning  
22 and she would like to be present when her impact  
23 statement is read in court, correct?

24 A. Correct.

1 Q. Well, that could happen no matter when the  
2 plea took place; isn't that right?

3 A. That's correct.

4 Q. The statute requires, doesn't it, that you  
5 inform the Court of the impact upon the victim in  
6 the case; isn't that right?

7 A. I don't have the statute in front of me,  
8 but I believe that that's the substance of the  
9 statute.

10 Q. And do you agree that what the statute says  
11 is the opposition shall inform the Court of what  
12 effect, if any, the granting of a continuance will  
13 have on the child?

14 A. If I could see a copy, that would be great.  
15 But that is the substance of what the statute does  
16 say.

17 Q. Did I read it accurately?

18 (Hands document to witness.)

19 A. (Witness reviews document.)

20 Q. "What effect, if any, the granting of a  
21 continuance will have on the child," right?

22 A. Yes.

23 Q. And where in the motion does it tell the  
24 Judge what effect a continuance will have on the

1 child?

2 A. It doesn't specifically talk about the  
3 effect. It simply states --

4 Q. It doesn't say it at all, does it?

5 A. Well, there's an understanding that closure  
6 is very important for victims, and especially  
7 children. And that by promising the child and the  
8 child's guardian that the case would be resolved  
9 that day, we made a commitment to the closure of  
10 this matter. And that is understood; that a  
11 continuance is very burdensome.

12 Q. It's understood. So you think that's a  
13 competent filing by an advocate? The Judge is  
14 supposed to read your mind as to what's going on?

15 A. I think that an experienced judge  
16 understands that closure for victims is very  
17 important; and that when a case is scheduled for a  
18 plea, that there's a lot of emotions attached to  
19 that, and that it's important both for the family  
20 and the child that that go along as planned.

21 Q. Then it was important for the DA's office  
22 for this plea to go forward that day, correct?

23 A. Yes, it was.

24 Q. And you didn't want anything to interfere

1 with that, correct?

2 A. That's correct.

3 Q. And so you didn't want to cause the  
4 defendant to be in such a position that he refused  
5 to plead that day, did you?

6 A. That's correct.

7 Q. And after all, it's the defendant's right  
8 to plea or not to plea.

9 A. Yes.

10 Q. You were informed by Anne Goldbach by then  
11 that he wasn't going to plead under those  
12 circumstances, weren't you?

13 A. No, and I don't believe Anne said he  
14 wouldn't plead under those circumstances of the  
15 press being present. I believe that Anne said that  
16 this was very difficult for the defendant. I think  
17 there were a number of options that the Judge and  
18 the defense attorney had before them in order to  
19 secure the plea on that day.

20 Q. What if they didn't want to? What if the  
21 defendant and the defendant's attorney didn't want  
22 to?

23 A. That's their choice.

24 Q. And if it blew up, this case was going to

1 go to trial, right?

2 A. That's correct.

3 Q. And this victim was going to have to be put  
4 in the courtroom and cross-examined, correct?

5 A. That's correct.

6 Q. And that wasn't to anyone's benefit, was  
7 it?

8 A. I disagree with that. I think that a trial  
9 in this case would have resulted in a sentence that  
10 would have been a just one for the defendant and  
11 that the victim in this case, while it may have been  
12 difficult to testify, would have felt good about  
13 himself afterwards and would have been proud of  
14 himself for having gone through this adversarial  
15 process.

16 Q. So it's a good thing then for the victim to  
17 testify.

18 A. I think it's a difficult thing, but it can  
19 be good for them.

20 Q. So you would think that for the victim to  
21 come into court and testify and be cross-examined  
22 would be a catharsis.

23 A. I think that there can be an aspect of  
24 catharsis to that process, yes.



1 Q. Yesterday you didn't think that when you  
2 told us that it was a horrible trauma for a victim  
3 to come in and testify and the DA's office did  
4 everything they could under all circumstances to  
5 avoid it, right?

6 A. Yesterday I indicated that testifying in a  
7 case for any witness is very difficult, but that  
8 doesn't mean that there isn't good things that can  
9 come out of a difficult process. And that's what I  
10 believe and that's what the DA's belief is. We  
11 evaluate each case as it comes to us, the strengths  
12 of the victim, the ability of the victim to  
13 participate in the process. Even if it's difficult,  
14 there can be good at the end of the process that  
15 results both for the victim and for the system.

16 Q. Now let's go through the Court's findings  
17 that you ultimately received.

18 First of all, you disagree with them,  
19 right?

20 A. Yes, I do.

21 Q. And you find them to be personally bad for  
22 you, right?

23 A. They're personally offensive, yes.

24 Q. Personally offensive?

1 A. Yes.  
2 Q. And they basically criticize your conduct,  
3 correct, as a lawyer?  
4 A. As a lawyer and as a person.  
5 Q. So these are bad things for you.  
6 A. That's correct.  
7 Q. So I take it you appealed them.  
8 A. No.  
9 Q. You left them on the record without an  
10 appeal? You thought they were unfounded, didn't  
11 you?  
12 A. That's correct.  
13 Q. You thought they were not supported by a  
14 record.  
15 A. That's correct.  
16 Q. They were not supported by fact.  
17 A. That's correct.  
18 Q. They were bad personally for you, both  
19 personally and professionally.  
20 A. That's correct.  
21 Q. And you didn't appeal them?  
22 MR. WARE: I object, Your Honor. You can't  
23 appeal a continuance.  
24 MR. EGBERT: You can't?

1 Q. Have you ever heard of Chapter 211, Section  
2 3? Have you?

3 HEARING OFFICER DAHER: Overruled.

4 Q. Have you ever heard of Chapter 211, Section  
5 3?

6 A. Yes, I have.

7 Q. Is that the supervisory power of the  
8 Supreme Judicial Court?

9 A. Yes, it is.

10 Q. And do they have the right to oversee such  
11 matters as these findings?

12 A. Well, at the point realistically -- these  
13 weren't filed until close to four o'clock on a  
14 Friday, so the continuance was going to happen one  
15 way or the other. You couldn't appeal the  
16 continuance.

17 Q. You could appeal the continuance and the  
18 findings and ask to have them be reversed because  
19 they were not supported by the record, correct?

20 A. How could you have a continuance reversed  
21 if the day is over?

22 Q. You could have the findings reversed,  
23 couldn't you?

24 A. That's possible.

1 Q. You could have findings instituted by the  
2 SJC that says this wasn't so, correct?  
3 A. That's correct.  
4 Q. You could have asked for reconsideration,  
5 couldn't you?  
6 A. Of the findings?  
7 Q. Of the findings.  
8 A. Yes, we could.  
9 Q. You could have asked for an evidentiary  
10 hearing, couldn't you?  
11 A. I don't know if we could have asked for an  
12 evidentiary hearing --  
13 Q. You could have filed, for example, a motion  
14 for reconsideration with affidavits by you refuting  
15 these findings, correct?  
16 A. That's possible.  
17 Q. Never did any of it, did you?  
18 A. No, we didn't.  
19 Q. You let these findings stand on the record.  
20 A. That's correct.  
21 Q. Now, the findings are, first, that "ADA  
22 Joseph unhappy with the Court's disposition."  
23 That's clear. You were unhappy with the Court's  
24 disposition, weren't you?

1           A.    As I said yesterday, I don't know if the  
2 word is -- if "happy" is the exact word or  
3 "unhappy" --  
4           Q.    Let's pick a word.  "Dissatisfied"?  
5 "Upset"?  "Shocked"?  
6           A.    Shocked, displeased --  
7           Q.    That would make you unhappy with them; is  
8 that a fair statement?  
9           A.    I suppose, but...  
10          Q.    Now, it says -- Ms. Joseph called the press  
11 in is basically what that says, right?  
12          A.    Yes.  
13          Q.    Now, you never denied calling the press in  
14 in that lobby conference, did you?  
15          A.    Again, I don't remember if I said anything  
16 that day specifically.  I know that I didn't call  
17 the press in --  
18          Q.    No.  My question to you is a simple one.  
19 Did you deny that you called the press in?  
20          A.    I think I said -- I shook my head when she  
21 was screaming at me and saying, "You called in the  
22 press."  I may have said --  
23          Q.    Not "may have," ma'am.  
24                MR. EGBERT:  I would ask that "may have"

1 don't come into this case.  
2 HEARING OFFICER DAHER: As best as you can  
3 remember.  
4 A. As best as I can remember, it's possible  
5 that I said, "I didn't call the press."  
6 MR. EGBERT: I move to strike the  
7 possibility.  
8 HEARING OFFICER DAHER: Stricken.  
9 MR. WARE: I object, Your Honor. Judge  
10 Lopez testified to that fact. She said she didn't  
11 call in the press.  
12 HEARING OFFICER DAHER: Stricken. Come on.  
13 Let's go.  
14 Q. Then it goes on, "Ms. Joseph has a habit of  
15 doing this."  
16 A. That's correct.  
17 Q. Now, you had in two cases previously,  
18 Calixte and Estrada, after the dispositions, gone  
19 and given statements to the press and argued  
20 sentencing matters in the press that you had never  
21 mentioned in court; isn't that true?  
22 A. No, that's not correct.  
23 Q. Let's take the Estrada case, for example.  
24 Did you argue in the Estrada case to Judge Lopez at

1 the sentencing that Estrada was a public menace and  
2 he should not be given this kind of treatment  
3 because "he just raped a girl in his own household  
4 and you can't also look at the car thief and say  
5 this guy's not a threat to me because he only steals  
6 cars in poor neighborhoods, or that guy's not a  
7 threat to me because he only breaks into houses in  
8 rich neighborhoods. Is that how we want to mete out  
9 justice?" Did you argue that to Judge Lopez?

10 A. In the Estrada case ,I don't believe I used  
11 the car thief analogy --

12 Q. So you did not argue that to Judge Lopez --

13 HEARING OFFICER DAHER: Let her finish the  
14 answer.

15 A. In advocating the Commonwealth's position  
16 for a sentence, the fact, however, that the  
17 defendant was raping his stepdaughter in his home, I  
18 did mention that on the record, that that was  
19 something that had occurred repeatedly and that that  
20 was the basis of the Commonwealth's recommendation.  
21 That was something that was on the record.

22 Q. Let's get back to my question. What I just  
23 read to you, you did not -- from Ms. McNamara's  
24 article -- you did not argue to the Court the

1 sentencing, correct?

2 A. You read a number of sentences to me --

3 Q. Did you argue that one? That Mr. Estrada  
4 was a public menace?

5 A. I don't believe I said "public menace," no.

6 Q. But you said it in a newspaper article with  
7 Ms. McNamara, right?

8 A. When Ms. McNamara spoke with me, I said the  
9 words "public menace," yes.

10 Q. And you said that he was a public menace,  
11 correct?

12 A. Yes.

13 Q. You didn't argue that to Judge Lopez,  
14 correct?

15 A. That's correct.

16 Q. And after that, you said this other  
17 statement about the car thieves and the like that's  
18 all in the record. You didn't argue that to Judge  
19 Lopez, correct?

20 A. That's all in the article, you mean?

21 Q. Right.

22 A. The car thief argument I did not make in  
23 open court, no.

24 Q. So you made a sentencing argument in the



1 newspapers that you never made to the Judge  
2 basically.

3 A. No. When Ms. McNamara called me, she was  
4 talking about sentencing in general, not only the  
5 sentencing of a specific case, the Estrada case.  
6 When I advocated the Commonwealth's position on the  
7 Estrada case, I was speaking about the specific  
8 facts of that case and the sentence in that case.  
9 In the McNamara -- Eileen McNamara article, I was  
10 talking about theories of sentencing in general.  
11 Ms. McNamara informed me she was writing about this  
12 economic theme, and in that sense, that's where that  
13 analogy about the car theft came up: Is in terms of  
14 explaining that whether or not someone rapes his  
15 child in his own home or in someone else's home, it  
16 still is a serious crime and should be treated that  
17 way.

