

1 IN THE COMMONWEALTH COURT OF PENNSYLVANIA

2 No. 1 M.D. 2013

3 JAKE CORMAN, in his official capacity

4 as Senator from the 34th Senatorial

5 District of Pennsylvania and Chair

6 of the Senate Committee on

7 Appropriations; and ROBERT M.

8 McCORD, in his official capacity as

9 Treasurer of the Commonwealth of

10 Pennsylvania,

11 Plaintiffs,

12 vs.

13 THE NATIONAL COLLEGIATE ATHLETIC

14 ASSOCIATION,

15 Defendant.

16 vs.

17 PENNSYLVANIA STATE UNIVERSITY,

18 Defendant.

19

20 Deposition of Gene Marsh

21 Tuesday, November 18, 2104

22 9:57 a.m.

23

24 Reported By: Dana Gordon

25 Job No. 87159

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Tuesday, November 18, 2014

9:57 a.m.

Deposition of GENE MARSH, taken by
Plaintiff, at the offices of Balch &
Bingham, 1901 6th Avenue North, Suite 1500,
Birmingham, Alabama, before Dana Gordon,
Alabama Certified Court Reporter, and Notary
Public in and for the State of Alabama,
beginning at approximately 9:57 a.m., when
were present on behalf of the respective
parties:

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20 ALSO PRESENT:

21 Michael McKenna

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1 GENE MARSH

2 The witness, having first been duly
3 sworn to speak the truth, the whole truth
4 and nothing but the truth, testified as
5 follows:

6 EXAMINATION

7 BY MR. HAVERSTICK:

8 Q Good morning, Mr. Marsh. We met
9 a few minutes ago. My name is Matt
10 Haverstick, and I am representing Senator
11 Jake Corman and Rob McCord who are the
12 plaintiffs in the action that we're here for
13 today.

14 You've been through these before,
15 I imagine?

16 A Yes.

17 Q Then I'll skip all the
18 preliminaries. The only one that I think
19 matters is if you want a break at any time,
20 please let me know. I'll probably break all
21 the time, too. So --

22 A Okay.

23 Q -- I'll be letting you know.

24 I'm probably going to be not
25 necessarily linear in my questions, and if I

1 ever get off track or I'm missing something,
2 you don't understand a question, let me
3 know.

4 A Okay.

5 Q Why don't you, to break the
6 ice -- well, first off, you're represented
7 by counsel today from Reed Smith?

8 A I'm here with --

9 Q With -- okay.

10 A Yes.

11 Q Did you meet with counsel for the
12 NCAA before the deposition today?

13 A Counsel for the NCAA?

14 Q Right.

15 A The Latham and Watkins people?

16 Q Yes.

17 A No.

18 Q Why don't you, however it makes
19 sense to you, give us your background.

20 A Okay. Grew up in Ohio, went --
21 spent three years in the Army infantry
22 between high school and college. Went to
23 Ohio State, Bachelor's and Master's. Went
24 to law school, Washington and Lee, graduated
25 '81.

1 Went to Alabama in 1981 and
2 taught there for 28 years as a tenured track
3 professor. During that time, spent seven
4 years as the faculty athletic rep; nine
5 years on the committee on infractions,
6 chaired it a couple.

7 2009 was approached by two law
8 firms to go to work for them as I was going
9 off the committee on infractions. One I had
10 a conflict that was not yet resolved because
11 it was a case that had -- I had heard, and
12 they were on the other side and it was on
13 appeal. So when they talked to me about
14 coming to work for them, I said it just
15 didn't feel right for me to be talking to
16 you about that. Technically, you're on
17 opposite sides, but it's kind of not the way
18 it works.

19 And then -- just weirdly, within
20 the same week, Lightfoot Franklin White came
21 to talk to me about going to work for them,
22 and I chose to go to work for them. Tried
23 to juggle a year of working in the law
24 school and still -- and doing that other
25 work didn't work out because of the demands

1 of the legal practice. So I left the
2 university permanent tenured track.

3 I am with -- in December of 2013,
4 Jackson Lewis came to meet with me, talk to
5 me about going to work for them. I chose to
6 do that. And I still teach a course in the
7 law school, sports law.

8 Q When you first started teaching,
9 what classes did you teach?

10 A Undergrad economics and kind of
11 an odd thing, economics and legal studies.

12 Q I don't know that that sounds
13 that odd. Probably more lawyers need some
14 training in economics.

15 A Well, it was -- it was the Reagan
16 time, and it was when everybody was obsessed
17 over law and economics. And I had done some
18 quantitative work in the economics program
19 at Ohio State, so I can talk the talk.

20 Q How about in law school? What
21 were your courses of -- or areas of
22 instruction?

23 A First course taught was 1982.
24 Contracts consistently pretty much over
25 time. Consumer protection, corporate

1 finance, business organizations, bankruptcy
2 on and off.

3 But the core courses were
4 contracts -- core -- I taught contracts for
5 like 25 years. So -- and then the other
6 ones I just mentioned. And occasionally, I
7 get pulled into something else. Torts, you
8 know, just because somebody has an illness
9 or something.

10 Q Tell me about your experience
11 with the NCAA in terms of professional
12 experience.

13 A Okay. I would include that --
14 before the NCAA infractions, I started -- I
15 was appointed to be faculty athletic rep at
16 Alabama and was faculty athletic rep for
17 about a year when we had a major infractions
18 case in basketball. And the school chose --
19 they asked me if I would basically be the
20 spokesperson at the hearing, essentially the
21 lawyer for the school, and I did. We got a
22 very good result for the school.

23 It just so happened that the
24 committee on infractions had an opening
25 coming up and they were looking for a

1 faculty athletic rep. So within, I guess,
2 maybe a year of that case being over --
3 about that roughly -- I got an invitation to
4 join the committee on infractions, and so I
5 did. And I spent nine years on the
6 committee on infractions.

7 Q Tell me about what you did on the
8 committee of infractions.

9 A You don't give up your day job.
10 I mean, you know, I continued to work full
11 time. I did not -- and I think only one
12 semester did I ask for release time. It was
13 when we had a major infractions case -- a
14 different one -- in 2000 -- 2000 which
15 stretched into 2001 and 2002.

16 During that time, I continued
17 with the full-time teaching, writing, all
18 that bit.

19 At that time, the committee on
20 infractions -- it had a little bit different
21 shape than it has now, but it was a standing
22 group of -- oh, I forget exactly. The
23 number was eight, nine or ten people. We
24 would meet six times a year. You would
25 normally have at least two hearings -- major

1 infractions hearings on those weekends, six
2 weekends a year. Occasionally, we would
3 meet more than six.

4 You would also deal with summary
5 dispositions, which were resolutions of
6 cases without a hearing. And we would also
7 handle other matters that were pending in
8 cases or questions that had come up
9 regarding penalties in other cases.

10 So you're not an NCAA employee.
11 You don't get paid for it. You just get
12 reimbursed for what your actual expenses
13 are.

14 Q Does it -- does the committee
15 function like a judiciary would? I mean, in
16 terms of being a judicial branch in terms
17 of --

18 A People -- people talk about it
19 that way. But I mean, it's a -- it's an
20 administrative process. At times, it's more
21 like the city council than it is a -- the
22 hearings are very informal -- pretty
23 informal. Rules of evidence are not in
24 play.

25 So yes and no. You know, it has

1 some feel to it that's -- people coming in
2 the room who are being judged, they surely
3 feel like it's a judicial audit.

4 Q Are you called upon on the
5 committee to interpret NCAA bylaws?

6 A No. There's an interpretive
7 process.

8 Q What is that?

9 A Well, usually through -- the
10 formal process at the NCAA, posing a set of
11 facts, and then AMA or some element of the
12 NCAA would give you a readback.

13 Q AMA?

14 A Academic and Membership Affairs.

15 And, you know, some of their
16 acronyms and groups and whatever I'm not
17 completely familiar with. I only go find
18 out when I need to. But there is an
19 interpretive process.

20 Q Did you all on the committee have
21 to get any kind of training from NCAA on
22 NCAA bylaws or other NCAA rules?

23 A I can't -- well, except for the
24 people who are public members, those are --
25 there are allotted slots on the committee

1 for people who are not in some NCAA
2 position, like being faculty rep or
3 conference commissioner or athletic director
4 or whatever.

5 Public members would be the only
6 ones who -- they are typically either
7 practicing lawyers or retired judges, that
8 kind of person. Other than those people,
9 you would be pretty well steeped in what's
10 going on.

11 I mean, no one memorizes the rule
12 book, but you know the gig.

13 Q You're living it really?

14 A Sure. I mean, yeah, yeah.

15 Q And I imagine that the -- through
16 the enforcement process, there's some level
17 of education simply by people putting on
18 their case and people defending their
19 case --

20 A Yeah.

21 Q -- if that's the right
22 nomenclature for it.

23 A In that way, it is very much like
24 a judge in that you get a case packaged up
25 with both a fact description and then the

1 various parties' advocacy on which bylaws
2 apply. And so you get -- like any -- almost
3 like I guess you would say a trial judge or
4 whatever, you get a tutorial from the
5 parties on what their view of the facts are
6 and then what they say is the applicable
7 bylaws and all that stuff.

8 Q I've seen reference to a bench
9 brief, and that was a quote from -- I think
10 in some of the NCAA e-mails.

11 A Uh-huh.

12 Q Did you -- do you recall ever
13 getting any kind of bench brief or other
14 materials laying out the NCAA's official
15 position on what a bylaw means?

16 A You may be referring to what was
17 then called a case summary.

18 Q It could be.

19 A And that is the enforcement
20 staff's document, which before a hearing
21 in -- I think the timeline may be after
22 they've had their sort of in-person meeting
23 with the parties right before the hearing.

24 The case summary is the
25 enforcement staff's position on the case; in

1 other words, here's our view of what the
2 facts were, here's our view of what the
3 bylaws are. And then you have a competing
4 document, which would be the institution's
5 response, written response.

6 So yeah, that's the only thing --
7 there's no -- I am not aware of anything
8 that anybody would call a bench brief except
9 that's probably what they were talking
10 about.

11 Q Okay. Yeah. It's not as if --
12 like a judge who has a clerk who writes up
13 something --

14 A No.

15 Q There's nothing like that.

16 A Not that I'm aware of anyway.

17 Q On the other side representing
18 institutions or individuals in front of the
19 COI, roughly, or you can ballpark it, how
20 many of those matters have you handled?

21 A How many what?

22 Q How many of those types of
23 matters have you handled on behalf of member
24 institutions or --

25 A I think actually -- oh, you mean

1 as a lawyer?

2 Q As a lawyer, right.

3 A Oh. Actually in front of the
4 committee --

5 Q Yeah.

6 A -- a couple. A couple more that
7 were resolved in the summary disposition
8 process that we didn't have to get to a
9 hearing. In other words, it's packaged like
10 a major infractions case, but it's resolved
11 short of a hearing.

12 And then -- well, go ahead.

13 Q No, no.

14 A That's -- well, I mean,
15 there's -- there are many other pieces of
16 work that involve NCAA bylaws, facts,
17 student athletes, coaches, et cetera, that
18 are a part of this process that are --
19 involve a violation, but they never get to
20 the point of being a major infractions case.
21 They're resolved through the secondary
22 process essentially.

23 And so the work is far -- the
24 work in lawyering in NCAA work is far
25 broader than infractions hearings.

1 Q Okay. Is the secondary process
2 the summary disposition process?

3 A No, no, no.

4 Q What's the secondary process?

5 A Well, until recently, violations
6 came in two flavors, major and secondary.

7 Secondary are the ones that --
8 usually an admitted violation, but it's
9 not -- if there's no need, then the decision
10 is made to resolve it largely through a
11 range of prearranged penalties that -- you
12 know, in other words, stipulated in the
13 process penalties that -- that can be
14 resolved without cranking up the larger
15 process.

16 Q It sounds like in some ways that
17 it could be similar to the summary
18 disposition process, but -- no?

19 A No.

20 Q Okay. Tell me what's different
21 about it.

22 A Summary disposition is a major
23 infraction allegation by the -- by the
24 enforcement staff. The institution submits
25 a written response to the allegations, and

1 it is -- there's no dispute as to --
2 essentially, no dispute as to facts and
3 really no dispute as to the applicable
4 bylaw.

5 So the committee on -- and
6 then -- so the institution then
7 self-admits -- typically admits to the
8 violations, self-imposes penalties. Those
9 documents, whatever you want to call them,
10 are then reviewed by the committee on
11 infractions to decide whether they think
12 we're -- it's okay. In other words, we
13 don't need a hearing.

14 Q Yeah.

15 A We don't have any additional --
16 that's different than secondary, a secondary
17 violation process.

18 Q So the summary disposition is
19 reserved for the major infraction cases, but
20 ones where the institution and the NCAA have
21 some level of agreement on kind of what
22 happened.

23 A It is the resolution of a major
24 infractions case without going through a
25 hearing.

1 Q Are most of the major infraction
2 cases disposed of in a summary disposition?

3 A I would say no, but someone else
4 could crank the numbers for you. Surely not
5 in my nine years on the --

6 Q In your experience, were most of
7 the major infractions dealt with in the --

8 A Hearing?

9 Q -- hearing process?

10 A Yes.

11 Q When was the first time that you
12 heard about the Jerry Sandusky matter at
13 Penn State?

14 A I would have no way of knowing
15 that. I get downloads --

16 Q All the time?

17 A -- every day from three or four
18 different services on basically sports
19 headlines. So I have no idea.

20 Q Do you recall communicating with
21 anyone inside NCAA prior to your hiring
22 about the Jerry Sandusky matter?

23 A Yes. And you've already
24 identified the Shep Cooper.

25 Q Yeah. I'll get to that. Well,

1 I'm going to do it now and just get it out
2 of the way.

3 I imagine that you maintain a
4 friendship with several of the folks at NCAA
5 like Shep?

6 A Yeah. Shep is a great friend of
7 mine. Yeah. I mean, he's, you know, as far
8 as I inside that building, I would say my
9 best friend inside that building.

10 Q Is David Berst another fellow
11 that you're at least on friendly terms with
12 and at least you consider --

13 A Yes, absolutely.

14 Q And I can show it to you and we
15 can --

16 A Yeah.

17 Q And I may end up looking at it
18 later, if you want to see it. But at the
19 point that that Shep Cooper e-mail was sent,
20 you didn't -- you had not been contacted by
21 Penn State.

22 A No. My hiring was on July the
23 11th.

24 Q Do you know how it was that Penn
25 State came to hire you?

1 A No. I mean, I don't think that I
2 ever asked. I did know Matt Stolberg, who
3 is their compliance director. They hired me
4 back -- first, Matt was an assistant in
5 compliance at the University of Michigan,
6 and I represented the University of Michigan
7 in their major infractions cases. So he was
8 in compliance there.

9 He moved to Penn State. Not long
10 after he got to Penn State, they had a
11 wrestling allegation, a wrestling matter.
12 It was resolved. You know, it started out
13 this big, oh, you know -- and that's the way
14 things often go is allegations flying all
15 over and it looks like it's going to be --
16 it ended up being, as I recall, resolved as
17 a fairly Mickey Mouse secondary. In other
18 words -- and so that then was the end of
19 that piece of business, and then it --
20 then -- it's not like you have an ongoing --
21 like an of counsel relationship with the
22 institution. That was the end. The end.

23 Q Yeah.

24 A So then the next contact was
25 months later, July 11.

1 Q Who do you recall contacting?

2 Was it Matt Stolberg?

3 A On July 11th?

4 Q Yes.

5 A Frank Guadagnino.

6 Q Frank Guadagnino?

7 A Yeah, right.

8 Q Okay.

9 A Yeah.

10 Q And what --

11 MR. HAVERSTICK: And I'll just
12 put this on the record and then -- so we're
13 clear, Mike.

14 Penn State has agreed to waive
15 the privilege with respect to your
16 discussions internally with Penn State about
17 the consent decree. I don't think I'd have
18 occasion to ask you any questions that get
19 outside of that. But I just wanted to -- I
20 just want to put it on the record and be
21 careful with it.

