

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

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

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

Harvey Chopp, Clerk

APPEARANCES:

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

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

Held at:  
Edward W. Brooke Courthouse  
24 New Chardon Street  
Boston, Massachusetts  
Tuesday, December 17, 2002  
9:45 a.m.

(Jane M. Williamson, Registered Merit Reporter)

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I N D E X

WITNESS                      DIRECT      CROSS      REDIRECT      RECROSS

Angela Beaucage (By Mr. Ware)	11-12		11-46	
(By Mr. Egbert)		11-26		
Joan Kenney (By Mr. Ware)	11-49		11-62, 78	
(By Mr. Egbert)		11-55		11-66
Suzanne DelVecchio (By Mr. Egbert)	11-79		11-161	
(By Mr. Ware)		11-128		
Anne Goldbach (By Mr. Egbert)	11-190			

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E X H I B I T S

EX. NO.		FOR ID	IN EVID.
T	Interview of Angela Beaucage 12/18/01	11-40	
J)			
K)	SJC decisions		11-84
L)			

## P R O C E E D I N G S

1  
2 HEARING OFFICER DAHER: I'm sorry I was  
3 late, but I'm trying to reconcile my notes with the  
4 transcript that I just received this morning. I  
5 point to particularly Page 167 in regards to  
6 questions put to Ms. Kenney.

7 MR. EGBERT: You said 167?

8 HEARING OFFICER DAHER: Yes.

9 "Question: Did you learn some additional  
10 information which Judge Lopez gave you after the  
11 statement went out?

12 "Answer: Yes. Each time I talked to her  
13 there was more information that she gave me. She  
14 asked me specifically to call a police detective.

15 "Question: Do you recall the detective's  
16 name?

17 "Answer: Jay Greene.

18 "Question: What did Judge Lopez tell you  
19 to do and what did you in fact do?

20 "Answer: She gave me the name of Jay  
21 Greene and said he would have information pertaining  
22 to this case, and I called him at her suggestion."  
23 It goes on.

24 So last night, in going over my notes, I

1 was concerned in regards to Ms. Kenney's testimony  
2 and as to whether it was her practice to seek out  
3 lawyers to speak on behalf of a judge concerning  
4 some general principle of law.

5 Judge Lopez asked Joan Kenney to speak to  
6 Detective Greene. It seems to me that Joan Kenney  
7 was acting more as an investigator than anything  
8 else. Judge Lopez went to Joan Kenney to speak to  
9 Detective Greene to learn something about the case.  
10 I still don't know what it was in Joan Kenney's --  
11 that Judge Lopez wanted Joan Kenney to hear.

12 In order for me to discharge my duties of  
13 the Supreme Judicial Court, it's vital for me to  
14 hear what Detective Greene said to Joan Kenney.  
15 Both sides seem reluctant to call Detective Greene.  
16 Both of you apparently have concerns about his  
17 veracity, but I clearly want to know what Detective  
18 Greene had to know for the truthfulness -- not for  
19 the truthfulness of his assertions. Rather, I need  
20 to know what he said in order to gain some insight  
21 of why Judge Lopez wanted Joan Kenney to make this  
22 call.

23 It seems to me that this relates to Judge  
24 Lopez's press release that there was some

1 exculpatory evidence in this case that she could not  
2 reveal. But without knowing what Detective Greene  
3 in fact said, I am at this point unable to draw any  
4 inferences from Joan Kenney's phone call with  
5 Detective Greene.

6 I am thus requesting that Joan Kenney be  
7 brought back to the stand to testify as to what  
8 Detective Greene told her. I will assume that  
9 everything that Detective Greene said is very highly  
10 questionable.

11 As you know, I've allowed both sides a  
12 tremendous amount of latitude in this case, and I  
13 have to get to the full truth of this matter.  
14 Without knowing what Detective Greene said to Joan  
15 Kenney, I'll be unable to make findings based upon  
16 all the evidence that should have been presented to  
17 me. I'll hear both sides.

18 MR. WARE: Well, Your Honor, as you  
19 correctly read, this conversation with Detective  
20 Greene purports to have been after the statement  
21 went out. So it could not affect the reason for the  
22 statement or the basis of the statement or the input  
23 to the statement.

24 Judge Lopez in her testimony did not give

1 any further particulars of what she was told by  
2 Detective Greene. So the statement stands in its  
3 own right. And nothing Joan Kenney was told by  
4 Detective Greene would have any bearing on the  
5 statement, principally because she didn't talk to  
6 him until after the statement was already published  
7 on September 7th. So I'm a little unclear what the  
8 thrust of the Court's problem is here.

9           Maybe there's curiosity about what  
10 Detective Greene said. I think both sides are  
11 satisfied -- I don't mean to speak for my  
12 colleague -- that there's reason to believe that  
13 Detective Greene's testimony before the Commission  
14 was simply not true, not truthful. And that affects  
15 both sides, and both sides have elected not to call  
16 him because that testimony is quite unreliable.

17           I'm willing at the side bar, out of the  
18 presence or out of the hearing of others, to provide  
19 the Court with what I think he said or to mark for  
20 identification his testimony before the Commission.  
21 I don't have any objection to that, so long as we're  
22 both in agreement with respect to it and it's not  
23 considered by the Court as substantive evidence in  
24 the proceeding. I don't mind your reading his

1 testimony.

2 HEARING OFFICER DAHER: But again -- I  
3 totally understand your point, but again, what was  
4 the purpose -- what did Judge Lopez know that was  
5 exculpatory that she felt that Joan Kenney could  
6 investigate and make known to the public?

7 MR. WARE: Well, Your Honor, these are  
8 issues, of course, of argument. I don't believe the  
9 Judge said what she knew. I think she wasn't given  
10 particulars by the Judge. She was told, according  
11 to testimony as I recall it -- and I'm prepared to  
12 be corrected by my brother across the aisle -- that  
13 indeed, she got a message from Ms. Goldbach with a  
14 beeper number to call Greene and that she called  
15 Greene and didn't have a substantive conversation  
16 with him, and then passed along that beeper number  
17 to Joan Kenney.

18 So my understanding of the stated testimony  
19 is Judge Lopez didn't know anything from Detective  
20 Greene about what he saw or didn't see.

21 MR. EGBERT: May I have a moment?

22 HEARING OFFICER DAHER: Take your time.

23 (Pause)

24 HEARING OFFICER DAHER: Go ahead. Mr.

1 Ware, are you not finished?

2 MR. WARE: Well, Mr. Braceras's  
3 recollection is that Greene gave some vague  
4 suggestion that he would be supportive of her  
5 sentence, but I don't believe there was any  
6 testimony or has been any testimony in the case of  
7 particular facts which Greene provided to the Judge.

8 HEARING OFFICER DAHER: Mr. Egbert?

9 MR. EGBERT: My concerns are a few-fold.  
10 You asked why I didn't -- why counsel didn't call  
11 Greene as a witness. I think I'm ethically bound  
12 not to call him as a witness. The canons of ethics  
13 require that lawyers not present evidence that in  
14 good reason we believe is false.

15 HEARING OFFICER DAHER: Yes.

16 MR. EGBERT: By the way, sir, I think, so  
17 that it not be -- Mr. Greene, in terms of what I  
18 think all counsel think was probably erroneous  
19 testimony to give it its best light, just basically  
20 denies --

21 HEARING OFFICER DAHER: But I'm concerned,  
22 Mr. Egbert, in a search for the truth. I'm  
23 interested in what he told Ms. Kenney that sent her  
24 out on an investigative search. That's what I'm



1 interested in.  
2 MR. EGBERT: Respectfully, you may be  
3 interested in that --  
4 HEARING OFFICER DAHER: And in my findings  
5 that I have to make to the Supreme Judicial Court.  
6 It's a search for the truth, and I want to get to  
7 the bottom of it.  
8 MR. EGBERT: Respectfully, I do think the  
9 Court is taking on a role that's in excess of the  
10 authority of the Court.  
11 HEARING OFFICER DAHER: Your  
12 objection/exception noted. You can tell the Supreme  
13 Court, if it ever gets that far.  
14 MR. EGBERT: The Supreme Court has  
15 indicated that you should be a Hearing Officer.  
16 HEARING OFFICER DAHER: Right.  
17 MR. EGBERT: Not an investigator. The  
18 investigation in this case was done by the Judicial  
19 Conduct Commission.  
20 HEARING OFFICER DAHER: I appreciate that.  
21 MR. EGBERT: And it was done fully before  
22 the formal charges were entered.  
23 HEARING OFFICER DAHER: Right.  
24 MR. EGBERT: There is now before you an

1 adversarial proceeding where counsel for each  
2 side -- after making their various choices as to  
3 what evidence they choose to present --  
4 HEARING OFFICER DAHER: Right.  
5 MR. EGBERT: I don't know of any authority,  
6 respectfully, for a Hearing Officer to call  
7 witnesses.  
8 HEARING OFFICER DAHER: Right.  
9 MR. EGBERT: And so that request seems to  
10 me --  
11 HEARING OFFICER DAHER: Absolutely on  
12 record. I appreciate that.  
13 MR. EGBERT: -- beyond the authority of the  
14 Court.  
15 HEARING OFFICER DAHER: I appreciate that  
16 argument.  
17 MR. EGBERT: The second part of this whole  
18 event seems to be that whatever Judge Lopez knew  
19 concerning Jay Greene's information at the time that  
20 the press release was issued or the press statement  
21 was issued, it's clear from the evidence came from  
22 Anne Goldbach at proceedings in court, meaning the  
23 plea conference. And Anne Goldbach is going to be  
24 testifying in these proceedings. And that is the

1 only place, prior to the issuing of the press  
2 statement, that Judge Lopez received any information  
3 concerning Jay Greene, except from the prosecutors  
4 and defense counsel during the proceedings in that  
5 case.

6 HEARING OFFICER DAHER: Mr. Ware?

7 MR. WARE: Yes, Your Honor. You know, I  
8 don't have an objection in principle to the Court's  
9 hearing additional evidence on this. And I would,  
10 if the Court so requests, recall Ms. Kenney and put  
11 those questions to her. In my direct examination I  
12 was careful to ask her whether she had a  
13 conversation and what she did as a result.

14 HEARING OFFICER DAHER: I've gone through  
15 it.

16 MR. WARE: I did not ask her the  
17 conversations --

18 HEARING OFFICER DAHER: Bring her back and  
19 ask her the questions. Your objection is overruled.  
20 Exception is noted. When can you get Ms. Kenney  
21 back?

22 MR. WARE: I'm prepared to call the next  
23 witness.

24 HEARING OFFICER DAHER: Call your next

1 witness.  
2                                   SISTER ANGELA BEAUCAGE, Sworn  
3                                   DIRECT EXAMINATION  
4       BY MR. WARE:  
5       Q.    Good morning, Sister.  
6       A.    Good morning.  
7       Q.    Will you state your name, please, for the  
8 Court.  
9       A.    Sister Angela Beaucage.  
10      Q.    And where do you currently -- I'm going to  
11 ask you, Sister, if you would, to pull the  
12 microphone toward you a little bit and speak as loud  
13 as you can so that everyone can hear you.  
14            Where do you currently reside?  
15      A.    At 382 Boston Road in Billerica.  
16      Q.    In Billerica?  
17      A.    Right.  
18      Q.    And for what period of time have you lived  
19 at that address?  
20      A.    Since 1980.  
21      Q.    By whom is that home owned?  
22      A.    The Carmelite Sisters in Concord, New  
23 Hampshire.  
24      Q.    And for a number of years you were a member

1 of the Carmelite order; is that correct?  
2 A. That's correct, yes.  
3 Q. When did you retire as a Carmelite nun?  
4 A. In 1980.  
5 Q. And since that time you've been affiliated  
6 with another group of sisters; is that correct?  
7 A. Yes.  
8 Q. And tell us the name of those sisters.  
9 A. Sisters of Christian Community.  
10 Q. And where are the Sisters of Christian  
11 Community based?  
12 A. They don't have a base. They function  
13 independently. They're a group of sisters who have  
14 been in traditional orders, then have left, but  
15 still function within the church.  
16 Q. Tell us what kind of work you do on a  
17 day-to-day basis.  
18 A. Taking care of elderly people mostly. I  
19 took care of my mother for a number of years, but  
20 now I'm just helping volunteer work for the elderly  
21 people.  
22 Q. If you don't mind me asking, Sister, how  
23 old are you as you testify today?  
24 A. Seventy-three.

1 Q. At some time in or around September 6th,  
2 2000, did you have occasion to observe what's come  
3 to be known as the Horton sentencing on television?

4 A. Yes.

5 Q. And will you tell us how that happened.  
6 Just give us a brief overview of what you saw.

7 A. It was on the 11 o'clock news. And I  
8 just -- that's when I saw the courtroom scene and  
9 reacted to it in my own way. I thought it was --

10 Q. I need to have you talk a little louder,  
11 Sister.

12 A. Okay.

13 Q. You said you were watching the news?

14 A. Yes.

15 Q. And what?

16 A. I was very upset by it, by the behavior --  
17 the sentencing of it all.

18 Q. And what did you do after you saw the news  
19 broadcast with respect to filing any kind of a  
20 complaint?

21 A. Well, I wrote to the Commission. Yes, I  
22 wrote to the Commission later, but it was in  
23 October, I think. I wrote to the Commission. Is  
24 that what you mean?

1 Q. Yes. Between September 6th when you saw  
2 the news broadcast, and mid October, when you  
3 actually filled out a complaint form, did you take  
4 certain steps -- how did you get to the point at  
5 which you filed a complaint?

6 A. All right. Okay. How did I come to that  
7 point? It was just a reaction to what I saw on TV  
8 and reading in the paper -- is that what you mean?  
9 I don't know what you mean.

10 Q. How did you get a complaint form?

11 A. I got it from Representative Greene  
12 after -- I called his office after -- um, let's  
13 see -- after I received the phone call on November  
14 1. Yes, November 1.

15 Q. Prior to that time, you filed an initial  
16 complaint with the Commission; is that correct? A  
17 first complaint with the Commission?

18 A. The first complaint was after -- no, it  
19 was -- the first complaint was in October.

20 Q. Yes. The first complaint was in October.  
21 Let's do it this way. In front of you you have  
22 Exhibit 31. Do you see that? In court we're  
23 calling this series of documents Exhibit 31. And I  
24 put it also on the screen. Do you see that

1 document?

2 A. Yes.

3 Q. And can you tell us what the first two  
4 pages of Exhibit 31 are?

5 A. What I sent into the Commission.

6 Q. That's the initial complaint that you filed  
7 with the Commission, correct?

8 A. That's right, yes.

9 Q. And that is dated, under your signature,  
10 October 17, 2000; is that correct?

11 A. Right. That's right.

12 Q. Following that complaint, something  
13 happened; is that correct? On November 1?

14 A. Well, she called my house.

15 Q. Tell us what happened on November 1.

16 A. She called the house after 11 o'clock at  
17 night and asked if I was Angela Beaucage.

18 Q. Now, when you say "she called the house," I  
19 want you to tell us from beginning to end what  
20 happened. Where were you at the time that the phone  
21 call came in?

22 A. I was asleep. I was in bed.

23 Q. And about what time did this phone call  
24 come to your house?



1 A. After 11 o'clock.

2 Q. What did you do when the phone rang?

3 A. I answered it, assumed it was the hospital,  
4 because I had spent the day in the hospital with my  
5 sister-in-law.

6 Q. So you thought this was a call from the  
7 hospital?

8 A. Yes, that was my only reaction to it.

9 Q. And what was the conversation with the  
10 person on the phone? What did she say and what did  
11 you say?

12 A. She asked who I was, and there were  
13 intervals -- somebody else was in the room. All I  
14 remember is at the end of the conversation she said  
15 "I'm pleased to meet you" or something to that  
16 effect. And I just assumed it was still the nurse  
17 at the nurse's station. And somehow there was a  
18 disconnect -- that was my only reaction to it.

19 Q. Did this individual on the other end of the  
20 phone say "good-bye" or say "thank you" or anything  
21 like that, or did she just hang up?

22 A. No. Just -- I didn't hear a phone  
23 clicking. I just assumed it was a disconnect from  
24 the hospital. That was my reaction to it.

1 Q. So at that point you still thought that you  
2 had gotten a call from the hospital that had been  
3 disconnected; is that correct?

4 A. That's right, uh-hum.

5 Q. After that call came in and after what you  
6 thought was a disconnect, what did you do?

7 A. I got up and went into the kitchen to look  
8 at the caller ID.

9 Q. And let me direct your attention to what  
10 has been marked in this case as Exhibit 45. I'm  
11 going to give you an actual photograph of that. Do  
12 you recognize that as a photograph of your caller  
13 ID?

14 A. Yes, uh-hum.

15 MR. EGBERT: Could we have a moment,  
16 please, and I'd ask that the cameras be shut down  
17 for a second.

18 HEARING OFFICER DAHER: Sure.

19 (At side bar)

20 MR. EGBERT: I think that the phone number  
21 of Judge Lopez should not be published.

22 HEARING OFFICER DAHER: Absolutely.

23 MR. WARE: Fair enough. I'll take it off  
24 the monitor.

1 HEARING OFFICER DAHER: Absolutely.  
2 (End of side bar)  
3 HEARING OFFICER DAHER: In re Judge Lopez's  
4 telephone number, that's not for publication to the  
5 media. I don't think anyone's going to do it, but  
6 I'm requesting that -- and I know that you'll all  
7 comply with it -- that that number not be published.  
8 There's been enough notoriety in this case. I  
9 appreciate it.  
10 BY MR. WARE:  
11 Q. I'm not sure whether we got this answer on  
12 the record, but am I correct that Exhibit 45 is a  
13 photograph of the caller ID as you observed it on  
14 the night of November 1, 2000, after 11 p.m.?  
15 A. Yes, I do.  
16 MR. WARE: Your Honor, I want to be sure  
17 that an actual photograph is in evidence and not a  
18 Xerox copy for the exhibit itself. So I wonder if  
19 we could just substitute that.  
20 HEARING OFFICER DAHER: Do you see a  
21 problem with that?  
22 MR. EGBERT: So long as the Court impounds  
23 that particular exhibit.  
24 HEARING OFFICER DAHER: I agree. Put it in

1 an envelope and seal it. Okay. You can continue.

2 HEARING OFFICER DAHER: Go ahead.

3 Q. After you observed the caller ID, what was  
4 your reaction?

5 A. At first I didn't know who M. Lopez was. I  
6 couldn't recollect. But then I remembered later  
7 that I had received a letter from the Commission of  
8 acknowledgment of a letter that I had sent, and I  
9 realized who it was. I realized that it was Judge  
10 Lopez.

11 Q. And what was your reaction when you  
12 realized that it was Judge Lopez who had called you?

13 MR. EGBERT: Objection as to relevance.

14 HEARING OFFICER DAHER: I want to hear it.  
15 Overruled. Go ahead.

16 A. My recollection was I wondered -- I thought  
17 it a very strange thing to happen and I felt really  
18 disturbed by it.

19 Q. When you say you felt disturbed about it,  
20 why were you disturbed?

21 A. Why would a judge call me about a letter I  
22 had written? It just seemed a very strange thing to  
23 do, and I had no idea what it all meant. I had no  
24 idea.

1 Q. And what did you do as a result of  
2 receiving the call?

3 A. The next morning I called Representative  
4 Greene's office, because that was the source of the  
5 form being sent to me, the complaint form. And I  
6 asked the girl in the office -- I told her what had  
7 happened. And I felt really disturbed by it. And I  
8 asked her if she had called anybody else, and she  
9 said "I have no idea." But I told her at the time  
10 that it felt like, you know, I-know-where-you-live  
11 kind of thing. That's really my only reaction, I  
12 guess.

13 Q. You interpreted the call as  
14 I-know-where-you-live kind of thing?

15 A. Yes, yes.

16 Q. And what did you do ultimately? Did you  
17 file another complaint or another letter with the  
18 Commission regarding the incident?

19 A. After -- it was in January that I had heard  
20 that I guess nothing had happened. I understood  
21 whatever information I had, and I assumed that  
22 nothing had happened. So that's when I wrote the  
23 second letter.

24 Q. You indicated that the morning after you

1 received the call, which I take it was on November  
2 2, that you made a call to the representative's  
3 office?

4 A. Yes.

5 Q. And at some point did you receive a call  
6 from the local police?

7 A. Yes. They called later that morning. They  
8 called that morning, yes; not too long after, yes.

9 Q. And what did they say to you?

10 A. They asked about the call and could they  
11 come over. And I said yes, they could. And I told  
12 them I'd be working outside, but they didn't come.

13 Q. Following that, at some point you filed  
14 another letter or complaint with the Commission on  
15 Judicial Conduct; is that correct?

16 A. Yes, in January I think it was.

17 Q. And let me ask you to turn to the next page  
18 of Exhibit 31, and I'm also going to put it up on  
19 the screen for you. There's a letter there dated  
20 January 19th, 2001.

21 A. Yes.

22 Q. And it has a complaint number on it. Is  
23 that the letter you signed regarding the telephone  
24 call you received?

1 A. Yes.

2 Q. At any time on November 1 during this  
3 telephone call did the caller identify herself?

4 A. No.

5 Q. Did she give you any indication who she  
6 was?

7 A. No.

8 Q. Directing your attention to the letter of  
9 January 19th, in the second full paragraph you  
10 describe the phone call; is that correct?

11 A. Yes. Yes.

12 Q. And you say that you were sound asleep, the  
13 phone rang, and then you described what occurred in  
14 the phone call. Can you, taking a look at this,  
15 tell us whether there's anything further that  
16 occurred that you haven't said so far? Let me put a  
17 less awkward question. Is this an accurate  
18 reflection of what was said in the phone call?

19 A. (Witness reviews document) Yeah, there are  
20 intervals, I guess, that somebody else was in the  
21 room and they were talking, but that's all I  
22 remember, yes.

23 Q. The caller said to you, "Is this Angela  
24 Beaucage"; is that correct?

1 A. Yes.  
2 Q. And you answered, "Yes"?  
3 A. Yes.  
4 Q. And then there was what you describe here  
5 as a, quote, long pause; is that correct?  
6 A. Uh-hum.  
7 Q. And then --  
8 A. Pauses, whatever.  
9 Q. And then some language about, "I am pleased  
10 to meet you," quote; is that correct?  
11 A. Uh-hum.  
12 Q. And then a hang-up?  
13 A. Yes.  
14 Q. Now, in the first letter you indicated in  
15 your earlier complaint on the first page of --  
16 excuse me -- the second page of Exhibit 31 that you  
17 did not know Judge Lopez; is that correct?  
18 A. That's correct, yes.  
19 Q. In the phone call on November 1 you say  
20 here that the caller said, "I am pleased to meet  
21 you."  
22 A. Uh-hum.  
23 Q. And then hung up the phone; is that  
24 correct?



1 A. Right.

2 Q. And is that what you recall having  
3 happened?

4 A. Yes.

5 Q. Following this, did you have any further  
6 contact with anyone whom you believed to be Judge  
7 Lopez?

8 A. No.

9 Q. And why did you save the caller ID?

10 A. Well, the girl at Representative Greene's  
11 office said to be sure to save it, and so I did,  
12 because it meant that much to me. It was very  
13 disturbing and I kept it over a long period of time,  
14 apparently.

15 Q. Did you take any personal precautions  
16 because you were disturbed by this call?

17 A. No, no.

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

20 HEARING OFFICER DAHER: Yes.

21 BY MR. WARE:

22 Q. There is additional language in the  
23 following paragraph of your letter of January 19th  
24 that's contained in Exhibit 31 in the paragraph that

1 says, "My reason for bothering to write..." Do you  
2 see that?  
3 A. Yes.  
4 Q. And you say, "Some would perceive this as a  
5 threat." Were you in fact concerned that this was  
6 some kind of a threat, or could be?  
7 A. Yes, I did.  
8 MR. WARE: I have no further questions.  
9 Thank you, ma'am.  
10 HEARING OFFICER DAHER: Any cross?  
11 CROSS EXAMINATION  
12 BY MR. EGBERT:  
13 Q. Good morning, Ms. Beaucage.  
14 A. Good morning.  
15 Q. Ma'am, am I correct that the reason you  
16 knew that it was M. Lopez at a particular phone  
17 number was because it was on your caller ID?  
18 A. Uh-hum, yes.  
19 Q. And that that was generated by the phone  
20 caller's caller ID or caller information, correct?  
21 A. Yes.  
22 Q. You didn't have any kind of special  
23 equipment of your own to indicate or to find out who  
24 was calling, correct?

1 A. No.

2 Q. So in the normal course of a phone call,  
3 your caller ID picked up the caller ID information  
4 from the calling phone, right?

5 A. That's correct, yes.

6 Q. And that's done by a number of -- strike  
7 that.

8 You get that caller ID for a number of  
9 calls that you receive, correct?

10 A. Yes.

11 Q. Now, when you got this particular call --  
12 let me go back a step.

13 It was Representative Greene who sent you  
14 the complaint form to send to the Commission,  
15 correct?

16 A. That's right, yes.

17 Q. And Representative Greene also sent you a  
18 letter telling you that he was filing a complaint at  
19 the Commission because he didn't like Judge Lopez's  
20 sentence in the Horton case, right?

21 A. That's right.

22 Q. And he told you in his letter that he was  
23 going to write to the Commission because he didn't  
24 like the Judge's sentence. He thought it was too

1 lenient and they should investigate the Judge for a  
2 lenient sentence; isn't that right?

3 A. Yes.

4 Q. And then he sent you a complaint form so  
5 you could do the same?

6 MR. WARE: Objection. The complaint speaks  
7 for itself.

8 HEARING OFFICER DAHER: Overruled. Go  
9 ahead.

10 Q. Is that correct?

11 A. What did you say again?

12 Q. He sent you a complaint form with a copy of  
13 his letter to the Commission, correct?

14 A. Yes.

15 Q. And the complaint form you understood was  
16 so that you could file a complaint?

17 A. Exactly, uh-hum.

18 Q. Now, that was sometime in late October,  
19 correct? October 19th, was it?

20 A. It was earlier than that. I kept it for  
21 quite a while actually before I filed it.

22 Q. I'm sorry?

23 A. I kept the complaint form for whatever  
24 period of time. I got that immediately in

1 September. I probably kept it for a month or five  
2 weeks, whatever.

3 Q. And you sent in your complaint on October  
4 17th, correct? You looked at that a few minutes  
5 ago.

6 A. Yes. I guess so, yeah.

7 Q. Is that correct?

8 A. The complaint form, yes, whatever it says.

9 Q. And you received a confirmation from the  
10 Commission that they received your complaint  
11 somewhere towards the end of October?

12 A. Yes, it was. Yes, the end of October.

13 Q. And then on the November 1 -- was it the  
14 1st or the 2nd that you received this phone call?

15 A. The 1st.

16 Q. On November 1 when you received this phone  
17 call, the woman said to you, "Is this Angela  
18 Beaucage," correct?

19 A. Yes.

20 Q. And you responded?

21 A. Yes, I was.

22 Q. You said, "Yes, I am"?

23 A. Yes.

24 Q. And did you ask, "Who is this calling?"

1           A.    No, I did not.  
2           Q.    So that person asked if you were Angela  
3   Beaucage.  And then shortly thereafter, after a  
4   pause I think you said, she said words to the effect  
5   of, "It's a pleasure to meet you" or "It's been nice  
6   meeting you," words to that effect?  
7           A.    That's correct.  
8           Q.    And during that conversation she was  
9   courteous, correct?  
10          A.    Yes.  
11          Q.    She did not raise her voice?  
12          A.    No.  
13          Q.    She did not threaten you?  
14          A.    No.  
15          Q.    She did not intimidate you?  
16          A.    No.  
17          Q.    She was not arrogant?  
18          A.    No.  
19          Q.    And in fact, after that, you didn't file  
20   any complaint with the Commission for almost two and  
21   a half months to three months, correct?  
22          A.    It was in January.  
23          Q.    I think your letter is dated January 19th,  
24   correct?