18 Q. When you argued in the Calixte case to  
19 Judge Lopez, did you argue to Judge Lopez that she  
20 must sentence Ms. Calixte in the way the  
21 Commonwealth recommended, because it would send a  
22 message to the victim in the Calixte case -- I'm  
23 sorry. The Estrada case -- let me go back to the  
24 Estrada case.

1                   Did you argue in the Estrada case that they  
2 should send a message to the victim?

3           A.    I don't think I used those words, no.

4           Q.    Is it fair to say that the thoughts and  
5 comments that you gave to Eileen McNamara in the  
6 newspaper article were not conveyed to Judge Lopez,  
7 as we just described?

8           A.    No, it's not fair to say. As we discussed  
9 earlier today, the notion of deterrence is something  
10 that judges take into consideration, for example, in  
11 the societal message --

12          Q.    There's a difference between what people  
13 are thinking and what you argue. I'm talking about  
14 what you argue.

15          A.    I don't think I was arguing with Ms.  
16 McNamara when I was speaking --

17          Q.    What you argued to Judge Lopez.

18          A.    Yes.

19          Q.    What you spoke, not what you assumed she  
20 thought.

21          A.    I never specifically argued to Judge Lopez  
22 that she needs to consider the factor of deterrence  
23 in sentencing.

24          Q.    In sending these messages and all this

1 business, right?

2 A. That's correct.

3 Q. So basically you gave a different  
4 sentencing argument to Eileen McNamara than you had  
5 made to Judge Lopez?

6 A. No. I gave different rationales for  
7 sentencing. Again, I wasn't arguing before Eileen  
8 McNamara. I was speaking with her on the phone.

9 Q. Let's go on with the findings. Three, "The  
10 defendant suffers from a sexual identity disorder.  
11 She looks female in all respects." That was true,  
12 wasn't it?

13 A. Yes.

14 Q. In fact, the sexual identity disorder was  
15 basically mentioned in the DA's press release by  
16 "transgendered," correct?

17 A. That's correct.

18 Q. And then, No. 4, "When the defendant and  
19 his mother were getting off the elevator on the  
20 first floor, there was a television camera waiting  
21 for her in the hallway." That was reported to you  
22 by Anne Goldbach?

23 A. That's correct.

24 Q. You had no contrary evidence to that.

1 A. That's correct.

2 Q. It was not in dispute.

3 A. That's correct.

4 Q. "The defendant and her mother refused to  
5 get off the elevator. There was a disruption in the  
6 hallway, with the defendant's mother yelling." That  
7 was basically conveyed to everyone in the lobby  
8 conference?

9 A. That's correct.

10 Q. And it was up on the screen.

11 A. That's correct.

12 Q. "The Court finds that Ms. Joseph attempted  
13 to embarrass and ridicule the defendant suffering  
14 from a psychological disorder," right? That's the  
15 Court's finding?

16 A. That's the Court's finding.

17 Q. Did you ever submit anything indicating  
18 that that was not your intention?

19 A. No, I never submitted anything indicating  
20 that I wasn't trying to ridicule a defendant for  
21 being transgendered. That finding is --

22 Q. That was my question. "And the Court finds  
23 that the Commonwealth caused the continuance because  
24 it sought to turn the court proceedings into a

1 circus."

2           What was the purpose of informing the press  
3 in a press release when you're dealing with someone  
4 on the one hand, a 12- or an 11-year-old victim, a  
5 transgendered defendant who suffers from sexual  
6 identity disorder, and various other matters that  
7 you've heard described -- what was the purpose in  
8 sending a press release before the day of the plea,  
9 saying that the defendant would plead guilty, he's a  
10 transgendered person that dresses like a woman?  
11 What was the purpose in that?

12           A. Well, again, I didn't send the press  
13 release, and I don't know that I could answer;  
14 therefore --

15           Q. If you can't, you can't.

16           Then the next finding: "There is little,  
17 if no, impact on the alleged victim, as this is a  
18 plea." Now, the only impact you've described is  
19 matters which were indicated were not made known to  
20 the Court; isn't that correct?

21           A. No, that's not correct.

22           Q. Tell me the impact on the victim from  
23 switching the plea from September -- strike that.  
24 From August to September.

1           A.    The fact of closure in these cases is  
2 extremely important to children and their families  
3 and, in fact, to all victims in cases.  
4           Q.    Let me stop you --  
5           MR. WARE:  Objection.  
6           HEARING OFFICER DAHER:  Let her finish.  
7           MR. EGBERT:  Can I just stop her in a piece  
8 of it?  
9           MR. WARE:  Objection, Your Honor.  
10          HEARING OFFICER DAHER:  Go ahead.  You  
11 finish.  
12          MR. EGBERT:  We've heard this speech.  I  
13 just want to take it one piece at a time.  
14          A.    When a person is victimized, what happens  
15 is they lose control and power over what has  
16 happened to them and also over the system.  
17                We keep in touch with the victims on a  
18 regular basis to help re-establish, allowing them  
19 some feelings of control; this is what's going to  
20 happen on such and such a day, this is what a  
21 courtroom looks like, who says what and when, so  
22 they are able to feel a bit more comfortable and  
23 regain some of the control that they've lost by  
24 becoming victimized in the first place.

1           So closure isn't a minor matter. It's a  
2 significant matter in a court proceeding, especially  
3 where this was a situation where, you know, the  
4 victim's guardian would have preferred that the  
5 defendant be incarcerated. And --

6           Q.    Well --

7           HEARING OFFICER DAHER:  Go ahead.

8           MR. EGBERT:  I'll just have to take notes.

9           Go ahead.

10          A.    And so this was at least being able to tell  
11 them they weren't getting maybe the sentence that  
12 they would have preferred, but there would be an end  
13 to this. It would end on this Friday before the  
14 weekend, whatever it would be, before school  
15 started. Come to court early. It wasn't a heavy  
16 docket that day. Those are the kinds of things that  
17 we were able to communicate with the child and his  
18 guardian about, so that they felt some control over  
19 the system and some ability to be empowered.

20          Q.    Let's start with the first thing:  This  
21 control thing.

22          A.    I don't know what you mean.

23          Q.    When you say every victim wants closure --

24          A.    Yes.

1 Q. -- that relates to every case you have,  
2 right?  
3 A. Every case I've had.  
4 Q. There's nothing special about that in terms  
5 of an individual case?  
6 A. Well, all cases are special --  
7 Q. That fact, I'm saying. You say that one  
8 applies to every case you have?  
9 A. That the victims want closure?  
10 Q. Yes.  
11 A. Yes.  
12 Q. So we've got a statute here that says that  
13 the Commonwealth has to tell the Court specifically  
14 the impact on this particular victim, correct?  
15 A. That's correct.  
16 Q. Now, anywhere in the motion do you say to  
17 the Judge, this victim wants closure?  
18 A. By explaining in the motion that the victim  
19 was promised and told --  
20 Q. You made aware --  
21 MR. WARE: Objection. The witness is  
22 entitled to answer the question, Your Honor.  
23 HEARING OFFICER DAHER: Sustained. Go  
24 ahead.



1           A.    The victim was told that the case would be  
2 resolved that day.  That is what we refer to as  
3 closure.

4           Q.    But do you say in there anything like,  
5 "They were made aware that the case would be  
6 resolved today, and it's important to them that it  
7 be done because he's got to go to school"?

8           HEARING OFFICER DAHER:  Overruled.  She can  
9 have that.  I'm going to give him some latitude.

10          Q.    Does it say that?

11          A.    No, it doesn't.

12          Q.    Did you tell the Judge in the motion that  
13 the grandmother was dissatisfied with the sentence?

14          MR. WARE:  Objection.

15          A.    No, we didn't --

16          HEARING OFFICER DAHER:  Overruled.  Go  
17 ahead.  You can have it.

18          A.    No, we didn't say that.  I did say that at  
19 the side bar on August 1st.

20          Q.    Did you say it in a motion --

21          MR. WARE:  Objection.  The motion is in  
22 evidence.  We can read it.

23          HEARING OFFICER DAHER:  Mr. Egbert, we've  
24 been over this avenue of interrogation.

1                   MR. EGBERT: Not on the ear which she just  
2                   threw in, which --  
3                   HEARING OFFICER DAHER: Overruled. I'll  
4                   give it to you.  
5                   A. I didn't put that the grandmother was  
6                   dissatisfied --  
7                   HEARING OFFICER DAHER: There's no mention  
8                   of the grandmother. Let's go. Next question.  
9                   Q. And then the last finding. "The matter has  
10                  been rescheduled to September 6th, 2000."  
11                  A. That's obviously true.  
12                  Q. There's no issue of that, correct?  
13                  A. Yes.  
14                  Q. Now, when did you get these findings?  
15                  A. They were faxed to our office late Friday  
16                  afternoon, around -- I believe it was around 3:30 or  
17                  so. I don't remember the exact time that we got  
18                  them.  
19                  Q. And you've already agreed with me that your  
20                  office took no action whatsoever to appeal,  
21                  reconsider or otherwise overturn these findings,  
22                  right?  
23                  A. That's correct.  
24                  Q. And on -- would you turn to Exhibit 15 -- I

1 don't know if it's been put in the book yet or not.  
2 It's the one that was recently offered by the  
3 Commission.  
4 A. It's an article? A newspaper article?  
5 Q. Yes.  
6 THE CLERK: It is in here. I wrote it  
7 down.  
8 Q. Do you have it before you? Is that an  
9 article by John Ellement?  
10 A. It is.  
11 Q. And in that article, go to the second page,  
12 about the third paragraph down. Do you see where it  
13 says, "No one should be deceived by this smoke  
14 screen, Borghesani said"?  
15 A. Yes.  
16 Q. And that's referring to the continuance and  
17 its findings, correct?  
18 A. Yes.  
19 Q. "Judge Lopez was prepared to hand down an  
20 extremely lenient sentence and she balked when the  
21 media was present to witness it," right?  
22 A. Yes.  
23 Q. Now, if a DA or a lawyer or a law office  
24 has a gripe with the Judge's findings, where should

1 it be taken up?  
2 MR. WARE: Objection.  
3 HEARING OFFICER DAHER: What's your  
4 objection?  
5 MR. WARE: Your Honor, again, we've been  
6 all through this. We've established it wasn't  
7 appealed.  
8 HEARING OFFICER DAHER: I think we have.  
9 Sustained.  
10 Q. Did you authorize these statements to be  
11 made in the case where you were the prosecutor?  
12 MR. WARE: The statements the Judge faxed  
13 to the media?  
14 MR. EGBERT: What is he talking about?  
15 Exhibit 15 was not faxed to the media.  
16 MR. WARE: Absolutely so.  
17 MR. EGBERT: Exhibit 15 is a newspaper  
18 article. Would you like to look at it?  
19 MR. WARE: I know what it is.  
20 MR. EGBERT: Do you think it was faxed to  
21 the media?  
22 MR. WARE: It quotes from the order the  
23 Judge faxed to the media, as you well know.  
24 BY MR. EGBERT:

1 Q. Do you see the article, lines in there, "No  
2 one should be deceived by this smoke screen,  
3 Borghesani said"?

4 A. Yes.

5 Q. Borghesani was the press person from your  
6 office?

7 A. Jim Borghesani was the press secretary,  
8 yes.

9 Q. Did you authorize that statement to be made  
10 in your case?

11 A. No, I didn't.

12 Q. The next event in this case was on  
13 September 6th -- in the Horton case -- when the plea  
14 was to take place in Middlesex County, correct?