22 Mike, if you think I'm asking a
23 question that's outside of the waiver that
24 we all agreed to that --

25 MR. SCOTT: Yeah.

1 MR. HAVERSTICK: You know, I just
2 say it so that we're on the same page.

3 MR. SCOTT: Penn State wants to
4 be completely transparent about its
5 rationale for entering into the consent
6 decree, the advice it received, the matters
7 it considered and weighed in making its
8 decision. So as a result, leading up to
9 this deposition, the university did make a
10 decision that it would waive the
11 attorney-client privilege for matters,
12 advice, discussions regarding the decision
13 to enter into the consent decree.

14 And so in Mr. Marsh's case, I
15 guess that covers a period from July 11th
16 when he was hired till July 22nd when it was
17 signed. And we're not going to assert an
18 attorney-client privilege for discussions or
19 advice or considerations looked at during
20 that period.

21 MR. HAVERSTICK: Okay.

22 MR. SCOTT: Do we have an
23 understanding that that's --

24 MR. HAVERSTICK: Yes.

25 MR. SCOTT: -- okay as a limited

1 waiver?

2 MR. HAVERSTICK: Yes.

3 BY MR. HAVERSTICK:

4 Q Tell me what you recall of that

5 first conversation with Mr. Guadagnino.

6 A There was someone else on the

7 phone. I cannot recall who it was. I don't

8 think it was Steve Dunham yet. Because I

9 don't think Steve actually was even in the

10 chair yet. In other words -- so it was

11 Frank --

12 Q Mark Faulkner? Does that name

13 ring a bell?

14 A I've seen that name come up in a

15 deposition. I wouldn't know Mark Faulkner

16 if he hit me in the butt. I don't know Mark

17 Faulkner at all. I mean, if he was on the

18 phone, so be it, but I just don't know.

19 But it was Frank and I thought

20 that it was someone else, but I just -- I

21 just don't recall. But I remember Frank

22 because I remember when I -- his name is not

23 obvious how to spell. And so within a day

24 or two, I was trying to figure out how do

25 you spell the guy's name.

1 So I know that it was Frank, but
2 I don't know who else it was.

3 Q What do you recall of the
4 conversation?

5 A They said to me we are calling
6 you to see if you will assist us on, you
7 know, this possible whatever, NCAA matter.
8 I mean, that's the only reason that I get
9 called.

10 So I said that's interesting, but
11 here's the problem. I am going to Maine on
12 a quick trip with my wife, and we leave
13 Friday. So whenever that was -- that was
14 Wednesday, July 11th.

15 I said I'm going to Maine on
16 Friday for a trip that would be Friday,
17 Saturday, Sunday, Monday, back Tuesday. And
18 these are folks who are our neighbors who
19 have a cabin -- they have a place in Maine
20 on an island. And I said I am not breaking
21 that up, so if that's a game changer, then
22 so be it.

23 And they said well, in our
24 opinion, it's not.

25 So I said fine.

1 And that was the extent of the
2 conversation. I don't even -- I don't
3 recall whether they even talked about the
4 pending Freeh Report, you know, in that -- I
5 just don't remember.

6 Q That was going to be one of my
7 questions. Because you don't remember right
8 now whether Guadagnino mentioned to you that
9 the Freeh Report was about to come out?

10 A I really don't. I don't
11 remember.

12 Q Did Mr. Guadagnino say how they
13 came to your name?

14 A Did not. Did not.

15 Q Did you subsequently ever learn
16 that your name had been suggested by anybody
17 at NCAA?

18 A No.

19 Q Do you recall in that
20 conversation whether Mr. Guadagnino and/or
21 whoever else was on the phone mentioned
22 that -- well, mentioned anything about the
23 Freeh Report in substance, not in timing?

24 A No, I don't. I don't.

25 Q Your best recall is that they

1 said that they had a pending or impending
2 potential for NCAA action?

3 A I think so. Well, you know, it
4 may have -- they may have thrown in, you
5 know, it relates to the Sandusky matter,
6 whatever. I just don't know.

7 It wasn't a very long call. I
8 can remember that. I mean, it was
9 honestly -- if it was 15 minutes, I would be
10 surprised.

11 Q And you were at Lightfoot and you
12 were in your office?

13 A I was at my house.

14 Q In your -- okay.

15 Do you know if they sent you any
16 materials that day?

17 A They did not.

18 Q How did you all leave it at the
19 end of the telephone call? You said you're
20 going to go away, and they said fine?

21 A Somewhere very quickly, either --
22 it was either them or, you know, just
23 because it was everywhere in the country, it
24 was clear that Louie Freeh was about to step
25 up to the podium and issue his report.

1 So you want me to keep going and
2 just --

3 Q Yeah.

4 A -- give a timeline?

5 Q Yeah.

6 A I mean, I can give you a timeline
7 if you want --

8 Q Please.

9 A -- instead of wasting you
10 pounding around.

11 Q Absolutely. I'm all for that.

12 A So here's the timeline. Freeh's
13 report was issued on what day? Thursday,
14 July 12th. Thursday, July 12th, right? I
15 think that's right.

16 (Kevin McKenna enters the
17 proceedings.)

18 MR. HAVERSTICK: So the record
19 reflects, this is Kevin McKenna who is with
20 us and who has, I can see now, apparently
21 gotten his bags. Maybe not his razor,
22 but --

23 BY MR. HAVERSTICK:

24 Q Okay. I'm sorry.

25 A That's okay. He's not the only

1 one in the room.

2 Thursday, July 12th, the Freeh
3 Report was issued, and I called my partner,
4 William King, and said we're going to be
5 getting on a plane tomorrow early -- or I
6 think -- I think actually we drove up --
7 Janelle and I, my wife, drove over to
8 Atlanta Thursday night. And I said I would
9 like to get a copy of the Freeh Report to
10 take with me.

11 The law firm printed the Freeh
12 Report and had it delivered to me in
13 Tuscaloosa before we took off. All right?

14 So flew to Portland, Oregon on
15 Friday --

16 MR. SCOTT: Oregon or Maine?

17 THE WITNESS: Sorry?

18 MR. SCOTT: Oregon --

19 A Oh, sorry. Portland, Maine.

20 Flew to Portland, Maine on
21 Friday. When we were in Portland, I
22 called -- I had been told by that time --
23 and I don't recall how -- that I -- the NCAA
24 expected to have a conversation with me --
25 and I think it was Remy. In other words,

1 call Donald Remy.

2 I called Donald Remy on Friday

3 and didn't get him, left a voice mail and

4 said well, I'm here and I'm calling you.

5 Because I think I -- I was told to call him.

6 I called him, left a voice mail and we ended

7 up not talking live until Monday. Until

8 Monday.

9 BY MR. HAVERSTICK:

10 Q In between that time period where

11 you get the call from Frank Guadagnino and

12 you attempt to call Donald Remy for the

13 first time, what conversations did you have

14 with Penn State folks about what you were

15 going to be doing?

16 A None that I recall.

17 Q Okay.

18 A None.

19 Q And no e-mail communications that

20 you remember?

21 A Absolutely none that I remember.

22 Q Was it the -- was it their

23 expectation that after the 15-minute phone

24 call where they got you on board, that you

25 would take the controls with respect to NCAA

1 and just keep them briefed?

2 A I don't like the idea of me
3 taking controls. I mean, I'm providing
4 advice.

5 Q Yeah. That's my
6 characterization, and I'm glad -- yeah,
7 please reject it. I'm not trying to spin it
8 any different way.

9 Was it your understanding that
10 they wanted you to be the lead interlocutor
11 with NCAA at that point and you should go
12 forward and begin discussions?

13 A I can't say that that's true
14 because almost immediately, at least as of
15 about Monday -- and I gather even maybe on
16 Friday -- there were parallel discussions
17 going on, Emmert, Erickson and then me with
18 Berst and Remy.

19 Q When did you learn about those
20 parallel discussions with Emmert and
21 Erickson?

22 A I think -- I think on Monday.
23 I'm not sure. I don't remember. I don't --
24 I just don't recall. You know, in other
25 words, I think -- I mean, clearly, the first

1 time that I talked to Rodney Erickson, he
2 had already had his -- he had -- I believe
3 had already had several conversations with
4 Emmert.

5 Q I'm going to ask you about that
6 in a second.

7 So I just want to make sure that
8 I've got it right in my head. That first
9 week, you have the call with Frank
10 Guadagnino. You get the copy of the Freeh
11 Report and you head to Maine and that
12 Friday, you attempt to contact Donald Remy.
13 And as far as you remember, there weren't
14 any contacts with Penn State folks in that
15 Monday to Friday time period?

16 A As far as I remember, right.

17 Q Do you remember how you knew that
18 it was you would have called Donald Remy?

19 A It may have come from somebody at
20 the NCAA. I'm not sure. I may have gotten
21 a call from Remy. I just don't remember.

22 No big drama. I mean --

23 Q Yeah.

24 A I mean, very quickly, it was the
25 idea of, hey, you need to --

1 Q Call.

2 A Something is up, call Donald
3 Remy, you know.

4 Q In your experience, did you find
5 it all unusual that Donald Remy was the
6 person communicating on behalf of NCAA?

7 A Unusual how? I mean, it was
8 not -- it's not usual in -- I mean, from the
9 first, it was -- from the first, the whole
10 thing was unusual. I mean, just boom. I
11 mean, just like a blanket the entire --

12 Q Well, tell me -- tell me about
13 that because I'm interested --

14 A Well, I mean, the first call -- I
15 mean, my first discussion with anyone at the
16 NCAA is with Donald Remy and David Berst on
17 what is potentially an NCAA infractions
18 matter. That call would typically come from
19 a director at the -- one of the directors in
20 the enforcement staff or at that time, Julie
21 Roe. I mean, that's -- that's the way it
22 would typically come. So right out of the
23 gate, it was unusual.

24 Q Was there any discussion in that
25 first conversation with Mr. Remy and

1 Mr. Berst that this was unusual?

2 A Yes.

3 Q Talk to me about that. What did
4 people say about it?

5 A Well, I mean, we had a -- you
6 know, I -- it's just my nature to say why
7 you guys? In other -- you know, in other
8 words, what -- and so they immediately
9 started in the discussion about this is not
10 a -- you know, this is not going to be
11 handled in the typical enforcement way.

12 That -- I mean, that is so
13 obvious it doesn't even need to be said. I
14 mean, if the call is Donald Remy and David
15 Berst and it's not the enforcement staff,
16 then it's a different critter right out of
17 the gate.

18 Q And that's -- everybody
19 understood that right from the jump, that
20 this was not what normally happens.

21 A Yes.

22 Q Do you recall when that phone
23 call -- that first phone call was with those
24 two fellows?

25 A Monday. Monday was Remy.

1 Tuesday, it's my understanding -- I mean, as
2 I -- as near as I can remember, Monday was
3 Remy and then Tuesday was Remy and Berst,
4 David Berst.

5 Q Do you know why David Berst was
6 involved?

7 A Well, I read his deposition. So
8 yes.

9 Q So now you --

10 A And I'm glad -- well, no.
11 I mean, I'm glad that he was. I mean,
12 immediately glad that he was.

13 Q Why?

14 A He is a decent guy who is not
15 afraid to express his own opinion. He had
16 been there many years and highly respected
17 and -- I mean, I can keep going. You did it
18 with him in the deposition.

19 I mean, he was the head of
20 enforcement. He was the head of enforcement
21 in the SMU case. He was vice-president for
22 Division I for about 15 years by the time --
23 or 13 maybe then.

24 In other words, he -- his
25 understanding of the NCAA and their process

1 and what all those issues would be far
2 exceeded anything that Donald Remy could
3 ever bring to the table.

4 Q Tell me about what of substance
5 was discussed in that first conversation you
6 had with Mr. Remy and Mr. Berst.

7 A Well, do you want the Monday or
8 the Tuesday one?

9 Q That's right. Monday was --
10 Monday was Donald Remy only?

11 A Yes.

12 Q Let's start there, please.

13 A He said -- he indicated
14 immediately that the board and executive
15 committee had grabbed ahold of this thing,
16 they had read the Freeh Report and that they
17 were contemplating some kind of
18 extraordinary -- not ordinary move, we're
19 going to sort of grab ahold of it and that
20 they -- I think -- although no particulars
21 were given on Monday. The first particulars
22 of what they were going to put on the table
23 as penalties were -- were Tuesday. That
24 there would be significant penalties, et
25 cetera. So that's what the nature of the

1 conversation was.

2 But the first substantive
3 conversation -- and again, I was in Maine on
4 Monday and on my cell phone sitting in some
5 little bitty cabin. And I recommend to you
6 reading the ESPN article because it is
7 exactly correct. I mean, I think there are
8 like three words in there that I would say
9 is -- they got something wrong.

10 Q Okay.

11 MR. SCOTT: And it has a picture
12 of the cabin.

13 MR. HAVERSTICK: I know.

14 BY MR. HAVERSTICK:

15 Q We're going to be looking at a
16 picture of the cabin in a little bit.

17 A Okay. So anyway -- because I --
18 I mean, my wife was about to kill me because
19 I spent almost all of Monday and Tuesday on
20 the phone.

21 Q You get that, too?

22 A Yeah. I mean -- and I mean, I
23 don't mean just like a little. I mean a
24 lot.

25 MR. GARDNER: We've all been

1 there.

2 A So Monday was Remy and then
3 Tuesday was when Remy and Dave gave me their
4 first list of what -- what penalties that
5 people had in mind.

6 BY MR. HAVERSTICK:

7 Q Let me ask about the Monday
8 conversation with Donald Remy. A couple of
9 things.

10 First off, I mean, he -- right
11 from the beginning, he articulated the
12 NCAA's position was the executive committee
13 was going to grab ahold of this. I'm
14 paraphrasing what you said. Did I get that
15 right?

16 A Yes.

17 Q Is that, in your experience, an
18 unusual thing for NCAA to do in what
19 otherwise would be an enforcement context?

20 A Let's just get this clear right
21 out of the gate. Everything about the
22 entire week was extraordinary, not normal,
23 not usual.

24 Q Okay.

25 A So like from A to Z, maybe up

1 through today. So let's -- that's a point
2 not even --

3 Q Well, that's good. Then we can
4 skip all of those other questions --

5 A Right.

6 Q -- where we talk about --

7 A Okay. Good.

8 Q In that conversation with
9 Mr. Remy, did he mention, if you recall --
10 well, what, if anything, do you recall him
11 mentioning about the Freeh Report? Let me
12 ask it that way.

13 A I don't remember him -- I mean,
14 I'm sure I told him that I had read it, but
15 I just don't remember.

16 Q Do you recall if in that
17 conversation, even if he didn't articulate
18 specific punishments that NCAA was seeking,
19 that he gave some indication of where
20 people's heads were?

21 A He said that they had -- they
22 were going to grab ahold of it, and I think
23 that's the first time -- and if it wasn't
24 then, it surely was Tuesday. But right
25 away, he indicated that the -- I think it

1 was Monday that he said the majority -- he
2 used this expression: Something like that
3 the majority of the presidents -- which is
4 actually consistent with the deposition
5 testimony that I read. The majority of the
6 presidents were talking about the cessation
7 of play; in other words, the death penalty.

8 Q So you recall in that Monday
9 conversation that topic coming up and some
10 suggestion that it was not only on the
11 table, but a lot of guys were thinking about
12 it on the executive committee.

13 MR. GARDNER: Objection to form.

14 A Men -- a lot of men and women.

15 BY MR. HAVERSTICK:

16 Q Women -- yeah, folks.

17 A Folks. And I don't recall if
18 Donald said that on Monday, but it sure was
19 Tuesday. He may have said it on Monday.

20 Q About how long, if you remember,
21 was the call with Donald on Monday?

22 A I don't remember, but it
23 wasn't -- Monday was not particularly long.
24 I don't recall honestly, but it was long
25 enough to get my wife irritated.