1           A.    Yes.  
2           Q.    So about two and a half months after the  
3 event.  
4           A.    Yes.  
5           Q.    And the reason you filed the complaint,  
6 isn't it, is because you saw on television that  
7 Judge Lopez had made a decision in a case permitting  
8 a striptease establishment to --  
9           A.    No, that is not true.  
10          Q.    Let me finish the question.  
11                The reason you filed that complaint is  
12 because you had read or heard on the news that Judge  
13 Lopez had issued a decision permitting a striptease  
14 joint to exist in a particular town over selectmen's  
15 objection, correct?  
16          A.    I don't remember that, no.  
17          Q.    You don't?  
18          A.    There is a place in Billerica that had lost  
19 their liquor license, but there was no -- I have no  
20 recollection of that --  
21          Q.    So you have no --  
22                MR. WARE:  May she finish her answer?  
23                MR. EGBERT:  I thought she did.  
24          Q.    Did I cut you off?

1 A. I have no recollection of that whatsoever.

2 Q. So you don't remember ever testifying in  
3 the past, then, that you had heard that Judge Lopez  
4 had overruled selectmen in town to put in a strip  
5 joint someplace and you thought it was so sleazy, it  
6 just bothered you a lot?

7 A. I have no idea where you got that  
8 information. I have no idea what you're talking  
9 about.

10 Q. You have no idea what I'm talking about?

11 A. Not at all, no.

12 Q. Did you testify at a Commission interview  
13 conducted on December 18th of the Year 2001?

14 A. I haven't testified to anything but what's  
15 been done here.

16 Q. Ma'am, do you recall going to the office of  
17 Goodwin Procter at 53 State Street and being  
18 interviewed under oath with a court reporter  
19 present?

20 A. Yes. I remember that, yes.

21 Q. And do you recall being examined by Mr.  
22 Braceras, this gentleman over here?

23 A. Braceras, yes.

24 Q. And do you recall giving testimony under



1 oath at that time?

2 A. Yes, I do, yes.

3 Q. And do you recall stating as follows --

4 MR. WARE: Can we get a page?

5 MR. EGBERT: 23.

6 Q. "I'll just be interested in how the whole  
7 thing works itself out. I just heard recently about  
8 the -- she overruled the selectmen in some town to  
9 put in a strip joint in some place. I think it's  
10 just so sleazy, and she just bothers me a lot in a  
11 lot of things, I guess."

12 Did you testify in that fashion before the  
13 Commission under oath?

14 MR. WARE: Objection. This is months  
15 after -- years after the complaint, and it's  
16 inconsistent.

17 Q. Did you testify in that fashion under  
18 oath --

19 HEARING OFFICER DAHER: One second. What  
20 we're dealing with, according to Mr. Ware, it was a  
21 substantial time subsequent to the alleged -- the  
22 Horton incident.

23 MR. EGBERT: It goes to the bias of the  
24 witness, Judge.

1 HEARING OFFICER DAHER: Go ahead, Mr. Ware.  
2 MR. WARE: It cannot possibly go to the  
3 witness' testimony. It occurred a year and a half  
4 after the complaint was filed, a year and a half  
5 after the phone call.  
6 MR. EGBERT: She is testifying here today,  
7 and her attitudes towards the Judge are appropriate  
8 on issues of bias.  
9 HEARING OFFICER DAHER: You may have to put  
10 it in a proper timeframe, because what I have right  
11 now is, according to Mr. Ware, this statement was  
12 made a year and a half subsequent to her filing a  
13 complaint with the JCC.  
14 MR. EGBERT: It's made on December 18th of  
15 the Year 2001. And the call was made -- and the  
16 complaint was January 19th, 2001.  
17 MR. WARE: I amend it. A year, not a year  
18 and a half.  
19 HEARING OFFICER DAHER: We're talking a  
20 year, 11 months or so subsequent to.  
21 MR. EGBERT: Judge, she says in her  
22 complaint on January 19th, 2001 --  
23 HEARING OFFICER DAHER: Go ahead.  
24 MR. EGBERT: -- "Today we learn that

1 Clinton gets a pass and Lopez gets a pass. God help  
2 any victim who appears in her court. Maybe she's in  
3 a position to do more harm than Clinton at this  
4 point."

5 She has indicated in her testimony that she  
6 wrote this complaint three months later because she  
7 had information, which she now knows to be erroneous  
8 information, which caused her to write the January  
9 19th complaint. I suggest to the Court that the  
10 information that she had and what was there was this  
11 ruling of Judge Lopez's, which she disagreed with so  
12 violently --

13 THE WITNESS: So violently -- excuse me.

14 HEARING OFFICER DAHER: Wait a minute.

15 MR. EGBERT: -- and which she has denied  
16 under oath every single word about it.

17 MR. WARE: Your Honor, how can an event  
18 which happened a year after the filing of the  
19 complaint have created a bias in the witness to file  
20 a complaint? The witness got a call and she filed a  
21 complaint.

22 HEARING OFFICER DAHER: Help me again with  
23 the timeframe, Mr. Egbert. When allegedly -- this  
24 says, quote, strip joint, end of quote. When was

1 that hearing? When was there a ruling on it?

2 MR. EGBERT: There were many of them,  
3 Judge.

4 HEARING OFFICER DAHER: But according to  
5 Mr. Ware, if she did have an attitude in regards to  
6 the liquor store and the strip joint -- if she did,  
7 which I don't know -- that occurred 11 months, a  
8 year later, after she filed a complaint with the  
9 JCC.

10 MR. EGBERT: Judge, let's start from the  
11 beginning. A witness' bias on the witness stand is  
12 appropriate for cross examination. When a witness  
13 calls a judge sleazy because of her rulings in a  
14 constitutional issue, I think that suggests bias,  
15 particularly when the witness has denied under oath  
16 that she ever made the statement.

17 THE WITNESS: I have no recollection --

18 HEARING OFFICER DAHER: One second, please.

19 MR. WARE: First of all, Your Honor,  
20 obviously the statement is hearsay. But in fairness  
21 to the witness, the witness isn't calling Judge  
22 Lopez sleazy. She's apparently referring to the  
23 strip joint. This is really a misuse of the  
24 testimony. But the important point is it's hearsay.

1 There's nothing inconsistent with what the witness  
2 has said, and it occurs months and months and months  
3 after the filing of the complaint.

4 MR. EGBERT: This witness has denied that  
5 she knew about any ruling, knew about any strip  
6 joint, knew about Judge Lopez's involvement in it,  
7 and has no bias towards her about it, and here she's  
8 made a statement over a year ago which exhibits the  
9 extreme bias based upon a judge's ruling on a  
10 constitutional issue. And her bias, as she  
11 testifies here today, is appropriate for you to  
12 consider some of the statements that have now come  
13 out on the witness stand.

14 HEARING OFFICER DAHER: I understand your  
15 point, Mr. Ware, but in this case I'm going to allow  
16 it. Overruled. Go ahead, Mr. Egbert.

17 BY MR. EGBERT:

18 Q. Did you testify before the Commission as  
19 follows: "I just heard recently about the -- what  
20 she overruled the selectmen in some town to put in a  
21 strip joint in some place. I think it's just so  
22 sleazy and she just bothers me a lot in a lot of  
23 things, I guess." Was that your testimony?

24 A. That was not a hearing. That was at a

1 deposition.

2 Q. Was that your testimony?

3 A. If you say so. I have no recollection of  
4 her doing --

5 MR. EGBERT: May I approach the witness?

6 HEARING OFFICER DAHER: Please. For the  
7 record we're talking about the 12/18/01 deposition?

8 MR. EGBERT: Yes. They've been calling it  
9 an interview at the Commission under oath.

10 HEARING OFFICER DAHER: All right.

11 Q. And I'm going to show you Page 23 of that.

12 A. Well, if it's there, it's there. I have no  
13 recollection of it. That's all I can say.

14 Q. In fairness to you, I'd like you to just  
15 take a look at it for a minute and read it.

16 A. Well, if it's there, it's there.

17 HEARING OFFICER DAHER: You take your time,  
18 Ms. Beaucage.

19 MR. WARE: Can you point it out to her,  
20 please?

21 Q. Let me just show you. It's the bottom  
22 section here (indicating).

23 A. (Witness reviews document) This was at our  
24 deposition last time I was there with you.

1 Q. Let me show the witness the front cover.  
2 Do you see that's an interview over at Goodwin  
3 Procter with Mr. Braceras?

4 A. Well, all I can say to you, sir, is I don't  
5 remember saying that. I don't remember anything  
6 that has happened that she had anything to do with.  
7 If it was in Billerica, I probably would remember.

8 Q. So you don't remember saying what's in this  
9 document?

10 A. Absolutely not.

11 MR. EGBERT: Your Honor, I would offer Page  
12 23, Line 17 through 24, of the interview.

13 MR. WARE: Objection, Your Honor.

14 HEARING OFFICER DAHER: I'll hear you.

15 MR. WARE: It does not make the transcript  
16 evidence. The witness is here. We have her  
17 testimony. She's been impeached. That's the  
18 evidence in the case.

19 MR. EGBERT: She's not been impeached, Your  
20 Honor, unless the document comes into evidence.  
21 I've asked her if that's her statement. She says  
22 she doesn't know.

23 HEARING OFFICER DAHER: Sustained, Mr.  
24 Ware.

1 MR. EGBERT: Your Honor, I would offer it  
2 as an ID exhibit, then, so the record is clear.

3 THE CLERK: T for ID.

4 (Document marked as Hearing  
5 Exhibit T for identification)

6 Q. Now, during your Commission interview, the  
7 interview we were just talking about with Mr.  
8 Braceras --

9 A. Uh-hum.

10 Q. Did there come times where the Commission  
11 lawyer went off the record to have discussions with  
12 you?

13 A. No.

14 Q. It never happened?

15 A. No.

16 Q. Are you sure of that?

17 A. I have no recollection of it whatsoever.

18 Q. Ms. Beaucage, do you recall there came a  
19 time during the interview with Mr. Braceras that he  
20 asked you some questions concerning the phone call?  
21 And then when you gave an answer -- the following  
22 answer to his question. You answered --

23 MR. WARE: What page?

24 MR. EGBERT: Page 16.



1 Q. You answered, "Maybe that's all she said,  
2 you know. I was just waiting for the nurse to tell  
3 me something, and that's it." And then there was a  
4 discussion off the record. Do you recall that?

5 A. No, I don't.

6 Q. And as soon as the discussion off the  
7 record ended, you spoke, without a question, and  
8 said, "I would say intimidating." Do you recall  
9 that time?

10 A. It was intimidation, yes.

11 Q. Do you recall that event of going off the  
12 record?

13 A. It's too long ago. Whatever I said is  
14 there. If it's there, it's there. What can I say?  
15 Intimidation was certainly a part of it.

16 Q. Would you take a look at this document and  
17 see if you agree that there was a discussion off the  
18 record --

19 A. I have absolutely no recollection --

20 Q. Let me ask the question. Would you take a  
21 look at the document and see if you can agree that  
22 the words that you spoke, "intimidating," came just  
23 after a discussion off the record with Mr. Braceras?

24 A. Nobody told me to say anything. Whatever I

1 say is what I know is the truth. That's all.  
2 Q. Let me just ask you a question, if I may.  
3 Do you recall that your statement "intimidating"  
4 came right after a discussion off the record with  
5 Mr. Braceras?  
6 A. Nobody told me to say "intimidated."  
7 Q. Do you recall that there was a discussion  
8 off the record?  
9 A. I do not.  
10 Q. So you don't recall that event at all?  
11 A. Not at all, no.  
12 MR. EGBERT: I would offer the transcript.  
13 MR. WARE: Same objection, Your Honor.  
14 HEARING OFFICER DAHER: Sustained. Mark it  
15 for ID.  
16 MR. EGBERT: May I be heard?  
17 HEARING OFFICER DAHER: Sure.  
18 (At side bar)  
19 MR. EGBERT: Judge, this transcript is a  
20 verbatim transcript under oath conducted by the  
21 Commission without me being present. It is evidence  
22 of the fact that they go off the record, have a  
23 conversation with her, ask her a question, that they  
24 go off the record and she comes back with a

1 response, without even a question, that says, "I  
2 would say intimidating." It goes to the issue of  
3 what was put in this witness' mouth, what  
4 conversations were had off the record, and what  
5 information she was provided and the like. It is  
6 the event itself. It is not hearsay. It's the  
7 event itself. They certainly can't complain of a  
8 lack of a right to cross examine. They conducted  
9 the interview.

10 HEARING OFFICER DAHER: I'll hear you.

11 MR. WARE: Your Honor, it is no different  
12 than any transcript. If we're going to start taking  
13 out-of-court transcripts and offering them into  
14 evidence, then we don't need live witnesses. That's  
15 what live witnesses are all about. The defendant  
16 here has the right to cross examine. He's  
17 exercising that right. That's what impeachment is  
18 all about. But that doesn't make the testimony  
19 inadmissible. You can't just throw a transcript  
20 into evidence.

21 MR. EGBERT: It is not throwing a  
22 transcript into evidence. It is a verbatim  
23 recitation of the event; and that is that they go  
24 off the record, have a discussion, and she comes

1 back with the statement "I would say intimidating,"  
2 without a question. That is something that this  
3 Court should consider in determining the credibility  
4 of these events.  
5 HEARING OFFICER DAHER: The ruling stands.  
6 (End of side bar)  
7 BY MR. EGBERT:  
8 Q. When you got this phone call -- and I think  
9 you said you thought there was a disconnect?  
10 A. Yes.  
11 Q. We're talking about the call on November 1?  
12 A. Yes.  
13 Q. And when you say you thought there was a  
14 disconnect, because there was no hang-up sound, at  
15 least to your ear?  
16 A. To my recollection, no. I thought it was a  
17 disconnect from the hospital, and I was going to  
18 call them back.  
19 Q. So that if the phone was hung up, I take it  
20 it was hung up in a very normal fashion, in terms of  
21 it wasn't loudly banged or --  
22 MR. WARE: Objection as to how the caller  
23 hung up the phone.  
24 HEARING OFFICER DAHER: Overruled. It

1 doesn't mean anything.  
2 Q. In other words, you just heard the call  
3 end, basically.  
4 A. Because I assumed it was the hospital, it  
5 was more of a disconnect to me, to my recollection,  
6 yes.  
7 Q. And right after the call when you hung up  
8 the phone, your thought at the time was that it was  
9 the hospital calling, correct?  
10 A. That's correct.  
11 Q. That they were calling to give you some  
12 information about --  
13 A. My sister-in-law.  
14 Q. Your sister-in-law?  
15 A. Yes.  
16 Q. And that you were going to try to get the  
17 number to call them back?  
18 A. Correct.  
19 Q. So there was certainly nothing in the phone  
20 call that intimidated you in any way, correct?  
21 A. No, until I found out who it was.  
22 Q. And the only thing you say was intimidating  
23 is the fact that the caller left an identification  
24 of "M. Lopez," correct?

1           A.    Of course, once I found out who it was.  
2           Q.    And the caller did nothing to disguise that  
3 caller ID, correct?  
4           A.    I have no idea how anyone could disguise  
5 it --  
6           Q.    You got it --  
7           MR. WARE:  Let her finish the answer.  
8           HEARING OFFICER DAHER:  Go ahead.  
9           A.    I have no idea how anyone could interrupt a  
10 call coming through on a caller ID.  I have no idea.  
11          Q.    And in this case, no one did anything to  
12 block that ID, correct?  
13          A.    No, I have no idea.  It was on the thing.  
14          Q.    And you considered this call as merely a  
15 call where someone called you to confirm your  
16 identity; isn't that correct?  
17          A.    Yes.  
18          MR. EGBERT:  I have no further questions.  
19          HEARING OFFICER DAHER:  Redirect?  
20                    REDIRECT EXAMINATION  
21          BY MR. WARE:  
22          Q.    When you say that you considered this call  
23 just a call to confirm your identity, did that  
24 understanding change when you realized who had

1 called you?  
2 A. Yes.  
3 Q. And how did you then feel?  
4 A. I felt it a very strange occurrence, and I  
5 had no idea why she would call me at that hour of  
6 the night. And I found it disturbing once I found  
7 out who it was.  
8 MR. WARE: Thank you, Sister.  
9 MR. EGBERT: May I have a minute, please?  
10 HEARING OFFICER DAHER: Sure. Take your  
11 time.  
12 (Pause)  
13 MR. EGBERT: I have nothing further, Judge.  
14 HEARING OFFICER DAHER: Thank you.  
15 MR. WARE: Your Honor, Ms. Kenney is now  
16 available. I wonder if I could have five minutes  
17 just to confer with her and get her focused on what  
18 it is we're talking about?  
19 HEARING OFFICER DAHER: That will be fine.  
20 MR. EGBERT: I have Judge DelVecchio here.  
21 She's been here ready to go and I'm anxious to get  
22 her back to work, if I can.  
23 HEARING OFFICER DAHER: I take it you've  
24 heard Mr. Ware needs five minutes to talk to Ms.

1 Kenney. I don't suspect her testimony is going to  
2 be overly long, and I'm going to grant him the five  
3 minutes, and we'll try -- I see Judge Russo here,  
4 and I certainly want to give Judge Russo -- I don't  
5 want to keep him here waiting any longer than  
6 necessary. So I'll try to accommodate everyone.  
7 Why don't you talk to Joan Kenney --  
8 MR. EGBERT: And I take it I can be present  
9 for that conversation with Joan Kenney?  
10 MR. WARE: No, Your Honor.  
11 HEARING OFFICER DAHER: No.  
12 MR. EGBERT: Judge --  
13 MR. WARE: If we're going to cry about it,  
14 I'll put her on right now. It will just take  
15 longer.  
16 MR. EGBERT: We're not going to cry about  
17 anything. We're going to make legal objections --  
18 HEARING OFFICER DAHER: Let's cut it short.  
19 Put her on.  
20 MR. WARE: May I have just one minute to  
21 confer with my colleague, Your Honor?  
22 HEARING OFFICER DAHER: Absolutely. Right  
23 after we get through with Ms. Kenney I'll take the  
24 motion in limine. I'll entertain that.



1 HEARING OFFICER DAHER: Before we get  
2 started, Mr. Egbert, do you want a few minutes to  
3 get ready for this witness or are you ready to go?

4 MR. EGBERT: I'm ready to go.

5 HEARING OFFICER DAHER: Let's go.

6 JOAN KENNEY, Sworn

7 DIRECT EXAMINATION

8 BY MR. WARE:

9 Q. Ms. Kenney, you are still, I take it, a  
10 Public Information Officer of the Supreme Judicial  
11 Court?

12 A. Yes.

13 Q. Nothing's changed since yesterday; is that  
14 right?

15 A. No.

16 Q. And you remain under oath? Do you  
17 understand that?

18 A. Yes, I do.

19 Q. Yesterday I asked you some questions with  
20 respect to conversations you had with Judge Lopez  
21 prior to the time the statement was issued by your  
22 office in her name. Do you recall that?

23 A. Yes.

24 Q. And following that statement, you had some

1 additional conversation with the Judge; is that  
2 correct?

3 A. Yes.

4 Q. And among the conversations you had was  
5 some reference to a detective by the name of Jay  
6 Greene?

7 A. Yes.

8 Q. Can you tell us what Judge Lopez said to  
9 you about any conversations she had with Jay Greene?

10 A. I don't remember any conversation that she  
11 had with Judge Greene that she told me about. She  
12 asked me to call Judge -- excuse me -- Jay Greene,  
13 and said that he would have information that would  
14 be useful or interesting for me to hear.

15 Q. And did you ask the Judge, "Well, what is  
16 he going to tell me" or "Why are you asking me to  
17 call him"?

18 A. No. I just at that point said I would give  
19 him a call.

20 Q. At no time did Judge Lopez herself relate  
21 to you any information which purported to come from  
22 Mr. Greene; is that right?

23 A. Not that I recall, yeah.

24 Q. Yesterday you testified that two pieces of

1 information were given to you; namely, that --

2 MR. EGBERT: Judge, I object to the  
3 reiteration of her prior testimony.

4 HEARING OFFICER DAHER: Overruled. Go  
5 ahead.

6 Q. Two pieces of information which were given  
7 to you were that this was not a kidnapping and that  
8 the screwdriver was not used as a weapon; is that  
9 correct?

10 MR. EGBERT: Judge, are we going to  
11 embark --

12 HEARING OFFICER DAHER: I'm only allowing  
13 him a short leash on this. Go ahead.

14 Q. Is that correct?

15 A. That's correct.

16 Q. And at some point following the direction  
17 or suggestion of Judge Lopez, did you call this  
18 Boston Police detective?

19 A. I did.

20 Q. And how did you get the number to call?

21 A. She gave me the number.

22 Q. "She" being Judge Lopez?

23 A. Judge Lopez gave me the number.

24 Q. And what conversation did you have with Mr.

1 Greene?  
2 MR. EGBERT: Just for the record, my  
3 objection as to both process and the hearsay nature  
4 of this conversation.  
5 HEARING OFFICER DAHER: Absolutely. It's  
6 on record. Go ahead.  
7 MR. EGBERT: Not to mention the fact that  
8 we have yet to have anything that identifies the  
9 person she's talking to.  
10 HEARING OFFICER DAHER: Go ahead.  
11 Q. Well, perhaps we can address that.  
12 Judge Lopez gave you a phone number which  
13 she represented as being that of Detective Greene,  
14 correct?  
15 A. That's correct.  
16 Q. And you called that number and you got  
17 someone on the other end; is that correct?  
18 A. I called him, I left a message, he called  
19 me back.  
20 Q. And did he tell you who he was when he  
21 called you back?  
22 A. Yes, he did.  
23 Q. What did he say?  
24 A. I explained who I was and how I got the

1 number, and asked him if he had some information  
2 about this case. It was a fairly brief  
3 conversation, but he told me that he had been at the  
4 scene of the incident. I think he said he was first  
5 at the scene or something like that. And he said he  
6 thought the boy was faking it. I don't think those  
7 were his exact words, but that was the impression  
8 that I was left with; that the boy, from his  
9 demeanor at the scene, that he was faking it, that  
10 he was not upset.

11 And he also said that he knew the boy from  
12 the neighborhood. He thought he was a very  
13 street-savvy boy. He mentioned a brother as well,  
14 said he knew the brother and was familiar with them  
15 from the neighborhood. I think he also indicated  
16 that this may not have been the first time that  
17 either he or the brother -- I wasn't sure -- had  
18 gotten into a car. And I took it to mean with Mr.  
19 Horton.

20 Q. Now, were you able in any way to verify a  
21 shred of that conversation?

22 MR. EGBERT: I object to the tone and  
23 nature of that question on direct examination.

24 HEARING OFFICER DAHER: Overruled, the

1 intonation, but obviously -- go ahead.

2 A. Well, I couldn't verify that that  
3 information was correct, but I felt it was in  
4 concert with what Judge Lopez had been telling me.  
5 She seemed skeptical that the boy had been  
6 kidnapped. She said it wasn't a kidnapping.

7 Q. And did you take certain steps to try to  
8 verify what Greene told you, as you said yesterday?

9 A. Well, I called the Boston Police Department  
10 to find out whether that information could be used  
11 in any way by the police department, what their  
12 rules are about that, and I had indicated that the  
13 press reports were giving information that was very  
14 different from what Jay Greene had told me.

15 Q. And as you testified yesterday, you also  
16 asked Greene to go on the record.

17 A. I did, yes. I asked him if he would give  
18 that information to the press, and he said he could  
19 not.

20 Q. Was there any other conversation with  
21 Greene that you recall?

22 A. No.

23 Q. And as you said yesterday, you never used  
24 this information.

1 A. I did not.

2 Q. Why not?

3 A. I wasn't sure what role he had in this  
4 case. I was never quite sure who Jay Greene was and  
5 what this information -- you know, whether this  
6 information could be used. I was also concerned if  
7 the Boston Police Department couldn't use it, that I  
8 shouldn't use it either.

9 Q. Did you consider the information reliable  
10 enough to use?

11 A. Well, I just wasn't sure whether it was or  
12 not.

13 MR. WARE: I have nothing further. Thank  
14 you, ma'am.

15 HEARING OFFICER DAHER: Mr. Egbert?

16 CROSS EXAMINATION

17 BY MR. EGBERT:

18 Q. Let's try to get some timeframes down.  
19 This conversation with Judge Lopez to call Jay  
20 Greene was after any press statement was released by  
21 your office, correct?

22 A. I think it was some days later, yeah.

23 Q. And that was at a time where you were still  
24 trying to find out more information on the case?

1           A.    Well, each time I talked to Judge Lopez, I  
2    feel I had a little more information about the case.  
3           Q.    And were you asking questions about the  
4    case?  
5           A.    Somewhat. I mean, I was relying mostly on  
6    what Judge Lopez was telling me.  
7           Q.    And did Judge Lopez tell you that there  
8    was -- there were allegations by defense counsel in  
9    the Horton case that the Commonwealth had withheld  
10   or secreted exculpatory evidence that Jay Greene may  
11   have?  
12          A.    I don't remember discussing that with Judge  
13   Lopez.  
14          Q.    Do you recall the word "exculpatory  
15   evidence" being used?  
16          A.    No, I don't.  
17          Q.    Do you know what that is?  
18          A.    Yes.  
19          Q.    And when you called Jay Greene and this man  
20   called you back, he told you that he was first on  
21   the scene or one of the first on the scene?  
22          A.    I think -- I believe so.  
23          Q.    You believe which?  
24          A.    That he was one or -- one of the first



1 people on the scene.

2 Q. One of the first people on the scene. Is  
3 that what you understood him to be saying?

4 A. I think so. I don't have a vivid memory of  
5 that, but I believe so.

6 Q. And this conversation you had with Jay  
7 Greene, did you find out Jay Greene's credentials  
8 with regard to how long he had been on the police  
9 department, for example?

10 A. No. It was is a very brief conversation I  
11 had with him.

12 Q. Mr. Ware was just asking you about whether  
13 or not or what steps you took to find the  
14 reliability of Mr. Greene's -- Detective Greene's  
15 statements. Do you recall that?

16 A. Yes.

17 Q. And so one of the ways to start the  
18 reliability check, so to speak, would be to find out  
19 how long he's been on the force and what his  
20 experience is, correct?

21 A. Well, I didn't feel this was my role. I  
22 was simply calling Jay Greene at Judge Lopez's  
23 suggestion, and I felt what he was telling me was  
24 supportive of what she had been telling me.

1 Q. And when you say "supportive of what she  
2 had been telling you," with regard to the  
3 kidnapping -- we're back to that kidnapping issue --  
4 what she had told you is that she had believed that  
5 the child got into the car willingly, correct?

6 A. That's right.

7 Q. And do you know if the Commonwealth ever  
8 suggested anything different than that in the case?

9 A. I don't know. I didn't know at the time,  
10 either.

11 Q. You think of kidnapping as people being  
12 snatched off the street, right?

13 A. That would be the traditional sense of the  
14 word.

15 Q. So when you're comparing kidnappings,  
16 basically when you talk about a regular kidnapping,  
17 you mean somebody snatched off the street either by  
18 force or with a gun or with a knife and the like,  
19 correct?

20 A. That's right.

21 Q. You don't think of a traditional kidnapping  
22 as someone agreeing to get into a car.

23 A. No, I don't.

24 Q. So when you're talking about a traditional

1 kidnapping versus one where the person willingly got  
2 in the car, you draw that distinction, correct?

3 A. I do.

4 Q. And did you know that the Commonwealth in  
5 the case of Ebony Horton actually alleged that the  
6 child willingly got in the car?