15 A. That's correct.

16 Q. And you testified that you got to court and  
17 the -- I think you said the defendant and Ms.  
18 Goldbach came out of a side door, something --

19 A. That's correct. Once we got into the  
20 courtroom itself, the defendant and Ms. Goldbach  
21 came in from a different entrance. That's correct.

22 Q. You're familiar, are you not, with the  
23 process of court officers, clerks and judges, in  
24 fact, making arrangements for various parties in

1 criminal cases when there is some issue as to media  
2 attention or contact or confrontation?

3 A. I'm familiar with the ability of court  
4 officers and judges and clerks to make  
5 accommodations for witnesses in different  
6 situations --

7 Q. I didn't say witnesses. I said people.  
8 It's not just witnesses; it could be anybody, right?

9 A. Yes, anybody. It could be an issue of a  
10 disability. It could be an issue for children --

11 Q. It could be an issue that the last time the  
12 press and Mr. Horton engaged each other, it blew the  
13 case apart, caused a continuance, and the plea  
14 didn't go forward?

15 MR. WARE: Objection. There's no evidence  
16 of that, Your Honor.

17 MR. EGBERT: There isn't?

18 HEARING OFFICER DAHER: I don't see it.  
19 Sustained.

20 MR. EGBERT: Judge, the fact of the matter  
21 is Judge Lopez already testified to that. That was  
22 the matter of the continuance, that the plea  
23 couldn't go forward that day. There was a problem  
24 with the defendant having encountered the press, the

1 whole incident with his mother being held upstairs,  
2 and all of them crying all over the place, and it  
3 was not conducive --

4 HEARING OFFICER DAHER: Let's go back two  
5 to weeks, Mr. Ware. How do you respond to that?

6 MR. WARE: I don't object to a general line  
7 of questioning about whether accommodations can be  
8 made.

9 HEARING OFFICER DAHER: Overruled. You  
10 can have it.

11 BY MR. EGBERT:

12 Q. You were aware, were you not, and in fact  
13 you said it was undisputed by you, that there had  
14 been a problem between the press and Mr. Horton on  
15 August 4th?

16 A. That's what Anne Goldbach said, yes.

17 Q. And it's undisputed?

18 A. I have no reason to doubt that.

19 Q. It was undisputed by you?

20 A. Yes.

21 Q. And it caused what you would agree with me  
22 was an emotional upset by the parties?

23 A. That's, again, what Anne Goldbach said,  
24 yes.

1 Q. And it was undisputed?

2 A. That's correct.

3 Q. And ultimately Anne Goldbach was looking  
4 for a continuance of the plea because of all those  
5 matters?

6 A. That wasn't clear to me on August 4th.

7 Q. Well, the case was continued by Judge Lopez  
8 having made certain findings with regard to the  
9 press and their interaction with Mr. Horton and the  
10 ability to get this matter done; isn't that right?

11 A. The case was continued, that's correct,  
12 yes.

13 Q. And in part, based upon what had occurred  
14 on August 4th between the press and Mr. Horton,  
15 correct?

16 A. That's correct.

17 Q. And Mr. Horton, you will acknowledge, at  
18 that time was suffering under a mental illness or  
19 disorder?

20 A. Well, it sounds like his being  
21 transgendered, which is something that's always been  
22 with him, is a constant issue for him.

23 \*Q. Schizophrenics have constant issues, too,  
24 but the fact is that it is true, isn't it, that Mr.



1 Horton suffered from that particular disorder?

2 \*A. That he was transgendered?

3 MR. WARE: Objection. There's no evidence  
4 of that, Your Honor. The Judge is the only one who  
5 diagnosed him with the disorder. Even the social  
6 worker didn't do that. He's transgendered.

7 HEARING OFFICER DAHER: Sustained.  
8 Objection sustained.

9 MR. EGBERT: I want to be heard, too.

10 HEARING OFFICER DAHER: Go ahead.

11 MR. EGBERT: The matters which have been  
12 provided to the Court in the DSM indicate this  
13 transgendered status is an accepted psychological  
14 and psychiatric disorder. That is a matter of law.  
15 It is a matter of record. The fact of the matter is  
16 whether the social worker used the word "mental  
17 illness" or not --

18 HEARING OFFICER DAHER: By the same token,  
19 under the Diagnostic Manual, being a person of a  
20 transgendered orientation, are you trying to create  
21 the impression that he also suffers from anxiety,  
22 has anxiety complex and other psychiatric problems?

23 MR. EGBERT: Because they're all in the  
24 report: Chronic depression, anxiety. All of those

1 things are diagnosed in the report that's before the  
2 Judge, along with the transgendered status.

3 MR. WARE: Your Honor, interpretation of  
4 the Diagnostic and Statistical Manual is not a  
5 matter of law. It's a matter of competent expert  
6 testimony from a Ph.D. psychologist or psychiatrist,  
7 of which there was nothing in this case. So there  
8 is no diagnosis of this man as having mental  
9 illness, mental disorder. He's termed  
10 "transgendered," and that's it. That's all the  
11 evidence is.

12 HEARING OFFICER DAHER: How do you address  
13 the issue of the fact, Mr. Egbert, that \$1,500 worth  
14 was approved by for a psychiatrist or clinical  
15 psychologist or someone with an advanced degree of  
16 the working of the mind, and what we have here is a  
17 social worker who made some -- gave an opinion in a  
18 report?

19 MR. EGBERT: Unrebutted.

20 HEARING OFFICER DAHER: And Mr. Ware is  
21 questioning the validity or the weight that should  
22 be given to the sociologist's report versus that  
23 clinical psychologist and M.D. psychiatrist.

24 MR. EGBERT: Would the Commonwealth have

1 done that at the hearing? They didn't question it.  
2 You've heard Ms. Joseph indicate she didn't disagree  
3 with anything in that. I took her through it, and  
4 the only matter she indicated she disagreed with  
5 were the issue of whether or not he would reoffend,  
6 if you recall.

7 HEARING OFFICER DAHER: Mr. Ware?

8 MR. WARE: Your Honor, the witness has  
9 testified that she didn't contest the report. There  
10 was nothing to contest. She wasn't challenging that  
11 the defendant had a difficult personal life. She  
12 wasn't challenging that the defendant was  
13 transgendered. She wasn't asked, nor was there any  
14 challenge by the defense to his competence or his  
15 criminal responsibility. Therefore, the report was  
16 utterly irrelevant. And in fact, defense counsel  
17 proffered it only in aid of sentencing, as the  
18 document says on its face, a dispositional plan,  
19 sentencing plan by a social worker --

20 MR. EGBERT: I don't know what it has to do  
21 with that. In fact, what it was used for -- and  
22 I'll address, by the way, your additional question  
23 as to the supplemental expenses. They never had to  
24 spend them. They never got to a point of trial,

1 where they would be using a psychiatric and a  
2 psychological defense to the charges on criminal  
3 responsibility or competency.

4 I'm sorry, Judge, but this cold of mine has  
5 got my mouth drying up, and I apologize.

6 That never came to be, because the case was  
7 pled out before they ever did it. The fact of the  
8 matter is what they did have were these findings by  
9 the social worker, which were unrebutted and  
10 unrefuted by the Commonwealth, and in fact, agreed  
11 to by the Commonwealth as she sat here today, not to  
12 mention the fact that just five minutes ago Ms.  
13 Joseph indicated she agreed with the finding that  
14 the defendant --

15 HEARING OFFICER DAHER: Mr. Ware, on the  
16 fact that Ms. Joseph acquiesced in a sense to that  
17 sociologist's report, social worker's report, I'll  
18 hear you.

19 MR. WARE: Junk science is still junk  
20 science, whether or not it's rebutted. The question  
21 is whether there was anything to rebut here. There  
22 was a four-page piece of paper handed up on the day  
23 of the disposition and plea or a lobby conference,  
24 read quickly by the Judge and counsel, used by the

1 defense lawyer from her own social worker. When she  
2 had an opportunity to get a qualified professional  
3 instead and chose not to, one might ask why. And  
4 there is nothing -- as the prosecution has  
5 testified, there was simply nothing to rebut. No  
6 one challenged that the gentleman, the defendant in  
7 question, had a difficult life or had many, many  
8 strains in his upbringing. That's true of every  
9 criminal defendant. It did not, in the  
10 Commonwealth's view, as the prosecutor has said,  
11 change the fact that he committed a crime. It's  
12 just that simple. This is an irrelevant line.

13 HEARING OFFICER DAHER: Last word, Mr.  
14 Egbert, before I make a ruling on it?

15 MR. EGBERT: Judge, the report was not  
16 there to determine whether or not he committed a  
17 crime. That was a given. This was a plea hearing,  
18 a plea conference. In fact, the report in its own  
19 statements indicates that his behavior at the crime,  
20 what he did at the crime, he wouldn't do that again,  
21 he accepts his responsibilities and the like.

22 The purpose of this was, in fact, the  
23 sentencing, the mental health of the defendant,  
24 problems of the effective rehabilitation and the

1 like.  
2 HEARING OFFICER DAHER: Overruled. Go  
3 ahead. Continue.  
4 MR. EGBERT: Can I have the last question?  
5 \*(Record read.)  
6 Q. A sexual identity disorder as described, as  
7 you already indicated, you agreed with, correct?  
8 A. I agree that the defendant was  
9 transgendered, yes.  
10 Q. Didn't you agree two minutes ago and I read  
11 you that finding that he suffered from a sexual  
12 identity disorder --  
13 MR. WARE: Objection.  
14 HEARING OFFICER DAHER: Let him finish the  
15 question.  
16 Q. You indicated, "Yes, that's correct"?  
17 MR. WARE: I object. That's not what she  
18 said. The Judge made the finding of a sexual  
19 identity disorder. The only evidence was that he's  
20 transgendered.  
21 MR. EGBERT: That's Mr. Ware's testimony.  
22 Her testimony was that she agreed with this finding.  
23 Q. Correct?  
24 A. The finding on the press release?

1 Q. Sexual identity disorder.  
2 A. If that's what being transgendered is, yes,  
3 I agree. If he is transgendered.  
4 Q. Fine. You heard Mr. Ware make a number of  
5 arguments just a moment ago concerning the efficacy,  
6 reliability and appropriateness of Exhibit 3, the  
7 licensed social worker's report?  
8 A. Yes.  
9 Q. Did you ever make any of those arguments to  
10 Judge Lopez?  
11 A. That report --  
12 Q. Did you ever make any of those arguments to  
13 Judge Lopez?  
14 A. There was nothing to rebut --  
15 Q. Did you ever make any of those arguments to  
16 Judge Lopez?  
17 HEARING OFFICER DAHER: Yes or no.  
18 A. No.  
19 Q. Thank you.  
20 Now, we were talking before about these  
21 special arrangements, so called. What I asked you  
22 is, you had a defendant with a sexual identity  
23 disorder, correct?  
24 A. Correct.