1 Q Do you remember if in that
2 telephone call he told you that Julie Roe
3 would not be involved?

4 A Well, one of the first things
5 that -- it was either he said or that he
6 and -- I think it was Monday. He said Julie
7 Roe would not be involved in this. In other
8 words, Julie Roe was not -- you know, in
9 other words, we are calling and Julie is not
10 because the executive committee -- and then
11 you can fill in the rest. That they're
12 going to grab it.

13 Q They're going to -- all right.
14 And that was the only reason he
15 said Julie isn't involved and the executive
16 committee is taking control that you
17 remember.

18 A Well, that's what -- I mean, it
19 was -- I'm just telling you what I
20 remember --

21 Q Okay.

22 A -- of what he said.

23 Q No.

24 A Yeah.

25 Q I just want to make sure I have

1 it right.

2 A Yeah.

3 Q The Tuesday telephone call, that
4 one sounds like it was a little longer and a
5 little more of substance.

6 A Yes.

7 Q Tell me what you remember about
8 what was said in that phone call, however it
9 is best for you to spit it back out.

10 A Well, I started -- they put on
11 the tables an initial list of proposed
12 penalties. And I started kicking back and
13 having a discussion largely with Dave --
14 because Dave is the only person you could
15 have that discussion with -- about what's
16 this all about.

17 And what I mean by that is we
18 discussed your view -- what's your view of
19 the power of the executive committee to grab
20 ahold of this thing? What's your view of
21 the application of the death penalty? Just
22 about everything that you could -- you know,
23 that would come up naturally in a discussion
24 like that, we had a discussion back and
25 forth.

1 Q What was your view of what power
2 the executive committee had to do what it
3 was doing?

4 A Let me say a couple of things.

5 One is -- David and I had back
6 and forths in that discussion in that -- on
7 that day about now, where is this coming
8 from, Dave? Where do you -- how do you grab
9 ahold of this thing? But it's also very
10 clear that immediately their message was not
11 let's have a debate about whether we have
12 the power. We have the power. It's our
13 decision. We are going to do this.

14 So as I've said to people before,
15 it very quickly became clear that they were
16 past the issue of whether -- you know,
17 having an internal debate about whether they
18 had the power or whatever. They were going
19 to grab it.

20 And Dave gave me the same thing.
21 He -- you know, I don't -- there's no reason
22 to go back and rehash --

23 Q No, no.

24 A -- what's in his deposition. You
25 know, you asked him or your partner asked

1 him who -- you know, where -- which bylaw
2 was in play, and he gave a tutorial of his
3 view of the world. And on my end, I'm
4 hearing it. And they say this is where
5 we're going.

6 So then the decisionmaking
7 process for Penn State is quite different
8 than, you know, if you were having a debate
9 about weather. Weather quickly got off the
10 table.

11 Q In your view -- I mean, you've
12 read his -- Mr. Berst's deposition.

13 A Yeah.

14 Q Do you agree with his assessment
15 of the executive committee's authority to do
16 what it did?

17 A Yes. But I also -- again, if
18 you're representing a client and the people
19 on the other side of the table are saying,
20 you know, we have -- David Berst's opinion
21 about what they had the power to do and what
22 they were going to do means more to me than
23 anybody else in that building times 10.

24 And it was clear that this is
25 what they were going to do, which then very

1 quickly changes the dynamic if you're on the
2 other side of that conversation. There
3 wasn't going to be a discussion about now,
4 let's go back and have a debate. That
5 didn't happen.

6 Q We can tick off another question
7 and we can just get it out of the way right
8 now.

9 Is it your view that this was not
10 a negotiation with NCAA?

11 A It absolutely was not a
12 negotiation. And I was finally glad to see,
13 you know, Dave Berst in his deposition,
14 boom, said it was not a negotiation. And
15 then in some correspondence that he had sent
16 to the CAA, I think, he said this was not a
17 negotiation.

18 So that's off the table. Let's
19 stop talking about it was a -- hence, my use
20 of the expression "cram down."

21 Q And you, I assume, still stand by
22 that?

23 A Yes.

24 Q This was a cram down.

25 A Yes.

1 Q And not just in the executive
2 committee's ability to do what it was doing.

3 A Right.

4 Q In terms of the penalties that
5 ended up being imposed.

6 A Say again. Reload that.

7 Q You viewed the consent decree, as
8 it ultimately turned out, to be a cram down
9 in the power exercised by the executive
10 committee. There was no debate about that.

11 A True. That doesn't mean that we
12 did not contemplate what our alternatives
13 were --

14 Q Sure.

15 A -- because we did.

16 Q And we'll talk -- I'll ask you
17 about that. I just --

18 A We did.

19 Q I'm splitting up both the power
20 to do it and then the sanctions imposed.
21 Both -- you viewed both of those as
22 non-negotiations.

23 A Yes, correct. But again, that
24 doesn't mean that we did not weigh
25 alternatives. Like, okay. What are --

1 what's our -- what could we possibly do
2 about that?

3 Q Or try to push back on occasion
4 to see --

5 A No, not just push back, but you
6 know, consider trying to revise the
7 infractions process, consider litigation.
8 We had full discussions on those.

9 Q Tell me what you recall the
10 penalties being that were broached in that
11 first conversation.

12 A I don't -- I mean --

13 Q We can -- honestly, I don't
14 remember either. We can look. I mean --

15 A Yeah. You can -- you know,
16 you -- it was -- I think -- I think I'm
17 right. It was fine -- I think it was
18 fine -- the fine, the scholarship, some kind
19 of agreement on some kind of an integrity
20 agreement, et cetera.

21 But I really -- you know, part of
22 what I really am big on is focusing on the
23 record at the time and what people said at
24 the time as opposed to when you get into
25 this litigation and everybody starts doing

1 their spin and --

2 Q After the fact.

3 A -- their releases.

4 Q Yeah.

5 A I'm just really completely
6 comfortable with talking about what at the
7 time --

8 Q Me, too.

9 Let me show you an exhibit that I
10 marked as Marsh 1.

11 (Marsh Exhibit No. 1 was marked
12 for identification.)

13 A Okay.

14 Q Because I hate playing memory
15 games. I would rather look at something.

16 A Right.

17 Okay. You'll note a couple of
18 things. You'll note that it's dated -- that
19 the time on it is 1:22 a.m.

20 Q Yeah.

21 A 1:22 a.m.

22 So here is what happened.

23 Janelle and I drove back -- we drove back
24 from Maine and -- from Atlanta, because we
25 had flown -- instead of going through

1 Birmingham -- Atlanta. And when I got back,
2 after having the conversations on -- our
3 travel day was Wednesday. So we had the
4 conversations on Monday, you know, me at the
5 cabin.

6 Q Yeah.

7 A Tuesday, me at the cabin.
8 Wednesday was our travel day, and we drove
9 back from Atlanta to Tuscaloosa. So by the
10 time we got home, it was very, very late.
11 But I felt like I owed it to Penn State to
12 write and give them an update. Because our
13 thought was to try to get on the phone the
14 next day, you know, with the Penn State
15 people.

16 Q On Wednesday.

17 A So this is -- this is a report,
18 as it says, of what my Monday and Tuesday
19 conversations were with the NCAA.

20 Q I'm going to go through a couple
21 of these.

22 Take a look at bullet point -- so
23 as I -- this was your memorialization of
24 the -- and maybe an amalgamation of the two
25 conversations you had on Monday and Tuesday

1 with first Remy and Remy and Berst?

2 A Yes, right.

3 Q Look at bullet point 5.

4 A This is on page 1?

5 Q Page 1, yes.

6 When do you recall it being
7 brought up for the first time that NCAA
8 wanted Penn State to accept the Freeh
9 Report's finding of facts, et cetera?

10 A It was either Monday or Tuesday,
11 I mean, obviously.

12 Q Do you remember if anyone said
13 why that mattered to NCAA?

14 A I don't remember exactly why. It
15 was just what they were looking for.

16 Q But that was, I mean, obviously a
17 deal point because that's something --

18 A Yeah. This is just -- I mean, I
19 guess, the -- you know, some of this
20 editorial comment and -- but I mean, it is
21 just simply here is what these people said.
22 Relaying information.

23 Q On that note, bullet point 8,
24 there's -- the last sentence is -- reads,
25 "This matter to them" -- I think it's

1 supposed to be "them" -- "is about 50
2 percent substance and 50 percent politics
3 pressure for the NCAA and Penn State to do
4 something."

5 A Right.

6 Q Where did that sentiment come
7 from?

8 A I want to make clear that when --
9 for example, like in Note 1 when I wrote,
10 "This is a very fluid situation," that's not
11 my assessment. It's what came from their
12 mouth.

13 Q That's important to me. I would
14 like to know for these. If there's one
15 here --

16 A Correct.

17 Q -- that somebody said, please let
18 me know.

19 A So they said 1. "Lots of energy
20 and" -- let's -- I would rather just walk
21 through these.

22 Q Yeah. Okay. That's great.

23 A Lots of energy and strong
24 feelings. Their conversations are frequent,
25 ongoing.

1 Q That's from them.

2 A So 2 -- these are my report of
3 what they are saying to me.

4 Q Okay.

5 A They would like to see a passage
6 on how Penn State responded. That they
7 expect much more beyond the measures
8 identified in the Freeh Report. Again,
9 that's their language.

10 4 is their language. 5 is their
11 language.

12 6 is -- it was clear from the
13 start -- I mean, I don't know why people
14 continued to discuss that if -- the call to
15 me was from Berst and Remy. I mean, it was
16 Berst and Remy. It wasn't Julie Roe.

17 7, they identified their meeting
18 that was coming up.

19 And I said to David Berst -- this
20 last sentence in 8, I said to David Berst
21 David, this thing feels to me like about 50
22 percent substance and about 50 percent
23 politics and pressure, and he said at least
24 that.

25 Q Okay.

1 A At least 50 percent. So that's
2 what he said to me on the phone.

3 And then the next page, I don't
4 know if that's a separate e-mail or -- I --
5 I don't know.

6 Q I think it's the same e-mail.

7 A Oh, okay. He just pointed out --
8 Mike just pointed out that the -- my caps on
9 corrective -- penalties and corrective
10 measures. So that's then a continuation of
11 my same e-mail.

12 So they mention this athletic
13 integrity agreement, and they mentioned the
14 costs would be -- this is 2. And then the
15 financial penalty -- and I maybe should have
16 changed that order there. But the financial
17 penalty, \$30 million, and then post-season
18 ban and then some discussion of the death
19 penalty.

20 You know, Remy -- Remy merely
21 echoed that the majority of the board or
22 whatever was -- was discussing cessation of
23 play or whatever.

24 Q Let's put this out on the table,
25 too, so we can move -- maybe we can get to

1 it in other ways. Did you feel in your
2 communications with Messrs. Remy and Berst
3 that the message was you have to do what
4 we're telling you to do or else you face an
5 imminent imposition of the death penalty or
6 something close to that?

7 A Well, here --

8 Q I would like to hear -- I would
9 love to hear you describe.

10 A Well, I'm glad you asked that,
11 because here's the thing. In the deposition
12 testimony -- in a long-winded e-mail to me
13 back in time, Donald Remy wrote, "I never
14 did threaten the death penalty."

15 Q Yeah.

16 A The word "threat" was never used.
17 In other words -- this is like Simon Says.
18 You know the game Simon Says?

19 Q I do.

20 A They never said, "Simon Says."
21 But from the standpoint of how does this
22 land on the institution, repeatedly during
23 the week and most dramatically for me on
24 Thursday late in the day, they start the
25 conversation again with -- when they called

1 me -- we had three or four conversations on
2 Thursday. I think three.

3 And at the very end of the day, I
4 think they had just gotten off the phone
5 maybe with their group, and David and Donald
6 Remy said before we get to business -- this
7 is on Thursday. Before we get to business,
8 we want you to know that the majority of --
9 this is really distracting. He keeps
10 handing you stuff.

11 Q I know. It's distracting to me,
12 too.

13 A The majority -- well, it is.

14 Q I know.

15 A And so the majority of the --
16 they start that late afternoon conversation
17 with the majority -- we want you to know
18 before we get to substance that the majority
19 of this group is in favor of cutting off
20 further conversations with Penn State.

21 And that was quite a surprise to
22 me because I thought we had gotten past
23 that. And I memorialized it at the time.
24 Because I called Frank Guadagnino and said
25 you're -- basically, you're not going to

1 believe this. And he said this is really
2 important, you should commit this to writing
3 right now, and so I did, just immediately.

4 So going back to the point, they
5 never used the word "threat." In other
6 words, "We threaten you." They don't use
7 those words.

8 But in my opinion, if you took a
9 hundred Einsteins or a hundred people who
10 shop at Walmart and you said this is the
11 message that was being pitched, I'm
12 perfectly happy to live -- or even maybe a
13 judge or a jury. Perfectly happy to live
14 with whether that was threatening to the
15 institution.

16 Q Nobody used the magic words, but
17 they didn't have to.

18 A Well, again, it wasn't -- again,
19 it wasn't a -- you know, it was -- I
20 believe -- particularly David. I mean,
21 David is a straight shooting guy. And he
22 said Gene, I think you should know that
23 these people -- I think you should know
24 where their thinking is. He thought that
25 was really important to know where their

1 thinking was. And that's the way it was
2 conveyed.

3 Q And that was the executive
4 committee.

5 A Yes.

6 You should know where their
7 thinking is. That's the way it was
8 conveyed. I don't want to get into a debate
9 about whether that's a threat or not. I
10 mean, that -- it's just what was said to us.

11 Q The number -- the \$30 million
12 number, was that -- it's -- in bullet point
13 3, it's referenced as a number they pitched
14 to you. Is that how you understood it, that
15 they were telling you, here is what we think
16 the financial penalty is going to be?

17 A Yes. \$30 million was the -- I
18 was just rereading the paragraph.

19 Q Take your -- I don't want to --

20 A \$30 million was the -- was the
21 first number that they pitched.

22 Q And they didn't -- that wasn't a
23 sort of speculative number. That wasn't
24 sort of well, we're thinking of something
25 like this. This is the -- this is what the

1 penalty is going to be.

2 A Well, I think it's more
3 thoughtful than that on their end. Because
4 when it changed to 60, I said what -- you
5 know, what's that about?

6 And they said someone had done an
7 analysis of -- and it was more or less this.
8 Something like gross revenues generated by
9 the football program over X years or some
10 number like that.

11 In other words, they linked it to
12 I gather some subsequent work that someone
13 had done regarding how much money was being
14 generated by Penn State football, and that's
15 when they changed the number over.

16 Q So you understood it to be some
17 sort of reasoned analysis to get --

18 A Yes.

19 Q -- to that bigger number, not
20 just an arbitrary number.

21 A Yes.

22 Q They did not in -- as you were --
23 to your recollection, in those first two
24 conversations, mention vacation of the wins
25 as a penalty.

1 A No. I don't think in those first
2 two conversations. I think it was later.
3 But again, I think it's in the record.

4 Q It is.

5 A Because I wrote an e-mail back to
6 Penn State saying here is the list, and
7 then, oh, by the way -- there was a
8 follow-up call, and it was -- they said
9 vacation of wins -- it was either a
10 follow-up call or an e-mail. They said
11 vacation of wins.

12 But it's in the record, so it is.

13 Q In the first conversation with
14 Mr. Berst, did you debate the applicability
15 of the death penalty to Penn State's
16 situation?

17 A Yes.

18 Q Tell me about that debate.

19 A Well, we had an exchange. I said
20 well, what's your view on the death penalty?
21 And he said I don't think it's exclusive to
22 repeat violators and here is my reasoning.

23 And again, when they are saying
24 with counsel, meaning their counsel, their
25 legislative history guy -- you could not

1 find a guy that's got greater depth than
2 David Berst. I mean, he is a part of that
3 legislative process. He headed the
4 enforcement program. He was the guy in the
5 SMU case. You know, the whole bit.

6 Q Uh-huh.

7 A You could not find greater depth
8 on a guy who is giving advice on what he
9 thinks is the correct interpretation.

10 And his view was the death
11 penalty could be imposed even though Penn
12 State was not a repeat violator. And -- but
13 the most important point was that that is
14 exactly what their position was. It
15 wasn't -- yeah.