7 A. I didn't know that at the time, but a lot  
8 of these --

9 Q. Do you know it now?

10 A. Well, now, because it was pointed out to  
11 me.

12 Q. Now, I think you said that Detective Greene  
13 gave you information about the boy, his family, and  
14 what Detective Greene knew from being a detective in  
15 that area over a period of time; is that correct?

16 A. He said he recognized or had some  
17 familiarity with the boy and his brother in that  
18 neighborhood.

19 Q. And Detective Greene didn't refuse to talk  
20 to you, did he?

21 A. Refuse to talk to me?

22 Q. Right.

23 A. No.

24 Q. But what he refused to do is to go and give

1 a press statement, correct?  
2 A. I'm sorry; I didn't hear you.  
3 Q. What he refused to do was to give a press  
4 statement, correct?  
5 A. I asked him if he would give that same  
6 information that he gave me to the press, and he  
7 said, "No."  
8 Q. So that means he refused to give a  
9 statement to the press.  
10 A. That's right.  
11 Q. Just like all the Boston police did in this  
12 child case, correct?  
13 A. I presume so. I don't know whether --  
14 Q. That's exactly what they told you when you  
15 called people over at the Boston Police Department,  
16 didn't they?  
17 A. When I called the Boston Police Department,  
18 they said they would not be able to comment on that  
19 case.  
20 Q. Because of the age of the victim, correct?  
21 A. Yes.  
22 Q. And so Detective Greene was basically doing  
23 the same thing as the rest of the Boston Police  
24 Department was doing vis-a-vis getting information

1 to the press through you.  
2 A. Well, he said he couldn't comment because  
3 he wasn't part of that child sexual assault unit.  
4 Q. And they were the only ones allowed to  
5 comment.  
6 A. I don't know.  
7 Q. The child sexual assault unit, they  
8 wouldn't comment either, right?  
9 A. Not that I know of.  
10 Q. And you tried to get them to comment.  
11 A. No, I wasn't trying to get anybody to  
12 comment. I was simply asking what their procedures  
13 were. I wasn't suggesting that anyone should  
14 comment. I just wanted to know what the procedures  
15 were.  
16 Q. And they told you they wouldn't comment.  
17 A. That they couldn't because this involved a  
18 victim.  
19 Q. Right.  
20 A. A young victim.  
21 Q. You took no steps to confirm a shred of  
22 information or not with regard to what Mr. Greene --  
23 Detective Greene told you, did you?  
24 A. I didn't think that was my role to do.

1 Q. But I do have to ask you the question. You  
2 didn't take any steps to confirm or deny anything he  
3 told you; isn't that right?

4 A. That's right.

5 Q. And that's because you didn't think it was  
6 your role.

7 A. That's right.

8 Q. So when asked whether or not you obtained  
9 any -- a shred of confirmation for his statements,  
10 you didn't go looking, did you?

11 A. The only confirmation was what Judge Lopez  
12 was telling me.

13 Q. Did you go looking any other places for  
14 confirmation?

15 A. No.

16 Q. That wasn't your task, was it?

17 A. Right.

18 MR. EGBERT: One moment, please. (Pause)  
19 I have nothing further.

20 HEARING OFFICER DAHER: Okay. Mr. Ware,  
21 anything?

22 REDIRECT EXAMINATION

23 BY MR. WARE:

24 Q. Judge Lopez told you that this was not a

1 kidnapping; isn't that right?

2 A. That's correct.

3 Q. And to your best recollection, those were  
4 her words, without qualifiers; is that right?

5 A. That's correct.

6 Q. Now, when Judge Lopez told you this prior  
7 to the statement being issued, she did not tell you  
8 that the boy, meaning the victim, and the defendant  
9 did not know each other, did she?

10 A. I'm sorry; could you repeat that?

11 Q. Yes. Did Judge Lopez tell you that the  
12 defendant admitted that the victim and the defendant  
13 did not know each other?

14 A. No.

15 Q. Did she tell you that the defendant  
16 admitted telling the boy that he was searching for  
17 his missing son, who, of course, didn't exist?

18 A. No.

19 Q. Did she tell you that --

20 MR. EGBERT: This is so far beyond what you  
21 permitted this witness to be called for --

22 MR. WARE: Your Honor, Mr. Egbert's  
23 testimony went far afield of the issue that you  
24 permitted the witness to testify to --

1                   MR. EGBERT: I think my cross was directly  
2 related to the issue of her conversation with Mr.  
3 Greene.

4                   HEARING OFFICER DAHER: I have allowed a  
5 lot of latitude on this matter. Overruled. Go  
6 ahead.

7                   MR. WARE: Thank you, Your Honor.

8                   BY MR. WARE:

9                   Q. Judge Lopez also did not tell you that the  
10 defendant admitted that he got the victim into the  
11 car by a ruse; that is, by being dressed as a woman  
12 and claiming that he was looking for his son and  
13 offering the child money; isn't that correct?

14                  A. I don't think I knew that at the time.  
15 It's hard to remember exactly, because I was  
16 reading, you know, newspaper accounts, too. And so  
17 a lot of this is mushed together.

18                  Q. But you do not recall Judge Lopez telling  
19 you those facts prior to the point at which you were  
20 putting out a statement in her name, correct?

21                  A. That's correct.

22                  Q. Judge Lopez did not tell you that the  
23 defendant admitted putting a screwdriver to the  
24 child's neck; isn't that so?



1           A.    Yes, she did not think it was used as a  
2    weapon.  
3           Q.    In fact, she told you the reverse; that it  
4    wasn't used as a weapon, right?  
5           A.    That's right, yes.  
6           Q.    She never told you that in open court the  
7    defendant had admitted to using the screwdriver as a  
8    weapon on the child, correct?  
9           A.    She told me what the charges were and what  
10   he had agreed to in the plea, but she obviously  
11   didn't believe that happened that way.  
12          Q.    In any event, she told you the screwdriver  
13   wasn't used as a weapon.  
14          A.    That's correct.  
15          Q.    Whatever the defendant had said in open  
16   court.  
17          A.    Right.  
18          Q.    The Judge did not tell you that the  
19   defendant admitted that he was there for purposes of  
20   some sexual act; is that correct?  
21          A.    Yes.  
22          Q.    And the Judge did not tell you that in  
23   fact, when the police approached, the child was  
24   crying.

1 A. I don't remember her telling me that.

2 Q. In fact, all she told you was that this  
3 detective was someone whom you should talk to. And  
4 you learned from this detective that at some point  
5 later, the child, in his view at least, wasn't  
6 crying, correct?

7 A. That's right.

8 Q. And the Judge did not tell you that the  
9 defendant had admitted in open court to having lied  
10 to the police when they interviewed him; isn't that  
11 correct?

12 A. Yes.

13 MR. WARE: I have no further questions.  
14 Thank you.

15 RE-CROSS EXAMINATION

16 BY MR. EGBERT:

17 Q. You are the press office of the Court  
18 system, correct?

19 A. Yes.

20 Q. You read the newspapers, correct?

21 A. I do.

22 Q. That's part of your function, basically, in  
23 one of these cases that's under scrutiny?

24 A. Yes.

1 Q. And would you turn to Exhibit 20 of the  
2 book in front of you. This is an article that  
3 occurred on September 7th in the Boston Herald,  
4 correct?  
5 A. I don't have the date already.  
6 Q. To make your life a bit easier, turn the  
7 page, and there's an Internet printout that's easier  
8 to read.  
9 A. Yes.  
10 Q. Do you have that?  
11 A. I do.  
12 Q. That's an article entitled, "Man Guilty of  
13 Sexual Attack on Boy Won't Go to Jail," dated  
14 September 7th of the Year 2000, correct?  
15 A. Yes.  
16 Q. Now, you would have read that, wouldn't  
17 you?  
18 A. I would have.  
19 Q. And in that document -- you would have read  
20 that probably the morning of September 7th, correct?  
21 A. Yes.  
22 Q. And that was before any press release or  
23 press statement, correct?  
24 A. Yes.

1 Q. And certainly well before your conversation  
2 with Judge Lopez about Detective Greene.

3 A. Yes.

4 Q. And well before your conversation with  
5 Detective Greene.

6 A. Yes.

7 Q. Correct?

8 A. Right.

9 Q. And so -- so you weren't ignorant of  
10 everything that had gone on in this case before  
11 September 7th, were you?

12 A. Well, I knew -- all I knew about the case  
13 was what I learned from Judge Lopez and what I was  
14 reading in the press reports.

15 Q. Let's see what you read in the press report  
16 on September 7th.

17 For example, you would have read that -- if  
18 you go down to the paragraph that begins, "On the  
19 afternoon of November 20..." Do you see that?

20 A. Yes.

21 Q. "On the afternoon of November 20 on Corona  
22 Street in Dorchester, Horton, dressed as a woman,  
23 lured the boy into her car under the pretense of  
24 needing help to find her lost son, according to

1 Suffolk County Prosecutor David Deakin. Horton then  
2 drove the boy to a deserted parking lot behind a  
3 warehouse at 50 Park Street and held a screwdriver  
4 to his neck while demanding oral sex, Deakin said.  
5 Yesterday in court Horton admitted to putting his  
6 finger and the screwdriver in the boy's mouth at  
7 various times while they were in the car," right?

8 A. Yes.

9 Q. And you also had, in combination with that  
10 information, the fact that Mr. Horton had in fact  
11 pled guilty to all of the offenses of guilty,  
12 assault to rape, assault and battery or assault and  
13 battery with a dangerous weapon and the like,  
14 correct?

15 A. Yes.

16 Q. So you knew all of that by September 7th.

17 A. Based on what I was reading and based on  
18 what Judge Lopez was telling me.

19 Q. Based on what you were reading, based on  
20 what Judge Lopez said based upon the charges, based  
21 upon the plea of guilty, correct?

22 A. Yes.

23 Q. This isn't some matter -- strike that.  
24 This isn't an area that you're unfamiliar with,

1 pleas and guilty pleas and the like, correct?  
2 A. That's right.  
3 Q. So you were familiar with the fact that he  
4 had pled guilty to these charges. You didn't need  
5 Judge Lopez to tell you that, right?  
6 A. Well, I asked Judge Lopez about that to be  
7 sure, but yes.  
8 Q. But you had already known it, correct?  
9 A. Well, I knew it from her.  
10 Q. You knew it from the press reports.  
11 A. The facts that I believe came from Judge  
12 Lopez.  
13 Q. Follow my questions for a minute and then  
14 we'll get to that.  
15 What I'm asking you is, you knew that this  
16 gentleman named Horton had pled guilty to these  
17 various offenses, correct?  
18 A. I knew that from Judge Lopez.  
19 Q. And didn't you know it from the news  
20 reports, too?  
21 A. Well, that supported it, I suppose.  
22 Q. Didn't you know it from the news reports?  
23 I don't mean to bicker with you, but did you read  
24 the paper?

1           A.    I read the paper.  
2           Q.    Did you see television?  
3           A.    Yes, I did.  
4           Q.    This was a fairly high-profile, highly-  
5   publicized case.  
6           A.    I followed it carefully.  
7           Q.    And when you followed it carefully, was it  
8   clear to you that this man had pled guilty to these  
9   offenses?  
10          A.    Yes, but I knew that from Judge Lopez.  
11          Q.    And other sources.  
12          A.    And I was reading it in the paper.  
13          Q.    And other sources, correct?  
14          A.    Sure.  
15          Q.    So your information was coming from a  
16   number of sources, not just Judge Lopez; isn't that  
17   right?  
18          A.    As I've testified, those two sources.  
19          Q.    So when you were asked by Mr. Ware whether  
20   or not Judge Lopez said this, that or the other  
21   thing, many of those things you already knew from  
22   various sources, correct?  
23          A.    I knew everything from what Judge Lopez  
24   told me and from what I read in the press or saw on

1 television.  
2 Q. Or saw on television, correct?  
3 A. That's all I knew.  
4 Q. And that was what the case was about,  
5 correct?  
6 A. That's right.  
7 Q. For example, Mr. Ware asked you whether or  
8 not Judge Lopez told you that the boy was lured into  
9 the car under the pretense of needing help to find  
10 her lost son. You don't recall Judge Lopez telling  
11 you about that, do you?  
12 A. Not specifically.  
13 Q. Not specifically. But that was a  
14 well-known fact, wasn't it?  
15 A. Well, as I said, a lot of this information  
16 was mashed together --  
17 Q. Please --  
18 MR. WARE: Objection. The witness is  
19 entitled to answer --  
20 HEARING OFFICER DAHER: This is a very  
21 vital part of it. Overruled. Go ahead.  
22 Q. I would like direct answers.  
23 A. I'm trying to.  
24 Q. This was a well-known fact, wasn't it, by



1 September 7th that the allegation was and what Mr.  
2 Horton pled guilty to was luring the boy into the  
3 car to help her find her lost son?

4 MR. WARE: Objection. Did you say  
5 September 4th?

6 MR. EGBERT: I said September 7th, I  
7 believe. If I didn't, I mean September 7th.

8 MR. WARE: The plea was September 6th.

9 MR. EGBERT: I know the plea was September  
10 6th.

11 HEARING OFFICER DAHER: Do you understand  
12 the question?

13 THE WITNESS: No. Could you repeat it.

14 Q. The question of the fact of the boy being  
15 lured into the car by a man dressed as a woman, that  
16 fact, you knew about that from the press, didn't  
17 you?

18 A. If you call the press facts -- I mean, I  
19 don't rely on those as always being the facts, but  
20 yes, I read those press reports.

21 Q. And you read that that's what he pled  
22 guilty to.

23 A. Yes.

24 Q. And did Judge Lopez ever indicate to you

1 that Mr. Horton didn't plead guilty to those facts?

2 A. No. I've already testified as to what I  
3 recall Judge Lopez told me.

4 Q. Please, if you could direct yourself. Did  
5 Judge Lopez ever tell you that Mr. Horton did not  
6 plead guilty to these various facts that you now  
7 know were in the news?

8 A. No, she never said he did not plead guilty.

9 Q. And in fact, she told you he had pled  
10 guilty to these particular offenses.

11 A. That's correct.

12 Q. And then she told you that in terms of her  
13 information, her understandings, she had certain  
14 beliefs as a sentencing judge, correct?

15 A. That's correct.

16 Q. And opinions as a sentencing judge based  
17 upon information that had been provided to her.

18 A. That's correct.

19 Q. Now, these conversations you were having  
20 with Judge Lopez at the time, these were  
21 conversations like you have with many judges, where  
22 they share your opinions and thoughts with you; is  
23 that correct?

24 A. Yes, sometimes.

1 Q. And during these conversations, do you  
2 consider them to be on the record?  
3 A. What do you mean by "on the record"?  
4 Q. In other words, do you consider yourself to  
5 be privy to talk about anything judges tell you?  
6 A. It really depends on what you're talking  
7 about. It's out of context --  
8 Q. Are there times when you talk to judges  
9 about their thoughts and their opinions and the like  
10 which you don't consider to be on the record or for  
11 public release?  
12 A. Do you mean about specific cases?  
13 Q. Yes.  
14 A. If I'm asking a judge about a case, I want  
15 to know whether it's information that can be used or  
16 not used, if that's what you're suggesting.  
17 Q. And did, for example, Judge Lopez tell you  
18 that you could or could not use any information she  
19 provided you?  
20 A. I don't remember that. I mean, I don't  
21 know, you know, what information she said you could  
22 use or not use.  
23 Q. For example, it must be so, at least as to  
24 these comments you've made to us about her thoughts

1 on the screwdriver and the kidnapping --

2 A. Yes.

3 Q. -- it must be so, musn't it, that you  
4 consider that to be not releasable information based  
5 on the press statement which says that she wouldn't  
6 talk about it?

7 A. That's right.

8 Q. So that what she was talking to you about  
9 was private?

10 A. I considered it that way, yes.

11 Q. And not for public dissemination?

12 A. That's right.

13 Q. In fact, all of her opinions and thoughts  
14 with regard to this matter that she was talking to  
15 you about were not ones which you were permitted to  
16 release to the public at large; isn't that right?

17 A. Except about the sentencing guidelines, I  
18 felt that was something I could.

19 Q. And that was in fact in the press  
20 statement?

21 A. Yes.

22 Q. But these other matters that we've  
23 discussed and the like, you didn't consider those to  
24 be matters which she was authorizing you to make

1 public comment or public dissemination of; is that  
2 right?

3 A. No, and I didn't feel I had all of the  
4 information to do that anyway.

5 Q. Whether you had all the information or not,  
6 please answer my question.

7 A. Okay.

8 Q. These matters which she was discussing with  
9 you, which we've talked about -- kidnapping,  
10 screwdriver and thoughts on sentencing and the like  
11 -- other than the guidelines, those matters were  
12 matters which she indicated to you were not to be  
13 made public and you were not to publicly disseminate  
14 them; isn't that correct?

15 A. I don't remember her ever saying "You are  
16 not to disseminate this," but I just took it that  
17 that's what I should do.

18 Q. Did you take it from the fact that in her  
19 press statement she said she was not permitted to  
20 talk about them, that you were also not permitted to  
21 talk about them?

22 A. I took it that way, that I shouldn't  
23 either, yes.

24 Q. And that was her decision and her

1 directive?  
2 A. Yes, I guess I would say that.  
3 MR. EGBERT: I have nothing further.  
4 HEARING OFFICER DAHER: Mr. Ware?  
5 FURTHER REDIRECT EXAMINATION  
6 BY MR. WARE:  
7 Q. At the time you prepared or drafted, at  
8 least, the statement that Judge Lopez ultimately  
9 issued under her name, the information that was the  
10 basis of that statement came from Judge Lopez and  
11 Judge Lopez alone; is that correct?  
12 A. That's correct.  
13 MR. WARE: Nothing further.  
14 HEARING OFFICER DAHER: Anything else, Mr.  
15 Egbert?  
16 MR. EGBERT: No, Judge.  
17 HEARING OFFICER DAHER: Thank you. Shall  
18 we take a short break here and start up in about  
19 five, ten minutes?  
20 MR. WARE: Yes. Your Honor, at some  
21 point -- I don't know if you want to hear a comment  
22 on the motion to exclude certain witnesses.  
23 HEARING OFFICER DAHER: Do you have a  
24 motion in limine?

1                   MR. EGBERT: Judge, my first witness is  
2 Judge DelVecchio, and that has nothing to do with  
3 anything in this motion in limine, and I would like  
4 to get her on the stand.

5                   MR. WARE: That's fine. I'm just saying  
6 it's fine to take a break, but then we'll put Judge  
7 DelVecchio on.

8                   HEARING OFFICER DAHER: You are concluded  
9 with your case in chief; is that correct?

10                  MR. WARE: Yes, subject only to just  
11 confirming that all the exhibits are in fact in  
12 evidence. I believe they are. I just want to  
13 reconfirm that.

14                  HEARING OFFICER DAHER: Fine. We'll pick  
15 that up in five minutes.

16                  (Recess)

17                                 SUZANNE DelVECCHIO, Sworn

18                                         DIRECT EXAMINATION

19                  BY MR. EGBERT:

20                  Q. Good morning.

21                  A. Good morning.

22                  Q. Could you state your name, please.

23                  A. Suzanne DelVecchio.

24                  Q. And what is your present occupation?

1           A.    I'm Chief Justice of the Superior Court.  
2           Q.    And could you give me a brief background of  
3 your professional history.  
4           A.    You mean from law school on?  
5           Q.    Yes.  
6           A.    Let's start with I was appointed to the  
7 Superior Court 17 years ago and I've been a justice  
8 of the Superior Court since then. I was the  
9 regional administrator justice for Plymouth County  
10 for many years and I was appointed Chief Justice  
11 three years ago.  
12          Q.    Was your appointment in the fall of '99 was  
13 it?  
14          A.    Yes, I think so.  
15          Q.    How long have you known Judge Lopez?  
16          A.    Since she came on our court.  
17          Q.    Would that be 1993 or so?  
18          A.    I don't recall, but I've known her since  
19 she's been on the court.  
20          Q.    And have you had any relationship with  
21 Judge Lopez other than a professional relationship?  
22          A.    No.  
23          Q.    During your time on the Superior Court  
24 bench and most particularly your time as Chief



1 Justice of the Superior Court, can you tell me what  
2 you know of Judge Lopez's judging in the Superior  
3 Court?  
4 MR. WARE: Objection.  
5 HEARING OFFICER DAHER: What's the  
6 objection?  
7 MR. WARE: I don't know what that question  
8 means. Of her judging in the Superior Court?  
9 HEARING OFFICER DAHER: It's somewhat  
10 ambiguous.  
11 MR. WARE: Is this character evidence?  
12 MR. EGBERT: No, it's not character  
13 evidence. It's a Chief Justice of the Court who has  
14 experience and knowledge of the performance of  
15 judges --  
16 HEARING OFFICER DAHER: "Judging" is so  
17 indefinite. If you could be more specific.  
18 MR. EGBERT: That's why I kept it to  
19 judging, as opposed to any personal characteristics,  
20 but if you'd like a better question --  
21 HEARING OFFICER DAHER: I'd appreciate it.  
22 Q. In your experience, Judge, can you give us  
23 an understanding of what your knowledge is as to  
24 Judge Lopez's handling of cases on the Superior

1 Court bench.

2 A. Since I've been Chief Justice, I've never  
3 had a complaint against Maria Lopez about the way  
4 she's handled any case. I think that she's most  
5 noted in our court for having handled a very  
6 difficulty case when she first came on the Court,  
7 which was the Demoulas case.

8 Q. When you said most noted for that, can you  
9 give us some understanding of why that case was of  
10 note?

11 MR. WARE: Objection. Irrelevant. The  
12 Demoulas case?

13 HEARING OFFICER DAHER: What's the  
14 relevancy?

15 MR. EGBERT: The relevancy is as to this  
16 Judge's performance on the bench on difficult cases.

17 HEARING OFFICER DAHER: She's already  
18 testified that she had a very difficult case and she  
19 did a nice job on it.

20 MR. EGBERT: And I think the nature of the  
21 difficulty of that case is important to note for the  
22 record.

23 HEARING OFFICER DAHER: Objection  
24 sustained.

1 BY MR. EGBERT:

2 Q. Have you followed the Demoulas case through  
3 the appellate process?

4 A. I read the advance sheets --

5 MR. WARE: Objection.

6 HEARING OFFICER DAHER: Yes or no. I'll  
7 give him a short leash. Go ahead.

8 A. I have read the advance sheets. I don't  
9 have any personal knowledge of the case, but I do  
10 read the advance sheets regularly.

11 Q. And are you aware of the result with regard  
12 to the appeals in the Demoulas case --

13 (Mr. Ware stands)

14 HEARING OFFICER DAHER: Sustained.  
15 Objection sustained.

16 MR. EGBERT: I'll ask then the Court to  
17 take judicial notice of all the Demoulas cases in  
18 the Supreme Judicial Court, including the Court's  
19 decisions on the motions to recuse that were filed  
20 in those cases.

21 HEARING OFFICER DAHER: Do you have any  
22 problems with that?

23 MR. WARE: No.

24 HEARING OFFICER DAHER: That's fine.

1 THE CLERK: For the record, it will be J, K  
2 and L.  
3 MR. WARE: One piece of paper is J, K and  
4 L?  
5 (Document handed to Mr. Ware)  
6 MR. WARE: Just so I understand, if these  
7 exhibits are copies of the cases, I have no  
8 objection.  
9 MR. EGBERT: He has the exhibits.  
10 THE CLERK: For the record, it's J, K, and  
11 L, judicial notice.  
12 (Document marked as Exhibits J,  
13 K and L moved into evidence)  
14 Q. Judge, in your dealings in the Superior  
15 Court, do you make judicial assignments?  
16 A. Yes.  
17 Q. And can you tell us what your experience  
18 has been with regard to Judge Lopez and the  
19 acceptance of assignments?  
20 A. In what?  
21 Q. In her acceptance of various assignments.  
22 A. I don't think she's ever turned an  
23 assignment down.  
24 Q. And with regard to the receipt of

1 complaints, do you receive complaints on occasion  
2 concerning judges?

3 A. Yes, I do.

4 Q. And do you receive complaints concerning  
5 judges' demeanor in cases?

6 A. Yes, I do.

7 Q. And during your course on the Superior  
8 Court have you ever received a complaint against  
9 Maria Lopez?

10 A. No.

11 Q. Judge, during your time on the Bench and  
12 particularly, again, as a Chief in the Superior  
13 Court, have you had any experience with problems  
14 between the judiciary and the press in the district  
15 attorney's office?

16 A. There's sometimes a very dynamic tension  
17 amongst those parties.

18 Q. And how would you describe that tension?

19 MR. WARE: I object to the generalization.

20 Q. I'll ask you a specific question. Have you  
21 had on occasion in the past seen, as a judge,  
22 district attorney offices using the press in an  
23 attempt to coerce or intimidate or affect a judge's  
24 decision?

1 MR. WARE: Objection. First of all, these  
2 are conclusions of this particular judge. They're  
3 not observations.

4 Secondly, we have no timeframe.

5 Third, they're in the nature of character  
6 evidence that's unsupported.

7 MR. EGBERT: They're not character  
8 evidence, Your Honor. It goes to some of the  
9 problems in the judiciary which Judge Lopez also  
10 faced at the time and which clearly are a factor in  
11 what's going on in this case.

12 HEARING OFFICER DAHER: Sustained.

13 Q. Judge, have you personally had experience  
14 with district attorneys calling in the press in  
15 cases where they were likely to be dissatisfied with  
16 your results

17 (Mr. Ware stands)

18 HEARING OFFICER DAHER: What's your  
19 objection?

20 MR. WARE: Irrelevant. It doesn't involve  
21 Judge Lopez --

22 HEARING OFFICER DAHER: Sustained.

23 MR. EGBERT: The objection the first time  
24 was that it wasn't in her personal knowledge. Now

1 when asked within her personal knowledge --  
2 HEARING OFFICER DAHER: Sustained.  
3 Q. Have there been conversations amongst  
4 judges while you were Chief in various conferences  
5 and other gatherings of the judiciary with regard to  
6 the issue of the DA's office's use of the press?  
7 MR. WARE: Objection.  
8 HEARING OFFICER DAHER: Sustained.  
9 Q. Do you as Chief Justice -- strike that.  
10 Was there recently a conference amongst  
11 judges concerning the judiciary and the press?  
12 A. Yes.  
13 Q. And was Judge Lopez present at that  
14 conference?  
15 MR. WARE: Objection.  
16 HEARING OFFICER DAHER: She can answer  
17 that.  
18 A. Yes.  
19 Q. And were there discussions at that  
20 conference with regard to the various litigants' use  
21 of the press in criminal cases?  
22 MR. WARE: Objection.  
23 HEARING OFFICER DAHER: Sustained.  
24 Q. Are you familiar, Judge, with the process

1 called plea conferences or lobby conferences as used  
2 in the Superior Court in the Commonwealth?

3 A. Yes.

4 Q. And were you both -- did you take part in  
5 such conferences as a judge?

6 A. Yes.

7 Q. And you have an understanding of those  
8 conferences and procedures as a Chief?

9 A. Yes.

10 Q. And have those matters also been discussed  
11 at judicial conferences and the like?

12 A. Yes.

13 Q. And with regard to Suffolk County -- I'll  
14 start for a moment. With regard to Suffolk County,  
15 do you have an understanding of the regular process  
16 for something called a plea conference?

17 A. Yes.

18 Q. Can you tell us what that is?

19 A. Generally when a case is brought into  
20 court, particularly in the First Session, but it can  
21 be obviously in trial sessions, too, there will be a  
22 conference between -- amongst the lawyers, the judge  
23 where really both sides put on their -- tell the  
24 judge about their case. And they ask the judge if



1 the judge would consider giving a sentence with  
2 regard -- if the defendant would take a plea rather  
3 than try a case. And that happens all the time.