1 Q. Are you all right?  
2 A. Yeah.  
3 Q. Just indicate if you're not.  
4 A. I'm okay.  
5 Q. A sexual identity disorder. You had a  
6 prior problem between the press and the defendant?  
7 A. That's correct.  
8 Q. Which caused a disruption, correct?  
9 A. That's correct.  
10 Q. Does it strike you as odd that the Judge  
11 would look to see that the disruption did not occur  
12 again?  
13 A. That wouldn't strike me as odd.  
14 Q. Wouldn't that be in everybody's best  
15 interests?  
16 A. Yes, it would.  
17 Q. Now, when you get to court on November 6th,  
18 prior to going to court, you indicated that you were  
19 going to read the victim impact statement and Mr.  
20 Deakin was going to do the advocating basically; is  
21 that correct?  
22 A. That's correct.  
23 Q. Did you tell Judge Lopez that at any time?  
24 A. I don't remember if Mr. Deakin informed



1 Judge Lopez of that ahead of time.  
2 Q. Do you know?  
3 A. I don't think he did, but I don't know.  
4 Q. Well, how would he have done it?  
5 A. Well, before the plea began, there was a  
6 side-bar conference, just to say, is everything in  
7 order, that kind of a thing. That would have been  
8 Mr. Deakin's opportunity to do that then.  
9 Q. You were there for that, weren't you?  
10 A. Yes, I was.  
11 Q. He didn't say it, did he?  
12 A. I don't think he did.  
13 Q. So the answer is, you know that Mr. Deakin  
14 didn't notify and you didn't notify Judge Lopez at  
15 any time that you were going to participate as a  
16 speaking role in that proceeding; isn't that  
17 correct?  
18 A. That's my memory, yes.  
19 Q. And you were there basically as second  
20 chair?  
21 A. I suppose, yes.  
22 Q. And with regard to that, at any time during  
23 the proceedings -- strike that.  
24 First of all, when the proceedings began

1 and counsel introduced themselves to the Court, did  
2 you stand and introduce yourself?  
3 A. I don't remember standing. I don't  
4 remember.  
5 Q. You don't remember?  
6 A. I don't remember.  
7 Q. Do you want us to play the tape?  
8 A. I mean, Mr. Deakin may have said, "With me  
9 is Leora Joseph." I don't remember exactly, or if I  
10 stood at that point --  
11 Q. Well, if you were going to participate in  
12 the proceedings, it would be appropriate for you to  
13 stand up and introduce yourself to the Court when  
14 counsel is asked to identify themselves.  
15 A. Not if Mr. Deakin was introducing me.  
16 Q. You'd just sit by?  
17 A. I would have made a motion to get up and  
18 stand.  
19 Q. And stand?  
20 A. Yes.  
21 Q. Did you?  
22 A. I don't remember if I did or not. I would  
23 have normally -- those things happen very quickly.  
24 Q. You would have if you were going to be

1 participating in the events? You would have stood  
2 up to the Judge and introduced yourself?

3 A. Had Mr. Deakin mentioned my name, I would  
4 have gotten up. I don't know how else to answer  
5 your question, really.

6 MR. EGBERT: Can we play the beginning of  
7 the tape, Judge?

8 MR. WARE: I'm going to object, Your Honor.  
9 We've played this tape over and over. We're now on  
10 the second witness two weeks into this case, and at  
11 this point it's irrelevant anyway.

12 MR. EGBERT: It's not irrelevant --

13 HEARING OFFICER DAHER: Mr. Ware, the  
14 stakes are very high in this case. Overruled. Go  
15 ahead.

16 MR. EGBERT: Mr. Ware will stipulate, to  
17 save us some time, that Ms. Joseph did not stand,  
18 nor introduce herself.

19 HEARING OFFICER DAHER: There we go. Okay.

20 BY MR. EGBERT:

21 Q. Now, before you got up -- strike that.

22 Did anyone, to your knowledge, inform Judge  
23 Lopez during the proceedings that you were going to  
24 be the person designated to read the victim impact

1 statement?

2 A. I don't believe so, no.

3 Q. And in fact, there was a bench conference  
4 just before the victim impact statement was read;  
5 isn't that correct?

6 A. I think so, yes.

7 Q. And would you go to Exhibit 22, Page 20,  
8 Line 3 -- you may want to just go back a page to  
9 orient yourself to what's going on. You may want to  
10 go back to Page 19. Do you see it?

11 A. (Witness nods head.)

12 Q. Do you see "Bench conference begins"?

13 A. Yes, I do.

14 Q. And Mr. Deakin is talking about the victim  
15 impact statement?

16 A. Yes.

17 Q. And then go to Page 20, Line 3. What does  
18 Mr. Deakin say to Judge Lopez?

19 A. "As to the mother's statement, I would  
20 propose to read it in its entirety. As to the  
21 grandmother's statement, there is one sentence that  
22 we discussed with her that we don't feel comfortable  
23 reading into the record, and I wanted to alert the  
24 Court to that omission. I'll allow the Court to

1 read the statements."

2 Q. So Mr. Deakin says as to the mother's  
3 statement, "I would propose to read it in its  
4 entirety" and then he goes on to talk to the  
5 grandmother's statement and agreed to take part of  
6 it out, correct?

7 A. Correct.

8 Q. At any time there does Mr. Deakin say to  
9 the Judge, "By the way, there's another lawyer,  
10 Leora Joseph, who I'm going to have do this"?

11 A. No.

12 Q. Are you familiar with the etiquette and  
13 rules of conduct of the court with regard to whether  
14 or not lawyers should be -- strike that.

15 Are you familiar with the custom and  
16 practice of the court where multiple lawyers are  
17 involved in the representation of a single client?

18 A. I believe I'm familiar with it. I haven't  
19 reviewed that.

20 Q. Do you agree with me that the normal  
21 practice is for one lawyer to address the Court in a  
22 matter, unless permission is given for more?

23 A. One lawyer at a time?

24 Q. No. One lawyer.

1           A.    That's a common practice, for one lawyer to  
2 do it at a time, but they're --

3           Q.    At a time?

4           A.    Yes.

5           Q.    So that's your understanding.  Lawyers just  
6 kind of bob up and down at a time, as long as only  
7 one is up at a time?

8           A.    Many times there are cases where there's  
9 two counsel and they take turns asking different  
10 questions or with different witnesses.

11          Q.    Without seeking permission from the Court  
12 to do so?

13          A.    I don't know if there is official  
14 permission that they need to seek or if it's one of  
15 those things that's a customary matter of practice.

16          Q.    You simply don't know what the custom is;  
17 is that it?

18          A.    The custom is that there are times where  
19 there are two lawyers that participate.  I'm not  
20 sure as to the necessary formalities to initiate  
21 those types of proceedings.

22          Q.    Is there any lawyering done in the reading  
23 of a victim impact statement?  Is there any special  
24 skill involved?

1 A. I don't know what you mean by "lawyering."

2 Q. Is there anything but reading what someone  
3 else wrote?

4 A. No.

5 Q. That's all it is, isn't it? It's not  
6 advocating, it's not providing legal argument, it's  
7 not doing anything but reading what some other  
8 person wrote out loud.

9 A. I actually think that reading an impact  
10 statement is part of advocacy because of the  
11 relationship that the district attorney's office  
12 develops with its victims, and that that's important  
13 for the victims in the cases.

14 But in terms of a specific skill, I mean,  
15 as long as you know how to read, then, yes --

16 Q. Anybody can do it?

17 A. You can read the impact statement, yes.

18 Q. You had no special skill over Mr. Deakin  
19 with regard to reading the victim impact statement?

20 A. I didn't have a skill with respect to Mr.  
21 Deakin in terms of reading; however --

22 Q. That's all I asked you.

23 MR. WARE: Your Honor, may the witness  
24 finish her answer?

1                   MR. EGBERT: The only question was, did she  
2 have a special skill --

3           A. I was the one that had the relationship  
4 with the child's family. And for them, on that day,  
5 I mean, I was the one who had been working with them  
6 through this process. And it was what we had worked  
7 out --

8           Q. Did anybody tell Judge Lopez that you had a  
9 special relationship with the family and you wished  
10 to give the victim impact statement?

11          A. I don't believe anyone said that to Judge  
12 Lopez.

13          Q. Or anything close to it?

14          A. She knew I was the lead prosecutor on the  
15 case.

16          Q. You weren't the lead prosecutor then. You  
17 were just sitting by when Mr. Deakin was doing all  
18 the work on that hearing; isn't that right?

19          A. On the day of the actual plea Mr. Deakin  
20 took the lead, but up until that point in time I was  
21 the lead prosecutor.

22          Q. Up until then?

23          A. Yes.

24          Q. But not then.



1 A. Not at the moment of the plea.

2 Q. Now, you were shown a statement by Judge  
3 Lopez that said there were facts that would change  
4 the characterization of the case that I, Judge  
5 Lopez, am not permitted to publicly disclose. Do  
6 you recall that?

7 A. I didn't say that.

8 Q. Do you recall reading that statement of  
9 Judge Lopez?

10 A. Yes, someone showed that to me.

11 Q. On your direct examination?

12 A. Yes.

13 Q. And being asked whether or not you could  
14 think of any such facts; and you said, "No, I can't  
15 think of any"?

16 A. That's correct.

17 Q. All the facts that were in Exhibit 3, the  
18 sociologist's report --

19 A. Yes.

20 Q. -- in your understanding of the law, was  
21 Judge Lopez able to make public comment on those  
22 outside of the courtroom?

23 A. The theme of that assessment was the  
24 fact --

1 Q. Ma'am, please, you know, would you answer  
2 my question. Were all the facts that were in this  
3 report permissibly disclosed by Judge Lopez in a  
4 public forum outside of the courtroom?

5 A. Well, the report was never filed with the  
6 Court, and she didn't have a copy of it. So I don't  
7 know that she would have been able to go through all  
8 the facts in the public way --

9 Q. Ms. Joseph, why don't you stick to my  
10 question just for a moment. Do you want me to go  
11 fact by fact? I will.

12 A. I guess I don't understand the theme --

13 Q. There's no theme to it. You testified on  
14 direct there were no facts known by Judge Lopez  
15 which could not be disclosed by her --

16 HEARING OFFICER DAHER: What's your  
17 objection?

18 MR. WARE: That's not the testimony. It  
19 was that the witness didn't believe there were any  
20 such facts. And, moreover, this is a question for  
21 Judge Lopez.

22 HEARING OFFICER DAHER: Go ahead.

23 MR. EGBERT: They asked her on direct  
24 whether or not there were any facts -- she looked at

1 that press release -- whether there were any facts  
2 that Judge Lopez could not release to the press.  
3 MR. WARE: No, that was not the inquiry.  
4 MR. EGBERT: Give me five minutes to get  
5 the record.  
6 HEARING OFFICER DAHER: Dig it out.  
7 MR. WARE: The statement says certain facts  
8 known to the prosecutors and the defense counsel.  
9 MR. EGBERT: Right.  
10 MR. WARE: And I asked the witness, "Were  
11 there any facts known to you as a prosecutor which  
12 could not have been made public?"  
13 MR. EGBERT: Okay. I'll rephrase the  
14 question  
15 BY MR. EGBERT:  
16 Q. Did you know what was in this Exhibit 3?  
17 HEARING OFFICER DAHER: Do you want a  
18 break?  
19 THE WITNESS: Yes.  
20 (Recess.)  
21 BY MR. EGBERT:  
22 Q. Turn to Exhibit 24, if you would.  
23 A. Yes.  
24 Q. And go to the part that says, "Final

1 Version." Do you see in the upper right-hand corner  
2 there will be a designation "Final Version"?

3 A. Yes.

4 Q. Do you have that?

5 A. Yes, I do.

6 Q. Now, halfway down you were asked about this  
7 on direct, this line in the statement: "In this  
8 case there were certain facts before me known by  
9 both the prosecutor and the defense attorney that  
10 were part of the plea conference and cannot be  
11 revealed by me, but which would undoubtedly change  
12 the characterization of this case as currently  
13 reported by some media outlets," right?

14 A. That's correct.

15 Q. Now, there's no doubt there were a number  
16 of facts before Judge Lopez at the plea conference,  
17 including the contents of this Exhibit 3,  
18 psychosocial report, which were not facts which  
19 could be released by her; isn't that right?

20 A. I don't know if they were or weren't facts  
21 that could be released by her, but --

22 Q. Let's stick with that question. I know you  
23 want to get to the next part of it. Let's stick  
24 with the facts. You want to say you don't think

1 they change the characterization of the case, right?