16 Q It may have been interesting to
17 debate, but it really didn't matter --

18 A Yeah. This is not like law
19 school, you know.

20 Q Again, it was an academic issue.
21 It wasn't a real-world issue because this
22 was how the NCAA viewed what was going to
23 happen.

24 MR. GARDNER: Object to the form.

25 A No. I mean, they -- his -- David

1 said this is my take, that the death penalty
2 could be imposed because -- and I have great
3 respect for his way of -- you know, his
4 thought process.

5 BY MR. HAVERSTICK:

6 Q As an aside, do you recall -- and
7 it may not have been this week, so don't
8 limit yourself to this week. Do you recall
9 you and Mr. Berst having a debate about
10 whether -- had Penn State gone through the
11 infractions process, that the death penalty
12 could have been imposed successfully?

13 A We discussed it.

14 Q Do you recall that the
15 conversation was resolved where you both
16 handicapping it that probably Penn State
17 would not receive the death penalty if it
18 went through the infractions process?

19 A I don't recall that discussion.
20 If it's in the record, it's in the record.
21 My only thought -- when we had the
22 discussion about what ifs -- and I -- I
23 described it as trying to revive. You know,
24 what if we tried to revive the infractions
25 process? Then how would that go?

1 I mean, I felt fairly confident
2 that the committee on infractions would not
3 come back with \$60 million. Because, I
4 mean, those are athletic directors and
5 conference commissioners and whatever, and I
6 don't think any of them were like well, we
7 can drop \$60 million.

8 But as to the rest -- Rodney
9 Erickson asked me -- he said, well, can you
10 guarantee that it would come out better?
11 And I said of course not. I said no way, I
12 can't guarantee how they would read -- for
13 all I know, the committee on infractions
14 might read the Freeh Report and generate
15 that same intensity. What was the word that
16 David Berst used? Outrage. I think he said
17 they were outraged. So I could not
18 guarantee it.

19 Q And I don't know if it developed
20 in the first two conversations. So if it
21 didn't, please tell me when it did.

22 What was your understanding of
23 the options available to Penn State
24 throughout this process?

25 A I think we had -- we had three

1 options, or at least three that I can think
2 of.

3 One would be the consent decree.
4 Two would be try to revive the infractions
5 process. And three, litigation, go to
6 court, get an injunction.

7 In fact, Donald even said that to
8 me at some point. He said if you don't like
9 it, sue us. And that -- that's a litigator
10 talking.

11 Q Break those down.

12 A Yeah.

13 Q Number one I get.

14 A Yeah.

15 Q Everybody agrees to the consent
16 decree.

17 A Yeah.

18 Q Number two, the infractions
19 process --

20 A Uh-huh.

21 Q -- was it your understanding that
22 had Penn State wanted to, it could have said
23 you know what? We don't want the consent
24 decree, we want the infractions process and
25 that the NCAA would have honored that?

1 A That was never my understanding.

2 But I mean -- this is not a simple answer
3 because of that dynamic in that week. I
4 mean -- and I would like to point to a
5 document.

6 Q Okay.

7 A And this is the transcript of
8 Rodney Erickson's statement to the board of
9 trustees.

10 Q And let's enter it as an exhibit
11 because I was going to ask you about it
12 anyway --

13 A Okay.

14 Q -- as Marsh 2.

15 (Marsh Exhibit No. 2 was marked
16 for identification.)

17 A So on page 25, he says,
18 "Dr. Emmert" -- well, let me back up a bit.

19 "I received a message to call
20 President Emmert on Friday, July 13th, as I
21 was leaving the Scranton campus after the
22 board of trustees meeting. Mark Emmert
23 indicated that now that the Freeh Report had
24 been issued, the university should begin to
25 work to respond to the letter we received

1 last November 17th from the NCAA following
2 the Grand Jury presentment."

3 "Dr. Emmert" -- and I'm not going
4 to go particularly long here, so don't worry
5 about that.

6 "Dr. Emmert indicated that he
7 would" -- "that we would have until the
8 first week or so of August to develop our
9 response to that November 17th letter.

10 Dr. Emmert called me back after the weekend
11 and indicated that both the NCAA Division I
12 Board and the NCAA Executive Committee were
13 shocked by the Sandusky trial, as well as
14 the facts that were provided in the Freeh
15 Report and that an overwhelming majority of
16 the board wanted blood to shut down Penn
17 State's football program for multiple
18 years."

19 "He then said that we should put
20 the November 17th letter aside, that things
21 were moving fast and not in a good direction
22 for Penn State. He indicated that the
23 nature of the violations were such that the
24 sanctions would not go through the normal
25 committee on infractions route as Gene just

1 indicated, but rather be taken up directly
2 by the board in this case, and the board had
3 the power to get that" -- "to go that
4 route."

5 "Emmert indicated" -- this is the
6 last paragraph I'll read.

7 "Emmert indicated that our only
8 chance to avoid a death penalty along with
9 sanctions might be to opt for a consent
10 decree that would have unprecedented
11 penalties, but would allow us to keep our
12 program running. He noted a hefty fine,
13 which actually became larger following
14 discussions with the board during the week,
15 lots of scholarships and a ban on postseason
16 play of several years."

17 So I think your question was what
18 was my understanding -- or something to the
19 effect as to what was my understanding
20 regarding the availability of the
21 infractions process. That was my
22 understanding.

23 Now, we subsequently had a
24 discussion about could we try to revive it.
25 Because the train was -- the problem here

1 with you asking me about my impressions is
2 that we have -- by the NCAA's design, we
3 have two completely parallel and --
4 conversations going on here. It's Emmert
5 and Erickson and it's me and Berst and Remy.

6 But early on, it was the -- I
7 mean, I think his description is exactly
8 correct. I mean, you would have to ask him.
9 I assume he's going to be deposed. But we
10 had subsequently a discussion about trying
11 to revive the infractions process, and we
12 weighed the alternatives. And Rodney
13 Erickson decided against trying to do that.

14 Q Do you have an understanding why
15 NCAA was proceeding in those two tracks?

16 A What do you mean? In the phone
17 calls?

18 Q Yeah.

19 A I don't, no.

20 Q Is it -- based on your -- and
21 I -- actually, your answers are much better
22 than -- I think it was even -- looking for
23 in terms of clarity.

24 It's not as simple to say in a
25 binary fashion yes, the infractions process

1 was open to us --

2 A Right.

3 Q -- or no, it wasn't.

4 A My only -- I mean, I guess --

5 when I read Dave Berst's depo transcript, it

6 sounded to me like he was saying well,

7 everyone had decided to get ice cream and it

8 was just vanilla, chocolate or strawberry.

9 It never ever, ever felt like that. It just

10 did not.

11 I mean, you know, I think --

12 whatever conversation Mark Emmert had with

13 Rodney Erickson -- and it was always my

14 impression that that conversation that

15 Rodney Erickson described occurred before my

16 first conversation with these guys. Because

17 in my first conversation with Erickson, he

18 said we're not responding to the letter.

19 The executive committee -- in other words,

20 he went on to describe this process as being

21 underway.

22 Q Option three, litigation --

23 A Right.

24 Q -- what would -- what would you

25 be litigating over?

1 A Some attempt to try to get an
2 injunction. You know, in other words, to
3 stop this process from occurring.

4 And we also weighed that. I
5 mean, both -- both the infractions process
6 was weighed with counsel. You know, in
7 other words, it was myself and Frank and
8 Steve Dunham, et cetera. That was weighed
9 with Rodney Erickson.

10 I never had a meeting with the
11 board or the executive committee until after
12 the consent decree was signed.

13 So the infractions process was
14 weighed and then litigation was weighed.

15 And as to litigation, Erickson
16 said I do not want to take that route
17 because I think -- first, he asked well, you
18 know, how we might come out? And I said
19 well, heaven's no. It's hard to know.

20 The NCAA has -- they have lost
21 lawsuits, but they haven't lost many in the
22 infractions process. They've lost
23 anti-trust and whatever, but they don't lose
24 many in this world. And -- in this world of
25 infractions.

1 And he said I just don't want to
2 do that because he said if I do that, the
3 country will think that we care more about
4 our competitiveness as a football team than
5 we care about those kids, the victims of the
6 Sandusky thing. Plus, he said who knows how
7 long it would go on. And that -- you know,
8 it's a really good point. Because think of
9 it. Three years later from the indictments,
10 we're still waiting for the State of
11 Pennsylvania to do something, which I don't
12 get. But whatever.

13 Q Did you ever have an
14 understanding that an option NCAA had
15 available was imposition of penalties by the
16 executive committee?

17 A I thought that's what we've been
18 talking about.

19 Q Well, I just want to make sure
20 that that's what we're -- that there's
21 consent decree. There is infractions, which
22 happens the way infractions does, and then
23 option three -- and this is the one I assume
24 that we would be litigating over, NCAA just
25 punishes.

1 MR. GARDNER: Object to the form.

2 A I don't -- I'm not -- keep going.

3 I'm just not aware of what you're talking

4 about here other than -- I mean, consent

5 decree -- oh, maybe I do know. I mean,

6 there's -- there's been -- consent decree,

7 enforcement process --

8 Q Right.

9 A -- litigation. There has been

10 some discussion -- and it was in subsequent,

11 I think, television interviews maybe given

12 by Erickson -- maybe the Pat Forde article

13 in Yahoo Sports or whatever where someone

14 asked him -- I think it was -- or maybe it

15 was an ESPN piece with Van Natta. Someone

16 asked Rodney Erickson what if Penn State had

17 not signed the consent decree, and I think

18 his response -- but again, that's a

19 newspaper article. Whether he would -- you

20 know, whether he -- that's just a newspaper

21 report. I think he went ahead and said

22 something like we would have or most likely

23 would have gone ahead and imposed even

24 greater penalties. I think that's -- all

25 I'm doing is repeating a quote that came

1 from him in an interview and whether that --

2 MR. SCOTT: "Him" is who?

3 THE WITNESS: Sorry?

4 MR. SCOTT: "Him" is who? Who

5 are you talking about?

6 THE WITNESS: I'm talking about a

7 quote from --

8 MR. SCOTT: Mark Emmert?

9 THE WITNESS: -- Mark Emmert

10 in --

11 MR. SCOTT: Thank you.

12 THE WITNESS: -- a news -- in

13 a --

14 BY MR. HAVERSTICK:

15 Q Got it.

16 A I think it's a newspaper piece.

17 Q So --

18 A I'm listening. Keep going.

19 Q -- in your -- in your discussions

20 that week with NCAA, did --

21 A I'm listening.

22 Q Well, I'm thinking of how to ask

23 the question so as to get through it.

24 Did you ever believe that if Penn

25 State rejected the consent decree and did

1 not opt to go into the infractions process,
2 that the executive committee, having grabbed
3 this, could just decide punishments and
4 attempt to impose them on Penn State?

5 MR. SCOTT: Object to the form.

6 A I really don't think -- I mean, I
7 really don't think that was in play. I
8 don't think we ever had that discussion.

9 BY MR. HAVERSTICK:

10 Q So the options were, in fact,
11 consent decree or some invocation of the
12 infractions process.

13 A Yeah. And I think frankly,
14 Emmert's statement -- Mark Emmert's
15 statements came after the consent decree was
16 signed. So it --

17 MR. GARDNER: I'm sorry. When
18 you get to a good --

19 MR. HAVERSTICK: Actually, I
20 think right about now is when I might do it.
21 Let me mark -- can you pull 60 and 65?

22 BY MR. HAVERSTICK:

23 Q Let's take a break. These are
24 two things -- I'm going to give you two
25 exhibits now I'm going to mark.

1 A Let me look at them so we can get
2 a running start on them.

3 Q That's why I was going to take a
4 break.

5 A Yeah. Okay.

6 (Marsh Exhibits Nos. 3 and 4 were
7 marked for identification.)

8 (A break was taken.)

9 BY MR. HAVERSTICK:

10 Q Thanks, Mr. Marsh, for taking a
11 look at these two things.

12 Let's skip to the Van Natta
13 article first.

14 A Uh-huh.

15 Q And I don't know what number that
16 one is.

17 MR. SCOTT: 3.

18 MR. HAVERSTICK: Thanks.

19 BY MR. HAVERSTICK:

20 Q I have it right that your earlier
21 testimony was, by and large, this article is
22 absolutely accurate save for a couple of
23 words?

24 A Yes.

25 Q Looking it over, can you tell me

1 the bit that isn't accurate?

2 A Hold on.

3 It's on what is page 7, and it's
4 the second full paragraph. "That afternoon,
5 Gene Marsh was stunned this time to learn by
6 phone that the draft would be" -- "draft
7 without the death penalty would be coming."
8 I wasn't stunned at all by that.

9 One, I thought the draft would be
10 coming; and two, by that time -- if you
11 thought a draft consent decree was coming in
12 lieu of the death penalty, why am I -- it
13 just seemed like a goofy choice of -- I
14 don't know where he was going. But anyway.

15 I think that's about it. I mean,
16 as far as I know, that's about the only
17 thing that I would say is -- that I would
18 say is -- relating to me that was odd.

19 Q As far as you know, the
20 recitation discussing what happened between
21 Messrs. Emmert and Erickson is accurate?

22 A I don't know if I would be in a
23 position to know that. But I mean, I --
24 I mean, I talked to Rodney Erickson about
25 it. I read his statement to the board, et

1 cetera. If there's any conflict, then
2 it's -- you can have that discussion with
3 Matt.

4 Q While we're on that -- and I'm
5 going to move off this article. While we're
6 on that bit that you -- that paragraph on
7 page 7 that you identified, "Marsh and
8 Erickson say it is hard to know why the
9 death penalty had been removed."

10 A Yeah.

11 Q Did you ever have a conversation
12 where NCAA explained or described why it
13 decided not to opt in that direction?

14 A Well, I mean, it's not very
15 complicated. I mean, we had argued all week
16 long. He describes it in his article and
17 it's in the consent decree. I mean, the
18 consent decree -- maybe you need to mark it
19 so we can talk about it, but the consent
20 decree says the executive committee decided
21 not to -- in light of -- and then it gives
22 this list. The executive committee decided
23 not to do this.

24 Q That was his explanation.

25 A Yes.

1 Q That's the explanation.

2 A Yes.

3 Q Let's move off of that one, then,
4 and look at the September 7, 2012 e-mail
5 from Donald Remy to you.

6 A Okay. Yeah.

7 Q I believe that you testified
8 about this e-mail at some point earlier
9 today, although bluntly, I don't entirely
10 recall what you said. So let me ask this.
11 This e-mail was, as I understand it, a
12 reaction to Ed Ray's interviews, public
13 statements, et cetera, about the death
14 penalty application?

15 A Yes.

16 Q Do you disagree with any of the
17 assertions that Mr. Remy makes to you in
18 this e-mail?

19 A I --

20 MR. SCOTT: I don't know that the
21 witness has had a chance really to reread
22 this. I know that he's seen it before. It
23 was addressed to him. But I would suggest
24 to the witness that before he answer that
25 kind of a question, you take the time to

1 read it.

2 BY MR. HAVERSTICK:

3 Q As much as you want.

4 A Well, I -- just -- here's -- let
5 me explain to you this -- my reaction to
6 this e-mail. If you note, the timing is
7 September. And you can tell that he is
8 frustrated. You know, it starts out, "I've
9 been flying" -- whatever. I mean, this
10 e-mail has a fair amount of element of
11 frustration in it.

12 And so when we got it, I shot it
13 immediately to the people at Penn State.
14 And I must say that I read it kind of
15 quickly and then just put it in a stack
16 because it seemed a little bit like a rant,
17 you know. And I -- and I frankly would have
18 -- I might have a difference of opinion with
19 -- you know, again, we talked previously
20 about the idea of these -- these choices
21 were not just simply like let's go have ice
22 cream and do you want strawberry, vanilla
23 and chocolate. It was pretty -- they were
24 pretty grim alternatives.