4 Q. Those conferences, in your experience, are  
5 often off the record? What I mean by that is  
6 without a court reporter?

7 A. It depends on the judge. But most of the  
8 times they are off the record.

9 Q. And during those conferences, is it  
10 basically a free exchange of --

11 MR. WARE: Objection to the leading nature  
12 of the question.

13 HEARING OFFICER DAHER: I'm going to allow  
14 him some latitude. It's very important.

15 Q. -- is basically a free exchange by the  
16 lawyers with the judge as to what they think the  
17 facts are and what they think the appropriate  
18 sentence may be?

19 A. Yes.

20 Q. And during those conferences, is it often  
21 the case where documents or information will be  
22 provided to the judge for purposes of advocating a  
23 particular sentence?

24 MR. WARE: Objection.

1 HEARING OFFICER DAHER: What's the  
2 objection?

3 MR. WARE: Again, leading, Your Honor.  
4 This is the direct testimony of this witness who is  
5 not an expert on plea conferences. I'd like to hear  
6 from her.

7 HEARING OFFICER DAHER: Again, obviously  
8 I'm going to give you extensive cross examination.  
9 It's a very important dimension of this case. I've  
10 allowed a lot of latitude. I'm going to allow Mr.  
11 Egbert that luxury. Go ahead. You have it.

12 Q. Do you recall the question?

13 A. No. Just ask it again.

14 Q. Are you familiar -- strike that.

15 During the course of these plea  
16 conferences, it is not unusual for lawyers to  
17 present the judge with documents or information  
18 while advocating their particular position; is that  
19 correct?

20 A. Yes, that's what happened.

21 Q. And during those plea conferences where  
22 there is no court reporter, the documents and  
23 information provided to the Court, are they placed  
24 on any permanent record?

1           A.    No.  Sometimes they may be placed in a  
2 probation file, but they're not placed as part of  
3 the public record of the case.  And I'm talking,  
4 there can be medical reports, psychiatric reports,  
5 even letters, character reference letters for a  
6 defendant, whatever, victim impact statements.  
7 Those are all placed in a -- if they are placed at  
8 all -- in a probation file.

9           Q.    And if they're not placed in a probation  
10 file, what's done with them?

11          A.    They're generally given back to the  
12 attorneys.

13          Q.    And is that after the judge has given their  
14 determination as to what the sentence will be?

15          A.    Yes, pretty much.  It just depends on what  
16 that judge likes to do, what that judge's habit is.  
17 Some judges request that the documents be placed in  
18 a probation file.  Some judges hand them back.  It  
19 just is the judge's preference.

20          Q.    And during those plea conferences and lobby  
21 conferences, do the judge have an expectation as to  
22 the roles of the parties?

23          A.    It's an adversarial proceeding, and we  
24 anticipate that the parties will tell us their best

1 case.

2 Q. When you were -- just for clarity, while  
3 you're Chief you don't sit on cases; is that  
4 correct?

5 A. No.

6 Q. While you were a judge, you engaged in a  
7 number of these plea conferences?

8 A. For 14 years.

9 Q. And during those conferences, would you  
10 understand that a judge's role would be to seek out  
11 evidence?

12 A. What do you mean?

13 Q. Well, to seek out -- to review tapes,  
14 police reports, things like that?

15 A. No. We're not investigators. We would  
16 anticipate that that information would be presented  
17 to us by either side.

18 Q. And with regard to -- do you have an  
19 exhibit book in front of you?

20 A. I do.

21 Q. Could you turn to Exhibit 3.

22 Now, that's entitled "Psychosocial  
23 Assessment and Dispositional Plan for Charles Ebony  
24 Horton." Do you see that?

1           A.    Yes.  
2           Q.    Have you seen documents such as that  
3 before?  
4           MR. WARE:  Objection.  
5           HEARING OFFICER DAHER:  What's your  
6 objection?  
7           MR. WARE:  Your Honor, this is in the  
8 nature of expert testimony regarding this report.  
9 This is precisely what the Court instructed counsel  
10 to notify us of prior to trial.  We've been all  
11 through this.  This witness was not identified as an  
12 expert on these reports or any kind of  
13 psychosocial --  
14          HEARING OFFICER DAHER:  Mr. Egbert, you're  
15 on record of a list; and in my order which indicated  
16 if there were experts, I wanted a CV.  You indicated  
17 at some time in the proceedings -- we can go back --  
18 that there were no experts.  And this indeed is in  
19 the nature of expert testimony.  
20          MR. EGBERT:  It's not.  I'm not asking her  
21 for opinions of expert testimony.  I'm asking her  
22 for the customs and practice of the Superior Court.  
23 It is not an expert question.  It is simply the  
24 custom and practices of the Superior Court and the

1 judges in the Superior Court over the course of many  
2 years, for which she is eminently familiar as Chief  
3 Judge.

4 MR. WARE: Your Honor, it is by definition  
5 in the nature of expert testimony. At a minimum the  
6 Judge presumably is going to testify based on her  
7 expertise, which again I don't doubt, and her  
8 experience in the Superior Court. It's precisely  
9 what we had a colloquy about back in November.

10 HEARING OFFICER DAHER: Overruled. I'm  
11 going to overrule you. Go ahead, Mr. Egbert.

12 Q. Have you seen documents such as that  
13 before?

14 A. Yes.

15 Q. And in the course of your practice on the  
16 Superior Court and your understanding of Superior  
17 Court practices, is a document such as that unusual  
18 to be presented in a plea conference?

19 MR. WARE: Objection. Now we're having her  
20 speculate on whether documents like this are or are  
21 not unusual in Superior Court Bench conferences.  
22 We're way far afield.

23 HEARING OFFICER DAHER: Didn't she testify  
24 that some judges put it on record, some judges

1 review it, some judges give back the reports -- I  
2 think we've already explored that avenue.

3 MR. EGBERT: We haven't identified the type  
4 of report or type of information --

5 HEARING OFFICER DAHER: Overruled. Go  
6 ahead.

7 A. Reports such as these are submitted from  
8 time to time.

9 Q. And I want to direct you to the last page  
10 of the document, which reads, "Joan R. Katz," or  
11 Katz -- I'm not sure how she pronounces it --  
12 "licensed social worker and BCD, Director of Social  
13 Services Committee for Public Counsel Services." Do  
14 you see that?

15 A. Yes.

16 Q. In your experience, if a defense counsel  
17 presented a report such as that at disposition or at  
18 a plea conference and the Commonwealth sought to  
19 have that report considered unreliable by the Court,  
20 whose job would it be to present that information to  
21 the Court?

22 MR. WARE: Objection, Your Honor. Again,  
23 this is expert testimony on how this witness would  
24 react if this report were given to her as a judge in

1 the Superior Court. This is precisely what was  
2 disallowed. It's precisely why we asked for this in  
3 advance of trial.

4 MR. EGBERT: Judge --

5 MR. WARE: This is a back-door way of  
6 trying to build up this report into something.  
7 We've had the Judge's testimony. That's all we  
8 need. Judge Lopez was the only one who was there on  
9 August 1st.

10 MR. EGBERT: Judge, the Judge was cross  
11 examined extensively and this Court asked questions  
12 extensively concerning the propriety of the manner  
13 in which the plea conference was held, whether the  
14 document was retained, whether it was put on the  
15 record, whether it was relied on, whether or not --  
16 Judge Lopez was cross examined at length as to  
17 whether or not she investigated who this person was  
18 and what she did and all these things. And I think  
19 it's appropriate to show that the custom and  
20 practice of the Court is exactly as she conducted  
21 herself.

22 HEARING OFFICER DAHER: Overruled. Go  
23 ahead.

24 Q. Do you have the question in mind?



1 A. No.

2 Q. Let me see if I can rephrase it.

3 If presented a report such as this during a  
4 plea conference -- when I say "such as this," I mean  
5 Exhibit 3 -- and the district attorney sought to  
6 have a court consider this to be unreliable or the  
7 like, whose role would it be to present the  
8 information of unreliability to the Court?

9 (Mr. Ware stands)

10 HEARING OFFICER DAHER: Sustained.

11 Q. As a judge of the Superior Court, who would  
12 you expect to refute any information provided by  
13 defense counsel?

14 MR. WARE: Objection.

15 HEARING OFFICER DAHER: What's the  
16 objection?

17 MR. WARE: Your Honor, again, we are asking  
18 this witness, however qualified, in effect to  
19 speculate on whether the process Judge Lopez used or  
20 should have used on August 1st, 2000 --

21 HEARING OFFICER DAHER: I thought a few  
22 minutes ago I heard you state you have no doubt  
23 she's an expert. She's been there for 14 years.

24 MR. WARE: That's my point. You entered an

1 order in this case with respect to experts. We have  
2 now totally breached that order and we are listening  
3 to Judge DelVecchio testify as an expert, right now  
4 as an expert on these kinds of reports. That's what  
5 you ordered could not happen without advance notice,  
6 CVs, and some summary of what the testimony was  
7 going to be.

8 The defense to this document is Judge  
9 Lopez's own testimony. No one's questioned the  
10 procedure of plea conferences. That's not what's at  
11 issue here. What's at issue is conduct.

12 HEARING OFFICER DAHER: What do you want to  
13 say, Mr. Egbert?

14 MR. EGBERT: Judge, again, I am simply  
15 asking of the custom and practices of the Court. It  
16 has nothing to do with expert testimony. But I will  
17 say this. That certainly Judge DelVecchio has been  
18 on the witness list from time immemorial. I  
19 indicated that she would testify to a number of  
20 things, including facts. My understanding is that  
21 since she has been on the witness list, no one from  
22 the Commission has sought to talk to her, ask her  
23 about her testimony, ask her about anything she was  
24 prepared to say. If the Commission seems prejudiced

1 by this, then I would suggest that the Court permit  
2 the testimony, continue her cross examination for a  
3 day or so away so that they can have time to  
4 prepare.

5 This whole issue of the custom and practice  
6 of the Court in these areas has been a subject of  
7 these proceedings from Day One.

8 HEARING OFFICER DAHER: Overruled. Go  
9 ahead.

10 A. I think your question to me was, if I were  
11 presented with this, would I anticipate that  
12 somebody would refute it and who would that person  
13 be?

14 Q. Yes.

15 A. I would anticipate --

16 MR. WARE: Objection.

17 HEARING OFFICER DAHER: Sustained. Go  
18 ahead.

19 A. -- that if presented with something that  
20 was given to me by defense counsel, if it were to be  
21 refuted, it would be refuted by the prosecution.

22 Q. Is it the custom and practice of the Court,  
23 in your understanding, when provided with reports of  
24 professionals, that the courts basically look at

1     them at face value?

2             A.    Yes, we do.  We look at them at face value.  
3     That's what we do.

4             Q.    In the Superior Court system and amongst  
5     Superior Court judges, are there certain factors  
6     which go into the decision of sentencing in various  
7     defendants?

8             A.    Yes.

9             Q.    And what, as you understand it, are the  
10    goals of sentencing?

11            MR. WARE:  Objection.  I don't know how  
12    this is anything other than expert testimony.  And  
13    it's irrelevant.  We've heard from Judge Lopez what  
14    she took into account.  That's what's at issue here.

15            MR. EGBERT:  Then if Mr. Ware and the  
16    Commission's position is that since we've heard from  
17    Judge Lopez, that's enough, then if they'll  
18    stipulate on the record that what Judge Lopez said  
19    is to be credited by the Court and not to be at all,  
20    as their cross examination indicated, either  
21    discredited or not given weight, then that would be  
22    one thing.  But the question of Judge Lopez's  
23    conduct as it relates to the custom and practice to  
24    the Court and as it relates to the questions here --

1 and that is the conduct of the Judge being reviewed  
2 by you to make findings of fact relative to that  
3 conduct -- then certainly she is entitled to  
4 buttress that conduct with the fact that the Chief  
5 of the Superior Court thinks that that conduct is  
6 what occurs every day, and rightly so.

7 HEARING OFFICER DAHER: Mr. Ware, last  
8 word? Same argument?

9 MR. WARE: Your Honor, what's at issue in  
10 this disciplinary proceeding is Judge Lopez's  
11 conduct. It's not Justice DelVecchio's view of how  
12 she might have conducted the sentencing proceeding  
13 or what factors judges generally take into account.  
14 All that's relevant here is what Judge Lopez did.

15 HEARING OFFICER DAHER: Mr. Egbert, once  
16 again, I'm the finder of fact. I'll take care of  
17 that. Overruled. Go ahead.

18 BY MR. EGBERT:

19 Q. What are the goals of sentencing?

20 A. Twofold. First of all, we have a victim.  
21 By the time we get to sentencing, there's either  
22 been an admission through a plea or there's been a  
23 trial where a defendant's been found guilty. And at  
24 that point we look to what happened to the victim,

1 we look to the record of the defendant, whether  
2 there was any past history, whether there's any  
3 criminal record, we look to the severity of the  
4 crime. In our court, unfortunately, because our  
5 court hears felonies, we have victims of crimes who  
6 are permanently disabled, either psychologically or  
7 physically, we look to that. These are all factors  
8 that we consider in sentencing.

9 We also look to the statute that the person  
10 has admitted guilt under or found guilty under to  
11 see what the statutory scheme is with regard to  
12 sentencing. And we also have a guideline system  
13 that we use, a sentencing guideline system.

14 Q. When you say a sentencing guideline system,  
15 are you talking about the proposed guidelines before  
16 the legislature which have not been adopted?

17 A. Well, when I came on the court 17 years  
18 ago, we had what we call the Ronan guidelines.  
19 These were a compilation of sentences that was put  
20 together by Justice John Ronan. And when we are  
21 ready to sentence somebody, we use -- the Probation  
22 Department uses numbers that they give under those  
23 guidelines to the process -- it's almost like the  
24 grid. And we are given a range of sentences that we

1 could impose pursuant, obviously, to the statute.  
2 A few years ago we had a meeting of the  
3 Court, where we decided that we might also impose --  
4 use the grid, which has never been adopted by the  
5 Commonwealth. The difference is, under the Ronan  
6 guidelines, the sentences were deemed to be served  
7 concurrently under those guidelines, as opposed to  
8 the grid where the sentences are deemed to be served  
9 consecutively. It makes a difference in the time --  
10 it means a lot to us when we do that. So we know  
11 that.

12 But when we are doing the sentencing  
13 conferences, we generally have a probation officer  
14 and we tell them to run the guidelines, just to give  
15 us an idea for a particular crime and taking  
16 everything into account that I've just talked about  
17 the way a sentencing could be.

18 HEARING OFFICER DAHER: Again, part of  
19 me -- pardon me, Chief, for a moment. On the  
20 website you have the proposed sentencing guidelines.  
21 You don't have the Ronan guidelines --

22 THE WITNESS: That's right.

23 HEARING OFFICER DAHER: The Ronan  
24 guidelines of '82, they're not even on the website.

1                   THE WITNESS: No. And we do use -- we  
2 changed the grid a few years ago. But some judges  
3 like the probation office to run both sets, because  
4 these are guidelines. These are not mandatory at  
5 all. They've never been mandatory for us. But it's  
6 an aid in sentencing. It helps judges to know in  
7 the past what's been done with sentencing for that  
8 particular type of crime.

9                   Q. Let me just show you, if I may, Exhibit E.  
10 Do you recognize what those are?

11                  A. Yes. This is the Ronan guidelines and it  
12 shows the process for placing a number in working  
13 out a formula how that's done.

14                  Q. The Judge asked you what guidelines were on  
15 your website.

16                  A. The website guidelines, we've changed from  
17 those to the proposed sentencing guidelines, which  
18 is done with a grid. What we found is, when we did  
19 have a meeting about this, the numbers were not that  
20 far off between the Ronan guidelines and the grid.  
21 What we did find is that the Ronan guidelines look  
22 to serving sentences concurrently versus the grid  
23 which looks to serving them consecutively. Once we  
24 figured that out, we understood that the numbers are



1 essentially the same. If I use the reason and/or if  
2 I use the grid, the numbers are pretty much the  
3 same.

4 Q. And are the Ronan guidelines used by  
5 judges?

6 A. Sometimes they are. Sometimes people  
7 prefer to use them. Especially people who have been  
8 on the Court longer, they'll ask the probation  
9 officers to work it out that way or even both ways.  
10 But it's just what a judge is used to working with,  
11 frankly. And these are informal. I want to stress  
12 the reason we have this flexibility is they are  
13 informal guidelines. They don't have to be used.  
14 But generally we have the probation office run these  
15 numbers for us, but they're not mandatory for us by  
16 any means.

17 Q. In your experience in the custom and  
18 practice of the Court, after a plea conference is  
19 conducted and a judge announces what sentence he or  
20 she will impose if a defendant pleads guilty, is  
21 that basically the end of the sentencing phase in  
22 terms of advocacy?

23 MR. WARE: Objection. It's the same point,  
24 that this is expert testimony. We're now trying to

1 broadly generalize about all cases. We've had reams  
2 of testimony about the advocacy that occurred after  
3 August 1st in this case.

4 HEARING OFFICER DAHER: Mr. Egbert, again,  
5 I think I've allowed you plenty of latitude on this  
6 matter. Again, it is expert testimony; and fine,  
7 and maybe through the guidance of -- I've allowed in  
8 a lot of it. I think I'm going to sustain Mr. Ware  
9 at this point.

10 MR. EGBERT: Judge, if the objection is  
11 that the Court is determining this to be expert  
12 testimony without notice --

13 HEARING OFFICER DAHER: That's essentially  
14 it.

15 MR. EGBERT: -- then I'm going to ask that  
16 the Court do one of two things. Either take the  
17 testimony and give the Commission whatever  
18 continuance they need to prepare for cross  
19 examination or continue it generally so they can  
20 prepare for cross examination.

21 HEARING OFFICER DAHER: How about the  
22 alternatives, Mr. Ware? What do you want to do?

23 MR. WARE: I don't know, Your Honor. I  
24 don't want any continuances. I'd like the rules

1 enforced. I think when this Court enters an order  
2 pretrial, the parties are bound by it and both sides  
3 have to live with it. And I don't think speculative  
4 testimony about what might happen in plea  
5 conferences in other cases and the degree of  
6 advocacy that postdates a plea conference has any  
7 role in this.

8 HEARING OFFICER DAHER: Bear with me for a  
9 moment. At the sake of being somewhat redundant, I  
10 did send out an order that before any expert  
11 testimony, to notify -- give us a CV so that the  
12 other side would be prepared. I've allowed a lot of  
13 latitude in this thing, but I think at this time I'm  
14 going to sustain Mr. Ware.

15 MR. EGBERT: Let me put on the record,  
16 Judge, that both the rule and the law require that  
17 the Commission show prejudice, first of all. I  
18 submit to you it's not expert testimony, but if you  
19 so rule, there is no prejudice to the Commission.  
20 Judge Lopez is entitled to due process. A rule of  
21 convenience by the Court is not one which can  
22 circumvent her right to present evidence on these  
23 issues. There has been no suggestion of prejudice  
24 by the Commission.

1           If they want time, fine. Judge DelVecchio  
2 has been on the witness list from Day One in this  
3 case. They have not taken the steps of even a  
4 simply minimally competent advocacy, and even gone  
5 to see --

6           HEARING OFFICER DAHER: Mr. Ware, let me  
7 hear you on the issue of expert versus an alleged  
8 violation of Judge Lopez's rights.

9           Mr. Egbert feels that, Judge, you did make  
10 an order, but this is so crucial to her due process  
11 rights, that --

12          MR. WARE: Your Honor, I can only say that  
13 you're the arbiter of what is relevant, probative  
14 here or not. This is a tangent. We know what Judge  
15 Lopez's position is. Everything was over on August  
16 1st, so it didn't matter what happened after August  
17 1st. I presume Justice DelVecchio is going to say  
18 something along that line.

19          It's irrelevant. We have what the Judge  
20 did. We don't need expert testimony which is, by  
21 definition, speculative as to how a hundred other  
22 judges permit or don't permit advocacy, whatever  
23 that's supposed to be, after a plea conference.  
24 There needs to be some control over the scope of

1 this evidence.

2 MR. EGBERT: The Commission was permitted  
3 to go into the farthest depths and size of their  
4 presentation of this case. They put things down as  
5 deep over my objection of a tape recording of the  
6 victim in this case, which Judge Lopez had never  
7 seen, nor --

8 HEARING OFFICER DAHER: She didn't ask to  
9 see it.

10 MR. EGBERT: Why would she ask to see it?  
11 With all due respect, Judge, we have apparently  
12 reached the point in our system of justice where the  
13 Commission expects judges to be advocates. And  
14 judges are not advocates and they are not  
15 investigators. Judges are presented with the  
16 information by the advocates, by the litigants, and  
17 that's what they rule on. They don't go looking for  
18 information. They don't go asking to go into police  
19 files. They don't go asking to go into DA's files.  
20 And I suggest to you DAs would be quite reluctant to  
21 start letting judges open up their files at plea  
22 conferences. So to inject that kind of statement  
23 into this proceeding borders on the frivolous.  
24 And so for us to be out on this far-ranging

1 attack on the way Judge Lopez conducted a plea  
2 conference and statements such as she didn't ask to  
3 see a tape recording --

4 HEARING OFFICER DAHER: Isn't that the  
5 argument that you presented to Leora Joseph? That  
6 she didn't ask to see --

7 MR. EGBERT: Leora Joseph is an advocate.  
8 She has a responsibility as an advocate, not only to  
9 represent her client, but to present to these judges  
10 the facts necessary upon which they can rule.

11 HEARING OFFICER DAHER: I appreciate the  
12 forcefulness of the argument. But where the  
13 allegation is a sexual abuse case, where the  
14 allegation is a kidnapping, where the allegation is  
15 a -- don't you think a judge should reach the  
16 point -- and they know that a tape has been made.  
17 Don't you think a judge should look at that tape?

18 MR. EGBERT: Judge, I don't want to act as  
19 an expert.

20 HEARING OFFICER DAHER: Go ahead.

21 MR. EGBERT: In 30 years of practicing  
22 criminal law, I have never in my life seen a judge  
23 do such a thing, in 30 years, and I'm going to bet  
24 you that that Judge sitting on the Bench for 17

1 years has never done it either and has never seen it  
2 done.

3           You are asking judges to take on a role  
4 that they have never had, they have never been  
5 given, they neither want, nor do the litigants want  
6 them to have them. It's the litigants'  
7 responsibility to present the judge with the  
8 information they need to rule. And that's how the  
9 system is done every single day. And to think  
10 differently, I suggest to this Court, is to go down  
11 a road that doesn't exist.

12           HEARING OFFICER DAHER: Go ahead, Mr. Ware.

13           MR. WARE: With all deference to my  
14 colleague, the defense in part in this case is there  
15 are a bunch of disputed issues of fact. I don't  
16 think Justice DelVecchio or anyone else is going to  
17 say that in the event that the judge had a question  
18 about a substantive disputed fact or opinion or  
19 report, that that judge could either not ask for  
20 additional information and continue the lobby  
21 conference; secondly, direct counsel to do more  
22 investigation or adduce additional evidence; or,  
23 third, in certain circumstances say, "May I see it?  
24 May I see your report? May I see a document?"

1           This is all within the realm of what  
2 happens every day. Nobody's putting a burden on  
3 judges to be investigators, but they are not  
4 mindless automatons. They are intelligent, honored  
5 people who make decisions, mostly good decisions.  
6 And they run plea conferences in a variety of ways,  
7 dependent upon the circumstances at hand.

8           What counsel is here trying to do is to  
9 give a broad brush to all plea conferences and thus  
10 whitewash the conduct of the Judge on August 1st.

11           MR. EGBERT: Judge, I've heard about as  
12 much disrespect out of Mr. Ware's mouth for Judge  
13 Lopez as I'm going to listen to. We've reached a  
14 point in these proceedings where his mouth is the  
15 most despicable conduct I've seen in a courtroom.

16           Judge Lopez is a judge in the Superior  
17 Court, and I will not sit by and accept his nonsense  
18 talk. I won't have it. I've had about enough of  
19 it. And I hope you'll stop it.

20           HEARING OFFICER DAHER: The objection is  
21 sustained. Go ahead.

22           BY MR. EGBERT:

23           Q. Judge, in the sentencing of defendants in  
24 criminal cases, are the factors of deterrence to the



1 defendant, likelihood of recidivism, and the  
2 defendant's record considered by the courts?

3 A. Yes.

4 Q. And is -- for example, you've talked about  
5 the defendant's record as being a factor in  
6 sentencing. How about the likelihood of recidivism?  
7 Is that something that is considered?

8 A. Yes, it is.

9 Q. And what kinds of things would one look to  
10 in that regard?

11 A. Well, first of all, we look to the record  
12 to see what the recidivism rate has been in any  
13 event. That's one of the first things that we do.  
14 And we can look at the juvenile record as well as an  
15 adult record. We look at all of it. If there are  
16 any reports that are submitted to the Court with  
17 regard to expectation of recidivism, we can look to  
18 that.

19 Q. Turn to Page 4 of Exhibit 3 that's in front  
20 of you. And do you see about three paragraphs down  
21 the sentence that begins, "I find..."

22 A. Yes.

23 Q. Would you just read that sentence to  
24 yourself.

1 A. Uh-hum.

2 MR. WARE: I'm going to object to this,  
3 Your Honor. Now we have this witness opining about  
4 this particular report.

5 HEARING OFFICER DAHER: She's already  
6 testified that recidivism is one of the issues  
7 that's taken into consideration in re the  
8 disposition. I'm going to overrule that. Go ahead.  
9 You have it.

10 Q. Have you read that?

11 A. Yes.

12 Q. Is that the kind of -- what you say,  
13 statement in a report, is that the kind of statement  
14 in a report you've been referring to?

15 A. Yes.

16 Q. Is rehabilitation an issue in sentencing?

17 A. Yes.

18 Q. And do courts look to the efforts of a  
19 defendant to rehabilitate himself prior to  
20 sentencing?

21 A. Yes.

22 Q. And would you look at -- actually, just  
23 take a brief look through that report from beginning  
24 to end.

1 A. (Witness reviews document)

2 Q. Have you read it?

3 A. Uh-hum.

4 Q. And is that the kind of report -- type of  
5 report that you have seen in the past with regard to  
6 rehabilitative efforts of a defendant?

7 MR. WARE: Objection.

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

10 MR. WARE: Again, relevance. The witness  
11 is just being used here to ratify this report.

12 HEARING OFFICER DAHER: Overruled.

13 A. Yes, it is.

14 HEARING OFFICER DAHER: Let me ask you one  
15 question, Judge. Would it make any difference, if  
16 you were sitting on a plea, as to who supplied you  
17 with this document? If the defendant's counsel  
18 provided you with a document from a social worker  
19 from their office, would you put the -- is it the  
20 same weight that you would had you had a  
21 court-appointed psychiatrist or a clinical  
22 psychologist conduct an examination? Would you put  
23 the same weight on it?

24 THE WITNESS: Probably not.

1 Q. What weight would you put on it?

2 A. I would give it weight, especially if it  
3 hasn't been -- if there's nothing from the other  
4 side. But if a court-appointed person had done it,  
5 we might suggest that that person is a little less  
6 biased. But if there had been nothing to contradict  
7 it from the prosecutor, that would be a factor for  
8 me to consider.

9 Q. So that -- and what if, when you were  
10 presented with this report, the prosecutor didn't  
11 even object to it?

12 A. Well, then I would assume that the  
13 prosecution was in agreement with it.

14 Q. And what if the prosecutor presented no  
15 evidence to refute it or sought time to refute it or  
16 sought any kind of independent examination?

17 A. It would be a factor.

18 Q. A factor towards the reliability of the  
19 report?

20 A. Yes.

21 Q. I take it you're familiar with the Horton  
22 case as it played out in both the media and the  
23 Superior Court?