2 A. That's correct.

3 Q. That's your opinion?

4 A. That's correct.

5 Q. Her opinion might be much different than  
6 yours?

7 A. Of course.

8 Q. So let's get to the factual issues; not the  
9 opinion questions.

10 HEARING OFFICER DAHER: Didn't Judge Lopez  
11 in a sense make a significant part of that  
12 psychosocial report public when she said, in her  
13 handwriting, "The defendant suffers from an identity  
14 disorder. She looks female in all respects" --

15 MR. EGBERT: She made that part of the  
16 report public information. Her report as to chronic  
17 depression, anxiety, the mother and father  
18 situation, the beatings she had as a child, the  
19 current treatment, the current psychological  
20 situation, the medications, the use of hormone  
21 therapy and various things -- I can go through a  
22 number of them. Each and every one of them were not  
23 made public, were not a matter of any public  
24 record --

1 HEARING OFFICER DAHER: Wasn't that your  
2 argument about an hour ago? You're trying to show a  
3 nexus between identity disorder and a host of other  
4 psychological or psychiatric problems?

5 MR. EGBERT: Because you're dealing with  
6 inferences, Judge. We're dealing with facts.  
7 They're inferences. You can infer from a number of  
8 facts a specific conclusion. But these facts --

9 HEARING OFFICER DAHER: So, indirectly  
10 didn't Judge Lopez make that public disclosure in  
11 stating, "The defendant suffers from an identity  
12 disorder. She looks female in all respects"? I  
13 mean, that's the thrust --

14 MR. EGBERT: First of all, the DA's office  
15 made that disclosure first in a press release. That  
16 disclosure was made before Judge Lopez's findings.  
17 The DA's office made that disclosure in a press  
18 release. That's first off.

19 Secondly, I agree with you that Judge Lopez  
20 indicated in her finding that the defendant suffered  
21 from a sexual identity disorder. No question about  
22 that. And I think he said, in all respects, dresses  
23 and acts like a woman. What the exact words were, I  
24 don't have it. But there is nothing in the public

1 record that goes to any of the facts which I'm about  
2 to relate to you.

3 For example, "She's been treated with  
4 female hormones for a couple of years." There is  
5 nothing in the public record about that. Aren't I  
6 right?

7 HEARING OFFICER DAHER: Mr. Ware is  
8 objecting before we move to the next question. Go  
9 ahead, Mr. Ware.

10 MR. WARE: The testimony from Judge Lopez  
11 is there was no fact that she thought she couldn't  
12 make public.

13 MR. EGBERT: That's not true.

14 MR. WARE: In Exhibit 32, her transcript of  
15 sworn testimony, she said it here again: "I don't  
16 dispute that on August 1st there were aspects of  
17 Exhibit 3, the social worker's four-page paper, that  
18 were not public, all these hardships in the  
19 defendant's life. That's true. And that's true of  
20 most criminal defendants. But the issue here is  
21 whether or not those facts would have changed the  
22 public's perception."

23 MR. EGBERT: No. The issue here is whether  
24 or not there were facts that she could not release.

1 That's what the issue is: Whether there were facts  
2 that were known to her that could not be released to  
3 the press. That's exactly what she says in the  
4 press release. She then goes on to say that it  
5 would change the characterization. That's her  
6 opinion, and that's what she testified here today --  
7 I mean last week. But the first issue is --

8 HEARING OFFICER DAHER: "She looks female  
9 in all respects." That's the basic import of the  
10 report that Ms. Goldbach submitted. I mean,  
11 "Identity disorder. She looks female in all  
12 respects." And this is an experienced jurist who  
13 says, "She looks female in all respects." I mean,  
14 isn't that making the report public, Mr. Egbert?

15 MR. EGBERT: No. It is simply not. It's  
16 simply not.

17 BY MR. EGBERT:

18 Q. Was this report on the public record?

19 A. No, this report was not made public.

20 Q. And do you know whether or not a judge can  
21 comment on facts not on the public record in the  
22 press?

23 MR. WARE: Objection.

24 HEARING OFFICER DAHER: What's the



1 objection?

2 MR. WARE: It's a matter of law.

3 HEARING OFFICER DAHER: Sustained.

4 Sustained.

5 Q. You testified yesterday there were no facts  
6 known to you which could not be released to the  
7 public, correct?

8 A. I don't think that's what I said yesterday.  
9 I thought I said that there were no facts that I  
10 knew that would change or mitigate in any way the  
11 defendant's criminal conduct on the day that he  
12 committed the crime.

13 Q. Question on Page 103: "To your knowledge,  
14 were there any facts in the Horton case which could  
15 not be disclosed?"

16 "Answer: Well, the child's name is  
17 supposed to be protected by statute."

18 A. Could I just ask where you're reading from?

19 Q. Listen to me. Listen along.

20 MR. WARE: If the witness would like to see  
21 the transcript that counsel is reading from, she  
22 should be given it.

23 MR. EGBERT: This is my daily transcript.  
24 I don't have copies of it.

1 HEARING OFFICER DAHER: We'll get it.

2 MR. EGBERT: Judge, by the way, I think  
3 it's perfectly appropriate to read from a transcript  
4 and ask the witness if that's what they said without  
5 providing transcripts to a witness.

6 HEARING OFFICER DAHER: You're right. Go  
7 ahead.

8 Q. Were you asked this question: "To your  
9 knowledge, were there any facts in the Horton case  
10 which could not be disclosed?" And you answered:  
11 "Well, the child's name is supposed to be protected  
12 by statute, and I know that's something that's not  
13 to be disclosed. Other than that, I don't know of  
14 any facts that cannot be disclosed to the public or  
15 to the Court." Do you recall saying that?

16 A. Yes.

17 Q. Now, my question is, would the Judge be  
18 permitted to disclose the facts in this report which  
19 were not a matter of public record to the public in  
20 a press release.

21 MR. WARE: Objection.

22 HEARING OFFICER DAHER: Sustained.

23 MR. EGBERT: Well, then, Judge, I move to  
24 strike her answers to questions on Page 102, 103,

1 and 104 on this subject. She was asked whether or  
2 not there were any facts that couldn't be disclosed  
3 by the Judge, and now I'm cross-examining that and  
4 I'm being prohibited from doing that.

5 HEARING OFFICER DAHER: Motion to strike  
6 responses on Pages 102, 103, and 104. I'll take it  
7 under advisement and make a ruling on it.

8 MR. EGBERT: And I'll give you specific  
9 lines, if you want.

10 HEARING OFFICER DAHER: I'd appreciate it.

11 Q. Was the defendant's criminal record public  
12 information?

13 A. That would have been -- yes, I believe that  
14 was in the court record, yes. I don't think it was  
15 public information, but it accompanied the docket  
16 sheet -- you know, Probation was there in court and  
17 they had a copy of it.

18 Q. CORI information is not permitted to be  
19 released to the public; is that right?

20 A. That's right.

21 Q. There's no doubt that the Judge and you and  
22 the defense counsel all had possession of the facts  
23 concerning Mr. Horton's criminal record or lack  
24 thereof --

1 A. That's right.

2 Q. -- which the Judge was not permitted to  
3 disclose to the public; is that correct?

4 A. That's correct.

5 Q. And the opinion of the licensed social  
6 worker with regard to whether or not Horton was  
7 likely to reoffend, that was not in the public  
8 record, was it?

9 A. I don't know that that opinion was stated  
10 on the record, no.

11 Q. Can you think of any place where it might  
12 be in the public record?

13 A. No.

14 Q. And the clinical impressions of the social  
15 worker contained in the report, none of that was in  
16 the public record, was it, aside from the  
17 transgendered --

18 A. Right. The primary impression was of the  
19 defendant's transgendered status, and that was in  
20 the public record.

21 Q. Was anything about the defendant suffering  
22 chronic depression in the public record?

23 A. In the report, that was subsumed under the  
24 concept of the defendant being transgendered.

1 Q. It was subsumed?

2 A. That's my understanding, yes.

3 Q. So when the report says, "Ebony has a  
4 chronic depression," you think that's subsumed by  
5 being transgendered?

6 A. The report relates the depression to the  
7 defendant's status as transgendered, that she was  
8 struggling with this transgendered issue, and as a  
9 result, that was depressing for her.

10 Q. And does one necessarily follow the other,  
11 as far as you're concerned?

12 A. No, not in life, but in this report I  
13 believe they did.

14 Q. So my question to you again is, the fact  
15 that she suffered chronic depression was not in the  
16 public record, correct?

17 A. Not the specifics of the depression.

18 Q. Not the fact that she suffered chronic  
19 depression, correct?

20 A. That's correct.

21 Q. Along with the fact that she was having  
22 suicidal thoughts was not in the public record,  
23 correct?

24 A. That's correct.

1 Q. Also not in the public record was her prior  
2 relationship to medications.  
3 A. That's correct.  
4 Q. And her current standing with regard to  
5 medications.  
6 A. That's correct.  
7 Q. Also not in the record was her prior  
8 psychological counseling.  
9 A. The fact that she wasn't in counseling?  
10 Q. Her prior counseling.  
11 A. I don't know. At some point Anne Goldbach  
12 mentioned that she was receiving therapy on the  
13 record. I don't know in the context of the plea --  
14 Q. Do you have any memory of her saying that?  
15 A. I don't. No, I don't remember the  
16 counseling issue --  
17 Q. And certainly it wasn't indicated the place  
18 and type of counseling that she had received on the  
19 record anywhere; is that correct?  
20 A. No.  
21 Q. Those were all matters which you knew about  
22 because you had seen or heard the report, correct?  
23 A. Yes.  
24 Q. Defense counsel knew about it, correct?

1 A. Yes.  
2 Q. And the Judge knew about it?  
3 A. Yes.  
4 Q. Along with the CORI information which we  
5 just discussed?  
6 A. Yes.  
7 MR. EGBERT: May I have a moment, please?  
8 (Pause.)  
9 MR. EGBERT: I have nothing further, Judge.  
10 HEARING OFFICER DAHER: Are you all done  
11 with Ms. Joseph?  
12 MR. EGBERT: Yes.  
13 HEARING OFFICER DAHER: Mr. Ware?  
14 MR. WARE: I have no questions for the  
15 witness. Thank you, Ms. Joseph.  
16 HEARING OFFICER DAHER: Please step down.  
17 MR. WARE: Your Honor, we'd like to call  
18 David Deakin. As I mentioned to the Court, I would  
19 like to have Mr. Braceras conduct direct  
20 examination, if that's okay with the Court.  
21 HEARING OFFICER DAHER: I think you've  
22 already agreed to that?  
23 MR. EGBERT: I've agreed to it, and I think  
24 it's appropriate that you be asked and be consulted.

1 HEARING OFFICER DAHER: Thank you very  
2 much. I appreciate that courtesy.

3 Mr. Ware, let's talk about your situation  
4 for the motion to continue.

5 MR. WARE: Yes, Your Honor. The Commission  
6 opposes a continuance in this case for the reasons I  
7 think I articulated, but I'll do so again.

8 First of all, obviously this is a schedule  
9 to which both parties agreed. No time is perfect.  
10 It's an imposition on everyone. I and my colleagues  
11 are appearing in this case on a pro bono basis. We  
12 have a practice to get back to at some point.

13 We're approaching the Christmas holidays.  
14 There are a great many people on both sides and  
15 court personnel involved in the matter. It's a  
16 matter, as you have pointed out on a number of  
17 occasions, that is one of great import, and I think  
18 the continuity for the purposes of witnesses, the  
19 testimony, the Court's absorption of the information  
20 is important to the process.