25 And so any attempt to

1 characterize it as just -- but I don't --
2 you know, can you point to me where you're
3 going? I mean, this is a long e-mail that's
4 got so much -- is there any element in it
5 that is of -- I mean, I was at least finally
6 glad to hear him, at least from his
7 perspective, talk about, you know, but
8 basically -- almost like but for -- and I
9 don't know exactly where it is because I
10 don't -- I don't usually write paragraphs
11 that long. But about the -- you know, the
12 death penalty, you know, being right there
13 on the edge but for the actions taken by the
14 school. I was finally glad to get that
15 clear, because Ed Ray was just fogging the
16 room up on that issue.

17 Q Explain that. I mean, I want to
18 hear -- what was your reaction to what you
19 perceived Ed Ray to be saying?

20 A Well, the representations made to
21 me during the week -- and again, I -- the
22 one that was most vivid to me was the
23 Thursday one where, you know, it starts the
24 conversation, and David Berst says to me
25 Gene, I just want you to know -- I think it

1 was David that said, we just got off the
2 phone with these guys, and even at this late
3 date -- that's Thursday of that week -- you
4 should know that the majority of them were
5 in favor of -- et cetera. We already talked
6 about that.

7 So then Penn State signs the
8 consent decree, and within about 24 or 48
9 hours, Ed Ray is making public statements
10 that just seemed to contradict that idea.
11 And it didn't just happen briefly. It went
12 on and on.

13 In other words, he would dribble
14 out. He would give interviews to people,
15 and -- and this is -- this is all the
16 while -- which I thought was fairly rich.
17 This is all the while that Donald is
18 expressing at page 3 his frustration about
19 Penn State and other people talking about
20 things publicly, you know.

21 In other words, frankly, I -- as
22 I told you, I don't make it a habit of
23 discussing these type of exchanges publicly,
24 et cetera. Well, if only that view held for
25 Ed Ray, then we would all be better off.

1 So I mean, Ed Ray created a
2 terrific amount of confusion, and there was
3 a terrific amount of heat going back at the
4 people at Penn State. And I don't blame
5 people for having that heat because of Ed
6 Ray's comments.

7 And there's an e-mail -- I'm sure
8 you have it -- where -- and you have the
9 voice mail that I received from Dave Berst.
10 And -- and my message to the NCAA in the
11 strongest of terms was what is this guy
12 doing? In other words, you know, what is he
13 saying? It's contrary to -- now, if what he
14 was trying to say was we never threatened
15 Penn State -- well, we've already had that
16 discussion.

17 Q Right.

18 A It's the Simon Says discussion.

19 But if he's saying -- if he's
20 saying that they never really got to that
21 point of, you know, the majority --
22 whatever, then that's -- then my point is
23 simple. It's completely contrary to the
24 representations made to me. So it's that
25 simple.

1 And so this thing was caused by
2 one more Ed Ray moment. And there were more
3 than a few.

4 Q I think a lot of my questions
5 about this e-mail you've answered already.
6 I know you -- I wanted to give it to you to
7 get to that piece and --

8 A But let me -- let me -- I'm sorry
9 about talking over. Let me just say, I
10 don't want to -- I do not want to leave
11 hanging in this air the idea that unless I
12 have refuted a sentence in here that I buy
13 into it. I just don't want to do that.

14 Q Yeah.

15 A This is his e-mail, his view of
16 the world, works for him. It's not me
17 adopting it because I haven't --

18 Q Understood.

19 A -- flagged something.

20 Q Understood. And I don't mean to
21 say that if we don't go over this
22 sentence-by-sentence --

23 A Right.

24 Q -- and you say I dispute it --

25 A Fair enough.

1 Q -- that you're agreeing with it.

2 Take a look -- just to close this
3 out, take a look at the first page. And
4 about in the middle of the first -- the
5 second paragraph, there's, "Fifth, in no
6 communication by David Berst or me did we
7 ever threaten the so-called death penalty."

8 My question about your agreement
9 with that assertion has been answered by my
10 previous questions and we don't need to go
11 through that again?

12 A Correct. I mean, it was like
13 Simon Says. I mean, they're just saying
14 that we didn't -- they never did say if you
15 don't sign the consent decree, we are going
16 to impose the death penalty.

17 Q On the second page --

18 A You know, again, let me -- it
19 dawns on me I should add.

20 Q Sure.

21 A They never did say that if you
22 don't agree to this, we are going to impose
23 the death penalty. They did say throughout
24 that the majority of the board of directors
25 was in favor of cessation of competition or

1 whatever. Okay?

2 Q All right. In the second page,
3 there's a reference by Mr. Remy in the
4 second full paragraph, that really big one,
5 towards the top of that paragraph, "During
6 the course of the Freeh investigation, both
7 the NCAA and the Big 10 were provided
8 periodic updates on progress. Contrary to
9 the suggestions by Penn State and its
10 counsel, we were not provided advanced
11 substantive information regarding the
12 findings of the Freeh group."

13 Do you know what representations
14 by Penn State and its counsel Mr. Remy is
15 referring to?

16 A No.

17 Q To your knowledge, did NCAA have
18 any advanced substantive information
19 regarding the Freeh group findings?

20 A I'm not in a position to know.
21 All that I was told from one of the very
22 first conversations -- and it's in one of
23 the e-mails -- that the NCAA received
24 periodic reports from the Freeh group. And
25 that's all I know, exactly like that. I

1 don't know if it was a here is who we
2 interviewed yesterday or if it went to
3 substance. I don't know.

4 Q It never got brought up in any of
5 your discussions during that week.

6 A Absolutely not, no.

7 Q I believe that I asked this
8 question before, and if I did, I apologize
9 because I'm tired.

10 NCAA insisted that in the consent
11 decree Penn State accept the Freeh Report
12 findings, correct?

13 MR. GARDNER: Object to the form.

14 MR. SCOTT: Object to the form.

15 A They wanted Penn State to blanket
16 accept the Freeh Report as gospel. Steve --

17 THE WITNESS: Well, I may need to
18 ask you a question because --

19 MR. SCOTT: No. It's -- you can
20 talk about that.

21 A Steve was very adamant -- Steve
22 Dunham was very adamant that the language be
23 added -- and it is one of the few places
24 where we actually got any push back in the
25 Freeh Report -- I mean, in the consent

1 decree. Steve Dunham was adamant that he
2 wanted the language in there that for
3 purposes of resolution of this dispute or
4 some such language -- it's in the consent
5 decree -- Penn State accepts, et cetera.
6 You know, in other words, to resolve this
7 matter. And so that language is in the
8 consent decree.

9 BY MR. HAVERSTICK:

10 Q Dunham wanted that language in --

11 A Yes.

12 Q And did you say that it was push
13 back from NCAA, that it -- maybe I misheard.

14 A No. Their initial draft had us
15 just -- had Penn State basically embracing
16 every part of the Freeh Report.

17 Q Oh, I got -- the first clause is
18 the piece that he wanted to insert for
19 purposes of --

20 A And he said -- he said that he
21 wanted that language in there because he --
22 yeah. I mean, you know the other things
23 that he was considering as the general
24 counsel there.

25 Q In any of your conversations

1 either during that week period or after, did
2 anyone at NCAA ever say why it was important
3 to NCAA that there be acceptance of the
4 Freeh Report?

5 A Donald Remy was arguing -- was
6 trying to get as much as he could for the
7 idea that Penn State would accept the Freeh
8 Report. Again, I guess that he had his mind
9 on maybe litigation down the road or
10 something, you know.

11 I mean, if it wasn't clear to
12 him, it was clear to me that the odds that
13 there would be litigation, when you resolve
14 a matter like this, are about close to 100
15 percent.

16 But you would have to ask him. I
17 assume he's being deposed, right? So --

18 MR. HAVERSTICK: Let me see the
19 little e-mail that goes in front of that,
20 please.

21 (Marsh Exhibit No. 5 was marked
22 for identification.)

23 BY MR. HAVERSTICK:

24 Q I'm going to mark -- did we mark
25 this already? Okay. 5.

1 Now, this is you forwarding the
2 article to Shep Cooper.

3 A Right.

4 Q And just so that I have it
5 answered, because I think that I know the
6 answer, what did you mean when you wrote to
7 him, "See the great choice," end quotes, we
8 had?

9 A Well, because people kept selling
10 the idea that, again, it was like chocolate,
11 vanilla or strawberry. You know, just like
12 something that you just -- well, you know,
13 you pick a curtain or something in a game
14 show. So anything like that. So it was
15 three choices of -- at least, in my opinion,
16 three choices of completely grim
17 alternatives.

18 Q Give me a sec here. Well, while
19 I do this, to set up a couple of questions
20 and try to wrap up, tell me internally at
21 Penn State to whom you reported on your
22 discussions with NCAA.

23 A Frank and Steve, Frank
24 Guadagnino, Steve Dunham, and in some of the
25 conversations, Rodney Erickson was involved.

1 I was on a conference call or two
2 that maybe involved their -- you know, might
3 have involved like their public relations
4 people or something, but we did not get
5 into -- I mean, those were exactly those
6 kinds of conversations. In other words,
7 what -- it was -- they wanted to better
8 understand say NCAA speak or something like
9 that.

10 Q Did you have an understanding
11 about who inside Penn State could make the
12 decision on whether a consent decree was
13 accepted or Penn State was going to go the
14 infractions route?

15 A I don't -- I never gave
16 governance advice. I was never asked to
17 give governance advice. I never met with
18 their board ahead of the consent decree and
19 I never met with the executive committee or
20 was on a telephone call ever.

21 Q Do you know internally inside
22 Penn State among the board of trustees'
23 members who was aware of the substance of
24 your negotiations or who wasn't or
25 discussions or however you want to

1 characterize those as?

2 A You would have to ask them.

3 Q You don't --

4 A I mean, it's my understanding --

5 well, I think that it's in Rodney Erickson's

6 statement to the board of August 12th that

7 he said at several points in the week that

8 he had discussions with the executive

9 committee. I think that's what he says.

10 And I was not a part of those discussions.

11 Q And it was never discussed in any

12 discussions you had this is who the

13 decisionmakers are.

14 A No. I did -- in the -- in the

15 private board meeting that I had -- the

16 first meeting that I had with the board of

17 directors up there was a private meeting.

18 It was not a public meeting -- there was

19 some discussion -- and I sat there until I

20 was basically asked to speak. And --

21 MR. SCOTT: I want to caution

22 you, Gene, that if this is after the consent

23 decree was signed --

24 THE WITNESS: Right.

25 MR. SCOTT: -- or reacting to

1 other things that were happening, we're not
2 waiving as to that.

3 A Well, all I can say is it was my
4 understanding that there was governance
5 advice given, but I don't -- you would have
6 to ask the people who gave the advice.

7 BY MR. HAVERSTICK:

8 Q When, if you recall -- well, let
9 me ask you first, did you ever advise Penn
10 State on what it should do given the three
11 options that were the pallet in front of
12 them?

13 A I had a full discussion with them
14 on what those choices were, and I told them
15 what I thought might become of the
16 enforcement process. There's no way to
17 know. You know, when people want to explore
18 that, they, I think, are in large part
19 missing the mark.

20 And here's why I think they're
21 missing the mark. It's something that I
22 said in the public. It's very clear from
23 the consent decree that the people at the
24 NCAA thought that this was in part an
25 infractions issue, but even larger, I think,

1 culture, a culture issue. You know, not
2 NCAA bylaw stuff, but culture. If you look
3 at the consent decree, it just says that
4 explicitly.

5 And so this process -- in fact,
6 when we had discussions about how long would
7 the penalties be, et cetera, and we pushed
8 back, pushed back, pushed back, we -- you
9 know, we pushed back on the idea for
10 heaven's sakes, why four years? You know,
11 scholarship losses and postseason ban and
12 that kind of thing.

13 And the answer that I got was
14 because we believe that it would take four
15 years to -- basically, for people to redeem
16 themselves on the culture idea. In other
17 words, that it's like -- I don't know.
18 Whatever -- you know, four years of
19 self-study or penance or something. I don't
20 know how you want to describe it.

21 But they -- they were -- we tried
22 to get from the start a so-called reopener,
23 you know, the idea of maybe, you know, two
24 years out you could have them reconsider.
25 And the best that we were able to achieve is

1 what is the -- I believe the last sentence
2 of the consent decree that it can be amended
3 by mutual consent of the parties.

4 And people can read that to mean
5 all kinds of things, but I guarantee you
6 what it meant to us was do the best that you
7 possibly can in implementing these
8 recommendations for reform with the idea
9 that there might be a prayer at the end of a
10 certain period of time where some relief
11 might be granted. They rejected the idea of
12 an express -- what Steve Dunham called a
13 reopener; in other words, take a look two
14 years down the road or whatever.

15 Q Am I right that there was an
16 attempt a month or so after the consent
17 decree to amend it that did not -- did not
18 succeed with the NCAA?

19 A Well, I'm in post consent decree.

20 MR. SCOTT: Well, you can talk
21 about your dealings with the NCAA if you had
22 any on that topic. Just don't talk about
23 what you said to Penn State and what Penn
24 State said to you. But if you dealt with
25 the NCAA on that issue --

1 A The idea was that maybe since
2 they were unyielding on the consent decree,
3 that maybe when we got to a discussion and
4 we went up there and had a meeting with them
5 on the athletic integrity agreement, that
6 maybe somehow we could get, you know,
7 through the back door something we weren't
8 able to get through the front door. Maybe
9 some kind of admission that two years into
10 it or whatever -- because I argued with them
11 about trying to get a reopener, and I got
12 the response of we just don't think there's
13 a chance that you could reform the culture
14 there inside four years. That's what their
15 response was.

16 So we tried in the athletic
17 integrity agreement to get some -- maybe,
18 you know, a back-door look at what Penn
19 State had done since it relates to the
20 integrity agreement and all the things that
21 they initiated, et cetera.

22 And so we -- you know, we tried
23 at that meeting to -- and I remember it drew
24 a complaint from, I think, the Big 10
25 counsel who said -- he was on the phone. He

1 said something like I'm confused, it seems
2 to me you may be trying to reopen the
3 consent decree or whatever.

4 I mean, I'm not ashamed to say
5 yeah, we were trying to get some -- we were
6 trying to figure out a way to get somebody
7 to give any air whatsoever, yeah, yeah. See
8 if they would go for it.

9 (Marsh Exhibit No. 6 was marked
10 for identification.)

11 Q I'm going to show you an exhibit
12 that we marked as Marsh 6.

13 A Okay.

14 Q I'm more interested in Mr. Remy's
15 e-mail to you.

16 MR. SCOTT: At the bottom of page
17 1?

18 MR. HAVERSTICK: Bottom of page
19 1, yeah.

20 A Okay. Yeah.

21 BY MR. HAVERSTICK:

22 Q Is this how you came to learn
23 that a punishment term would be vacation of
24 wins?

25 A I believe so, yes. It just came

1 as a followup to a conversation that might
2 have occurred just right before that. Like
3 hang up the phone and then ten minutes later
4 is another e-mail, something like that.

5 Q One more thing.

6 A Right, correct.

7 Q Was there ever a rationale given
8 to you for the -- was there a rationale
9 given for why the wins were being taken
10 away?

11 A Ill-gotten gains, you know. It's
12 the same thing that Julie Roe came around to
13 finally in her e-mail at some point that you
14 have and you've discussed in a deposition
15 where she started skeptical and then she
16 ends with these folks won a lot of games on
17 this sort of public facade or -- she didn't
18 use the word "facade," but through their
19 idea of having so much integrity, and then
20 she says point blank that was a lie, and so
21 taking away the wins is appropriate. That
22 was the rationale.

23 I mean, vacation of wins, you
24 take away what are perceived to be
25 ill-gotten gains.

1 Q Was there language that was
2 originally going to be in the consent decree
3 and it was taken out explaining that the
4 vacation of the wins related to sort of
5 ill-gotten gains?

6 A I don't know what they ever had
7 in -- I just don't remember what they ever
8 had in -- that might have been taken out or
9 whatever. Ill-gotten gains, I just don't
10 know.

11 Q You follow up replying to
12 Mr. Remy to the one more thing with an
13 e-mail of your own. And the second-to-last
14 paragraph includes a note that at some
15 point, an institution may be better off
16 under a traditional infractions process.