24 A. Yes.

1 Q. And you're familiar with it as Chief  
2 Justice, I take it?  
3 A. Yes.  
4 Q. Early on, after the sentencing in the  
5 Horton case, is it fair to say that there was a high  
6 degree of media attention?  
7 A. Yes.  
8 Q. And did you have conversations with Judge  
9 Lopez shortly after the sentencing?  
10 A. Yes.  
11 Q. And do you recall when the first of those  
12 conversations took place?  
13 A. No. It was pretty much immediately  
14 afterwards, though.  
15 Q. And did you have conversations with Judge  
16 Lopez concerning a remark that she had made in court  
17 concerning "low level" or "low scale"?  
18 A. I don't recall exactly that conversation.  
19 Q. Well, you talked with Judge Lopez at some  
20 point concerning a press statement issued by the  
21 Court on Judge Lopez's behalf?  
22 A. Apparently I did. I didn't recall, and I  
23 don't recall specifically that conversation, but  
24 apparently I did have that conversation.

1 MR. EGBERT: May I have a moment? (Pause)  
2 Q. I don't know if this has been put in your  
3 book. It was a late entry. Could you check and see  
4 if Exhibit 50 is in your book?  
5 A. Yes.  
6 Q. Now, have you seen Exhibit 50 before?  
7 A. I probably have, since it's addressed to  
8 me.  
9 Q. And do you recall receiving that fax?  
10 A. Do I recall specifically that I did? No.  
11 Q. Do you recall having some discussion with  
12 Joan Kenney concerning a press statement by Judge  
13 Lopez?  
14 A. Yes, I do.  
15 Q. Then would you take a look at Exhibit 51.  
16 A. There is no -- here it is. Yes.  
17 Q. And does that contain your writing?  
18 A. Yes, it does.  
19 Q. And your signature?  
20 A. Yes, it does.  
21 Q. And it says, "Joan, I revised your original  
22 draft after a telephone consultation with Justice  
23 Lopez. Thank you for all of your help in this."  
24 A. Yes.

1 Q. "S. DelVecchio," correct?

2 A. Yes.

3 Q. Does that now refresh your memory that you  
4 spoke with Judge Lopez concerning this matter?

5 A. No.

6 Q. You did, however -- strike that. You were  
7 involved in looking at the press release, making  
8 some revisions to it, and discussing it with Judge  
9 Lopez; is that right?

10 A. Yes.

11 Q. And would you take a look at Exhibit 24.

12 A. Yes.

13 Q. Go to the one that says "Final Version," if  
14 you would.

15 A. All right.

16 Q. And take a look at it, please.

17 A. (Witness reviews document) Yes.

18 Q. Is that, in fact, the document that  
19 ultimately was sent back to Joan Kenney by you and  
20 your office?

21 A. I don't think so. I think that what was  
22 sent back was the first one, which is a little  
23 different from this one.

24 Q. So the sequence of events was that there

1 was a first draft sent to you and you made some  
2 changes; isn't that correct?

3 A. Right.

4 Q. And then you sent those changes back --

5 A. Right.

6 Q. -- to Ms. Kenney. And go to the first  
7 page. Now, so you know, that's a compilation made  
8 by counsel in this case, which is a comparison  
9 basically, from first draft to second draft, with  
10 redlining. Do you see that?

11 A. Okay.

12 Q. And is that redlining consistent with the  
13 changes you made, your memory of the changes you  
14 made?

15 A. I think those are the changes I made.

16 Q. Now, with regard to -- there's a section in  
17 that statement which says, "My statement in open  
18 court that it was low-scale matter pertains solely  
19 to the appropriate level of the sentencing  
20 guidelines used by judges in sentencing convicted  
21 defendants." Do you see that?

22 A. Yes.

23 Q. Now, what do you understand that to mean?

24 A. Well, that the probation office had worked



1 the guidelines with regard to this case, and it came  
2 out to be -- the numbers -- I hate to use the words  
3 "low level," but that's what happens. As I say, our  
4 court is a case where we'll see major felonies. And  
5 a low-scale matter I assumed meant something to do  
6 with the sentencing guidelines.

7 Q. And when you say in your court, the Court  
8 involves itself in major felonies and the like, take  
9 my example -- did I leave Exhibit E up in front of  
10 you?

11 A. It's probably caught in the middle of these  
12 pages. Yes.

13 Q. Take a look, if you would -- those are the  
14 so-called Ronan guidelines, correct?

15 A. Yes.

16 Q. And --

17 MR. WARE: I object, Your Honor. There's  
18 no evidence that the so-called Ronan guidelines were  
19 used by anyone at any time in this case.

20 HEARING OFFICER DAHER: Mr. Egbert?

21 MR. EGBERT: Judge Lopez testified that she  
22 relied on all the factors that she described in  
23 determining appropriate sentencing in this case,  
24 factors which are considered in the Ronan guidelines

1 and factors which are considered in the sentencing  
2 guidelines.  
3 MR. WARE: Judge Lopez testified that she  
4 didn't use any guidelines, that no guidelines were  
5 in existence, and that she was talking about general  
6 factors.  
7 HEARING OFFICER DAHER: Could you point me  
8 to that part of the transcript? My memory is  
9 somewhat consistent with that of Mr. Ware.  
10 MR. EGBERT: I can hardly point you to that  
11 section of the transcript as I stand here now.  
12 HEARING OFFICER DAHER: Again, I don't have  
13 any recollection that she said she relied on the  
14 Ronan guidelines.  
15 MR. EGBERT: She didn't say she relied on  
16 the Ronan guidelines. She said she relied on the  
17 same factors relied upon by the guidelines -- in all  
18 of the guidelines that are used in sentencing  
19 defendants in criminal cases.  
20 MR. WARE: Again, Your Honor, Justice  
21 DelVecchio is being asked to do something with the  
22 Ronan guidelines. There's no evidence in this case  
23 that anybody looked at the Ronan guidelines.  
24 HEARING OFFICER DAHER: Sustained.

1 BY MR. EGBERT:

2 Q. Judge, when you involved yourself in the  
3 sense of correcting or changing this press  
4 statement, you were a judge at the Superior Court at  
5 the time and Chief at the time, correct?

6 A. Yes.

7 Q. Was the Horton case a pending case at that  
8 moment?

9 A. Sentence had already been passed, and it  
10 was a plea -- there are cases that hold that the  
11 case is over when sentence has been passed, et  
12 cetera, so technically was it a pending case?  
13 Probably not.

14 Q. And in fact, was there any appeal  
15 available, to your knowledge, in a case such as  
16 this?

17 A. No, not that I know of. Because the  
18 prosecutor cannot appeal the sentence.

19 Q. You are familiar with the canons that --

20 A. I am.

21 Q. -- that relate to a judge commenting on a  
22 pending case?

23 A. Yes, I am.

24 Q. And had you, as Chief Justice, believed

1 this to be a pending case at the time, would you  
2 have involved yourself in this press statement?

3 MR. WARE: Objection.

4 HEARING OFFICER DAHER: What is the  
5 objection?

6 MR. WARE: Speculative, Your Honor.

7 HEARING OFFICER DAHER: Sustained.

8 Q. As Chief Justice of the Court, do you often  
9 give directives with -- strike that.

10 As Chief Justice of the Court, do you  
11 attempt to discuss with your other judges matters,  
12 if they become known to you, which may be  
13 inappropriate?

14 A. What do you mean?

15 Q. In other words, if matters come to your  
16 attention where a judge may be embarking on conduct  
17 which could be inappropriate, do you seek them out  
18 to discuss that matter?

19 A. I'm trying to think if I have within the  
20 past three years. I have.

21 Q. And did you in this case, as Chief Justice  
22 of the Court, tell Judge Lopez not to issue a press  
23 release or press statement?

24 A. I told her she shouldn't say anything.

1 Q. Was that as a directive of the Court? In  
2 other words --

3 A. I can't direct a judge not to do something.  
4 I can advise. I can't forbid a judge from talking  
5 to the press. I can't do any of those things. But  
6 I advised her not to say anything.

7 Q. And was that from a public relations  
8 standpoint?

9 A. Yes.

10 Q. It was not from the matter of whether or  
11 not it was appropriate under the canons.

12 A. I didn't consider the canons at the time,  
13 whether it was appropriate -- but that's up to her  
14 to consider. I don't tell a judge how to conduct  
15 themselves pursuant to the canons, but I did think  
16 that at that point in this case, the less said, the  
17 better.

18 Q. And that was from a public relations  
19 standpoint; is that correct?

20 A. Yes, it was.

21 Q. And why did you tell her that?

22 A. Because what happens from time to time in  
23 our court is judges give sentences that prosecutors  
24 don't like, et cetera, that the public doesn't like,

1 perhaps. And we do that. We do it in all good  
2 faith, and we think it's the right thing to do. And  
3 there will be sometimes a discussion about it in the  
4 press, and we have found -- judges in our court have  
5 found from past practice to simply not say anything  
6 about it. What we say we say on the record in the  
7 courtroom as we are sentencing. And we don't say  
8 anything beyond that.

9 We have had judges that have been  
10 excoriated by the press. And what we find is we  
11 explain ourselves in the courtroom, on the record,  
12 and nothing beyond that.

13 Q. And during the course of your conversations  
14 with Judge Lopez, do you recall her talking to you  
15 sometime a week or two after these events concerning  
16 the issuing of a sentencing memorandum?

17 A. I vaguely recall a discussion about that.

18 Q. And do you recall indicating to her --

19 MR. WARE: Objection. He's putting words  
20 in the witness' mouth.

21 HEARING OFFICER DAHER: Sustained.

22 Q. Did you give her any advice with regard to  
23 that?

24 A. Yes.

1 Q. And what did you tell her?

2 A. I told her at that point I felt it was too  
3 late to do that.

4 Q. Now, Judge, you've been involved in the  
5 Superior Court on a number of cases, correct?

6 A. Yes.

7 Q. And have you had an understanding of the  
8 practice of the Court with regard to making  
9 arrangements in various cases where there's media  
10 attention, to keep the parties away from the media?

11 A. Yes.

12 Q. And can you tell us in general terms what  
13 that means?

14 A. Sometimes cases ongoing get to be high-  
15 profile cases. The media is there, everyone is  
16 jostling for pictures, for comments, et cetera, and  
17 we try and conduct the Court in an orderly fashion.  
18 If we feel that something is going to be disoriented  
19 in any way about the proceedings, we will have our  
20 court officers devise some kind of a plan to bring a  
21 witness in, et cetera, so that we don't have that  
22 kind of a media circus.

23 Q. And would that plan include using different  
24 doors for parties in the case?

1 A. We could.  
2 Q. Or different rooms or the like?  
3 A. Yes, absolutely.  
4 Q. Is that unusual?  
5 A. No. If we know it's going to be an issue  
6 ahead of time, we can plan for it ahead of time.  
7 Q. And in those cases do you seek the district  
8 attorney's permission?  
9 A. No.  
10 MR. EGBERT: May I have a moment, please,  
11 Judge?  
12 HEARING OFFICER DAHER: Sure.  
13 (Pause)  
14 MR. EGBERT: I have no further questions at  
15 this time.  
16 CROSS EXAMINATION  
17 BY MR. WARE:  
18 Q. Good afternoon, Judge. You indicated a  
19 couple of moments ago that you think at some point,  
20 perhaps two weeks after September 6th, 2000, you had  
21 a conversation with Judge Lopez about the sentencing  
22 memorandum?  
23 A. Yes.  
24 Q. And your advice at that time was, it was



1 too late; is that correct?

2 A. Uh-hum.

3 Q. Now, again, it's your testimony that you  
4 don't tell judges what to do, do you?

5 A. No.

6 Q. And as you put it, you're there to advise,  
7 you're there to give whatever counsel you can as  
8 Chief Justice, but each judge of the Superior Court  
9 has the same constitutional and legal power that you  
10 do; isn't that correct?

11 A. Yes.

12 Q. And in fact, you personally take quite  
13 seriously your deference to all other Superior Court  
14 judges as colleagues, not subordinates; isn't that  
15 correct?

16 A. Absolutely.

17 Q. And you depend on those colleagues to be  
18 truthful with you and to provide you with  
19 information you need to give good advice and make  
20 reasoned decisions; isn't that so?

21 A. Yes.

22 Q. Now, nothing in this case, as you  
23 understand it, would have prevented Judge Lopez from  
24 issuing a sentencing memorandum on September 6th or

1 for that matter after September 6th; isn't that so?  
2 A. You're right.  
3 Q. She could have done that?  
4 A. Yes, she could have.  
5 Q. And at no time until this roughly two weeks  
6 later did Judge Lopez come to you and say, should I  
7 issue a sentencing memorandum? That was all in her  
8 hands.  
9 A. Not that I can recall.  
10 Q. You indicated that -- in fact, many judges  
11 do issue sentencing memoranda, do they not?  
12 A. Yes, they do.  
13 Q. And one virtue of a sentencing memorandum  
14 is that it, in general, lays out the basis for the  
15 sentence that's been handed down, correct?  
16 A. Yes. It explains your reasoning and the  
17 factors you considered, what you took into account  
18 when you were giving that sentence.  
19 Q. Now, there's nothing unusual about a  
20 sentencing memorandum.  
21 A. No.  
22 Q. And there's nothing unusual about a  
23 Superior Court judge in a criminal case issuing a  
24 sentencing memorandum, correct?

1 A. No.

2 Q. It's entirely within the judge's  
3 discretion?

4 A. Yes, that's right.

5 Q. You indicated that -- first of all, do you  
6 recall or are you now familiar with the fact that  
7 sentencing in the Horton case occurred on September  
8 6th, 2000?

9 A. Yes.

10 Q. And will you accept from me that the  
11 exhibit placed in front of you, the statement marked  
12 Exhibit 24, was issued on the following day,  
13 September 7th?

14 A. Yes.

15 Q. Now, you didn't know anything substantive  
16 about the Horton case other than what you might have  
17 read in the morning paper; isn't that so?

18 A. That's right.

19 Q. You were not doing some independent  
20 investigation of the facts, correct?

21 A. Not at all.

22 Q. And you certainly did not interrogate Judge  
23 Lopez with respect to the basis for the pleas of  
24 guilty in that case; isn't that so?

1 A. That's right.

2 Q. Were you aware of the charges to which the  
3 defendant had pled guilty?

4 A. I don't even recall what they were,  
5 frankly, and I don't know at the time if I was aware  
6 of what specific charges the defendant pled guilty  
7 to.

8 Q. Let me ask you to look briefly at Exhibit 2  
9 in the very front of the book, which is a docket  
10 sheet.

11 A. Okay.

12 Q. Exhibit 2 lists five felony charges as to  
13 which there were pleas of guilty, does it not?

14 A. Yes, it does.

15 Q. Whether or not you understood those  
16 particular charges after September 6th or not, you  
17 understood that this was a serious felony case,  
18 correct?

19 A. I think the fact that it's a felony to us  
20 means it's not a District Court case. It's a  
21 Superior Court case. So that in itself gives rise  
22 perhaps to the word "serious."

23 Q. But in this case, charges of kidnapping or  
24 assault with intent to rape a child under 16 are

1 among the more serious felony charges that we have;  
2 isn't that so?

3 A. Yes.

4 MR. WARE: I apologize for the runny nose,  
5 Your Honor.

6 HEARING OFFICER DAHER: That's perfectly  
7 all right.

8 Q. When you received the draft statement,  
9 Exhibit 24, just to be clear here, Exhibit 24, the  
10 face page is a document which I prepared, showing  
11 the changes between the first draft, which you got,  
12 and the final draft that went out?

13 A. Uh-hum.

14 Q. The second page is the initial draft which  
15 came to you.

16 A. Okay.

17 Q. Does that square with your recollection?

18 A. That's probably accurate.

19 Q. And then moving back to the first page,  
20 just because it's easier to see, you made three  
21 relatively minor changes in that statement and then  
22 sent it back to Joan Kenney; is that correct?

23 A. Yes.

24 Q. For purposes of any substantive

1 information, you were dependent, were you not, on  
2 Judge Lopez to fill you in on anything that was  
3 inaccurate in this statement; isn't that correct?

4 A. Yes. I didn't do any independent research  
5 on this.

6 Q. Nor would you expect that you would have  
7 to; is that right?

8 A. That's right.

9 Q. You received this as a proposed statement  
10 from Judge Lopez. You knew it had been drafted by  
11 Joan Kenney --

12 A. I received it from Joan Kenney.

13 Q. Yes. But you knew it was to be a statement  
14 of Judge Lopez; isn't that correct?

15 A. Yes.

16 Q. And inherent in that, would you agree that  
17 you expected that Judge Lopez would look carefully  
18 at the statement, since it was attributed to her,  
19 and make any corrections that were appropriate?

20 A. I would assume.

21 Q. That would certainly be consistent with  
22 both good practice and with candor with your Chief  
23 Justice, would it not?

24 A. Yes.

1 Q. So that if there were any errors in this  
2 when Judge Lopez saw the document in draft form, you  
3 would have expected her to bring those errors to  
4 your attention before you saw the document, correct?

5 A. Yes, or even have corrected it with Joan  
6 Kenney ahead of time. I don't know what went on  
7 before I received a fax of the document.

8 Q. Now, the first sentence of the release  
9 says, "The judicial canons prohibit judges from  
10 commenting on pending and impending cases," correct?

11 A. Uh-hum.

12 Q. Is it fair to say that you left the  
13 question whether this was or wasn't a pending case  
14 to Judge Lopez?

15 A. Yes.

16 Q. You weren't trying to pass judgment on  
17 that, correct?

18 A. No.

19 Q. And in fact, you had no basis to know one  
20 way or the other; isn't that so?

21 A. No.

22 Q. Now, you mentioned in your direct testimony  
23 that the Commonwealth has no right to appeal. Am I  
24 not correct that in circumstances in which a new

1 condition of probation is imposed at the time of  
2 sentencing --

3 MR. EGBERT: Just so it's clear, we're now  
4 asking her her expert opinion?

5 MR. WARE: Well, I don't have much choice,  
6 considering the direct testimony.

7 HEARING OFFICER DAHER: Are you objecting?

8 MR. EGBERT: No. But if she's being asked  
9 questions on her expert opinion, I intend to  
10 redirect on those areas.

11 MR. WARE: I'm cross-examining with respect  
12 to areas counsel covered. I don't have much choice.  
13 The rulings have been made.

14 HEARING OFFICER DAHER: Fine. Evidently  
15 she is going to be testifying in an expert capacity.

16 MR. WARE: I do not agree with that. And I  
17 am not going to agree that Mr. Egbert can stand up  
18 and have a free-for-all with this witness. I am  
19 cross-examining, as is the Commonwealth's right  
20 here.

21 HEARING OFFICER DAHER: But again, you  
22 objected to it and I overruled many of your  
23 objections, but I did sustain several of them. But  
24 in this particular regards, you're asking her for



1 her expert opinion, I take it. And I made my  
2 ruling. Go ahead. You may examine.

3 BY MR. WARE:

4 Q. In any event, with respect to this  
5 particular case, the Horton case, you didn't know  
6 the particulars of the sentence that was imposed,  
7 correct?

8 A. That's right.

9 Q. And you didn't know whether or not a  
10 condition of probation was a new condition imposed  
11 only at sentence, as opposed to discussed on August  
12 1st, correct?

13 A. That's right.

14 Q. Am I correct that in circumstances in which  
15 a new condition of probation is imposed, the  
16 defendant himself may have a right to appeal, even  
17 though it's a plea?

18 A. I've never seen that done, frankly. No.  
19 I've just never seen it done.

20 Q. You're not saying it can't be done. You're  
21 not familiar with it?

22 A. I have no idea. The problem has never  
23 arisen.

24 Q. You were asked with respect to other

1 language in this statement -- and let me direct you  
2 in that regard to the middle of the document. I'm  
3 going to work from the third page, which is less  
4 cluttered.

5 A. Okay.

6 Q. Actually, I guess it's the third sentence.  
7 "My statement in open court that it was a low-scale  
8 matter pertains solely to the appropriate level of  
9 the sentencing guidelines." Do you see that  
10 language?

11 A. I do.

12 Q. And when you saw that in draft form, you  
13 understood that Judge Lopez was referring to -- was  
14 saying that her use of the term "low scale" in the  
15 sentencing proceedings applied to or was referencing  
16 the sentencing guidelines, correct?

17 A. Yes.

18 Q. Earlier you were asked a number of  
19 questions with respect to what have variously been  
20 called plea conferences or lobby conferences, even  
21 though they may not be in the lobby. Do you recall  
22 some of that questioning?

23 A. Yes.

24 Q. Now, when lawyers engage in a lobby

1 conference before you or any other judge, you expect  
2 those lawyers to present information. And your job,  
3 as a judge, is to sift through that information and  
4 make some judgments about what's either true or not  
5 true or deserves weight or does not deserve weight;  
6 isn't that correct?

7 A. Yes.

8 Q. So you were not there to simply accept at  
9 face value anything that's stuck in front of you.  
10 You're in the business of making judgments from  
11 advocates, correct?

12 A. That's right.

13 Q. And each advocate may present you with  
14 information, you look at it, and based on your  
15 experience and your know-how you may say, well, I  
16 think that's a little out there?

17 A. That's right.

18 Q. You might give deference to a different  
19 fact, correct?

20 A. That's right.

21 Q. And this case, in which Exhibit 3 was  
22 presented to a judge, you would expect would be no  
23 different than that; isn't that so?

24 A. Exhibit 3?

1 Q. Yes.

2 A. That's right.

3 Q. And so the fact that a judge is given a  
4 report like Exhibit 3, as counsel referred to it,  
5 doesn't mean that report should be taken at face  
6 value, does it?

7 A. No.

8 Q. In fact, you are familiar, are you not, as  
9 an experienced judge, with the obligations you have  
10 to sift through the credibility of so-called expert  
11 reports; isn't that right?

12 A. Yes.

13 Q. And so there's a whole body of law and set  
14 of rules that attend that. There are references to  
15 a case called Daubert or Daubert from the U.S.  
16 Supreme Court. There's a so-called gatekeeper  
17 function; isn't that correct?

18 A. That's right. But this isn't a trial.  
19 When we're talking about this case, we wouldn't  
20 apply Daubert, because Daubert talks about evidence  
21 that's going to be presented to a jury during a  
22 trial. And if that case deals with the fact that we  
23 have to determine that the evidence is  
24 scientifically reliable.

1           This is a different situation. This is  
2 where somebody is pleading guilty or has already  
3 pled guilty. And what we are doing at that point is  
4 something that is not going to involve the jury.  
5 It's going to involve us. And we get information  
6 from various reports that are presented to us to aid  
7 us in putting a sentence together.

8           Q. Exactly. But that doesn't mean you put  
9 your judgment or your wisdom aside, does it?

10          A. No.

11          Q. You still look critically at the document  
12 given to you; isn't that so?

13          A. Yes, of course we do.

14          Q. And this particular document says -- first  
15 of all, it's got a pleading heading on it; isn't  
16 that right?

17          A. Yes.

18          Q. It's got the name of the case?

19          A. Yes.

20          Q. And it's set up like a pleading, correct?

21          A. Yes.

22          Q. It doesn't look like an independent  
23 psychiatric report with attachments; isn't that so?

24          A. We get different kinds of things in our

1 court. I wouldn't tell you what the format is.  
2 Some people do it one way, some people do it  
3 another.

4 Q. Let me direct you to the last page of this  
5 report?

6 A. Yes.

7 Q. And do you see there that it's indicated  
8 that it is authored by the Director of Social  
9 Services for CPCS?

10 A. Yes.

11 Q. What inference do you draw from that?

12 A. That CPCS -- they did the report -- that  
13 they had the report done.

14 Q. All right. This is an in-house document  
15 for somebody who works for CPCS; is that correct?

16 A. Right.

17 Q. Is there anything mystical or difficult  
18 about drawing that inference based on that  
19 signature, in your opinion?

20 A. No.

21 Q. It's pretty self-evident, is it not?

22 A. It is.

23 Q. If you look at this report, it would not  
24 occur to you to think that this was a privately-

1 retained psychiatrist or psychologist, would it?  
2 A. Frankly, I don't know how CPCS does this,  
3 so I don't know. And sometimes CPCS, we give them  
4 money so that they can hire people. I have no idea  
5 what this means, frankly.  
6 Q. But this document appears to be prepared by  
7 someone working for CPCS, correct?  
8 A. Yes.  
9 Q. And that's the way you would understand it?  
10 A. Yes.  
11 Q. The document says that it's a dispositional  
12 plan, in part. It says, "Psychosocial Assessment  
13 and Dispositional Plan"; isn't that so?  
14 A. Yes.  
15 Q. And you understand that to mean it's an aid  
16 in sentencing, right?  
17 A. Yes.  
18 Q. That's what disposition is. It means  
19 sentencing.  
20 A. That part of it could be.  
21 Q. Yes. Have you had occasion to review this  
22 report prior to today?  
23 A. No.  
24 Q. You've never seen it?

1           A.    No.  
2           Q.    And so any views you formed in your direct  
3 testimony are from scanning this report --  
4           A.    Yes.  
5           Q.    -- in your direct examination?  
6           A.    That's right.  
7           Q.    Let me direct you to the next-to-the-last  
8 page. I think you were asked about this language  
9 that says, in part, "I find it highly unlikely..."  
10          A.    Uh-hum, yes.  
11          Q.    Did you note, as you scanned through this  
12 report, that there's no reference whatsoever to what  
13 the alleged crimes are or the facts surrounding  
14 these events as to which this individual is being  
15 evaluated?  
16          A.    There is nothing.  
17          Q.    There is not a word --  
18          A.    No.  
19          Q.    -- about the facts; isn't that so?  
20          A.    That's right.  
21          Q.    There is not a word about the defendant's  
22 conduct; isn't that so?  
23          A.    That's right.  
24          Q.    You certainly couldn't tell from this



1 report whether or not the social worker even knew  
2 the facts that gave rise to the indictments and the  
3 conviction; isn't that so?

4 A. Now I have to read it again to find out.  
5 Well, there's a reference in the first paragraph to  
6 "accepting responsibility for showing poor judgment  
7 being involved with a minor child." So I would  
8 assume that there must have been some kind, but I  
9 don't know what was told to the social worker, you  
10 know, but obviously from that, something was.

11 Q. The closest this report comes to describing  
12 any of the events that are relevant to this crime  
13 are the language you pointed to --

14 A. Right.

15 Q. -- "accepting responsibility for showing  
16 poor judgment being involved with a minor child" --

17 A. Right.

18 Q. That's it, right?

19 A. Right.

20 Q. Is that yes?

21 A. Yes.

22 MR. EGBERT: You were asked a question  
23 concerning the whole report. If that's the whole  
24 place. Have you had a chance to look through --

1                   THE WITNESS: Let me look through more.  
2           Q. Go ahead. And if you find any other facts  
3 specific to these indictments, let me know.  
4           A. (Witness reviews document) The other  
5 place, obviously, is the statement, "I find it  
6 highly unlikely that Ebony will repeat the behavior  
7 that brought her to court in this case." I'm going  
8 to assume from that that there must have been some  
9 kind of a discussion about the behavior that did  
10 bring her to court. And I'm going to assume that  
11 these charges must have been discussed with the  
12 social worker as a result of that.  
13          Q. But these are assumptions. There's nothing  
14 in the report with respect to the facts, correct?  
15          A. That's right.  
16          Q. Now, you would agree, would you not, that  
17 most of what this report deals with is the  
18 background of the defendant and why the defendant's  
19 life has been unfortunate?  
20          A. Yes.  
21          Q. That's primarily what the report deals  
22 with, isn't it?  
23          A. It deals with the defendant's history, what  
24 the defendant's life has been like, what the

1 defendant has done to rehabilitate herself. There  
2 appears to be a history that's been brought forth  
3 after we're told about the problems that confronted  
4 this defendant. We're also told about the  
5 defendant's attempts to deal with those problems  
6 through counseling, et cetera.