21 I don't believe, without demeaning in any  
22 way what Judge Lopez intends to do in Cuba, that  
23 that ought to take preference or precedence over a  
24 formal court proceeding before Your Honor. I think



1 that's an inappropriate request. And I think that  
2 there is no basis for putting everybody on hold and  
3 picking up again on the 15th and 16th of December,  
4 running into Christmas week. I think that's  
5 unreasonable. We oppose it, and I think it's a  
6 burden on a great many other people.

7 HEARING OFFICER DAHER: Mr. Egbert?

8 MR. EGBERT: I don't know what Mr. Ware  
9 indicated about a burden on various people. There's  
10 been no showing that anybody is unavailable or the  
11 like. It's a matter of continuing for a week, which  
12 is not uncommon in administrative-type hearings,  
13 which this is. And we don't have jurors waiting and  
14 we don't have court personnel all dedicated to the  
15 beginning and end of a trial. And I've been  
16 involved in numerous administrative-type proceedings  
17 where hiatuses have been taken for appropriate  
18 purposes.

19 Judge Lopez made these plans, I think, in  
20 early September -- I might add, just in case -- and  
21 I hate to rely on newspaper accounts, but I read a  
22 newspaper account of what you were told and it's not  
23 what you were told, and I want to make sure there's  
24 no misunderstanding. I read a newspaper account

1 that said that you were told that this was an ABA  
2 international committee --

3 HEARING OFFICER DAHER: I wasn't told  
4 anything.

5 MR. EGBERT: -- by me or by Judge Lopez,  
6 and that's not what you were told. And what it  
7 is -- so it's crystal clear -- I think it was clear  
8 last time -- Judge Lopez has been involved for a  
9 year or more, involved in increasing and improving  
10 the relations between Cuba and the United States in  
11 a number of ways, and she has been one of the few  
12 that is permitted to have visas and permits to take  
13 American citizens over for cultural, legal and the  
14 type. I think this is her third or fourth trip.

15 JUDGE LOPEZ: Twelfth.

16 MR. EGBERT: Twelfth. She has taken  
17 Congressmen over in the past and the like and met  
18 with various officials. This trip was planned with  
19 some 20 or 30 people. It has been planned well in  
20 advance. She is the sponsor, basically, of the  
21 trip. And as part of not just the trip, in dealing  
22 with the cultural affairs in that regard, while  
23 there, she has been asked by -- and again -- what's  
24 his name?

1 JUDGE LOPEZ: By Don DeAmicis.  
2 MR. EGBERT: By Don DeAmicis, who is the  
3 president-elect in the American Bar Association,  
4 International Law Committee, to organize because  
5 they've been turned down by Cuba on previous  
6 occasions. Judge Lopez while in Cuba has set up --  
7 HEARING OFFICER DAHER: Let's talk about  
8 scheduling, if you would, Mr. Egbert. I have no  
9 doubt it's probably a very noble project, but let's  
10 talk about scheduling. We had a problem in  
11 September. You were tied up, Mr. Ware was tied up,  
12 and we kept on bandying around a date. We finally  
13 came to the date, I think, of sometime in November.  
14 MR. EGBERT: November 4th.  
15 HEARING OFFICER DAHER: Okay. When did  
16 Judge Lopez schedule -- when did she make the  
17 arrangements for this?  
18 MR. EGBERT: In September I believe was the  
19 origination of it.  
20 HEARING OFFICER DAHER: And she was advised  
21 obviously that we would start in November.  
22 MR. EGBERT: We thought we would start on  
23 November 4th, and the original projection by the  
24 Commission was that their case would take three

1 days. That's what we were told. And certainly if  
2 we started on November 4th, we wouldn't be running  
3 into this problem. It was not my problem, you  
4 remember. Mr. Ware sought the continuance from  
5 November 4th to the 18th or so because he had a case  
6 in Maine, I think it was, in a conflict from the  
7 original schedule that we had all written in stone,  
8 so to speak. I didn't present this until it became  
9 clear to me it was going to be a problem. I was  
10 hopeful it wouldn't be. I talked with Mr. Ware  
11 about it a bit ago to let him know that. Other than  
12 we don't start and finish from beginning to end, I  
13 don't see a substantial inconvenience to the  
14 proceedings or to the parties.

15 HEARING OFFICER DAHER: Not putting this on  
16 a monetary level, but Mr. Ware's office -- you just  
17 heard him -- is strictly pro bono, and he has other  
18 cases to try.

19 MR. EGBERT: So do I. And he's hardly  
20 strictly pro bono, from what I understand. I always  
21 thought pro bono was you don't charge.

22 HEARING OFFICER DAHER: Let's not get into  
23 that.

24 MR. EGBERT: He makes that statement to

1 you, Judge.

2 HEARING OFFICER DAHER: I have an idea as  
3 to what pro bono means. It's what we're all working  
4 for here today.

5 MR. WARE: I might also mention that Mrs.  
6 Braceras's wife will be delivering a baby in a few  
7 weeks, too.

8 HEARING OFFICER DAHER: He's not going to  
9 be delivering the baby.

10 MR. BRACERAS: She wants me present.

11 MR. WARE: We really are running up against  
12 a major time problem here.

13 MR. EGBERT: I don't see it, Judge. I  
14 don't see we're running up against time. The two  
15 major witnesses in this case are now done. And have  
16 in mind that the Commission indicated that their  
17 whole case was a three-day case when we scheduled  
18 this matter.

19 MR. WARE: I disagree with that.

20 MR. EGBERT: The record will show it.

21 MR. WARE: We both gave estimates that the  
22 case would wrap up within a three-week period.

23 MR. EGBERT: You said three days and I said  
24 two weeks.

1           MR. WARE: I've probably only taken three  
2 days. You've taken another five or six.  
3           HEARING OFFICER DAHER: Let's not have the  
4 acrimony.  
5           Harvey, could we get a Thursday courtroom?  
6           THE CLERK: Now we have to deal with the  
7 other courts.  
8           HEARING OFFICER DAHER: Can we get another  
9 courtroom for a Thursday to make up for the --  
10          THE CLERK: I don't know.  
11          HEARING OFFICER DAHER: I'm going to allow  
12 the continuance and I'm going to see if we can speed  
13 up the process by getting -- rather than have a  
14 hiatus on Thursday, if we can get another courtroom  
15 to make up for the lost time.  
16          MR. EGBERT: Tomorrow?  
17          HEARING OFFICER DAHER: I don't think I can  
18 do it tomorrow. So the motion for a continuance is  
19 allowed. And let's pick up with Mr. Deakin.  
20          MR. WARE: Your Honor, there is a cost  
21 involved in keeping the electronics available, and  
22 I'd at least ask that the defense counsel pay that  
23 extra cost of the delay.  
24          HEARING OFFICER DAHER: What is the cost?

1 MR. WARE: I don't know the numbers.  
2 HEARING OFFICER DAHER: What is it for? Is  
3 it a rental?  
4 MR. BERRIMAN: Yes, all screens and wiring.  
5 HEARING OFFICER DAHER: That's a rental?  
6 MR. WARE: Yes.  
7 HEARING OFFICER DAHER: You people don't  
8 have this as part of your standard equipment at an  
9 office like that?  
10 MR. WARE: We do not.  
11 MR. EGBERT: They can return it and bring  
12 it back when they need it.  
13 HEARING OFFICER DAHER: What is the cost?  
14 MR. WARE: We can submit that to the Court.  
15 I couldn't say specifically off the top of my head.  
16 I don't know. Jim, do you know?  
17 MR. BERRIMAN: A few hundred dollars.  
18 HEARING OFFICER DAHER: Do we have to  
19 rewire it?  
20 THE CLERK: We could leave it here.  
21 HEARING OFFICER DAHER: Why don't we stop  
22 with Mr. Deakin at one. Then we'll talk about the  
23 ways of resolving the logistics in this matter.  
24 MR. WARE: I also want to reiterate that I

1 have another trial scheduled in January. We're  
2 certainly not going to finish this case before  
3 Christmas at this rate. And we're going to start up  
4 again on what date? The 15th or 16th? We're going  
5 to go four days.

6 HEARING OFFICER DAHER: I'm going to try to  
7 pick up another day. The reason that we go four  
8 days is because this courtroom is pretty heavily  
9 used on Thursdays, which is an eviction day.

10 MR. WARE: This request for continuance, as  
11 I understand it, is for all of next week and at  
12 least Monday of the following week; isn't that  
13 right?

14 HEARING OFFICER DAHER: No. She's coming  
15 back on Sunday, right?

16 JUDGE LOPEZ: Monday.

17 MR. WARE: We're missing, in effect, eight  
18 days --

19 JUDGE LOPEZ: I can try and change my  
20 return to Sunday.

21 HEARING OFFICER DAHER: So we won't miss a  
22 Monday.

23 MR. EGBERT: And we'll do that. Judge,  
24 would it make sense to go full days?



1 HEARING OFFICER DAHER: I'll be delighted  
2 to. I thought of that. That's what I had in mind.  
3 We'll go on Thursdays and we'll try to go until 4:30  
4 -- I thought of that before -- to make up for the  
5 hours that we're missing. We'll double up --

6 MR. WARE: It's okay with me if that's our  
7 only alternative. I think it's unreasonable and I  
8 think it's a burden on everyone except Judge Lopez,  
9 and I think the Court should not allow it in a  
10 proceeding of this dimension. I see no reason for  
11 that. But to the extent the Court's ruled, if the  
12 alternative is running this case into January or up  
13 until Christmas Eve, then yes, I'd like to go to  
14 4:30 or 5:00. And what I'd really prefer is for the  
15 Court to put a time limit on the case and the Court  
16 order that this case be completed by a specific  
17 date, come hell or high water. If we have to sit  
18 until six o'clock, we sit.

19 HEARING OFFICER DAHER: We're faced with  
20 Judge Lopez's and every respondent's due process  
21 rights.

22 Let me see what we can do right after we  
23 get started with Mr. Deakin.

24 Before we get started, Mr. Egbert, is that

1 a problem with the wiring? The way his office feels  
2 is that if there's a cost involved with the wiring  
3 and your client is taking a week off as a hiatus, is  
4 that a problem with picking up the cost of the  
5 wiring? It's not going to break the bank?

6 MR. EGBERT: That's the only question. I  
7 don't know what it is. If it's something  
8 reasonable, I'm not going to squawk about it.

9 HEARING OFFICER DAHER: Okay. Let's go.

10 DAVID DEAKIN, Sworn

11 DIRECT EXAMINATION

12 BY MR. BRACERAS:

13 Q. Would you state your name for the record,  
14 please.

15 A. David Deakin.

16 Q. And can you briefly describe your education  
17 for us.

18 A. I graduated from Williams College in 1986  
19 with a Bachelor of Arts in English literature. I  
20 graduated from Oxford University in England in 1988  
21 with a second bachelor's degree in English  
22 literature, and I graduated from Harvard Law School  
23 in 1991 with a juris doctorate degree.

24 Q. Where did you go to work after Harvard Law

1 School?

2 A. After law school I spent a year as a  
3 judicial clerk for the then Honorable -- I guess she  
4 still is -- the Honorable Ruth Abrams, who was then  
5 on the Supreme Judicial Court of Massachusetts.

6 Q. After your clerkship?

7 A. After that I went to work in the Norfolk  
8 County district attorney's office.

9 Q. How long were you in the Norfolk DA's  
10 office?

11 A. From September of 1992 to April of 1996, so  
12 roughly three and a half years.

13 Q. What positions did you hold there?

14 A. Initially, for the first year I was there I  
15 was a line assistant district attorney in Quincy  
16 District Court, which just means a trial prosecutor,  
17 general assignment trial prosecutor in the District  
18 Court.