17 At that point in time, did you
18 feel Penn State would have been better off
19 with a traditional infractions process or
20 the consent decree?

21 A This is a frustration e-mail
22 obviously. It felt like a bit of a runaway
23 train there, you know. A lot of emotion.
24 Of course, they said that from the start.
25 Very fluid situation. People had very

1 strong feelings. They're outraged, et
2 cetera. But oh, by the way, vacation of
3 wins since 1998 is a pretty extraordinary
4 act, and it -- the way it felt to me, it was
5 an oh, by the way. You know, I mean, oh, by
6 the way.

7 Those are the kinds of things --
8 I know from my work on the infractions
9 committee that those are the kind of things
10 that people react very strongly to, taking
11 away wins and whatever. So it's not just an
12 oh, by the way. It felt like an oh, by the
13 way, but that's why I reacted the way I did.

14 Q But it's not because, in your
15 view, it's actually a very significant --

16 A Sure.

17 Q -- not oh, by the way thing.

18 A Absolutely it's not a -- yes, it
19 is. It is a great big thing to a lot of
20 people. It's not just a -- you know, it's
21 -- yes, it's a big deal.

22 Q This is your view. Do you buy
23 the rationale that NCAA proffered for taking
24 -- for vacating the wins, that it was
25 ill-gotten gains?

1 MR. SCOTT: You're asking him for
2 his opinion --

3 MR. HAVERSTICK: Sure.

4 MR. SCOTT: -- today as an expert
5 or are you asking him what his view was back
6 then?

7 BY MR. HAVERSTICK:

8 Q Well, how about your -- yeah, how
9 about your view back then?

10 A I think I -- if you -- if you
11 accept the Freeh Report as the narrative --
12 that's the truth, you know, in other
13 words -- then the answer would be yes. And
14 here's why. Throughout my nine years on the
15 committee and my work since, you have wins
16 vacated for the craziest of reasons. Let me
17 give you an example.

18 In the Alabama -- one of the
19 recent Alabama cases, wins were vacated
20 because players got extra books at the
21 bookstore. In other words, there's a rule,
22 believe it or not, that says you can give
23 players certain textbooks, et cetera, but if
24 you give them a thesaurus or a dictionary or
25 a -- whatever, it could be outside the

1 permissible bounds. Well, Alabama did.
2 Books at the bookstore. Education. Right?
3 Everybody -- everybody recruits
4 illegally that way, right? Please come to
5 Alabama. We'll give you extra books.

6 And we ended up -- we ended up
7 having to vacate wins because our players
8 got extra books. And so if vacating wins
9 because players got extra books is proper,
10 vacating wins for what is described in the
11 free narrative is times a hundred proper.

12 Q Your frustration expressed in
13 this e-mail, then, isn't -- if I understand
14 it -- isn't necessarily with the
15 intellectual underpinning of the vacation of
16 wins; it's the sort of arbitrary manner.
17 It's just sort of oh, yeah, by the way, this
18 --

19 A Correct.

20 Q In the Alabama situation, were
21 those wins vacated through the infractions
22 process?

23 A Yes.

24 Q Was that -- was that vacation
25 appealed, if you know?

1 A I don't know. I'm not sure. I
2 suspect. I can remember Nick Saban's
3 reaction to it. He blew a holy smoke
4 gasket, yeah.

5 Q Give me five minutes.

6 A Yeah.

7 (A break was taken.)

8 (Marsh Exhibit No. 7 was marked
9 for identification.)

10 BY MR. HAVERSTICK:

11 Q Mr. Marsh, I have put in front of
12 you a document marked as Marsh 7. Do you
13 recall -- and this is an e-mail roughly
14 around the time that the consent decree was
15 signed, right?

16 A Sorry? It's roughly --

17 Q This e-mail was sent roughly
18 around the time that the consent decree was
19 signed; am I right?

20 A A few weeks after.

21 Q Okay.

22 A Or no, no. Excuse me.

23 MR. SCOTT: We'll stipulate that
24 was the date --

25 A Okay. Whatever, yeah.

1 BY MR. HAVERSTICK:

2 Q Do you remember this -- do you
3 remember what leak you referenced in this
4 e-mail?

5 A I don't. I don't remember. I
6 don't remember this e-mail at all. I
7 remember the other ones I have seen, not
8 this one.

9 Q Do you believe -- well, did you
10 believe then that it was, in fact, typical
11 for the NCAA to leak and conduct its
12 business sort of in the public domain?

13 A Well, I'd say that's unfair. I
14 mean, leaks have occurred -- clearly, leaks
15 have occurred from the NCAA, but I mean, in
16 my experience on the committee on
17 infractions where everybody has pledged that
18 there will be, you know, no public comment
19 or whatever, it just doesn't happen.

20 I mean, there have been leaks
21 before from the NCAA. There have been leaks
22 from institutions, lawyers for the
23 institution. It's -- I don't -- number one,
24 I just don't recall this -- what triggered
25 this up. So I mean, I'm just gassing on

1 here otherwise.

2 Q Is the NCAA, in your view, an
3 image-conscious organization?

4 MR. GARDNER: Object to the form.

5 A I would -- I would say it is,
6 yeah, just like Regions Bank is there across
7 the street and all of them. I mean, they
8 all are, as your law firm is.

9 BY MR. HAVERSTICK:

10 Q Never with us.

11 There was a press conference
12 scheduled for announcement of the signing of
13 the consent decree, right?

14 A I believe so, right.

15 Q Do you recall if that press
16 conference -- strike that. Let me ask it
17 this way.

18 MR. GARDNER: Which press
19 conference are you talking about? Ours or
20 theirs?

21 MR. HAVERSTICK: That's a great
22 point. Thank you.

23 BY MR. HAVERSTICK:

24 Q Do you recall NCAA letting you
25 know that it intended to hold a press

1 conference regardless of whether Penn State
2 executed the consent decree?

3 MR. GARDNER: Object to form.

4 A I didn't have any discussion with
5 the NCAA in their scheduling of a press
6 conference or whatever. Nothing whatsoever.

7 Q Okay.

8 A None.

9 BY MR. HAVERSTICK:

10 Q By my count, the consent decree
11 was developed in conversations with you over
12 a period of about 11 days. Does that sound
13 right?

14 A Well, "developed" is an
15 interesting word.

16 Q Don't -- feel free to use your
17 own.

18 A Well, I mean --

19 Q Imposed?

20 A -- if you have the ability to
21 look at the original draft and then look at
22 the final, then see how much development
23 came from Penn State's side. Pitifully
24 little, you know.

25 So I mean, I don't want to -- it

1 was not a negotiation and the consent decree
2 draft that was put on the table, we got
3 very, very, very little movement from the
4 original draft.

5 Q It all went down in a very -- or
6 relatively compressed period of time.

7 A Right. I don't -- but somewhere
8 along the way, in recent depositions or
9 somewhere, there's a memo -- someone has got
10 me tagged as somehow an architect or
11 something. That is completely wrong. I
12 mean, just total bologna.

13 Q The speed -- you mean the
14 architect of the speed of the thing?

15 A No, no. The -- somehow drafting
16 the consent decree or whatever. That's
17 total bologna.

18 Q That's not how -- you didn't
19 draft it.

20 A Hardly.

21 Q Did you ever get an explanation
22 from NCAA why NCAA wanted the consent decree
23 done in such a short period of time?

24 A They were driving towards an
25 early August meeting of the -- that was told

1 to me. It wasn't a surprise.

2 Q Tell me --

3 A They were trying to get some
4 resolution of this matter before their
5 August meeting, because I believe I'm right
6 in that the August meeting was Ed Ray's swan
7 song as the president of the executive
8 committee. I think I'm right, that that
9 was -- I mean, it was made clear to me
10 almost -- it's in the e-mails and it's in
11 one of the first conversations. They're
12 driving towards an August -- they want to be
13 able to have this thing in the can by the
14 time that they have their board or executive
15 committee meeting in August. That was said
16 point blank and it's in the e-mails.

17 Q Do you recall who said that to
18 you?

19 A It was either Remy or Dave, one
20 or the other.

21 Q And was it for the purpose of
22 giving an accomplishment to Mr. Ray?

23 A You'll have to ask them. It's
24 not -- I could not -- I have no idea. I
25 just told you what they told me.

1 Q They didn't say why; they
2 just said we're doing this --

3 A Couldn't answer.

4 Q And was "swan song" your word or
5 their word?

6 A Mine. Of course, mine. That's
7 mine.

8 Q But the sentiment that it was --

9 A Yeah. I don't in any way want to
10 suggest that they were saying that they
11 needed, you know, this to be like some final
12 accomplishment or whatever. It's just a
13 matter of they're conducting business and
14 this group, I think, on a regular calendar
15 comes together in that week in August, and
16 they were driving towards having this thing
17 resolved by that week in August.

18 Q By then.

19 A And motivation is theirs to
20 explain. Couldn't --

21 Q It wasn't discussed with you.

22 A No.

23 MR. HAVERSTICK: I don't have any
24 other questions for you at this time. Thank
25 you for sitting with us.

1 MR. GARDNER: We have a few, but
2 why don't we take a break and switch
3 positions because I think it would probably
4 be easier for the court reporter who is
5 nodding and she likes that idea.

6 (A break was taken.)

7 (NCAA Exhibit No. 1 was marked
8 for identification.)

9 EXAMINATION

10 BY MR. GARDNER:

11 Q Mr. Marsh, I've handed you what's
12 been marked as -- Defense Exhibit 1 is the
13 way it's been marked.

14 MR. GARDNER: And if
15 nobody objects, we'll just keep going with
16 that.

17 MR. SCOTT: Let's call it NCAA
18 Exhibit 1.

19 MR. GARDNER: I can live with
20 that.

21 BY MR. GARDNER:

22 Q Earlier in your testimony, you
23 talked about a conversation that you had
24 with Shep Cooper at the NCAA and thought
25 that might have been your first involvement

1 with anything related to Sandusky and Penn
2 State?

3 A I mean, I -- what I remembered,
4 yeah.

5 Q Right.

6 And what is marked in front of
7 you as NCAA Exhibit 1 is an e-mail chain
8 that starts chronologically on May 16, 2012
9 between yourself and Frank Guadagnino,
10 correct?

11 A Yeah. Uh-huh.

12 Q And there you're talking about
13 Penn State and Sandusky generally speaking,
14 correct?

15 A Yeah. I just didn't recall this
16 exchange. Yeah.

17 Q So if this happened before your
18 July 4th 2012 exchange with Shep Cooper,
19 then --

20 A So be it, yep. And I -- it
21 wouldn't have registered a great deal with
22 me because, as I said, a few months before,
23 I had worked for them -- or at least
24 sometime back in that wrestling matter. So,
25 you know, this is just a -- whatever. Yeah.

1 Okay.

2 MR. GARDNER: NCAA 2, please.

3 (NCAA Exhibit No. 2 was marked
4 for identification.)

5 BY MR. GARDNER:

6 Q Mr. Marsh, you've been handed
7 what's been marked as NCAA 2.

8 A Right.

9 Q It's July 18th.

10 A Okay.

11 Q And you're asking whether --
12 you're asking the Penn State lawyers whether
13 e-mails from you are subject to open records
14 requests, correct?

15 A Right. Uh-huh.

16 Q Why did you ask that?

17 A Because it's normally in my --
18 particularly with my old firm, we try to
19 establish right out of the gate what is or
20 isn't subject to open records requests and
21 what they do or don't want put in e-mails.

22 And as you know, open records
23 laws have a wide variety. So it's just
24 better to get that out front.

25 Q You wanted to know whether what

1 you were talking to Penn State's lawyers
2 about would be possibly disseminated to the
3 whole world.

4 A I wanted to know what their
5 preference was for the most part. In other
6 words, they have to tell me what they do or
7 don't want in discussions.

8 Q And Mr. Guadagnino responded that
9 no, your e-mails to them would be protected
10 by the attorney-client privilege, correct?

11 A Yeah. That's what he said.
12 Yeah.

13 Q Which I take it you took to mean
14 I can -- I can say what I need to say and it
15 won't be sent to the whole world.

16 A Right. In other words, I can
17 give them reports on what the NCAA said or
18 whatever and it's not going to end up in the
19 paper on Monday. Right. Because some news
20 organizations have standing open records
21 requests that in short order snags this kind
22 of correspondence. So I need to know --
23 needed to know what their deal was, what
24 they did or didn't want, yeah.

25 Q And I take it by the time you

1 were engaged on the -- the Sandusky/Freeh
2 matter, whatever we're calling it, this was
3 already an issue of interest in the press?

4 A Oh, yeah. I mean, because they
5 didn't hire me until July 11th. So yeah, to
6 say the least. I mean, it started --
7 started with November 2011 and then it was
8 hanging out there, yeah.

9 Q From the time that you were hired
10 on July the 11th -- specifically -- I
11 shouldn't say hired -- specifically engaged
12 on this matter that brings us here today
13 until the signing of the consent decree on
14 the 22nd --

15 A Yep.

16 Q -- was there any point in time
17 when Penn State was not free to walk away
18 from the consent decree process?

19 A Penn State was not free to walk
20 away. Given all the discussion we had this
21 morning, you know what the alternatives
22 were. I mean, the school weighed and
23 considered litigation. The school weighed
24 and considered -- I called it trying to
25 revive the infractions process, because by

1 the time that I got involved, or at least in
2 the first conversation that I had, it seemed
3 -- because Erickson, without even any
4 knowledge of my conversations with Berst and
5 Remy, said this is what's being proposed,
6 don't respond to the November letter, it's
7 going to be an executive committee board
8 action.

9 So we -- ongoing during that
10 week, we had discussions about the
11 alternatives and weighed the alternatives.

12 Q And throughout the process until
13 the execution of the consent decree, I take
14 it that Penn State was free to choose any
15 one of the three options that you outlined
16 earlier today.

17 A As long as you're not making it
18 sound like chocolate, vanilla or strawberry.
19 "Free" -- you know, "free" just sounds like
20 you're just walking around the clover field.
21 I mean, you're -- well, whatever.

22 Q Fair enough. And in clover
23 fields in my experience, sometimes you step
24 in --

25 A Whatever, yeah.

1 Q -- unpleasant things.

2 A You know what I mean.

3 Q I do.

4 A Three grim choices. So just --

5 Q Three grim choices based on what
6 was outlined in the Freeh Report, right? I
7 mean, we're not talking about something that
8 would --

9 A It wasn't just the Freeh Report.
10 It was also -- the Penn State Board of
11 Directors, after the Freeh Report was
12 issued, they -- and I made this point with
13 them in a board meeting. They walked up to
14 the microphone and accepted responsibility,
15 and they didn't technically adopt the Freeh
16 Report, but they accepted responsibility and
17 they gave very vivid statements about what
18 they thought were the failings of oversight,
19 et cetera.

20 So it was my view -- and I told
21 them this in a board meeting -- that if you
22 take the Freeh Report as -- the narrative of
23 the Freeh Report and you take their language
24 and you put one over the other, then indeed
25 you do have lack of institutional control

1 and unethical conduct, et cetera.

2 So it wasn't just the Freeh
3 Report. It was the board's action.

4 Which, again, you know, that's
5 what gets so distorted in this stuff. What
6 is not noble about that? I mean, what's not
7 noble about the idea of having an unfettered
8 examination of how this all happened and
9 then, as a responsible group of people,
10 accepting responsibility for it?

11 You know, anywhere in life, in
12 church or whatever, you would say that's
13 really -- that's a -- that's the right thing
14 to do. Yet, in this world of litigation and
15 second guessing and whatever, people get
16 criticized for it. I just don't get it.

17 Q You won't get any argument from
18 me on that point.

19 A Okay. Good.

20 (NCAA Exhibit No. 3 was marked
21 for identification.)

22 Q Mr. Marsh, we've handed you
23 what's been marked as NCAA Exhibit 3.

24 A Right.

25 Q It's a Thursday, July 19th e-mail

1 from you to President Erickson and lawyers
2 Dunham and Guadagnino copying a couple of
3 your colleagues, correct?