7 Q. So we have somewhat of a history of the  
8 defendant's background?

9 A. Right.

10 Q. And then some clinical impressions  
11 beginning at Page 3?

12 A. Right.

13 Q. And then a recommendation, correct?

14 A. Yes.

15 Q. You can't tell from this report how long  
16 this social worker met with the defendant; isn't  
17 that so?

18 A. No, that's right.

19 Q. Let me direct you to the paragraph just  
20 above the word "Recommendation" on the  
21 next-to-the-last page.

22 A. Okay.

23 Q. Do you see the language, "Further  
24 incarceration will be a disaster"?

1 A. Yes.

2 Q. Do you agree that that's not particularly  
3 professional language? That it's an emotional  
4 conclusion?

5 A. I've seen other reports containing such  
6 language, so I'm not going to...

7 Q. But you would agree that that's not  
8 scientifically dispassionate language. It's an  
9 opinion, based in part on emotion of a social worker  
10 who works for the defense lawyer; isn't that right?

11 A. I can't say that, Mr. Ware. I don't know  
12 how the social worker expresses herself. But I'm  
13 not going to get picky about that language, frankly.  
14 It's not the first time I've seen it in a report.

15 Q. Now, let me direct you to the top of the  
16 third page that begins, "Sometime ago..."

17 A. Okay.

18 Q. Do you see the sentence that says, "Ebony  
19 is in agreement that she needs to return for  
20 counseling"?

21 A. Yes.

22 Q. And do you draw the inference from that  
23 that Mr. Horton had not, until now, been in  
24 counseling -- had been then stopped, now needs to

1 return?

2 A. I'd have to look and see what came before  
3 that, frankly.

4 Q. Do you see in the third line where it says  
5 that Mr. Horton was frightened off medication?

6 A. Yes.

7 Q. And the language goes on to say, in the  
8 next sentence, "I have suggested that she return to  
9 the agency for both counseling and a psychiatric  
10 consult." Do you see that language?

11 A. Yes.

12 Q. And do you understand that language to mean  
13 that this social worker is recommending that Mr.  
14 Horton be seen by a psychiatrist?

15 A. Yes.

16 Q. The report also goes on on that same page,  
17 for example, the first sentence of the next  
18 paragraph, "Ebony realizes she should be spending  
19 her time with other individuals closer to her age."  
20 Do you see that?

21 A. Yes.

22 Q. And it goes on to say that the defendant's  
23 been volunteering during the week educating teens.  
24 Do you see that?

1           A.    Yes.  
2           Q.    And then the next line it references  
3           "working with young people."  
4           A.    Yes.  
5           Q.    And down at the very bottom of the page,  
6           the social worker in essence gives the opinion that  
7           it will be hard for Mr. Horton to locate mainstream  
8           employment. Do you see that?  
9           A.    Yes.  
10          Q.    Now, CPCS is a professional defense firm,  
11          if you will; isn't that correct?  
12          A.    It is the body that is publicly funded to  
13          provide lawyers for people who cannot afford them on  
14          the criminal side of the Court; defense lawyers.  
15          Q.    And these kinds of reports from CPCS, as  
16          you've said, are not unusual; isn't that correct?  
17          A.    That's right.  
18          Q.    They are fairly common in a number of CPCS  
19          cases.  
20          A.    Well, I wouldn't say that they're fairly  
21          common. I have only seen them in cases where there  
22          is a psychiatric component. You certainly don't  
23          see them in every case, and we don't see them  
24          unless there is a psychiatric component to the

1 case.

2 Q. When you say a psychiatric component, you  
3 would agree, would you not, that a social worker is  
4 not competent to make a psychiatric diagnosis,  
5 correct?

6 A. Well, there are licensed psychiatric social  
7 workers, and I'm not going to tell you that I don't  
8 think that they can't make certain judgments about  
9 things or have certain opinions that have been  
10 accepted in a court of law. And I will not say  
11 that. Because we do have licensed psychiatric  
12 social workers that perform a function.

13 Q. This was not a licensed psychiatric social  
14 worker; isn't that correct?

15 A. I don't know.

16 Q. Well, if you look at the credentials --

17 A. Yes. I don't know what "LIS" -- what a  
18 licensed social worker -- and what is a "BCD"?

19 Q. I've forgot myself. Board certified.

20 A. Board certified as a social worker.

21 Q. This is not a psychiatric specialist; isn't  
22 that correct?

23 A. I don't know if -- she may not have been  
24 board certified in that, but may not have a history

1 in it. I don't know.

2 Q. In any event, as a judge reading this, you  
3 have no information to go from in that regard; is  
4 that correct?

5 A. That's right.

6 Q. And, accordingly, you would not treat the  
7 report as a psychiatric evaluation? You would treat  
8 it as a social worker's evaluation?

9 A. You know, the boundaries --

10 Q. If you would, please, Judge.

11 MR. EGBERT: Let her finish.

12 A. The boundaries between these professions,  
13 sometimes we do get reports from social workers,  
14 from psychiatric social workers, et cetera, instead  
15 of a full-blown psychiatric report.

16 Q. Let's talk about this report. If this  
17 report was presented to you, you would not view it  
18 as having a psychiatric opinion; isn't that  
19 correct?

20 A. I would view it as the opinion of a social  
21 worker.

22 HEARING OFFICER DAHER: Can we recess at  
23 this time?

24 MR. WARE: Yes. That would be fine, Your



0153

1 Honor.  
2 HEARING OFFICER DAHER: See you at 2:00.  
3 (Luncheon recess taken from  
4 1:02 p.m. to 2:00 p.m. )  
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## AFTERNOON SESSION

1

2 BY MR. WARE:

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4 Q. I would ask you to take a look again at  
5 Exhibit 24, which is the series of press statements.

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A. Yes.

Q. Earlier I asked you about the first sentence, I think, the one that says, "The judicial canons prohibit judges from commenting on pending and impending cases." Do you see that?

A. Yes.

Q. Now, when you received this statement in draft form from Joan Kenney, you made no change to that particular statement; is that correct?

A. That's right.

Q. Is that because you didn't know one way or another whether the case was pending?

A. I didn't think about it. I mean, that's a true statement. The statement itself is a true statement.

Q. Let's accept that it's a true statement. You understood that contained in this release it carried with it an implication to the media or the press that because this case was pending, it would preclude certain statements from being made; isn't

1 that right?

2 A. No.

3 Q. You don't think the inclusion of that  
4 language implied to the reader, the media, that  
5 certain things could not be said because the case  
6 was pending?

7 A. I, frankly, didn't think about it. It was  
8 just a statement that prohibits judges from talking  
9 about -- commenting on pending and impending cases.  
10 I don't think it registered with me whether it was  
11 or it wasn't.

12 You have to understand something. It was  
13 up to Justice Lopez to determine herself whether she  
14 could comment about a case. It's solely up to her  
15 to do that.

16 Q. Sure. I understand that, and I think  
17 you've said that clearly. But when you received the  
18 statement in draft form and when you made changes to  
19 it, you made no change in that particular sentence,  
20 correct?

21 A. No, I didn't.

22 Q. And do you now agree that reading this  
23 statement, it carries with it an implication that  
24 one of the reasons that the Judge can't say more

1 about the case is that it's pending?

2 A. Let me read the rest of it, then.

3 Q. Sure.

4 A. (Witness reviews document) But she does go  
5 along and talk about, afterwards, factors that she  
6 considered in sentencing. So, I mean, in reading  
7 through it...

8 Q. All right. My question really is, when you  
9 got the document, you're saying you didn't really  
10 pay close attention or didn't make particular note  
11 of the first sentence; is that correct?

12 A. I didn't make the judgment as to whether  
13 the case was pending or not pending at all. I read  
14 the first sentence. That happens to be an  
15 absolutely true statement.

16 Q. And one of the reasons that you didn't fix  
17 on that statement was you understood it was the  
18 obligation of Judge Lopez to decide whether the case  
19 was pending or not pending, whether she could say  
20 something or could not say something?

21 A. That's right.

22 Q. It wasn't up to you, correct?

23 A. No, it wasn't.

24 Q. And you weren't purporting to be an

1 intermediary vetoing what she said or blessing what  
2 she said.

3 A. That's right.

4 Q. Now, let me ask you again, am I correct or  
5 would you agree with me that reading this, it  
6 carries with it, since it includes that first  
7 statement, an implication that at least one of the  
8 reasons Judge Lopez could not say more was that the  
9 case was pending?

10 A. But she goes on to talk about the case.

11 Q. Am I wrong?

12 A. You're asking me to make a judgment. I  
13 mean, I just read this on its face.

14 Q. You do not read the statement containing  
15 the first sentence as carrying with it an  
16 implication that one of the reasons Judge Lopez  
17 could not comment further was that the case was  
18 pending?

19 A. But she does comment further. That's what  
20 I'm trying to suggest to you. As I read further in  
21 the body of this statement, she does comment  
22 further.

23 Q. Okay. And do you mean by that, yes, the  
24 first statement does indicate that she can't

1 comment, but she goes on and does it anyway?

2 A. No.

3 Q. You mean the first statement does not carry  
4 with it the implication that the case is pending?

5 A. In reading this, this appears to be a  
6 statement of what the canons prohibit. Then she  
7 goes on to state that she is not going to talk about  
8 some of it, but she does then talk about some of it.  
9 So that, you know, as I say, it's up to her. That  
10 canon applies to her, and it's her case.

11 Q. You left to Judge Lopez the decision  
12 whether or not the case was pending, such that it  
13 could or could not be commented on, correct?

14 A. I left to her the decision to comment on  
15 the case.

16 Q. Were you aware of the fact that Judge Lopez  
17 had specifically retained jurisdiction in this case?

18 A. No.

19 Q. And would you agree that in circumstances  
20 in which a sentencing judge specifically on the  
21 record retains jurisdiction, that that case, in the  
22 event of a violation of probation, will go back  
23 before the sentencing judge?

24 A. That's true. And that's not unusual, by

1 the way.

2 Q. All right. But at least in a case in which  
3 the judge has unambiguously retained jurisdiction,  
4 it's assured that the case will go back to the  
5 sentencing judge who retained jurisdiction.

6 A. Yes. And that's for the probation matters.  
7 And that's to determine -- generally when that is  
8 done, it's because the judge has fashioned a  
9 probation program and the judge wants to make sure  
10 that that probation program is complied with.

11 Q. And is it also the case that in the event  
12 of a violation of probation, having retained  
13 jurisdiction, the case would come back before that  
14 sentencing judge?

15 A. Yes.

16 Q. If I understood you correctly, you became  
17 Chief Justice of the Superior Court in 1999?

18 A. Three years ago October -- I think it was  
19 October. So I think that would be it, isn't it?

20 Q. Yes. That sounds like three to me.

21 The proposed sentencing guidelines that  
22 were discussed earlier with you were promulgated in  
23 1998 by the Commission, of which Judge Mulligan was  
24 the Chair?

- 1           A.    That's right.  And at the same time Judge  
2 Mulligan was Chief Justice of our court.
- 3           Q.    Yes.  So those sentencing guidelines came  
4 out in 1998, correct?
- 5           A.    I don't really know, but if you tell me  
6 they did, I'm going to assume that they did.  I'm  
7 not questioning you on that, Mr. Ware.
- 8           Q.    I'm going to show you a copy of Exhibit 23  
9 in evidence.
- 10          A.    It says February 1998.
- 11          Q.    As far as you know, then, the sentencing  
12 guidelines were promulgated and published at least  
13 in 1998?
- 14          A.    Right.  They were never adopted.
- 15          Q.    Now, the fact that they're not adopted  
16 doesn't mean that district attorneys and judges  
17 don't consider them; is that right?
- 18          A.    That's right.
- 19          Q.    In fact, they consider them every day, as  
20 you've said, correct?
- 21          A.    Yes.
- 22          Q.    That's routinely done, is it not?
- 23          A.    Yes.
- 24          Q.    Would you agree with me that it is inherent



1 in being a trial court judge having to pass sentence  
2 on criminal defendants, that the judge would be  
3 subjected to public criticism sometimes?

4 A. Yes.

5 Q. And it's fair to say that criticism comes  
6 with the territory, whether it's fair criticism or  
7 it's unfair criticism; isn't that right?

8 A. Yes.

9 Q. And it's also fair to say that judges are  
10 not free or not as free as the rest of us to stand  
11 up and defend themselves; isn't that correct?

12 A. Yes.

13 Q. They have limited options when they're  
14 criticized, do they not?

15 A. That's right.

16 Q. And those options are governed, among other  
17 things, by the canons of judicial conduct, good  
18 sense and fairness; isn't that right?

19 A. Yes.

20 MR. WARE: I have nothing further. Thank  
21 you, Judge.

22 REDIRECT EXAMINATION

23 BY MR. EGBERT:

24 Q. Would you turn to Exhibit 22 in the book.

1           A.    Yes.  
2           Q.    Do you have it in front of you?  
3           A.    I do.  
4           Q.    Just so that you know, that's a transcript  
5 of the change of plea in Commonwealth versus Horton.  
6 I want you to turn -- first acclimate yourself.  
7 You'll see that on Page 5 the Court begins to  
8 address the defendant at the plea colloquy?  
9           A.    Yes.  
10          Q.    You're familiar with that process?  
11          A.    Yes.  
12          MR. WARE:  You're Honork, I'm going to  
13 object to this.  This was not the subject of cross  
14 examination.  This is supposed to be redirect.  
15          MR. EGBERT:  We were talking about change  
16 conditions in probation, we were talking about the  
17 sentencing that was imposed on cross, we were  
18 talking about serious felony cases and the like.  
19          HEARING OFFICER DAHER:  But again, that  
20 wasn't what came up on cross.  
21          MR. EGBERT:  I just quoted from his cross.  
22 He asked Judge DelVecchio whether or not this was a  
23 serious felony case, he asked Justice DelVecchio  
24 whether or not a change in conditions of probation

1 affected people's right of appeal, all of which is  
2 taken care of right in this particular document.

3 HEARING OFFICER DAHER: Mr. Ware?

4 MR. WARE: Your Honor, I did not examine  
5 with respect to any of the proceedings, which is  
6 what Exhibit 22 is, at the sentencing on September  
7 6th. It simply wasn't the subject of the cross  
8 examination because it wasn't the subject of the  
9 direct.

10 MR. EGBERT: He asked the Judge  
11 specifically whether or not a change in conditions  
12 of probation -- I take it he had to have some  
13 meaning in this case -- a change in conditions of  
14 probation affected the appealability or likelihood  
15 of appeal or right to appeal of the defendant in  
16 this case. And I want to put before this Judge the  
17 plea colloquy in this case, which makes certain  
18 matters clear concerning that issue.

19 HEARING OFFICER DAHER: Sustained. Mr.  
20 Ware's objection is sustained.

21 BY MR. EGBERT:

22 Q. You were asked whether or not the defendant  
23 has a right of appeal if conditions of probation are  
24 changed. Do you recall that question?

1           A.    Yes.  
2           Q.    Do you have any reason to believe that the  
3 conditions of probation in this case were changed --  
4           MR. WARE:  Objection -- excuse me.  
5           HEARING OFFICER DAHER:  Finish the  
6 question.  
7           Q.    Do you have any reason to believe that the  
8 conditions of probation were changed in this case  
9 after the defendant's plea was taken?  
10          MR. WARE:  Objection.  
11          HEARING OFFICER DAHER:  What's the  
12 objection?  
13          MR. WARE:  The Judge is not competent --  
14 and I use that in a legal sense -- to opine on  
15 anything in this case.  
16          HEARING OFFICER DAHER:  Sustained.  
17          Q.    You were asked by Mr. Ware whether or not  
18 this was a serious felony case.  Do you recall that?  
19          A.    I think so, yes.  
20          Q.    And I think your response was, "All  
21 felonies are serious," correct?  
22          A.    Uh-hum.  
23          Q.    But there are matters of degree, are there  
24 not?

1           A.    Yes.  
2           Q.    And each case has within it a matter of  
3 degree not subject to the title of the case, but the  
4 facts of the case?  
5           A.    That's right.  
6           Q.    And is it true that the factors that you  
7 consider in gauging the seriousness of the case  
8 include the injury to the victim?  
9           A.    Yes.  
10          Q.    Whether it be physical or psychological or  
11 otherwise, correct?  
12          A.    That's right.  
13          Q.    Whether or not -- in a sexual assault case,  
14 whether or not there had been penetration?  
15          A.    Yes.  
16          Q.    In a sexual assault case, whether or not  
17 there had been repeated assaults or repeated  
18 penetrations?  
19          A.    Yes.  
20          Q.    In a sexual assault case, whether or not  
21 the offender was a pedophile, for example?  
22          A.    When you say "pedophile," do you mean a  
23 repeat offender?  
24          Q.    Someone likely to repeat the conduct or

1 unable to control their impulses.  
2 A. Uh-hum, yes.  
3 Q. And in dealing with the seriousness of an  
4 offense, calling it a serious felony and the like,  
5 have you ever heard -- strike that.  
6 Judge Lopez said to Mr. Deakin in these  
7 proceedings, "Can you rate this case 1 to 10?" Is  
8 that a discussion of sentencing guidelines?  
9 MR. WARE: Objection.  
10 HEARING OFFICER DAHER: What's the  
11 objection?  
12 MR. WARE: Well, he's now asking for an  
13 opinion of the Judge on what Mr. Deakin said in a  
14 proceeding at which she was not present.  
15 MR. EGBERT: The matter is the record as  
16 to -- not what --  
17 MR. WARE: Your Honor --  
18 MR. EGBERT: Let me finish.  
19 HEARING OFFICER DAHER: Okay, guys.  
20 MR. EGBERT: Okay, guys --  
21 HEARING OFFICER DAHER: Finish. I want to  
22 hear you.  
23 MR. EGBERT: It wasn't Mr. Deakin who said  
24 1 to 10. It was Judge Lopez who indicated on a

1 scale of 1 to 10, please advise me as to where this  
2 case stands.

3 So I want to ask this Judge, because she  
4 was asked about guidelines, she was asked about what  
5 certain things meant in the guidelines, she was  
6 asked about what was meant by certain statements in  
7 the press release about guidelines, I wanted to hear  
8 the exact language that was stated by the Court at  
9 that time.

10 HEARING OFFICER DAHER: Mr. Ware?

11 MR. WARE: Two things, Your Honor. No. 1,  
12 we're back to expert testimony. He now wants to  
13 take the transcript and have Justice DelVecchio say  
14 whether or not she agrees that this was or wasn't on  
15 a scale of 1 to 10, No. 1.

16 No. 2, this is not the subject of cross  
17 examination, so it can't be a subject of redirect.

18 MR. EGBERT: Judge, may I be heard?

19 HEARING OFFICER DAHER: Please.

20 MR. EGBERT: If you haven't finished, go  
21 ahead.

22 MR. WARE: Essentially that's it, but we  
23 don't need testimony here about Judge Lopez's  
24 thinking. We have that testimony.

1 MR. EGBERT: I'm not asking --

2 HEARING OFFICER DAHER: Go ahead. What do  
3 you want to say?

4 MR. EGBERT: I'm not asking her questions  
5 about Judge Lopez's thinking. But two things come  
6 to mind. In the first instance, this Court  
7 prohibited me from asking certain expert questions  
8 of this witness on direct. Mr. Ware then went and  
9 had his cross and asked her a number of questions as  
10 an expert. I'm going back to ask a number of the  
11 questions that I was kept from asking because of  
12 your ruling on her testifying as an expert, because  
13 the Commission has obviously opened the door by  
14 asking her a number of questions on cross as an  
15 expert to give an expert opinion, which she has done  
16 continuously on cross.

17 HEARING OFFICER DAHER: I allowed you a lot  
18 of latitude, especially after you indicated that  
19 there weren't any expert testimony coming in. Bear  
20 with me for a minute. You're asking her to rate  
21 this on a scale, is that correct, based upon the  
22 guidelines?

23 MR. EGBERT: No, I'm not.

24 HEARING OFFICER DAHER: What specifically



1 is your question?

2 MR. EGBERT: I'm asking her first to  
3 understand -- since you wouldn't let me show her the  
4 transcript -- to let her understand what Judge Lopez  
5 said at the hearing, when she turned to Mr. Deakin  
6 and asked him to rate this case from 1 to 10.

7 HEARING OFFICER DAHER: Rate it 1 to 10 in  
8 re of the sentencing guidelines; is that correct?

9 MR. EGBERT: No, sir, that's not what  
10 occurred in court. Let me go to the page.

11 HEARING OFFICER DAHER: Go ahead.

12 MR. EGBERT: If the Court would turn to  
13 Page 29, Line 19.

14 HEARING OFFICER DAHER: I've got it.

15 MR. EGBERT: That is the statement of Judge  
16 Lopez, which says, "And of those hundred cases, in  
17 terms of the facts of this case, on a scale of 1 to  
18 10, where would you put this case?" That was the  
19 language used by Judge Lopez at those proceedings.  
20 There was nothing about guidelines. She didn't say  
21 anything about guidelines. There's nothing in there  
22 about guidelines.

23 I want to ask this judge, having heard  
24 those words, whether or not that could possibly

1 refer to any sentencing guidelines, per se.  
2 HEARING OFFICER DAHER: Mr. Ware?  
3 MR. WARE: Your Honor, I object, because  
4 you're now asking a witness who wasn't there to  
5 interpret the words of Judge Lopez, who's already  
6 testified in the case, there's no probative value to  
7 this. And we should not permit Justice DelVecchio,  
8 in fairness to her and to the proceeding, to be put  
9 in the position of giving an opinion whether this is  
10 or isn't a case on a scale of 1 to 10.  
11 MR. EGBERT: I haven't asked her that.  
12 MR. WARE: Judge DelVecchio is not here to  
13 interpret what Judge Lopez said.  
14 MR. EGBERT: I'm not asking her to give her  
15 statement of 1 to 10. I'm first asking her to look  
16 at those words. And my question to her is, after  
17 looking at those words of Judge Lopez, do you know  
18 of any way that could refer to any sentencing  
19 guidelines --  
20 (Mr. Ware stands)  
21 HEARING OFFICER DAHER: Objection is  
22 sustained.  
23 Q. Do you know of any sentencing guidelines  
24 that have a scale of 1 to 10?

1 MR. WARE: Objection. It's irrelevant.  
2 HEARING OFFICER DAHER: I want to hear  
3 that, go ahead. Can you answer that?  
4 A. No.  
5 Q. Now, with regard to the statement that  
6 you've been shown most recently by Mr. Ware, where  
7 he asked you concerning the pending case issued, do  
8 you recall those questions?  
9 A. Yes.  
10 Q. And I think you testified that the first  
11 line reads, "Judicial canons prohibit judges from  
12 commenting on pending and impending cases."  
13 A. Yes.  
14 Q. 24, by the way.  
15 A. Yes.  
16 Q. And then you see that the Judge went on to  
17 comment on various matters with regard to the Horton  
18 case; is that correct?  
19 A. Yes.  
20 Q. And that's what you interpret that to be?  
21 A. Yes.  
22 Q. And with regard to -- you were asked with  
23 regard to the statement on "low scale" and  
24 "sentencing guidelines." Do you recall that?

1 A. Yes.

2 Q. When you were discussing this -- strike  
3 that.

4 When you received this statement, did you  
5 understand it -- having in mind what the Judge said  
6 in open court was, "And of those hundreds of cases  
7 in terms of the facts of this case, on a scale of 1  
8 to 10, where would you put this case"; and then her  
9 saying after that, that she considered it on a low  
10 scale or very low level, what did you understand  
11 those two statements to mean in conjunction?

12 MR. WARE: Objection.

13 HEARING OFFICER DAHER: What is the  
14 objection?

15 MR. WARE: Justice DelVecchio has never  
16 given any indication -- first of all, she certainly  
17 didn't have a transcript. She has never suggested  
18 in the slightest that she knew what words Judge  
19 Lopez used in the courtroom.

20 MR. EGBERT: The Commission, by its cross,  
21 asked Judge Lopez to interpret this statement on a  
22 number of events and a number of occasions, and I'm  
23 asking her to do the same and to fully explain it,  
24 as opposed to single-word answers.

1 HEARING OFFICER DAHER: Anything else, Mr.  
2 Ware?

3 MR. WARE: No, Your Honor.

4 HEARING OFFICER DAHER: Overruled.

5 THE WITNESS: What was the question again,  
6 Mr. Egbert?

7 MR. EGBERT: Let me see if I can repeat it  
8 again.

9 Q. Having in mind that Judge Lopez's words in  
10 open court that "And of those hundreds of cases, in  
11 terms of the facts of this case, on a scale of 1 to  
12 10, where would you put this case?" and then her  
13 further statement that "... in the scale of cases  
14 that charge sexual assault of children, this is on a  
15 very low level" -- in conjunction with the statement  
16 and the press statement which I've read to you, "My  
17 statement in open court that it was a low-scale  
18 matter pertains solely to the appropriate level of  
19 sentencing guidelines used by judges in sentencing  
20 convicted defendants," what did that statement mean  
21 to you?

22 MR. WARE: Objection.

23 HEARING OFFICER DAHER: What is the  
24 objection?

1                   MR. EGBERT: Judge, how many times do we  
2 get to object? It's hard enough --  
3                   MR. WARE: I get to object every time you  
4 ask a question.  
5                   MR. EGBERT: I asked the same question that  
6 you already ruled on.  
7                   HEARING OFFICER DAHER: I want to hear it.  
8 Go ahead.  
9                   A. First of all, I didn't --  
10                   HEARING OFFICER DAHER: It's overruled.  
11                   A. I did not know anything about this  
12 transcript or what was said in that courtroom.  
13                   HEARING OFFICER DAHER: Did you know what  
14 the charges were?  
15                   THE WITNESS: No.  
16                   HEARING OFFICER DAHER: Did you know that  
17 the charges included kidnapping, assault with intent  
18 to rape a child under 16, indecent assault and  
19 battery on a child under 14, assault and battery,  
20 and assault and battery with a dangerous weapon?  
21 Did you know that?  
22                   THE WITNESS: No, I did not.  
23                   HEARING OFFICER DAHER: Now you can ask  
24 your question.

1 Q. Did you know in general the nature of the  
2 charges against the defendant?

3 A. No.

4 Q. You had no idea what the case was about?

5 A. Well, I did from reading in the paper know  
6 what the allegations were in the case, but I had no  
7 idea what the formal charges were and what this  
8 defendant had pled guilty to.

9 Q. And again, having in mind my question as to  
10 having all those factors in mind, what did you  
11 understand that statement to mean or what did it  
12 mean to you when you read it?

13 MR. WARE: Objection.

14 HEARING OFFICER DAHER: Overruled. I want  
15 to hear the response.

16 A. First of all, initially, I thought in  
17 reading this, before I just paid attention to the  
18 transcript of the trial or to the plea -- I thought  
19 that this was -- "low level" meant sentencing  
20 guidelines. However, based on the colloquy that  
21 I've just read with regard to Judge Lopez --

22 MR. WARE: Objection, Your Honor. "Based  
23 on the colloquy I just read." The Judge is now  
24 going to give us an interpretation of the

1 transcript.  
2 THE WITNESS: No.  
3 HEARING OFFICER DAHER: Overruled. Go  
4 ahead.  
5 A. It leads me to believe, based on that  
6 colloquy -- if that's what she meant -- and I don't  
7 know what she meant -- but it leads me to believe  
8 that what she did was consider the things that were  
9 behind our numerical guidelines, such as --  
10 MR. WARE: Your Honor, I object.  
11 HEARING OFFICER DAHER: Sustained.  
12 MR. WARE: I move that it be struck.  
13 HEARING OFFICER DAHER: Yes. Stricken.  
14 Q. Well, you understand that the matter of the  
15 Judge's statement, 1 to 10, as I've just described  
16 it to you in the transcript, and "low level" as I've  
17 just described it to you in the transcript, you  
18 understand that those segments of the Judge's  
19 comments were played on television day in and day  
20 out from the moment of sentencing for the following  
21 number of days, don't you?  
22 A. I saw it on television.  
23 Q. And this press statement you understood to  
24 be some kind of an explanation for the statements



1 the Judge made in open court? Didn't you understand  
2 that?