19 The second year I was in Quincy District  
20 Court. I continued to be a line prosecutor, but I  
21 was also the co-supervisor in that office. After  
22 that year -- so at the two-year mark I was asked to  
23 join the sexual assault and domestic violence unit  
24 which was based in the Dedham headquarters of the

1 district attorney's office. I spent a year and a  
2 half in that unit. Initially I was having sexual  
3 assault cases involving abuse of adults and children  
4 in the various district courts in Norfolk County.  
5 And gradually, after I had been there for about a  
6 year, I began presenting cases to the grand jury and  
7 doing some work in Norfolk Superior Court.

8 Q. At some point did you move to the Suffolk  
9 DA's office?

10 A. I did. I believe it was either April or  
11 May of 1996.

12 Q. What brought that about?

13 A. I was approached initially by a former  
14 colleague in the Norfolk DA's office, who had moved  
15 to the Suffolk district attorney's office, about  
16 whether I would be interested in joining the child  
17 abuse unit in Superior Court in the Suffolk County  
18 district attorney's office. And when I expressed an  
19 interest, I had a formal interview with the man who  
20 was then the chief of that unit.

21 Q. Who was that?

22 A. His name is Josh Wall. He's now the deputy  
23 district attorney.

24 Q. So when you joined the Suffolk's DA's

1 office, you joined the child abuse unit?

2 A. That's correct.

3 Q. And you were a line ADA in that unit?

4 A. I was a line ADA in Superior Court, so I  
5 was a trial prosecutor in Superior Court.

6 Q. When you were a line ADA in Superior Court  
7 in the child abuse unit, approximately how many  
8 cases per year did you handle?

9 A. I would be estimating. Based on my  
10 familiarity with the overall statistics, I would  
11 imagine it was somewhere in the range of 150 to 175  
12 investigations each year.

13 Q. And out of those investigations  
14 approximately how many cases were indicted?

15 A. Indictments would probably have run  
16 somewhere between 12 and maybe 18 or 20 per year out  
17 of that number.

18 Q. At some point you became chief of the child  
19 abuse unit?

20 A. That's correct. It was at the beginning of  
21 December of 1998.

22 Q. Generally speaking, what are your  
23 responsibilities as chief of the child abuse unit?

24 A. Well, in addition, I have a case load still

1 which is similar to a line ADA's case load except  
2 somewhat reduced to allow for administrative  
3 responsibilities. I'm responsible for overseeing  
4 all referrals of child abuse to law enforcement in  
5 Suffolk County. In particular, I am responsible for  
6 reviewing all the cases that come to us via the  
7 police, the Department of Social Services, and then  
8 other -- that's the bulk of our referrals. I'm  
9 responsible for reviewing those cases, assigning  
10 them for prosecution and supervising the work of the  
11 prosecutors, who then investigate and prosecute  
12 those cases.

13 Q. You said, I think, that you still handle  
14 cases?

15 A. Yes, I do.

16 Q. And you also mentioned that you review all  
17 of the cases that come into the unit?

18 A. That's correct. Actually, all of the cases  
19 that come into the district attorney's office  
20 involving child abuse.

21 Q. All of the cases that remain with the child  
22 abuse unit, do you keep current with the cases and  
23 the development of those cases?

24 A. Yes, I do. I also try to keep current with

1 the cases that are referred back to District Court,  
2 although that's somewhat more difficult and involves  
3 some cooperation with the District Court  
4 supervisors, but the cases that remain in the child  
5 abuse unit in Superior Court I try to remain current  
6 with.

7 Q. And you do that by meeting with the line  
8 ADAs?

9 A. That's correct, and also exchanging memos  
10 and emails at times and meeting with them both  
11 formally and informally.

12 Q. At some point you became involved in the  
13 Horton case; is that right?

14 A. That's correct.

15 Q. About when was that?

16 A. I believe it was the end of November of  
17 1999. I'm not sure of the precise date.

18 Q. How were you first alerted to the Horton  
19 case?

20 A. I don't recall exactly which came first. I  
21 know that we received a referral from the District  
22 Court where he had been arraigned. I have a memory  
23 that he was arraigned on a Monday. I'm not certain  
24 of that, but I know we received a referral. We also

1 received a fax of police reports from the Boston  
2 Police Department sexual assault unit. I don't  
3 recall which of them came first, but they came in  
4 very close succession to one another, and I reviewed  
5 those reports.

6 Q. Now, you mentioned that it's one of your  
7 responsibilities to assign cases that came in; is  
8 that right?

9 A. That's correct.

10 Q. To whom did you assign the Horton case?

11 A. To Assistant District Attorney Leora  
12 Joseph.

13 Q. And how did you make that decision to  
14 assign the case to her?

15 MR. EGBERT: Objection. Relevance.

16 HEARING OFFICER DAHER: Overruled.

17 A. My normal procedure is I basically keep  
18 sort of an informal duty rotation among the  
19 assistants in the unit, and the general assignment  
20 criteria is whoever is next, whoever has not had a  
21 case assigned to them in the longest period of time.  
22 Whoever is up. I sometimes --

23 MR. EGBERT: We're not asking for  
24 procedures. We're asking what he did in this case.



1 The question was how did he come to pick Leora  
2 Joseph.  
3 HEARING OFFICER DAHER: Relevancy.  
4 MR. BRACERAS: I think he was answering  
5 that question, but fine. I'll put another question  
6 to the witness.  
7 HEARING OFFICER DAHER: Sustained.  
8 Q. Why did you assign the case to Ms. Joseph?  
9 A. I had probably assigned it to her --  
10 MR. EGBERT: Motion to strike.  
11 HEARING OFFICER DAHER: Sustained to the  
12 word "probably."  
13 A. To the best of my memory I assigned it to  
14 her because she was the next prosecutor on the duty  
15 list.  
16 Q. She was next up in the rotation?  
17 A. Correct.  
18 Q. At the time that you assigned the case to  
19 Ms. Joseph, that would have been in November of '99?  
20 A. Correct.  
21 Q. So shortly after you received the case?  
22 A. Either that day or the next morning. I'm  
23 not sure which.  
24 Q. Now, when you assigned the case to Ms.

1 Joseph, Judge Lopez was not on the case; is that  
2 right?

3 A. No. In Superior Court the judges rotate.  
4 Even after a case has indicted, it's very difficult  
5 to know what judge is going to sit on what case, and  
6 they sometimes sit on a part of it and then rotate  
7 out and another judge sits.

8 At this point it hadn't yet even been  
9 indicted, so there's no way to know what Superior  
10 Court judge might come into contact with it.

11 Q. Now, you're familiar with dangerousness  
12 hearings?

13 A. Yes, I am.

14 Q. Was there a dangerousness hearing requested  
15 in the Horton case?

16 A. No, there was not.

17 Q. When is a dangerousness hearing sought?

18 A. Virtually always -- well, dangerousness  
19 hearing by statute has to be sought at the time a  
20 defendant is first brought before the Court.  
21 Virtually always if a dangerousness hearing is  
22 sought, it would be sought at the defendant's first  
23 presentation in District Court, which is virtually  
24 always at arraignment. That's virtually always the

1 defendant's first contact with District Court.

2 Q. Is that your office's practice as to when  
3 to seek a dangerousness hearing?

4 A. Absolutely.

5 Q. Now, does the fact that you may not seek a  
6 dangerousness hearing in a case reflect on whether  
7 the defendant is dangerous?

8 A. In general. I mean, obviously if we seek a  
9 dangerousness hearing, it's because we believe a  
10 defendant is dangerous. There are many instances,  
11 however, that we recognize that a defendant poses a  
12 potential danger where we do not seek a  
13 dangerousness hearing.

14 Q. Why is that?

15 A. In the child abuse unit the most common  
16 reason is the dangerousness hearing permits a  
17 defense counsel to call witnesses, including the  
18 child victim. Because the dangerousness hearing is  
19 under a very strict time chronology -- that is,  
20 there are very strict provisions about how long it  
21 can continue -- that generally means that a defense  
22 attorney can subpoena the victim to testify in a  
23 serious child abuse case within days or maybe as  
24 much as a week or ten days of the abuse.

1                   We generally find that this process is hard  
2 enough on children as it is, without asking them to  
3 go through what I would view as a very demanding  
4 ordeal of testifying within days of the assault.

5           Q.    Now, in this case, the Horton case, the  
6 decision not to seek a dangerousness hearing, that  
7 would have been your decision as head of the unit?

8           A.    I don't actually believe that I was  
9 consulted on the question of whether to seek a  
10 dangerousness hearing in the District Court.  
11 Because of people's schedules and the difficulty of  
12 getting in touch with people, a decision is often  
13 made with District Court supervisors --

14           MR. EGBERT:  Objection as to what's often  
15 done and what possibly might be done.

16           HEARING OFFICER DAHER:  Sustained.

17           Q.    The fact that a dangerousness hearing was  
18 not sought in the Horton case is not a decision by  
19 your office that the defendant was not dangerous; is  
20 that right?

21           MR. EGBERT:  That's leading.

22           HEARING OFFICER DAHER:  I'll give some  
23 latitude.

24           A.    No, it was not.

1 Q. And is a sentence of imprisonment -- let's  
2 step back and say eventually in this case, the  
3 Horton case, you recommended a sentence of  
4 imprisonment; is that right?

5 A. That's correct.

6 Q. Now, do you view a recommendation of  
7 imprisonment to be inconsistent in any way with the  
8 failure to seek a dangerousness hearing?

9 A. Absolutely not. We regularly recommend  
10 sentences of incarceration, including to the state  
11 prison, on defendants who are on bail, who have  
12 posted bail and are at liberty during the pendency  
13 of the proceedings. That happens if not daily,  
14 certainly weekly.

15 Q. Now, before the August 1st lobby conference  
16 in the Horton case, did you consult with Ms.  
17 Joseph, ADA Joseph, on the Horton case?

18 A. On several occasions.

19 Q. What matters did you discuss?

20 A. Initially when I assigned the case to her,  
21 we had a meeting to discuss the investigation, what  
22 needed to be done and in what order. We had sort of  
23 ongoing informal meetings, essentially meetings on  
24 the fly as she was involved in that investigation.

1 And then sometime thereafter, I'm not certain  
2 exactly when, but shortly thereafter Ms. Joseph  
3 submitted a request for direct indictment approval,  
4 which is our form for an ADA to request permission  
5 of the office to present evidence to a grand jury.  
6 And I reviewed that document, discussed it with her,  
7 put my comments on it, and sent it to First  
8 Assistant District Attorney Elizabeth Keeley.

9           After that time we had a brief discussion  
10 toward the end of her grand jury presentation about  
11 the state of the grand jury, the evidence before the  
12 grand jury. And we also had a meeting to discuss,  
13 shortly thereafter, after the grand jury returned an  
14 indictment, the statement of the case that she would  
15 file and talk to her about the contents of that.

16           Subsequently, in the several ensuing months  
17 while discovery was going on in the case, we  
18 discussed it in a very sort of brief fashion as we  
19 were discussing a whole series of her cases. Not a  
20 great deal was happening from a supervisory point of  
21 view during discovery.

22           And then sometime before the August 1st  
23 lobby conference -- I'm not exactly certain of the  
24 time frame -- but it was fairly shortly before, she

1 let me know that there would be a lobby conference,  
2 and we met at some length to discuss the  
3 Commonwealth's recommendation on sentencing.

4 Q. Before we get to that meeting -- and that  
5 was a meeting that you had to discuss the sentencing  
6 recommendation?

7 A. Yes.

8 Q. Before we get to that meeting, you said  
9 that you discussed with ADA Joseph her direct  
10 indictment request?

11 A. That's correct.

12 Q. Does that direct indictment request list  
13 the charges to indict the defendant on?

14 A. Yes, it does.

15 Q. Did you approve the charges in that direct  
16 indictment request?

17 A. Yes, I did.

18 Q. Is it then office policy that those charges  
19 have to be approved by the first attendant?

20 A. That's correct.

21 Q. Now, getting back to this meeting before  
22 the August 1st lobby conference on the sentencing  
23 recommendation, do you recall how much before the  
24 lobby conference that meeting occurred?