4 A Yes.

5 Q And feel free to take a look at
6 this. It's a few -- it's a couple of pages
7 long.

8 A Okay. I had looked at this
9 before today. So -- like a refresher.

10 So --

11 Q Okay.

12 A So go ahead, and then if I need
13 to study it further, then I will.

14 Q That's fine.

15 You reviewed this to prepare for
16 your deposition today?

17 A Yes.

18 Q And this is a report on -- to
19 your client on conversations that you had
20 had with David Berst and Donald Remy,
21 correct?

22 A I think it was -- yes. And it's
23 Thursday, and I think it was the second of
24 what were at least three conversations, I
25 think. And then there was a third, or

1 another one.

2 Q And I think that we're going to
3 get into that one next.

4 In reviewing this in preparing
5 for your deposition today, did you see
6 anything in this that in hindsight wasn't
7 accurate?

8 A No. I think that -- I mean, I
9 think all I was doing was just basically
10 reporting. I mean, that's what I ended up
11 doing in a whole lot of situations, just
12 being the like mouthing go between.

13 Q Right. And I understand that.
14 So what you're saying is you're
15 reporting on the conversation --

16 A Correct.

17 Q -- to your client, right?

18 A Correct. Yeah.

19 Q In the second paragraph, you note
20 that you punched back on some things today?

21 A Right.

22 Q Not to start a gun fight, but to
23 point out extreme positions?

24 A Right.

25 Q And when you say you "punched

1 back," I take it you pushed back on what
2 Berst and Remy were saying.

3 A Yeah. But I mean, they were just
4 conveying -- it's my understanding that they
5 were conveying other people's thoughts.
6 Same idea. Right.

7 I don't think that it's
8 constructive to get into yell sessions about
9 any of this. We didn't.

10 Q But you advocated your client's
11 position.

12 A Yes.

13 Q In the next paragraph, you
14 reported that a majority of the NCAA board
15 is still clamoring for the death penalty,
16 but are receptive to having a different
17 package proposed.

18 A Correct.

19 Q That was your understanding of
20 the state of play as of the second call on
21 July 19th.

22 A Yeah. That's -- again, they were
23 reporting -- and I always got the idea that
24 David Berst was trying to be -- David Berst
25 is a person that I have known a long time,

1 and that he was trying to convey to me the
2 sentiment of their governing body so that
3 there's no surprise.

4 Q Did it assist you in your role in
5 knowing what the sentiment was of at least
6 some of the board members at the NCAA?

7 A Well, sure. I would rather -- I
8 mean, in weighing what the alternatives are,
9 I would rather know than not know, yes.

10 Q If you flip to the next page --
11 I'm trying to skip some of this stuff that
12 we've already talked about because I don't
13 want to plow old ground.

14 About a third of the way down,
15 there's a paragraph entitled Individual
16 Culpability Down The Road. Do you see that?

17 A Right.

18 Q I take it that you had a
19 conversation with Mr. Berst and Mr. Remy
20 about individual culpability not being part
21 of the consent decree should you get there,
22 but being taken care of later, if at all?

23 A Something like that, right.
24 Because I voiced the idea that you can't --
25 how can you make unethical conduct findings

1 or whatever against people without -- I
2 think that my point was, right or wrong,
3 people are free to disagree with it.

4 But in the -- you know, in the
5 typical infractions process, they would have
6 the ability to speak their minds, say their
7 view of things and whatever. And if they
8 were going to make some pronouncement about
9 individuals and culpability, I think that I
10 would have to at least raise the issue with
11 Penn State as like where would they stand as
12 an entity were anybody to try to fashion
13 that as an idea?

14 But from the start, frankly,
15 they -- they viewed this -- this -- it's my
16 understanding that they viewed this action
17 to be an institutional action and then --
18 and particularly then because of these
19 criminal trials, if the State of
20 Pennsylvania ever gets around to it, we
21 might know what the NCAA's view is as to
22 them.

23 Q So it's your understanding
24 that -- based on discussions at the time and
25 what ultimately ended up being in the

1 consent decree, that individual culpability
2 of -- and in your note you say Spanier,
3 Schultz and Curley was not determined in the
4 consent decree and was reserved for later,
5 if at all.

6 A That was their view, absolutely
7 their view.

8 Q And did you disagree with it
9 based on your involvement in the process or
10 what you saw in the consent decree?

11 A My client was the institution.
12 That was their decision to make about how
13 they want to package that and then what the
14 ramifications were to going that way, how
15 people would feel about it, whether they go
16 out and lawyer up. That was all their call
17 to make.

18 Q And ultimately, the consent
19 decree does not make any findings against
20 Spanier, Schultz or Curley individual
21 culpability, correct?

22 A I could read it again, but I
23 think that it may even say expressly so. I
24 believe so.

25 Q Correct. It expressly reserves

1 for later.

2 A Correct. Yes.

3 Q And we can get that --

4 A Yeah.

5 Q We may get there.

6 Board of trustees, two more

7 paragraphs down --

8 A Okay.

9 Q -- you talk about some action to
10 remove the fun, end quotes, associated with
11 athletics as to board members, and then you
12 say something about the first idea was real
13 dumb. I turned them around on it.

14 A Yes.

15 Q What are you talking about there?

16 A They had this idea that you would
17 somehow put almost -- it struck me as like
18 you would have police tape up that board
19 members couldn't go past. So they couldn't
20 go have any members -- they couldn't go have
21 any -- most universities on Saturday
22 football home games put on the dog for
23 trustees. And their idea was that they were
24 going to try to prohibit that. They were
25 going to make -- banish them -- not like a

1 disassociation, but they would all have to
2 go sit in the cheap seats or some crazy
3 thing like that. It sounded completely
4 unworkable and ridiculous to me.

5 Q And you turned them around on
6 that, that idea?

7 A I did, yes. Well, I can't tell
8 say that I turned them around. I just
9 simply said -- no, I didn't -- I said just
10 explain to me -- what? Are you going to
11 have a collar on these people? Are you
12 going to have a GPS tracker on these people?
13 Are you going to have to assign policemen to
14 make sure that people can't get near an
15 organized Penn State -- it's absurd. And so
16 they -- I mean, I just said that. I said,
17 you -- tell me how you would articulate
18 that, and they dropped it.

19 Q Okay. How about up above on
20 postseason ban? You're reporting a -- the
21 discussion having changed from one year to
22 five. And then you say you hit back on
23 this.

24 A Right.

25 Q And you use the argument from

1 your years on the committee of infractions
2 about the innocence of the future players.

3 What happened to the postseason
4 ban ultimately? Was it one, five or --

5 A Four essentially. They dropped
6 it to four.

7 Q Towards the bottom, a couple up
8 from the bottom, Process. Do you see that
9 paragraph?

10 A Yes.

11 Q You say, "After," and then in
12 parens, "If we reach an agreement"?

13 A Right.

14 Q I take there was still some
15 possibility as of -- after the second call
16 on Thursday that the NCAA and Penn State
17 might not have reached an agreement?

18 A We were still -- I mean, we
19 weighed the alternatives all the way through
20 the end, whether you would do this route or
21 the other routes.

22 Q Okay. We'll mark this as NCAA 4.
23 (NCAA Exhibit No. 4 was marked
24 for identification.)

25 A I remember this one, yes.

1 Q And "this one" being what's been
2 marked as NCAA 4, correct?

3 A Yes.

4 Q And this is the e-mail after what
5 I understand to be the third Thursday call
6 between you --

7 A Yes. I think that it was the
8 third. I ended up spending more than three
9 hours on the phone that day with the NCAA
10 people. I can remember that.

11 And so this e-mail -- this one
12 came late in the day. This was a later
13 call, and -- and they started out -- this is
14 the one where David Berst said Gene, I think
15 that it's important for you to know that the
16 majority of the board of directors is still
17 in favor -- and they used some expression
18 like even now, even at this date stopping
19 further discussion and so we can -- what
20 does that mean? You know, it's Simon Says
21 again. It's like Simon Says again.

22 So -- and so then we went through
23 this list. They gave me this list. And I
24 called Frank and I said you're not going to
25 believe this. He said Gene, this is really

1 important, please create an e-mail right
2 now, so I did.

3 Q Okay.

4 A And then about an hour or two --
5 maybe an hour later, I was walking down my
6 driveway just trying to clear my head, and I
7 got a call from Rodney Erickson. And he
8 said I thought that your earlier e-mail was
9 maybe -- maybe you're wearing out or
10 something, you know. In other words, maybe
11 I'm getting spent and a little bit over the
12 top.

13 And he said heck, I just got off
14 the phone with Mark Emmert or had some --
15 you know, prior to this, and he said my call
16 with him was even more intense as far as
17 where people's thinking was.

18 Q Now, let me ask you about the --
19 I want to object to the form of my own
20 question and start over again.

21 In the third paragraph on this
22 e-mail, the idea of the death penalty comes
23 up and you're reporting on that. That's not
24 the first time that you've reported on that
25 possibility, right? We've talked about

1 it -- you've already talked about it this
2 morning.

3 A Was that the first time that I --

4 Q No, no, it was not.

5 A Oh, it was not, no, no.

6 Q It was not.

7 And you've testified about it
8 already several times today when I was
9 sitting over there listening instead of
10 asking questions, correct?

11 A Correct.

12 Q When the idea was relayed to you
13 by, I think, largely Mr. Berst that some
14 majority of the board members were
15 advocating or wanted the blood and the death
16 penalty, you took that as threatening to
17 your client, correct? In other words, the
18 fact that they're considering that was a
19 threat to Penn State.

20 A Who wouldn't consider it a
21 threat?

22 Q Absolutely.

23 A Yes.

24 Q And you got responses both in a
25 voice mail from Berst and from the Remy

1 e-mail that we've looked at that said hey,
2 we didn't threaten the death penalty, we
3 just reported the facts.

4 A They never used the word
5 "threat." They never said if you don't sign
6 the consent decree, we are going to impose
7 the death penalty. I don't think that they
8 would have been in a position personally
9 themselves to even say that because they
10 would have to take it back to the ranch.

11 Q And even in the last e-mail that
12 we looked at, you reported that Berst was
13 not advocating the death penalty, he was
14 just reporting that hey, there are a lot of
15 people talking about it.

16 A He was not advocating it, that's
17 correct.

18 Q So he's talking Simon Says, that
19 dynamic you're talking about?

20 A Yes.

21 Q If people are talking about the
22 death penalty, decisionmakers, then that's a
23 threat to my client even if Berst and Remy
24 don't say if you don't sign this, we will
25 come down on you with the death penalty.

1 A When the majority of their
2 leadership believes first and has been
3 counseled that they have the authority to
4 take this extraordinary action and then we
5 get the message that the majority is in
6 favor of the death penalty -- I think the
7 term that David Berst used in his deposition
8 was that they were immediately "outraged,"
9 outraged, and that they started talking
10 about cessation of competition. I don't
11 know how anybody in the world -- you know,
12 in contract law, we have the subjective
13 test/objective test. How anybody on the
14 receiving end of that would not receive that
15 as threatening.

16 Q Sure. No. I understand that. I
17 understand that.

18 A I just don't get that.

19 Q I think that it's just a verbiage
20 issue.

21 A Simon Says. It's what it is.

22 Q Sure.

23 A Simon Says be threatened or just
24 be threatened. That's what I don't --
25 whatever.

1 Q I hear you.

2 A Okay. Yeah.

3 Q Then there's some more specifics.

4 The postseason ban has now gone from five
5 years to four years you're reporting, right?

6 A Yes.

7 Q Scholarships has changed. The
8 scholarship limitations have changed some as
9 well.

10 A Yeah.

11 Q So as of the last call on
12 Thursday, the 19th, still fluid.

13 A Yes.

14 Q The last line, you report "They
15 thought if the case was processed through
16 the normal infractions process, it would
17 come out the same way."

18 A Yeah.

19 Q Is the "they" Berst and Remy?

20 A Yeah. I mean, Dave and I had a
21 conversation about, you know, where would
22 all this -- that may have been a bit of an
23 overstatement there, but I mean, it was, you
24 know, where might all this come out?

25 Well, if the board of directors

1 is outraged and the executive committee is
2 outraged, who is to say that if you put it
3 in front of the committee on infractions
4 they would not be similarly outraged?

5 I had not long before that come
6 out -- come out of a committee on
7 infractions hearing with the same people.
8 They would have been essentially the same
9 people. And they blew a gasket over tattoos
10 and trinket sales in the Ohio State case.
11 So -- and they imposed a postseason ban.

12 Q Right.

13 A So who is to say what they would
14 have done with this fact situation.

15 (NCAA Exhibit No. 5 was marked
16 for identification.)

17 THE WITNESS: All right. I'm
18 aware of -- I'm familiar with this one, too.
19 I've read it. We can have a discussion
20 about it, but I'm aware of it. I've read it
21 recently.

22 BY MR. GARDNER:

23 Q This is NCAA Exhibit 5, a Friday,
24 July 20th e-mail from 9:35 a.m. Yes?

25 A Yes.

1 Q And again, this is in the same
2 vain as your earlier e-mails. This is an
3 update to your clients about discussions
4 with the NCAA.

5 A Yes.

6 Q I think that we've covered most
7 of this, so I'm interested mostly in just
8 starting with "after sleeping on it."
9 Because I think that everything above that
10 you've already covered.

11 A Okay. Right.

12 Q You say, "After sleeping on it,
13 here is what I think. What if Penn State
14 were to reject this process and trigger a
15 traditional infractions process?"

16 A Right.

17 Q "The enforcement staff would
18 instantly hit a brick wall in the important
19 interviews."

20 A Yes.

21 Q This is you -- this is more than
22 just a report; this is you talking to your
23 client about weighing options, correct?

24 A Correct, yes.

25 Q And you say, "The enforcement

1 staff would instantly hit a brick wall in
2 the most important interviews." What did
3 you mean?

4 A Conversation -- I mean, it's what
5 Berst and I talked about all week long, and
6 that is that -- it was Spanier that spoke to
7 the Freeh group, right? I think I'm right
8 about that, but the other folks did not.
9 And of course, Joe is not there.

10 So the most critical part would
11 end up being a brick wall. So then some
12 decision would have to be made about how far
13 they want to proceed with a significant
14 amount of important information not out
15 there, how far they would want to go.

16 There have been many -- not many,
17 but more than a few NCAA cases that at the
18 same time the NCAA was inquiring into
19 something, there were criminal cases
20 involved. And it's always a weighing on --
21 I gather on their part of how far they want
22 to go or whatever. But sometimes things
23 just fall into their lap, that defendants
24 plead guilty or something like that.

25 So it's -- that's where it

1 would -- I mean, they would hit a brick wall
2 and then, as I pointed out -- if I didn't
3 say it in this paragraph, I certainly said
4 it enough all week, and that was you take
5 the Freeh Report, you take the board of
6 directors' response -- which, again, I think
7 is a responsible and right thing to do --

8 Q Yeah.

9 A -- and then that -- that largely
10 sets the table for this -- at least in
11 part -- people concluding at least in part
12 NCAA bylaws were violated, but then you have
13 this other culture element.

14 Q Right.

15 If you go on in the paragraph,
16 you actually do talk about exactly that in
17 weighing the options. You say --

18 A Yeah.

19 Q -- the institution has already
20 embraced the Freeh Report and publicly said
21 that it's going to implement the
22 recommendations.

23 A Correct.

24 Q And then you say based on that,
25 even though there would be an opportunity to

1 be heard and an opportunity to appeal if you
2 went the traditional infractions process,
3 you don't see how they would get out Scott
4 free. There are going to be violations
5 found is basically your advice, correct?

6 A Yes.

7 Q You even go on to say that
8 there's even a good chance that the
9 committee on infractions would impose
10 draconian penalties, maybe the death
11 penalty.

12 A Yes.

13 Q And you say that it would -- you
14 know, one thing that is certainly clear, it
15 would take a long, long time to get to
16 resolution under the traditional enforcement
17 process, right?