3 A. Yes.

4 Q. And these are the very statements in open  
5 court that these were geared to explaining to the  
6 press and to the public; is that correct?

7 A. Yes.

8 Q. And having that in mind, what did you  
9 understand from this statement?

10 MR. WARE: Objection.

11 HEARING OFFICER DAHER: Sustained.

12 MR. EGBERT: I want to make an offer of  
13 proof. First, I'd permit the Judge to answer for  
14 the offer of proof.

15 MR. WARE: No, Your Honor.

16 HEARING OFFICER DAHER: Go ahead. He wants  
17 to make an offer of proof and he wants the Judge to  
18 respond. It's his witness. So it's not a witness  
19 on cross.

20 MR. WARE: Your Honor, that is not an offer  
21 of proof.

22 MR. EGBERT: It is an offer of proof,  
23 Judge. You obviously ruled it inadmissible, but the  
24 record ought to reflect what her answer would have

1 been had it been admitted.

2 MR. WARE: I object to that. I've never  
3 seen an offer of proof with a live witness answering  
4 a question that the Court's just sustained an  
5 objection to.

6 HEARING OFFICER DAHER: Sustained.

7 MR. EGBERT: Then I'll make the offer of  
8 proof based on my good-faith belief on what her  
9 answer would be, but I won't take any responsibility  
10 from any statement that what I'm saying isn't out of  
11 this witness' mouth or the like. I'm trying to get  
12 the most accurate offer of proof that's available  
13 under the law.

14 HEARING OFFICER DAHER: Mr. Ware?

15 MR. WARE: Your Honor, I don't mind counsel  
16 making an offer of proof in the way it is supposed  
17 to be done, which is at side bar on the record.

18 MR. EGBERT: Side bar is only when there's  
19 a jury present. There's no jury present here.

20 HEARING OFFICER DAHER: Side bar. Come on.

21 MR. EGBERT: Judge, respectfully, I object  
22 to side bar. This is a public proceeding. This is  
23 a public proceeding, and for those purposes I think  
24 all of these matters ought to be in the public

1 record and in the public domain.  
2 HEARING OFFICER DAHER: Objection noted.  
3 Side bar.  
4 (At side bar)  
5 MR. EGBERT: I believe the Judge's response  
6 would be that reading this segment of the press  
7 release, that it was her understanding that what the  
8 Judge was talking about in juxtaposition to the  
9 position of low level was the factors that went to  
10 the sentencing of the criminal defendants in most  
11 criminal cases, including the seriousness of the  
12 offense, the rehabilitation, likelihood of  
13 recidivism, and the various deterrent factors and  
14 the like that she has described in other events in a  
15 more forward fashion.  
16 HEARING OFFICER DAHER: Comment?  
17 MR. WARE: No, Your Honor.  
18 (End of side bar)  
19 BY MR. EGBERT:  
20 Q. And you were asked whether or not you  
21 relied on Judge Lopez being candid with you in the  
22 preparation of this statement and the like; is that  
23 correct?  
24 A. Yes.

1 Q. Do you have any reason to believe she  
2 wasn't being candid with you?

3 A. No.

4 Q. Turn to Exhibit 3, if you would, please,  
5 Judge. You were asked a number of questions by Mr.  
6 Ware about whether or not this document, first of  
7 all, indicated whether or not there was a  
8 description of facts either provided to the social  
9 worker or discussed with the social worker with  
10 regard to this case, correct?

11 A. Yes.

12 Q. Now, first of all, when you receive a  
13 document such as this, Exhibit 3, executed by a  
14 licensed social worker or a professional of any  
15 kind, and submitted by an officer of the court, do  
16 you have any reason to doubt its accuracy?

17 A. No.

18 Q. And do you draw fair inferences from what's  
19 stated in the document?

20 A. What do you mean by that?

21 Q. Do you regularly draw fair inferences from  
22 facts which are stated in the document?

23 A. I don't know what you mean by that.

24 Q. Well, let me ask you specifically. For

1 example, on Page 1 of the first paragraph the  
2 statement is made, "This is behavior that will not  
3 occur again."

4 A. Uh-hum.

5 Q. Do you agree that it's a fair inference  
6 from that statement that the behavior that was  
7 charged in the offense had been described to the  
8 social worker?

9 A. Yes.

10 Q. And when, on the last page the social  
11 worker, if that's what she is, indicates, "I find it  
12 highly unlikely that Ebony Horton will repeat the  
13 behavior that brought her to court in this case," do  
14 you believe it to be a fair inference from that  
15 document?

16 MR. WARE: Objection. These questions are  
17 all leading. The witness should be asked how she  
18 reads the statement.

19 HEARING OFFICER DAHER: Sustained.

20 Q. Do you draw any inference from that  
21 statement?

22 A. I draw the inference that it is that social  
23 worker's opinion that this defendant will not offend  
24 again.

1 Q. Do you draw any inference from the  
2 statement "will not repeat the behavior that brought  
3 her to court in this case"?  
4 A. Just what it says; that that is the social  
5 worker's opinion.  
6 Q. Would it be fair to infer from that that  
7 the social worker knew of the behavior that brought  
8 her to court?  
9 MR. WARE: Objection. Again --  
10 HEARING OFFICER DAHER: Sustained.  
11 Q. You were asked also whether or not an  
12 independent examination would have been stronger, I  
13 guess was the word, than this particular document.  
14 Do you recall those questions?  
15 A. Yes.  
16 Q. How often in criminal cases at a plea is  
17 there some independent psychological or sociological  
18 report?  
19 A. I would say it's rare.  
20 Q. In most instances are reports of this  
21 nature given to you by one party or the other?  
22 A. Yes.  
23 Q. Whether it be the prosecution or the  
24 defense?

1           A.    Yes.  
2           Q.    And are those documents -- strike that.  
3                   Who generally hires the people that provide  
4 those reports?  
5           A.    Either the prosecutor or defendant's  
6 counsel.  
7           Q.    Is that unusual?  
8           A.    No.  
9           Q.    And is that, in your opinion, any reason to  
10 disregard the report?  
11          A.    No.  
12          Q.    Or to lessen its impact?  
13          A.    No.  
14          Q.    You've now had a chance to look at this  
15 report in some depth?  
16          A.    Yes.  
17          Q.    Would you describe -- how would you  
18 describe this report in terms of its depth,  
19 discussion of facts and discussion of history and  
20 the like?  
21                   MR. WARE:  Objection.  
22                   HEARING OFFICER DAHER:  What's the  
23 objection?  
24                   MR. WARE:  Again, this is just expert

1 testimony --

2 HEARING OFFICER DAHER: You went over it  
3 considerably, Mr. Ware. Overruled.

4 MR. WARE: Your Honor, I asked because you  
5 let this in on direct testimony. We're now going to  
6 have an opinion about the opinion.

7 HEARING OFFICER DAHER: Overruled. I'll  
8 give it the weight that it deserves.

9 A. This report does not state what the  
10 defendant told the social worker, for instance,  
11 although the report indicates that the defendant did  
12 talk to the social worker and recount some  
13 information to the social worker. And it says that  
14 in a couple of places. It does not say what that  
15 was. It does not go through the history. It  
16 doesn't list the crimes charged, for instance.

17 Q. How about with regard to the defendant's  
18 prior dealings with the mental health system and the  
19 like?

20 A. There's an extensive discussion here of the  
21 defendant's prior -- well, really from the  
22 defendant's childhood on into what the defendant's  
23 mental health issues were and what the defendant did  
24 to deal with those issues.



1 Q. And does it also discuss in some depth the  
2 steps taken to rehabilitate -- to get  
3 rehabilitation?  
4 A. Yes.  
5 Q. Does it discuss -- strike that.  
6 In the scheme of things, would you call  
7 this report an in-depth report?  
8 MR. WARE: Objection.  
9 HEARING OFFICER DAHER: Sustained.  
10 Q. How would you describe it?  
11 MR. WARE: Objection.  
12 HEARING OFFICER DAHER: Too vague.  
13 MR. EGBERT: I can't lead her and I can't  
14 ask her how she would describe it, Judge. I'm not  
15 sure what other questions can be asked.  
16 HEARING OFFICER DAHER: I sustain it.  
17 Rephrase it.  
18 Q. Would you describe this report as  
19 comprehensive?  
20 MR. WARE: Objection. The  
21 characterizations of the report --  
22 HEARING OFFICER DAHER: Sustained.  
23 Q. In the scheme of cases that you've had in  
24 reports of this nature that have been before you,

1 how would you characterize this one?

2 MR. WARE: Objection.

3 HEARING OFFICER DAHER: He's asking on a  
4 comparative basis as to what her experience is. I'm  
5 going to overrule it.

6 A. I've seen other reports like this. We get  
7 some that have more detail with regards to pressing  
8 a crime charge. In these reports it doesn't list  
9 that; but a type of report that would list the  
10 history of the defendant and what history the  
11 defendant has had, for instance, with the mental  
12 health system, et cetera, I've seen these before.

13 Q. Would you rely on such a report?

14 MR. WARE: Objection.

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

17 MR. WARE: Well, Your Honor, the relevance  
18 of whether this Judge would rely upon this report  
19 now, having seen it only today, is not probative.  
20 Judge Lopez has testified she did rely on it.

21 HEARING OFFICER DAHER: Go ahead.

22 MR. EGBERT: He has asked her a number of  
23 questions which go to the insinuation that this  
24 report should not be relied on and snippets of

1 pieces of information as to whether or not it is a  
2 good report or a bad report. I think it's important  
3 to find out whether a Superior Court judge --  
4 HEARING OFFICER DAHER: I think there's a  
5 vast difference of being on the witness stand seeing  
6 reports like this and having Judge Lopez intimately  
7 involved in the proceedings. We're cosmically  
8 apart. Sustained, Mr. Ware.  
9 BY MR. EGBERT:  
10 Q. You were asked about this gatekeeper  
11 function of the Daubert case. Do you understand  
12 that?  
13 A. Yes.  
14 Q. At a plea conference or a plea hearing,  
15 does the Court embark on Daubert hearings?  
16 A. No.  
17 Q. What do you do with reports such as this  
18 when they're provided?  
19 A. Read them.  
20 Q. And then do what?  
21 A. Consider them.  
22 Q. And then do what?  
23 A. Give them whatever weight I'm going to give  
24 it and then consider that a factor as part of my

1 sentencing.

2 Q. And, Judge, in whose sole discretion is it  
3 in the criminal justice system as to what weight to  
4 be given to such a report as to the sentence to be  
5 delivered?

6 A. The judge.

7 Q. Anybody else?

8 A. No.

9 Q. Judge, you were asked a number of questions  
10 about judges being subjected to public criticism,  
11 right?

12 A. Yes.

13 Q. And that it's inherent in being a judge?

14 A. Yes.

15 Q. And is it inherent in being a judge to have  
16 reporters in your yard and setting up radio programs  
17 in your yard and calling on people to call your home  
18 and come to your home and make threatening calls?  
19 Is that inherent in being a Superior Court judge in  
20 the Commonwealth of Massachusetts?

21 A. The First Amendment says that basically  
22 this is a country with a free press. And as long as  
23 they don't trespass on your property, they can  
24 certainly do that.

1 Q. And have you -- and it's your testimony,  
2 and you said before, that a judge is limited in  
3 their options on how they can defend against that;  
4 is that right?  
5 A. Absolutely.  
6 Q. And one of their options, as you know, and  
7 has been done, is to engage surrogates to discuss  
8 the system and discuss the procedures in any  
9 particular case, correct?  
10 A. Yes.  
11 Q. Such as bar association members or  
12 executives, correct?  
13 A. That's right.  
14 Q. Lawyers?  
15 A. Uh-hum, yes.  
16 Q. Other scholars and professors?  
17 A. This happens routinely.  
18 MR. EGBERT: May I have a moment, please.  
19 HEARING OFFICER DAHER: Sure.  
20 (Pause)  
21 MR. EGBERT: I have nothing further.  
22 HEARING OFFICER DAHER: Mr. Ware?  
23 MR. WARE: No questions. Thank you.  
24 HEARING OFFICER DAHER: Thank you very

1 much.  
2           Gentlemen? Mr. Egbert, anybody else?  
3           MR. EGBERT: Yes. Anne Goldbach.  
4           HEARING OFFICER DAHER: Mr. Egbert, I take  
5 it this witness is going to be somewhat extensive  
6 examination and cross examination?  
7           MR. EGBERT: I would think.  
8           HEARING OFFICER DAHER: I would think so,  
9 too. Is Judge Russo here?  
10          MR. EGBERT: No. I sent him home so that  
11 he wouldn't be tied up.  
12          HEARING OFFICER DAHER: I agree. Mr. Ware,  
13 it's going to be a rather extensive examination on  
14 this witness. Do you want to start it tomorrow?  
15          MR. WARE: I would rather get going with  
16 it, Your Honor.  
17          HEARING OFFICER DAHER: Let's go.  
18                    ANNE GOLDBACH, Sworn  
19                    DIRECT EXAMINATION  
20          BY MR. EGBERT:  
21          Q. Good afternoon.  
22          A. Good afternoon.  
23          Q. Would you state your name, please.  
24          A. Anne Goldbach.

1 Q. And how are you employed?

2 A. I'm employed by the Committee for Public  
3 Counsel Services.

4 Q. Let me go back. Are you an attorney?

5 A. I am an attorney.

6 Q. Licensed to practice in the Commonwealth?

7 A. Yes, I am.

8 Q. And can you give us a bit of your  
9 professional background and experience.

10 A. I've been with the Committee for Public  
11 Counsel Services or the public defender's office for  
12 almost 25 years. I've been a staff attorney in both  
13 the Boston and Roxbury offices. I was the attorney  
14 in charge of the Boston trials office, which is the  
15 largest of the many trials offices in the  
16 Commonwealth. For the past five years I've been the  
17 forensics director for the state, for the public  
18 defender's office, as well as for bar advocates.

19 Q. What is the public defender's office or the  
20 Committee for Public Counsel Services?

21 A. We provide defense for indigent clients all  
22 over the state in criminal cases.

23 Q. And who funds the Committee for Public  
24 Counsel Services?

1 A. The state does.

2 Q. Now, how much of your practice over the 25  
3 years has been devoted to the trial of criminal  
4 cases?

5 A. Most of my practice -- well, I'd say the  
6 first ten years was entirely casework. Running the  
7 trials office I maintained a case load, but I also  
8 had administrative duties, and I still have cases.

9 Q. When you say "running the trials office,"  
10 at what time did you begin running the trials  
11 office?

12 A. From November of 1987 to November of 1997.

13 Q. And what did that entail?

14 A. We had over 20 trial attorneys in our  
15 office. We had two investigators, support staff. I  
16 would oversee the assignment of attorneys to various  
17 courts. We had supervisors overseeing teams in  
18 those courts. I would meet with the supervisors, I  
19 would meet with individual attorneys. We saw to  
20 some of the training of our lawyers. We had weekly  
21 meetings for ongoing training. I would evaluate the  
22 attorneys in the office, things like that.

23 Q. And then you've indicated that for the last  
24 five years I think you said you've been head of



1 forensics for CPCS?

2 A. That's right.

3 Q. What is that?

4 A. I maintain a forensics resource list. It  
5 contains hundreds of names of experts throughout the  
6 state. I act as a resource both for bar advocates,  
7 as well as public defenders. When they have any  
8 type of forensic issue that arises in one of their  
9 cases in a criminal case, they call me. And that  
10 could be looking for an expert, that could be  
11 looking for information files. We also keep  
12 transcripts of expert testimony, and sometimes we  
13 make those transcripts available to defense counsel.

14 Q. Ms. Goldbach, at some point in time did you  
15 undertake the representation of Charles Ebony  
16 Horton?

17 A. I did.

18 Q. Approximately when was that?

19 A. Late November of '99.

20 Q. And in what court was the case pending when  
21 you first took the case over?

22 A. The Dorchester District Court.

23 Q. So you were assigned to it -- strike that.  
24 Were you assigned from the initial arraignment?

1           A.    I was not the arraignment attorney.  Eve  
2 Hanan was the arraignment attorney.

3           Q.    And when did you come into the case in  
4 terms of process rather than date?

5           A.    Maybe a couple of weeks later.

6           Q.    And while you were in the Dorchester court,  
7 did there come a time when a proceeding occurred in  
8 which you served a subpoena on any particular police  
9 officer?

10          A.    I served a subpoena on Detective Jay  
11 Greene.

12          Q.    When did that occur?

13          A.    That was prior to the first probable cause  
14 date, which would have been December 16th of 1999.

15          Q.    And was there a reason that you subpoenaed  
16 the police officer to a probable cause hearing?

17          A.    It was because of a conversation I had with  
18 him when I ran into him in the Dorchester District  
19 Court on an entirely different date, when I had  
20 other cases in that court.  And as a result of my  
21 conversation with him, I summonsed him to court.

22          Q.    And prior to you summonsing him to court,  
23 had you had any conversation with any members of the  
24 district attorney's office concerning Detective

1 Greene?

2 A. I summonsed him and then had a conversation  
3 with the district attorney's office.

4 Q. In the District Court?

5 A. Yes.

6 Q. And who would that conversation have been  
7 with?

8 A. I don't recall the name of that district  
9 attorney now.

10 Q. Was it someone who was assigned to the  
11 case?

12 A. Yes, it was.

13 Q. In the District Court?

14 A. Yes, it was.

15 Q. And can you tell me what the conversation  
16 was with that member of the district attorney's  
17 office?

18 MR. WARE: Objection.

19 HEARING OFFICER DAHER: I want to hear it.  
20 Overruled. Go ahead.

21 A. That Detective Jay Greene had what I  
22 believed to be exculpatory information concerning  
23 the allegations in this case. And I elaborated what  
24 those exculpatory bits of information were to the

1 district attorney, and I asked that the district  
2 attorney speak to Jay Greene.

3 Q. Now, was Detective Greene -- at that time  
4 did you have the police reports in hand?

5 A. I had the police reports, yes, I did.

6 Q. And do you know whether or not, from the  
7 police reports, Detective Greene was on scene at or  
8 about the time of the arrest?

9 A. At this point I don't recall whether he was  
10 listed within the police reports.

11 Q. I'm going to ask you to turn to Exhibit 27.  
12 Take a look at that for a moment.

13 A. (Witness reviews document) Yes.

14 Q. Let me first ask you, is that at least one  
15 of the police reports involved in the case of  
16 Commonwealth versus Charles Ebony Horton?

17 A. Yes, it is.

18 Q. And can you tell me from that report  
19 whether or not Detective Greene was on scene --  
20 listed as on scene at sometime during that --

21 A. He is listed as being there, as being on  
22 scene.

23 Q. And where are you looking to determine  
24 that?

1           A.    It is the last line of Page 2 of a three-  
2 page eleven-incident report dated November 20th of  
3 1999.

4           Q.    Now I want you to turn to Page 3 of that  
5 same report and take a look at that.  And does that  
6 give you any further information as to Jay Greene's  
7 presence and involvement -- Detective Jay Greene?

8           A.    Yes, that there were statements made by my  
9 client to Officer Sweeney and Detective Greene.

10          Q.    So Detective Greene was part of the team,  
11 so to speak, that interviewed your client?

12          A.    Yes.

13          Q.    Now, I recognize, Ms. Goldbach, that -- let  
14 me state it a different way.

15                Is there an attorney/client privilege that  
16 currently exists between you and Charles Ebony  
17 Horton?

18          A.    Yes.

19          Q.    And has Charles Ebony Horton waived that  
20 attorney/client privilege?

21          A.    No, she has not.

22          Q.    So is your testimony limited by Charles  
23 Ebony Horton's nonwaiver with regard to  
24 conversations between you and Charles Ebony Horton?

1 A. Yes, it is.

2 Q. I'm going to ask you some questions that  
3 may implicate those statements. And if there's any  
4 time where you can't answer because of that, would  
5 you indicate that as opposed to simply not  
6 responding?

7 A. Yes.

8 Q. When you took on the representation of  
9 Charles Ebony Horton, did Charles Ebony Horton  
10 provide you a version -- his version of the events  
11 which occurred which formed the basis of his  
12 criminal charges?

13 A. Yes.

14 Q. And are you able to discuss those with us  
15 today?

16 A. No.

17 Q. Prior to the Superior Court arraignment --  
18 let's go back to the process for a minute. You said  
19 that you were in the District Court and there was  
20 supposed to be a probable cause hearing and you  
21 subpoenaed Detective Greene?

22 A. That's right.

23 Q. Was there a probable cause hearing?

24 A. No, there was not.

1 Q. Why not?

2 A. The Commonwealth sought a continuance.  
3 They said that the case was being indicted.

4 Q. And what would normally happen at a  
5 probable cause hearing?

6 A. At a probable cause hearing, if there had  
7 been one, I would have had the opportunity to  
8 subpoena and cross-examine Commonwealth witnesses  
9 and any other witnesses I sought to have there in  
10 the court. Normally the Commonwealth has some  
11 witnesses there, and sometimes we subpoena  
12 witnesses.

13 Q. And without regard to who you could  
14 subpoena and the like, what does the Commonwealth  
15 have to do in a probable cause hearing?

16 A. They have to present enough evidence to get  
17 by the probable cause standard. That's usually by  
18 way of the testimony of an alleged victim and,  
19 additionally, sometimes police officers.

20 Q. And that did not occur in this case?

21 A. No, it did not.

22 Q. Did there come a time when there was to be  
23 an arraignment in the Superior Court?

24 A. Yes. That was January of 2000.

1 Q. And prior to the arraignment, had the  
2 defendant, Charles Ebony Horton, been released on  
3 bail?

4 A. Yes.

5 Q. And was there, at the time of the  
6 arraignment, from your mind, a consideration as to  
7 whether or not bail would become an issue?

8 A. I expected that it might become an issue.

9 Q. And in preparation for that, did you do  
10 anything?

11 A. Yes. I asked Joan Katz of our office, a  
12 licensed social worker, clinical social worker, to  
13 meet with my client and evaluate her. That wasn't  
14 the only reason I asked for her to meet with my  
15 client, but that was one of the reasons.

16 Q. And you mentioned Joan Katz.

17 A. Yes.

18 Q. How long have you known Joan Katz?

19 A. I've known her for probably 15 years, at  
20 least.

21 Q. Do you know of her background and  
22 experience?

23 A. She had worked at the Committee for Public  
24 Counsel Services as the social services director I



1 believe from 1987 until about the past year. She is  
2 a licensed clinical social worker. They used to be  
3 called "psychiatric social workers." She's also a  
4 diplomate in her field, which means that she has  
5 extra training and extra certification on a regular  
6 basis to maintain that status as a diplomate.

7           Prior to her coming to the Committee for  
8 Public Counsel Services, she worked in the Court  
9 Clinic at the Quincy District Court. She evaluated  
10 individuals for competency and responsibility. She  
11 evaluated others for other sorts of mental health  
12 issues or disorders. She even did some short-term  
13 therapy in her capacity at the clinic.

14       \*Q. Now, you say she evaluated people for  
15 competency and criminal responsibility. When did  
16 she do that, to your knowledge?

17           MR. WARE: Objection.

18           HEARING OFFICER DAHER: What's your  
19 objection?

20           MR. WARE: This witness didn't know Ms.  
21 Katz at that time.

22           MR. EGBERT: She knows her credentials.

23           MR. WARE: She's given an overview of her  
24 background. I don't object to that. As to detail,

1 Ms. Katz can testify.

2 MR. EGBERT: She's entitled, Judge, to tell  
3 you the knowledge that she has about Ms. Katz's  
4 background.

5 HEARING OFFICER DAHER: Which he had no  
6 problems with.

7 MR. EGBERT: She gave an answer and I was  
8 unclear whether or not that was done for the  
9 Committee for Public Counsel Service or for Court  
10 Clinic.

11 HEARING OFFICER DAHER: Would you read back  
12 that question, please, again.

13 \*(Question read)

14 HEARING OFFICER DAHER: Overruled. Go  
15 ahead.

16 A. When she worked for the Quincy Court  
17 Clinic.

18 Q. And you're familiar with court clinics in  
19 your practice?

20 A. Yes, I am.

21 Q. What are they?

22 A. The court clinics employ sometimes  
23 psychologists, sometimes psychiatrists, sometimes  
24 licensed clinical social workers. Quite often when

1 individuals come into the court at arraignment, a  
2 probation officer or a court officer or a lawyer  
3 will detect that there may be an issue with a  
4 person's competency or responsibility, and there may  
5 be a referral to the Court Clinic so that they can  
6 be evaluated to that end. If there's a real concern  
7 about the competence and responsibility, there may  
8 be a request for further evaluation beyond that,  
9 which can be done at the Court Clinic.

10 Q. And so as you came upon Ebony Horton's  
11 arraignment in I think you said January of '99; am I  
12 correct?

13 A. January of 2000 was the Superior Court  
14 arraignment.

15 Q. January of 2000. I apologize. As you came  
16 upon that date, did you have an understanding as to  
17 the background and experience of Joan Katz in the  
18 area of psychological disorders?

19 A. Yes, I did.

20 Q. And how would you describe that?

21 A. It was extensive. She had seen hundreds  
22 and hundreds of individuals by that point, both in  
23 her capacity as a member of the Quincy Court Clinic,  
24 as well as in her capacity as our director of social

1 services at the Committee for Public Counsel  
2 Services.

3 Q. When you say director of social services,  
4 what is that position, if you could help us out?

5 A. We have over the years employed a number of  
6 social workers in our various offices throughout the  
7 state, not in every office, and we have fewer now  
8 than we did a few years ago. So not only did she  
9 have responsibilities in terms of helping or  
10 advising or evaluating clients in our particular  
11 office, the Boston trials office, she met with the  
12 other social workers and discussed with them issues  
13 that they were dealing with throughout the state.  
14 She talked to them about ongoing training. She had  
15 certain supervisory duties as well.

16 Q. And you say that you asked Joan Katz to see  
17 Charles Ebony Horton before the Superior Court  
18 arraignment?

19 A. I did.

20 Q. And do you know whether or not Joan Katz  
21 actually did meet with Charles Ebony Horton?

22 A. I do.

23 Q. And did she?

24 A. She met with Ebony Horton at first at the

1 Nashua Street jail.

2 Q. And were you present for that interview?

3 A. No, I was not. I made a referral to her.

4 Q. And do you know whether or not there were  
5 any other meetings before the Superior Court  
6 arraignment other than the Nashua Street jail  
7 meeting?

8 A. My memory is that there was also a meeting  
9 at the office.

10 Q. And do you know -- were you present for  
11 that meeting?

12 A. No.

13 Q. And is it customary for the lawyers to be  
14 present when meeting with licensed social workers  
15 and the like?

16 A. Many of us, what we will do is make a  
17 referral to Joan Katz in written form and outlining  
18 what we are seeking, for instance, to have an  
19 evaluation done, as I did in this case, attaching  
20 police reports, grand jury minutes, things like  
21 that. And in this instance, what I did was greet my  
22 client at the office, introduce her to Joan, but I  
23 did not sit through the evaluation.

24 Q. Now, did you provide to Joan Kenney before

1 the Superior Court arraignment the police reports in  
2 this case?