1           A.    I'm not certain.  I believe it was days,  
2  but I'm not certain of that.

3           Q.    Did you eventually agree with ADA Joseph on  
4  a sentence recommendation?

5           A.    Yes, I did.

6           Q.    What was that?

7           A.    It was a sentence of 8 to 10 years in state  
8  prison, followed by a lengthy period of probation to  
9  be served from and after the incarcerated portion of  
10 the sentence.

11          Q.    Whose responsibility was it to approve a  
12 sentencing recommendation?

13          A.    It was mine.

14          Q.    And in this case, in the Horton case, who  
15 had the responsibility to approve the sentencing  
16 recommendation?

17          A.    I did.

18          Q.    And you did approve the sentencing  
19 recommendation in this case?

20          A.    That's right.

21          Q.    Now, in this meeting with Ms. Joseph, what  
22 factors did you consider in reaching the  
23 8-to-10-year term of imprisonment?

24               MR. EGBERT:  Objection.  Relevance, Judge.



1 HEARING OFFICER DAHER: What's the  
2 relevancy?

3 MR. BRACERAS: Your Honor, I think this is  
4 certainly relevant that Judge Lopez has put the  
5 basis for her sentence at issue in this matter.

6 HEARING OFFICER DAHER: Overruled. You can  
7 have it. Let's go with it.

8 A. We considered first and foremost the nature  
9 and circumstances of the alleged -- at that time  
10 alleged assault. We took into account the strength  
11 of the case from an adjudicative point of view; that  
12 is, for trial. We took into account the defendant's  
13 criminal history, which was not particularly  
14 significant. We took into account the sentencing  
15 guidelines. I think those are the factors  
16 essentially that we took into account.

17 Q. So just to take these one at a time, you  
18 said you took into account the facts and  
19 circumstances of the crime. What were those facts  
20 and circumstances as you understood them?

21 A. As we understood them, the victim in this  
22 case, the boy, was lured into the defendant's  
23 automobile by a ruse, perhaps also assisted by  
24 physical force. That wasn't entirely clear to me at

1 that point. The defendant then, on false pretenses,  
2 drove the boy around, claiming to be looking for  
3 sons that the defendant obviously didn't have, drove  
4 the boy eventually to a remote location where they  
5 wouldn't be observed, and then tried to force the  
6 boy to perform oral sex on him by putting his hand  
7 behind the boy's head and pushing the boy's head  
8 down towards the defendant's lap. And then when the  
9 boy resisted, forcing the boy to simulate oral  
10 sexual activity first with the defendant's finger  
11 and then with a screwdriver, refusing to allow the  
12 boy to leave and go home, even though the boy cried  
13 and asked to be let go home.

14 At one point or perhaps two points -- I'm  
15 not sure -- placing the -- I think it was one point  
16 -- placing the sharp end of the screwdriver against  
17 the boy's neck and telling him to be quiet. Even --  
18 as I said, refusing to let the boy leave, and  
19 ultimately, when the police arrived, offering the  
20 boy money in return for his silence.

21 Q. Now, you said that you also considered the  
22 evidentiary strength of the case; is that right?

23 A. That's correct.

24 Q. What did you understand that to be?

1           A.    We -- first of all, I discussed with ADA  
2 Joseph at some length --  
3           MR. EGBERT:  I would object to this again  
4 on grounds of relevance as --  
5           HEARING OFFICER DAHER:  Overruled.  
6           MR. EGBERT:  This is the first time we've  
7 gone into issues like this, so I intend to cross-  
8 examine fully --  
9           HEARING OFFICER DAHER:  I have no doubts  
10 that you will.  
11          MR. EGBERT:  -- as to their recommendations  
12 in other cases.  
13          HEARING OFFICER DAHER:  Overruled.  
14 Continue with your direct examination.  
15          Q.    So how did you assess the evidentiary  
16 strength of this case?  
17          A.    First I discussed with ADA Joseph the  
18 credibility of the boy in the case and his  
19 willingness and ability to testify.  She assured me  
20 that both she and the investigative team believed  
21 that he was very credible and that he was willing,  
22 if not anxious, to testify.  We noted that in the  
23 case, the two police officers, uniformed police  
24 officers of the Boston Police Department, had

1 arrived on scene and had observed what they  
2 described as a long-haired person in the driver's  
3 seat of the car they pulled up on moving his or her  
4 head -- it wasn't clear entirely -- up and down or  
5 back and forth rapidly. They observed this for a  
6 period of several seconds.

7           When it stopped a few seconds later, they  
8 saw another head emerge from the area of the lap of  
9 the driver of the car and sit up into the area of  
10 the passenger's seat of the car, which corroborated  
11 the child's account of what had happened to him.

12           The police also, as they approached the  
13 car, noticed or heard -- one police officer heard  
14 the defendant saying to the boy, "Tell them you're  
15 helping me look for my sons," which is what the boy  
16 had told us the defendant had said to him. They  
17 observed the defendant's pants to be down, sort of  
18 pulled down around the hip area, which tended, in  
19 our view, to corroborate the boy's account of what  
20 had happened to him.

21           The police recovered a screwdriver from the  
22 console area between the driver's side and the  
23 passenger's side -- the driver's seat and the  
24 passenger seat of the car, which was exactly where

1 the boy had said the defendant had placed the  
2 screwdriver after using it on him.

3 The police also noted that the boy was  
4 upset and crying at the time that they came upon him  
5 and testified to that effect in the grand jury as  
6 well.

7 The detective assigned to his case, and his  
8 partner, Detective Keeley and Detective Hargrove  
9 with the sexual assault unit, subsequently  
10 interviewed the defendant, and during that interview  
11 he conceded that he had been involved with sexual  
12 activity with the child and conceded that he had  
13 hoped to perform oral sex on the child -- or have  
14 oral sex with the child, which was consistent with  
15 what the child had said the defendant had sought to  
16 do. Based on all of these factors, we assessed our  
17 likelihood of success at trial as quite high.

18 Q. Now, you said that in considering the  
19 recommended sentence, that you also considered the  
20 Defendant Horton's criminal history; is that right?

21 A. That's right.

22 Q. And how did you assess that in this case?

23 A. His -- as I recall, the defendant's  
24 criminal history was he had prior charges -- my

1 recollection is that most, if not all, of them were  
2 dismissed or otherwise did not result in  
3 adjudications of guilt. As a result, we viewed him  
4 as having, for the purposes of this sentencing, no  
5 record. There was nothing in his record that  
6 indicated that we should increase our sentencing  
7 recommendation because of the record.

8 Q. Finally, Mr. Deakin, you said that in  
9 reaching a determination as to the recommended  
10 sentence, that you considered sentencing guidelines;  
11 is that right?

12 A. That's correct.

13 MR. BRACERAS: I'd like to mark this for  
14 identification as Exhibit 23.

15 HEARING OFFICER DAHER: Mr. Egbert?

16 MR. EGBERT: I think using the back door to  
17 get in sentencing guidelines which don't exist is  
18 both improper and unfair. The Commission knows and  
19 Mr. Deakin knows that the sentencing guidelines  
20 which are now being put up are not the law of the  
21 Commonwealth of Massachusetts, and to put them in  
22 the public record as something related to this  
23 case --

24 HEARING OFFICER DAHER: Mr. Braceras, help

1 me out. At one time I felt that these had been  
2 adopted. They were on the website, but they were  
3 the proposed sentencing guidelines. Why don't you  
4 respond to Mr. Egbert's argument.

5 MR. BRACERAS: Your Honor, Mr. Egbert might  
6 say that they didn't exist, but they're here and  
7 exist. And whether or not they've been enacted into  
8 law or not, the question to Mr. Deakin was whether  
9 he relied on them. They're clearly relevant. They  
10 existed as of 1998. They were recommended by the  
11 Massachusetts Sentencing Commission, the Honorable  
12 Robert Mulligan, chairman of the sentencing  
13 Commission. So whether they were written into law  
14 is irrelevant to the question of whether the DA's  
15 office and whether Superior Court judges, for that  
16 matter, relied on them. And the evidence will be  
17 that the DA's office and Superior Court judges --

18 HEARING OFFICER DAHER: I don't know how  
19 you can say Superior Court judges -- Mr. Egbert, in  
20 re the fact that Mr. Deakin may have relied on these  
21 proposed sentencing guidelines --

22 MR. EGBERT: Is irrelevant.

23 HEARING OFFICER DAHER: Tell me why it's  
24 irrelevant.

1                   MR. EGBERT: His recommendation in this  
2 case and how he came to it is of no relevance to the  
3 charges here. They made the recommendation. We all  
4 know that. We know what the recommendation was and  
5 we know what Judge Lopez ultimately did. And the  
6 justness or nonjustness --

7                   (Mr. Ware stands up)

8                   HEARING OFFICER DAHER: Now we have Mr.  
9 Ware jumping into this.

10                  MR. BRACERAS: Your Honor, Mr. Egbert  
11 cannot say that the sentencing recommendation --

12                  HEARING OFFICER DAHER: But why is it  
13 important as to how Mr. Deakin arrived at it?

14                  MR. BRACERAS: Two ways. At the September  
15 6th hearing the DA in this case was being accused of  
16 being disingenuous when he put forth what he thought  
17 was a legitimate sentencing recommendation and when  
18 he described this as is a serious case. In getting  
19 to the conclusion that this was a serious case, in  
20 part, Mr. Deakin has already testified he relied on  
21 the sentencing guidelines.

22                  Further, No. 2, Judge Lopez has already  
23 testified that she issued a press release in which  
24 she referenced sentencing guidelines. And she said



1 that the Horton case, when she used the term "low  
2 scale," she was referring to the sentencing  
3 guidelines.  
4 HEARING OFFICER DAHER: Overruled. Go  
5 ahead. You got it.  
6 THE CLERK: For ID?  
7 MR. BRACERAS: I'll offer this.  
8 HEARING OFFICER DAHER: Fine.  
9 (Document marked as Exhibit 23  
10 moved into evidence)  
11 HEARING OFFICER DAHER: I'd like to go a  
12 little longer today, if that's okay with everybody.  
13 MR. EGBERT: How long are you going to go?  
14 HEARING OFFICER DAHER: 2:00?  
15 MR. EGBERT: I just have to make a phone  
16 call.  
17 HEARING OFFICER DAHER: I have to make a  
18 phone call, too.  
19 (Recess)  
20 THE CLERK: Is 23 in for an exhibit?  
21 HEARING OFFICER DAHER: It's an exhibit.  
22 MR. BRACERAS: May I approach?  
23 HEARING OFFICER DAHER: Please.  
24 BY MR. BRACERAS:

1 Q. Mr. Deakin, I'm showing you Exhibit 23. Do  
2 you recognize that?

3 A. Yes. Let me skim through it quickly. It  
4 is the Massachusetts Sentencing Commission Proposed  
5 Sentencing Guidelines.

6 MR. EGBERT: I want to approach the Bench.  
7 (Bench conference off the record)

8 HEARING OFFICER DAHER: Because of  
9 information proffered to the Court, we're going to  
10 recess now at this time and we'll pick it up on  
11 Friday. And you'll take care of the security  
12 aspect?

13 MR. EGBERT: Yes, absolutely. Thank you,  
14 Judge.

15 (Whereupon, the hearing was  
16 adjourned at 1:25 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 VIII, is a true and  
accurate transcription of my stenographic notes  
taken on Wednesday, December 4, 2002.

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Jane M. Williamson  
Registered Merit Reporter

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