3 A. Joan Katz?

4 Q. Joan Katz.

5 A. Yes, I did, and grand jury minutes --  
6 sorry. That was later. The police report, yes.

7 Q. Do you recall on this first event now  
8 whether you supplied anything beyond police reports  
9 by way of documents?

10 A. I don't believe I had other pieces of  
11 discovery at that point beyond the police reports.  
12 As I said, it was a written referral.

13 Q. Now, you say you made a written referral.  
14 For what purpose did you make this written referral?

15 A. There were multiple purposes. Based on my  
16 experience, I expected that this case would take a  
17 several-month period before it was resolved either  
18 by trial or by some sort of disposition. And I felt  
19 that it was important that Ms. Katz see my client as  
20 early as possible, and then to be able to observe my  
21 client over a long period of time, rather than just  
22 having a quick evaluation. So that was one purpose:  
23 to get her involved early in the case and keep her  
24 involved early in the case.

1           The other purpose, of course, was that I  
2 was anticipating that the district attorney's office  
3 might be seeking an increase in bail, and that if it  
4 were necessary and if Ms. Katz's evaluation were  
5 favorable, that I could bring that to court to use  
6 in terms of a bail argument.

7           Q. Did you in your referral tell Ms. Katz what  
8 to put in her report?

9           A. No, I did not.

10          Q. Did you tell her what findings to make?

11          A. I did not.

12          Q. Did you tell her anything about what  
13 conclusions she should draw?

14          A. No, I did not.

15          Q. In your experience with Ms. Katz, would she  
16 permit that?

17                 MR. WARE: Objection.

18          A. No, she would not.

19                 MR. WARE: Objection as to what Ms. Katz  
20 would do.

21                 HEARING OFFICER DAHER: Sustained.  
22 Stricken.

23          Q. Have you ever had any experience with Ms.  
24 Katz succumbing to lawyers' requests to put certain

1 results in their reports?  
2 MR. WARE: Objection, Your Honor.  
3 HEARING OFFICER DAHER: What's the  
4 objection?  
5 MR. WARE: This is back-ended character  
6 evidence. That's all it is.  
7 MR. EGBERT: This is what this lawyer  
8 presented --  
9 HEARING OFFICER DAHER: Overruled. You  
10 have it. Go ahead.  
11 A. No, I've never seen her succumb to  
12 something like that.  
13 Q. Now, I take it you went to the Superior  
14 Court arraignment?  
15 A. I did.  
16 Q. And Ebony Horton went?  
17 A. My client went, some of her family went,  
18 her minister was there, yes.  
19 Q. And she was out on bail at the time?  
20 A. She was out on bail.  
21 Q. And did you have a conversation with Leora  
22 Joseph at or about the time of the Superior Court  
23 arraignment?  
24 A. I did.



1 Q. Did you have any conversations particularly  
2 with concern to Ms. Katz's reports?  
3 A. I offered her Joan Katz's report.  
4 Q. Let me go back a step.  
5 A. Yes.  
6 Q. Was there a report prepared for  
7 arraignment?  
8 A. There was an evaluation that was prepared  
9 prior to arraignment. I brought it with me.  
10 Q. To court?  
11 A. To court.  
12 Q. On the date of arraignment?  
13 A. On the date of the arraignment.  
14 Q. Now, I want you to, in as much detail as  
15 possible, describe to us what occurred with regard  
16 to the report in your conversations with Leora  
17 Joseph.  
18 A. I offered Joan Katz's report to Leora  
19 Joseph. She basically flipped through it very  
20 quickly and handed it back to me very quickly, as  
21 though she were not interested in it.  
22 MR. WARE: Objection. I move that that  
23 conclusion be struck.  
24 HEARING OFFICER DAHER: Stricken.

1 Q. Describe her demeanor in as much detail as  
2 you can.

3 A. Her demeanor was a lack of interest in this  
4 psychosocialist's evaluation that I had brought to  
5 court.

6 Q. When you say she handed it back to you, did  
7 she just hand it back to you pleasantly?

8 A. No, she did not.

9 Q. What did she do?

10 A. Very rapidly, with a look on her face that  
11 was negative, just like it was a worthless piece of  
12 paper.

13 Q. Did she keep a copy?

14 A. No, she did not.

15 Q. Did she seek to make a copy?

16 A. I had multiple copies. That was a copy for  
17 her, but she didn't keep it.

18 Q. So you actually had a copy for her that  
19 day?

20 A. That was her copy, yes.

21 Q. And she gave it back to you?

22 A. She did give it back to me.

23 Q. Now, that was on the date of arraignment?

24 A. That was on the date of arraignment.

1 Q. Now, did that report differ -- turn to  
2 Exhibit 3 in that book in front of you, if you  
3 would.

4 A. (Witness complies) Yes.

5 Q. Do you see what that is?

6 A. Yes, I do.

7 Q. And tell us what that is.

8 A. This is the psychosocial assessment and  
9 dispositional plan for Charles Ebony Horton that was  
10 prepared in the summer of 2000, prior to a plea  
11 conference in this case.

12 Q. The report that's Exhibit 3 in this case,  
13 is that materially different than the report that  
14 was prepared some I guess it was seven months  
15 earlier or so?

16 A. No. What it is is it's an updated report.  
17 Basically the same information that was in the first  
18 report is in here, but it is updated in terms of  
19 things my client had accomplished over that  
20 seven-month period, improvements in her life in  
21 various ways, and some of her activities, the things  
22 that she had been doing for self-improvement, if you  
23 will, over that seven-month period.

24 Q. Is it the same type of report?

1 A. Absolutely, it is.

2 Q. Now, during the course of discovery in the  
3 Horton case, do you recall whether or not there came  
4 an issue -- strike that.

5 During the course of discovery in the  
6 Horton case, were you made aware -- before August  
7 1st of the Year 2000, were you made aware that there  
8 had been any tests conducted on a screwdriver that  
9 was retrieved from Ebony Horton's car?

10 A. Before August 1st?

11 Q. Before August 1st of the Year 2000.

12 A. No. I was seeking those tests, but I had  
13 yet to receive any lab reports.

14 Q. Now, had anyone told you orally that the  
15 tests were negative?

16 A. No. I knew of no forensic evidence at that  
17 point that was inculpatory, but I had not been told  
18 orally what the lab results were.

19 Q. So by August 1st -- up until August 1st of  
20 2000 -- we'll move on from there in a moment, but at  
21 least up until August 1st of 2000, you did know that  
22 there had been a screwdriver seized from Ebony  
23 Horton's car, correct?

24 A. Yes, I did.

1 Q. You believed, I take it, that there were  
2 tests that had been conducted?

3 A. Yes.

4 Q. And that those tests were for the presence  
5 of something that would indicate that the victim's  
6 saliva was on the screwdriver?

7 A. That's right. I expected it to be the  
8 Amylase test.

9 Q. And the amylase test -- why don't you tell  
10 us what that is.

11 A. An enzyme that you have in saliva. And if,  
12 in fact, saliva had been detected -- amylase had  
13 been detected, these days further tests can be  
14 conducted, such as DNA.

15 Q. And so was that an important fact for you  
16 in preparation for this case?

17 A. Yes, it was.

18 Q. And why was that? Did it relate to some  
19 particular allegation?

20 A. There were inconsistencies within the taped  
21 interview of the victim in this case. And there was  
22 other information that I had that led me to believe,  
23 from Jay Greene, as well as from my investigation,  
24 that the screwdriver had never been in the child's

1 mouth.

2 Q. And what would the amylase test do with  
3 regard to that?

4 A. The absence of amylase would be  
5 exculpatory, particularly in this case, where  
6 supposedly the police happened upon the scene -- in  
7 other words, happened in the midst of things --

8 MR. WARE: I object. This is nonresponsive  
9 at this point. She can give us her understanding of  
10 an amylase test, but no more.

11 HEARING OFFICER DAHER: I'd like to know a  
12 little more, again, about the chemical background of  
13 this amylase, as to how fast it degenerates. It's  
14 an enzyme. DNA is totally virtually indestructible.  
15 Amylase is an enzyme. It's a protein carbohydrate  
16 enzyme. It deteriorates.

17 THE WITNESS: Right.

18 HEARING OFFICER DAHER: I don't know if  
19 she's an expert to testify in regards to that. If  
20 that's what you're asking, I'd like to know. Why  
21 don't you ask her about the amylase and what she  
22 knows about it.

23 Amylase is an enzyme that breaks down  
24 carbohydrates; is that correct?

1 THE WITNESS: Yes, Your Honor.

2 HEARING OFFICER DAHER: Okay. Go ahead.

3 A. Because the police seized the screwdriver  
4 so quickly, that it was supposed to be almost  
5 minutes, if not seconds, after it was allegedly in  
6 the boy's mouth --

7 MR. WARE: I object to this, Your Honor.  
8 This is the witness' characterization. No police  
9 officer is saying this.

10 HEARING OFFICER DAHER: Go ahead. It's her  
11 belief that it was seized immediately. Go ahead.

12 MR. EGBERT: I think, Judge, not only that,  
13 we've had testimony from Leora Joseph as to the  
14 immediate nature of the police arriving on the  
15 scene. We have a colloquy at the plea where Mr.  
16 Deakin said that the police came immediately on the  
17 scene as the events were occurring and, as you  
18 recall, as the boy's head was down. And we have the  
19 boy's own statement now in evidence that the police  
20 were immediately on the scene during the course --

21 HEARING OFFICER DAHER: This is turning out  
22 to be a CSI case.

23 MR. EGBERT: We go where we must.

24 HEARING OFFICER DAHER: I'm going to give

1 some latitude in regards to the amylase. At this  
2 point -- I don't know how much she knows about it  
3 and how the amylase was tested.

4 BY MR. EGBERT:

5 Q. Have you, during the course of your  
6 professional career, had occasion to investigate the  
7 amylase tests?

8 A. I have.

9 Q. And to read and study on their use?

10 A. I have.

11 Q. And to examine and cross-examine experts in  
12 the field?

13 A. Yes.

14 Q. And when dealing with -- I think you called  
15 yourself head of forensics right now for CPCS?

16 A. Yes.

17 Q. Is amylase testing something you considered  
18 to be forensic?

19 A. Yes.

20 Q. And would you tell us, please, what you  
21 were looking for with regard to this amylase test,  
22 vis-a-vis the facts as you understood them to be  
23 alleged in the indictments and police reports?

24 A. What I was looking for was the absence of



1 amylase. I believed that the lab reports would  
2 demonstrate that the screwdriver had not been in the  
3 boy's mouth and that the absence of amylase would be  
4 exculpatory. And in fact, that is what happened  
5 eventually when I got the results.

6 And given that the screwdriver was taken  
7 into police custody so quickly, I anticipated that  
8 it was handled properly and that absence of amylase  
9 would be exculpatory, even if amylase breaks down --

10 HEARING OFFICER DAHER: I've allowed some  
11 latitude. "Handled quickly." "I assume." I'm not  
12 going to allow that in.

13 Q. Let me ask you this question, Ms. Goldbach.  
14 You've been a criminal defense lawyer for 25 years?

15 A. Yes.

16 Q. Do you know what the definition of  
17 "exculpatory evidence" is?

18 A. Yes.

19 Q. And in your formal understanding of the  
20 law, would it be exculpatory evidence in a case  
21 where a victim alleges that he was forced to put his  
22 mouth on a screwdriver and suck on it repeatedly,  
23 the police arrived within moments of that event, the  
24 screwdriver was seized, tested and found to not

1 contain amylase?

2 MR. WARE: Objection. We're not here to  
3 get a legal opinion from Ms. Goldbach.

4 HEARING OFFICER DAHER: Sustained.

5 MR. EGBERT: Judge, with all due respect,  
6 virtually everything that this lawyer has done and  
7 did with regard to this case, both in what was  
8 brought up by her to the Court or what was said to  
9 the Court, all is based upon her investigation, the  
10 proceedings which occurred in the past and her  
11 professional experience. These are all matters  
12 which were made available to Judge Lopez, which  
13 you'll see in future testimony were part and parcel  
14 of her arguments to Judge Lopez and upon which this  
15 whole event continued on.

16 HEARING OFFICER DAHER: Mr. Ware, last  
17 word?

18 MR. WARE: I don't have the last word, Your  
19 Honor.

20 HEARING OFFICER DAHER: With that  
21 presentation by Mr. Egbert, I'm very much inclined  
22 to overrule the objection. Go ahead, Mr. Egbert.  
23 You have it.

24 Q. Do you remember the question?

1 A. I considered it exculpatory, yes.  
2 Q. Did you also consider it important?

3 A. Very important.

4 MR. WARE: Objection.

5 HEARING OFFICER DAHER: Sustained.

6 Q. Did you make a request of the Commonwealth  
7 for production of any and all forensic reports of  
8 that nature?

9 A. I did.

10 MR. WARE: Objection. It's irrelevant,  
11 Your Honor.

12 MR. EGBERT: Well, it goes to a couple of  
13 matters. One, it goes to the conduct of the case by  
14 the Commonwealth.

15 No. 2, I suggest that it is in direct  
16 contravention of Leora Joseph's testimony, where she  
17 testified in this proceeding, one, that she orally  
18 told Ms. Goldbach long before August 1st of the  
19 tests and their results, and that she provided the  
20 results to Ms. Goldbach in writing after August 1st,  
21 but she fully apprised her of this information prior  
22 to August 1st. That was Ms. Goldbach's testimony in  
23 this case when presented by the Commission.

24 MR. WARE: Your Honor, again, this is a

1 side issue. The issue is not what Ms. Goldbach knew  
2 or what Ms. Joseph knew. The issue is what Judge  
3 Lopez knew at the time that she lobbied this case on  
4 August 1st. Judge Lopez didn't testify she was  
5 aware of any of this. That's the only way in which  
6 it could be relevant here.

7 MR. EGBERT: Judge, the issue of whether or  
8 not people come into this courthouse and courtroom,  
9 take the oath, and lie to this Court in  
10 presentations is always an issue. The credibility  
11 of Leora -- her testimony need not be taken alone.  
12 She testified in direct contravention to what I know  
13 this witness will testify to.

14 MR. WARE: Your Honor, this goes to the  
15 same character issue that we've been trying to bring  
16 before the Court for the last two days. We cannot  
17 engage in a sideshow with respect to each witness in  
18 an attempt to assassinate or let's just say question  
19 the character of witnesses. That's not the way it's  
20 done. That evidence is not relevant here. This is  
21 a case about Judge Lopez's conduct and what Judge  
22 Lopez knew and on the basis of which Judge Lopez  
23 made decisions.

24 MR. EGBERT: This is a case about, as all

1 cases are, what credibility this Court should give  
2 to any witness who has testified before it.  
3 You have heard Leora Joseph come in here --  
4 (Mr. Ware stands)  
5 HEARING OFFICER DAHER: Overruled. You've  
6 got it.  
7 BY MR. EGBERT:  
8 Q. Did Leora Joseph provide you orally any  
9 results from the amylase test prior to August 1st of  
10 the Year 2000?  
11 A. No, she did not.  
12 Q. Had you been requesting those results?  
13 A. Yes, I had.  
14 Q. What did she tell you before August 1st,  
15 2000, concerning those results?  
16 A. That she would get them for me, but not  
17 what the results were.  
18 Q. Did she tell you that she knew the results?  
19 A. No, she did not.  
20 Q. Was Mr. Horton released on bail at the  
21 Superior Court arraignment?  
22 A. Yes. The bail remained the same at the  
23 Superior Court arraignment.  
24 Q. Was it argued? And what I mean by that is,

1 was there a hearing in which both sides argued --  
2 strike that. That's very inarticulate.  
3 Was there a hearing in which the  
4 Commonwealth sought to increase the bail?  
5 A. That's correct. There was.  
6 Q. And who sought to increase the bail?  
7 A. Leora Joseph.  
8 Q. And do you have any question about that in  
9 your mind?  
10 A. I have no question about that in my mind.  
11 Q. Were you at the hearing?  
12 A. I was at the hearing. Members of my office  
13 were at the hearing.  
14 Q. And did Leora Joseph seek a dangerousness  
15 hearing on that occasion?  
16 A. No, she did not.  
17 Q. Did bail remain the same?  
18 A. Bail remained the same.  
19 Q. And the defendant was released?  
20 A. Yes.  
21 Q. Sometime between the arraignment and August  
22 1st of the Year 2000, is it fair to say that typical  
23 discovery practices were ongoing?  
24 A. Yes.

1 Q. And at or about August 1st of 2000, had  
2 there been a proceeding scheduled for the Superior  
3 Court with regard to a lobby conference?

4 A. We were scheduled to be on the 15th floor  
5 in the First Session where the Judge is, as opposed  
6 to the magistrate session, for a possible plea  
7 conference on August 1st.

8 Q. When you say "a possible plea conference,"  
9 what does that mean?

10 A. When I say "possible plea conference," what  
11 I mean is sometimes these conferences are scheduled,  
12 but they don't necessarily happen the first time  
13 around.

14 In this instance, it did happen the first  
15 time around, and we did have a plea conference on  
16 August 1st.

17 Q. So the "possible" was related to whether or  
18 not a plea conference would take place?

19 A. That's right.

20 Q. Now, by the way, you say the word "plea  
21 conference."

22 A. Yes.

23 Q. What is a plea conference?

24 A. It's basically a scenario -- and it can

1 happen in different locations -- that could be in  
2 the courtroom, it could be at side bar, it can be in  
3 a judge's office or a lobby. But it's where the  
4 Commonwealth and defense counsel present their sides  
5 of the story and explain to the judge the type of  
6 sentence that they're seeking -- present it to the  
7 judge, sometimes backing it up with documentation of  
8 various sorts, and seeking to find out what type of  
9 a sentence a judge would consider imposing after  
10 hearing from both sides.

11 Q. And are those generally on or off the  
12 record? And what I mean by that is with or without  
13 a court reporter.

14 A. It's quite often done without a court  
15 reporter. But some judges do choose to have a court  
16 reporter there.

17 Q. Now, did a plea conference take place on  
18 August 1st of the Year 2000?

19 A. Yes, it did.

20 Q. First of all, who was the judge?

21 A. It was Judge Lopez.

22 Q. And where did the conference take place?

23 A. It was to the Judge's right at side bar.

24 Q. Was that the customary place for Judge



1 Lopez to conduct her lobby conferences?

2 A. This was actually the first case I had ever  
3 conferenced with Judge Lopez. But I spent some time  
4 in the courtroom that morning before it was my turn.  
5 My case came up in the courtroom, before it was  
6 called up to the Bench. And all of the plea  
7 conferences were occurring at side bar that day.

8 Q. And were they on the record, to your  
9 knowledge?

10 A. To my knowledge, none of them were on the  
11 record.

12 Q. And how many occurred that day that you can  
13 remember?

14 A. I didn't count. I know that there were a  
15 lot of attorneys, including lawyers in my office,  
16 waiting behind me. It wouldn't surprise me if at  
17 least there were a dozen of them, but I didn't  
18 count. There seemed to be a lot of them. The  
19 courtroom was quite full.

20 Q. Now, at that lobby conference -- strike  
21 that.

22 Before that lobby conference, did you have  
23 occasion to have a discussion with Leora Joseph  
24 concerning your recommendation and her

1 recommendation and the like?

2 A. I had a brief conversation with her. I  
3 don't know if I told her what my recommendation was  
4 going to be. I did offer Joan Katz's report, that  
5 is now Exhibit No. 3, to her on August 1st.

6 Q. Stop there, if you would. Where were you  
7 when you offered the report of Joan Katz, which is  
8 now Exhibit 3, to Leora Joseph?

9 A. In the courtroom, in the audience area.

10 Q. And were you standing or seated, if you  
11 recall?

12 A. Standing.

13 Q. And is that the area where lawyers stand,  
14 waiting to be called?

15 A. Yes.

16 Q. During that -- tell us exactly what you  
17 said and what she said, to the best of your memory,  
18 concerning this report and its provision to her.

19 A. There wasn't much conversation at all. I  
20 handed it to her again, and basically the same thing  
21 happened as happened before. She looked through it  
22 and she handed it back to me.

23 Q. What you handed her, was that her copy?

24 A. Yes, it was.

1 Q. You had made copies for counsel?  
2 A. Yes. I always do.  
3 Q. And she just gave it back to you?  
4 A. She did.  
5 Q. Did you require that she give it back?  
6 A. Did I?  
7 Q. Require that she give it back?  
8 A. Absolutely not. That was her copy.  
9 Q. Did you expect that she would keep it?  
10 A. Yes, I did.  
11 Q. Did it strike you as unusual --  
12 MR. WARE: Objection.  
13 HEARING OFFICER DAHER: Allowed.  
14 Sustained. Go ahead.  
15 A. Yes --  
16 HEARING OFFICER DAHER: No. I actually  
17 sustained the objection.  
18 Q. You say that Ms. Joseph looked through the  
19 document?  
20 A. Yes.  
21 Q. How long did it take her to look through  
22 the document?  
23 A. Seconds.  
24 Q. Did she read it, in your judgment?

1 A. No. She glanced at it.  
2 Q. Did she discuss it with you at all?  
3 A. No.  
4 Q. And when she gave it back to you, what was  
5 her demeanor in giving it back to you?  
6 A. She just handed it back to me.  
7 Q. Did you feel at that time that you had  
8 performed your ethical functions in providing copies  
9 to counsel?  
10 MR. WARE: Objection.  
11 HEARING OFFICER DAHER: Sustained.  
12 Q. Why did you give her a copy?  
13 A. It's my practice to give the district  
14 attorney a copy of a psychosocial evaluation that  
15 I'm going to present to the Court. It would be  
16 unethical for me not to do that. And this was  
17 something that helped my client, in my view. I was  
18 hoping that perhaps it would in some way perhaps  
19 change the view of Ms. Joseph in terms of the way  
20 she viewed my client. So, of course, I wanted her  
21 to have a copy of this.  
22 Q. After that occurred, did you actually have  
23 a plea conference with Judge Lopez?  
24 A. Yes. It was at side bar.

1 Q. And can you first just tell us the  
2 procedure -- we'll get to the details in a minute.  
3 Tell us the procedure that occurred for this  
4 conference.

5 A. There were clerks standing in the clerk  
6 area. The court reporter was seated in his chair,  
7 but not taking notes at that point.

8 Q. Let me stop you for a moment. Where is the  
9 court reporter in the First Session.

10 A. It's basically in the same position where  
11 the court reporters are here today, to the left of  
12 the Judge.

13 Q. The Judge facing out, to the Judge's left?

14 A. To the Judge's left.

15 Q. And where did this conference take place?

16 A. To the Judge's right. In the First Session  
17 on the 15th floor there are two or three stairs that  
18 lead up to the Judge's Bench. And actually, I  
19 believe we took turns standing on those stairs next  
20 to the Judge's Bench in order to speak with her.

21 Q. And what was the process that occurred?

22 A. The process was that Ms. Joseph, on behalf  
23 of the Commonwealth, outlined her view of what the  
24 allegations were, the events, the incident itself,

1 and then made -- she made a sentence recommendation,  
2 and then, of course, the procedure would be that I  
3 would follow with any comments that I had to make  
4 regarding those allegations, as well as the reasons  
5 why I was seeking probation for my client in this  
6 case.

7 Q. And now, do you have a clear memory of what  
8 Ms. Joseph said with regard to the allegations that  
9 you put forward to Judge Lopez?

10 A. I don't remember everything she said about  
11 it. I remember certain things, certainly, but I  
12 cannot be absolutely positive of each and every  
13 thing that she said.

14 Q. Do you recall whether or not Ms. Joseph  
15 told Judge Lopez --

16 MR. WARE: Objection. Leading. I think we  
17 ought to have the witness' recollection.

18 HEARING OFFICER DAHER: Sustained.

19 Q. Was there any discussion of force being  
20 used to pull the boy into the car?

21 A. No, there was not.

22 Q. Did you hear those words or words like  
23 those spoken at all by Leora Joseph?

24 A. No.

1 Q. Is there any doubt in your mind about that?

2 A. No, there is no doubt.

3 Q. Was there any discussion of Ebony Horton  
4 threatening to kill --

5 MR. WARE: Objection to the leading nature  
6 of these questions.

7 HEARING OFFICER DAHER: Sustained.

8 MR. EGBERT: Judge, I don't think it's  
9 leading to identify an area and then ask her to give  
10 us the discussion.

11 HEARING OFFICER DAHER: Sustained. Go  
12 ahead.

13 Q. Did you see the tape of the victim  
14 statement?

15 A. Yes, I did.

16 Q. When did you see the tape?

17 A. I can't tell you the first time I saw it.  
18 I haven't checked the date, but it was -- in the  
19 course of discovery, it was weeks, if not months,  
20 prior to the plea conference.

21 Q. We're going to play the tape now and I'm  
22 going to stop it in certain places and ask you  
23 whether or not any of those matters on the tape,  
24 individual matters --

1 HEARING OFFICER DAHER: Again, if we could  
2 do that tomorrow morning. We haven't had a break.

3 MR. EGBERT: I'll go with your schedule.

4 MR. WARE: Whatever you say, Your Honor.  
5 Are we going to recess now?

6 HEARING OFFICER DAHER: Yes.

7 MR. WARE: Your Honor, if we're going to  
8 recess, I would like to make a demand at this point  
9 for a copy of the report to which the witness  
10 referred. I've previously asked for that report and  
11 have been denied it and would like a copy of the  
12 first report, the one that the witness has testified  
13 is a precursor to Exhibit 3.

14 MR. EGBERT: I don't have it. I've never  
15 seen it.

16 MR. WARE: I'd like the witness to produce  
17 it tomorrow.

18 THE WITNESS: Your Honor, as Ebony Horton's  
19 attorney, I would object to that. That never was  
20 made part of the court record. I did not use it.  
21 It was not necessary for me to present it to the  
22 trial magistrate at the arraignment, and it has  
23 never been part of any record in this proceeding --  
24 in the Horton matter, Your Honor.



1 HEARING OFFICER DAHER: Your position is --  
2 THE WITNESS: It's confidential at this  
3 point.

4 MR. WARE: Your Honor, by definition it is  
5 not privileged, and it's certainly relevant if it's  
6 a precursor to the existing report.

7 This witness testified this afternoon that  
8 she physically gave a copy to the district attorney,  
9 and the district attorney looked through it. To the  
10 extent there was any privilege, it was waived at  
11 that point. And I'm entitled to that report. I've  
12 asked for it before.

13 HEARING OFFICER DAHER: Counselor?

14 THE WITNESS: Again, Your Honor, I would  
15 object. It's not substantially different --

16 HEARING OFFICER DAHER: Forget the  
17 "substantially different." You did make an offer,  
18 did you not?

19 THE WITNESS: I offered it to her. It was  
20 returned to me. It was not read.

21 HEARING OFFICER DAHER: I'm going to deem  
22 the privilege waived. You'll produce a copy for Mr.  
23 Ware.

24 THE WITNESS: Fine.

1 MR. EGBERT: And that goes to both counsel?  
2 HEARING OFFICER DAHER: Oh, yes, of course.  
3 Okay. 9:30 tomorrow morning.  
4 MR. WARE: Your Honor --  
5 HEARING OFFICER DAHER: Go ahead.  
6 MR. WARE: There is as well this pending  
7 motion that we have with respect to --  
8 HEARING OFFICER DAHER: The motion in  
9 limine, fine. Go ahead.  
10 MR. WARE: Is that something you want to  
11 deal with now, tomorrow morning or --  
12 HEARING OFFICER DAHER: Probably tomorrow  
13 morning. I have my thoughts on that. I've been  
14 going through it, I've been leafing through it.  
15 Tomorrow morning.  
16 MR. WARE: Thank you.  
17 (Whereupon, the hearing was  
18 adjourned at 3:36 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 XI, is a true and accurate transcription of my stenographic notes taken on Tuesday, December 17, 2002.

\_\_\_\_\_  
Jane M. Williamson  
Registered Merit Reporter

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