18 A Yes. And that was a major factor
19 in Rodney Erickson's weighing of the
20 choices.

21 Q He wanted to put it behind him.

22 A Yes.

23 Q Behind the institution. I
24 shouldn't have said "him."

25 A As much as he could, yes.

1 MR. SCOTT: Still does.

2 MR. GARDNER: As soon as we go
3 off the record, I'll tell you my thoughts.

4 BY MR. GARDNER:

5 Q So that was a benefit to going
6 the consent decree route is hypothetically,
7 theoretically at least, ending it.

8 A Right. I mean, there were two
9 things in play. One, he thought -- and I
10 said this before, but it's a good place to
11 package it. He thought that if Penn State
12 rose up and fought this, that it would send
13 the signal to the rest of the country that
14 they cared more about having a competitive
15 football team than they cared about those
16 kids.

17 And then two, he asked for
18 timelines on this stuff. And I said, you
19 know, this could take quite some long time.
20 He said I just don't want that hanging over
21 the school, and he -- you can tell in his
22 statement to the board that he's a genuine
23 person. He said it's the hardest decision
24 he ever made in his life, and I don't doubt
25 it for a second.

1 And -- and now particularly it
2 turns out to be brilliant. Because think of
3 it. Three years later, the State of
4 Pennsylvania still has not resolved these
5 criminal proceedings. And I don't get it,
6 but to the extent that something is hanging
7 over the school, look at where we are.

8 Q Right. Right.

9 (NCAA Exhibit No. Number 6 was
10 marked for identification.)

11 THE WITNESS: Okay. I have
12 looked at this recently as well.

13 BY MR. GARDNER:

14 Q This is what has been marked as
15 NCAA 6. It's a Sunday, July 22nd, 10:59
16 e-mail from you to the same crew, correct?

17 A Yes.

18 Q The subject is "Thought, what
19 if?"

20 A Right.

21 Q Fair to characterize this e-mail
22 as continued weighing --

23 A Yes.

24 Q -- of the various options that
25 you and Penn State faced?

1 A Yes.

2 Q In looking at this e-mail, is
3 there anything in this that you think is
4 inaccurate? We can walk through it if
5 that's easier. You tell me how you want to
6 go.

7 You know what? Let's hit a
8 couple of points.

9 You say in the second sentence,
10 "Part of Penn State's calculation here had
11 to be weighing this outcome," being the
12 consent decree, right? -- "against possible
13 outcomes in the traditional infractions
14 process."

15 A Yes.

16 Q And this is the day that the
17 consent decree was signed.

18 A Morning of, I guess, yep.

19 Q You then point in the next
20 sentence that the death penalty was in play.
21 Even as noted in the most recent draft of
22 the consent decree is what you're talking
23 about, correct?

24 A Yes. Again, we kept getting a
25 little bit different signals timing-wise.

1 I gathered that Erickson was getting some
2 numbers and I was getting less specific and
3 shorter, but yes, yes, correct.

4 Q You then go on in the next -- the
5 large paragraph there -- although not as
6 large as some we've seen in other e-mails,
7 but the largest one on this page to talk
8 about the Freeh Report has been adopted and
9 embraced by the board. You overlay the
10 bylaws and you're going to end up in the
11 traditional enforcement process with
12 violations and real penalties.

13 A Yes. Yes.

14 Q And this is you advising your
15 board in the weighing process that you've
16 testified to.

17 A Well --

18 Q Not your board. Excuse me. I
19 misspoke. President Erickson.

20 A And the other two folks on --

21 Q Exactly. I said "board" and I
22 misspoke. The board, to your knowledge, is
23 not addressed here and you don't know
24 whether they saw this or not.

25 A I don't know.

1 Q You go on to state that prior to
2 the Freeh Report, there was good faith
3 disagreement and that you were one of the
4 doubters?

5 A Yes.

6 Q But after the Freeh Report, you
7 were no longer a doubter and --

8 A Not in the Freeh Report, and then
9 on top of that, the board is embracing the
10 failures and they used language which would
11 be just classic lack of institutional
12 control, unethical conduct language, right.

13 Q You then go on to say, "There
14 will always be a few doubters, but they
15 don't matter"?

16 A They don't matter to me. I mean,
17 I just don't care. I mean, this is -- if
18 you deal in college sports, any -- I mean,
19 you're down to the level of people thinking
20 that what they say in a call-in talk show
21 radio program is weighty. I'm just not
22 there, including many of the lawyers I know.

23 Q Leaving that and continuing on,
24 you go on to say that you had gone the
25 traditional enforcement process, there would

1 have been a cloud hanging over the campus
2 while the inquiry was ongoing, right?

3 A Yes.

4 Q You also go on to say, "Don't say
5 this anywhere, but part of the calculation
6 is that they would have found some
7 additional NCAA violations"?

8 A Yes.

9 Q And when you say
10 "additional," you mean unrelated to the
11 Freeh Report.

12 A Correct. I have never known an
13 infractions case where if the enforcement
14 staff shows up on campus, they don't find
15 some additional violations. It has never
16 happened. So that's what would have
17 happened.

18 Q So avoiding that was of obvious
19 benefit and part of the weighing process.

20 A I don't know how great it was,
21 but it's not like you think there's a
22 gigantic basket of major infractions or
23 whatever out there, but I have never seen a
24 process happen when the enforcement staff
25 doesn't come to a campus and they don't kick

1 a can and whatever.

2 Q But in part you're weighing
3 that was --

4 A Correct.

5 Q -- of some benefit.

6 A Correct.

7 Q Your last sentence, after kind of
8 laying everything out on the day that the
9 consent decree gets executed, you say, "I
10 think this was the only choice to make as
11 lousy as it is."

12 A Correct.

13 Q Do you agree with that sentiment
14 today?

15 A Yeah, I do.

16 Q You expressed similar sentiments
17 to what we just looked at on that e-mail in
18 conversations with Berst and Remy.

19 A Yes.

20 (NCAA Exhibit No. 7 was marked
21 for identification.)

22 THE WITNESS: Okay. Have at it.

23 BY MR. GARDNER:

24 Q We've actually finally marked as
25 NCAA 7 the actual consent decree, correct?

1 A Yes.

2 Q I just want to hit a couple of
3 points. I'm not going to go through the
4 whole thing.

5 If you go to page 2, under the
6 heading Findings and Conclusions --

7 A Right.

8 Q -- there's a sentence that
9 states, "Penn State has communicated to the
10 NCAA --" Do you see where I am?

11 A Yes.

12 Q -- "that it accepts the findings
13 of the Freeh Report for purposes of this
14 resolution and acknowledges those facts
15 constitute violations of the constitutional
16 and bylaw principals described in the
17 letter."

18 A Right.

19 Q "The letter" being a November 17
20 letter.

21 A I guess so, yeah.

22 Q It's stated up above.

23 A Okay. Okay. Yeah.

24 Q This is the language that was
25 ultimately accepted that you said was

1 influenced by Steve Dunham's concern about
2 how the Freeh Report findings were accepted
3 and the exact language that was used and
4 admitted.

5 A Yes, because he had -- obviously,
6 they had pending matters -- they would have
7 pending matters in civil litigation and
8 elsewhere, and that's what he was concerned
9 about. Among other things, but at least one
10 of the things that he was concerned about.

11 Q So that sentence was not entered
12 into lightly by Penn State.

13 A No, no.

14 Q Next sentence, "Penn State
15 expressly agrees not to challenge the
16 consent decree and waives any claim to
17 further process, including, without
18 limitation, any right to a determination of
19 violations by the NCAA committee on
20 infractions, any appeal under NCAA rules and
21 any judicial process related to the subject
22 matter of this consent decree."

23 A Yes.

24 Q Did Penn State, based on your
25 understanding and your discussions, enter

1 into this part of the agreement lightly?

2 A No.

3 Q In other words, did it take the
4 waiver that it was making seriously?

5 A Significantly so, yes.

6 Q So was this a knowing and
7 informed waiver that was made here in your
8 opinion?

9 A I would say, but, you know, I
10 mean, it's their lawyers and -- and Steve
11 Dunham and Frank Erickson and maybe their
12 executive committee -- I don't know how
13 far -- but yes, I would say it was
14 significantly considered and weighed.

15 Q And this is the conclusion of all
16 the weighing e-mails that we've been looking
17 at and you've been testifying about today,
18 correct?

19 A The consent decree is the
20 conclusion?

21 Q Yeah. The consent decree and
22 waiving rights to go any other route.

23 A It was part of the consent
24 decree. I don't know about what you're
25 packaging there, but --

1 Q Well, earlier you testified of
2 different options that Penn State had.

3 A Right.

4 Q All lousy.

5 A Right.

6 Q One was consent decree.

7 A Yes.

8 Q That's ultimately the route that
9 Penn State chose to go.

10 A Right.

11 Q Other options were traditional
12 infractions process, right?

13 A Right.

14 Q For all the reasons you've
15 testified about, Penn State chose not to go
16 through the infractions process.

17 A Correct.

18 Q And here they -- correct me if
19 I'm wrong, but Penn State expressly agreed
20 to waive any right to go anywhere down that
21 traditional infractions process.

22 A Correct. I just feel like it
23 should be their in-house and their lawyers
24 speaking to this almighty subject more than
25 me. I'm not a NCAA lawyer.

1 Q That's okay.

2 Did they carry the water on this
3 as opposed to you? Is that what you're
4 telling me?

5 A I don't know about carrying
6 water. We were all carrying water. I mean,
7 as far as their governance and all that
8 stuff. I mean, I got hired on July 11th. I
9 just wish somebody had given more thought to
10 backing that up a bit more.

11 Q You mean you wish you would have
12 been hired earlier?

13 A I wish that we could have weighed
14 -- yes. I wish that we could have weighed
15 the possibilities here instead of this very
16 truncated process.

17 Q On the last page, page 9, above
18 the signature block --

19 A Yes.

20 Q -- Penn State University makes a
21 representation.

22 A Okay.

23 Q Do you recall this?

24 A I mean, I recall reading it. I
25 don't recall ever being a part of a

1 discussion about ramifications or whatever.

2 I certainly recall reading it. I mean,
3 we -- I was the one that got the consent
4 decree from Remy and so, yeah. I mean --

5 Q Here Penn State is representing
6 that it's taken all actions necessary to
7 execute and perform the consent decree and
8 then it goes on to say that its entry into
9 the consent decree and the AIA is consistent
10 with and allowed by the laws of Pennsylvania
11 and any other applicable law.

12 Were you involved in giving
13 advice to the university about its authority
14 to enter into the consent decree?

15 A No.

16 Q Who was?

17 A I believe that it was -- I think
18 that Frank was the governance guy, and I
19 think that he wrote -- maybe even wrote
20 opinions about the governance process and
21 the authority.

22 Rodney Erickson refers to that in
23 his statement to the board on that Sunday
24 where he says that he received counsel on
25 his authority, et cetera.

1 Q Given your involvement in
2 discussions and understanding that you're
3 not the primary did the university have the
4 authority to enter into this --

5 A Right.

6 Q -- you were privy to discussions
7 about the university confirming that it had
8 the authority to enter into the consent
9 decree.

10 MR. SCOTT: Would you clarify
11 when you're talking about?

12 BY MR. GARDNER:

13 Q During the waiver period, between
14 the 11th and the 22nd, and there was public
15 disclosure about it in the transcript that
16 you talked about from the board meeting.

17 A Yeah. There was some discussion
18 about well -- there was very brief
19 discussion with me about the issue of where
20 does this thing need to go, you know, the
21 full board or whatever. And of course, it's
22 not my area. Their governance process is
23 not my area.

24 And so I gather that they got
25 that -- according to Erickson's statement

1 and whatever, they had their own pow-wow on
2 that, and I was not involved in their
3 governance process at all.

4 Q Is it fair to say that by the
5 time this thing got signed, you didn't have
6 concerns about whether Penn State had the
7 authority to enter into the consent decree?

8 A I don't know their governance
9 process. I don't know their bylaws. I
10 don't know their articles and I don't know
11 Pennsylvania law. So that's an
12 all-encompassing no.

13 Q That would be an all-encompassing
14 no.

15 A How much longer are we going?
16 Because I need to take a break.

17 Q Let's take a quick break.

18 A Just a couple of minutes.

19 (A break was taken.)

20 MR. GARDNER: I thank you for
21 your time, and I'm finished.

22 FURTHER EXAMINATION

23 BY MR. HAVERSTICK:

24 Q I'm going to burn through a
25 couple of these.

1 Can you take a look at NCAA 3,
2 please?

3 A Okay. I'm on it.

4 Q The first paragraph that says
5 "First," there's a reference to a date of
6 August 2?

7 A Yeah.

8 Q Is that the date that you were
9 referencing in your testimony at the end of
10 my examination of you about the executive
11 committee meeting?

12 A The number doesn't matter. What
13 was relayed to me was -- I think that the
14 number that was originally pitched to me
15 turned out to be incorrect. It doesn't
16 matter. But they had an August meeting
17 coming up.

18 Q Got it.

19 A That's it. The number doesn't
20 matter.

21 Q Exhibit 4, please.

22 A Okay.

23 Q NCAA Exhibit 4. I'm sorry.

24 I'm looking at the -- don't count
25 that first sentence, but the one, two --

1 third paragraph down. "They also said these
2 dramatic penalties are consistent with the
3 philosophy of the working group that is
4 about to come out with some major changes to
5 impact the culture on campus."

6 What's your understanding of what
7 "the working group" was?

8 A They used the expression -- at
9 the NCAA, they use this expression "working
10 group." Other people might say task force
11 or committee. They get assigned a specific
12 job to go look at something like rewriting
13 the bylaws or enforcement or whatever.

14 And so you can even -- you will
15 recall from some exhibits in a previous
16 deposition that, I think, Ray in his
17 communication to Julie Roe said something
18 like hey, Julie, we haven't done anything in
19 the Penn State thing or whatever and how is
20 that going to make us look in light of the
21 fact that we have these -- in light of the
22 fact that the working group is about to come
23 on line with new recommendations? And
24 really I think it was October 2012 is when
25 we had a fairly seismic shift in new

1 penalties, et cetera.

2 So he was proposing that maybe
3 some action needed to be taken or otherwise,
4 some folks might consider the NCAA not to
5 have taken sufficient action in light of the
6 fact that they are about to announce a new
7 sheriff in town on the issue of the
8 infractions process and enforcement and a
9 new structure for penalties and all that
10 stuff.

11 Q This working group that you're
12 referencing, then, is a working group that
13 is developing tougher penalties or tougher
14 sanctions?

15 A Yeah. They had four or five
16 different ones going on. One related to
17 rewriting the bylaws. One related to the
18 enforcement process, and some of them, of
19 course, would get on top of each other. So
20 there were several working groups.

21 Q The next sentence, "In some
22 respects, the PSU case will jump start the
23 work of the working groups."

24 A That was said to me.

25 Q Do you remember who said it?

1 A David Berst.

2 Q And then NCAA Exhibit 5.

3 A Yep.

4 Q The second paragraph and the last
5 two sentences. This is again David Berst
6 telling you that the Penn State case is
7 the -- is the jumping off point for the new
8 sheriff in town.

9 A That's what they said. They
10 said -- I mean, it -- and that surprised me
11 and irritated me, but it's what they said.
12 They said that the timing of this, given the
13 timing of other matters that are pending, is
14 good timing for them they said to just make
15 this like the bold stroke of the new day in
16 enforcement and infractions and that Penn
17 State -- this Penn State case would just --
18 I think that I used the expression somewhere
19 would be like a starter log on the fire,
20 something like that.

21 Q Starting gun?

22 A Yeah, starting gun or something.

23 They just said that on the phone.
24 And that's why in another e-mail I think
25 that we've already talked about, I said

1 that's just fairly unusual to me. I mean,
2 the -- I mean, the idea of -- I guess that
3 I'm glad for the honesty, but Penn State
4 facts ought to be Penn State facts. They
5 ought not be part of some broader
6 initiative.

7 That's what I -- that's the way
8 that I felt. That's the way that I feel
9 now.

10 Q And that was Remy and Berst
11 saying --

12 A Yes.

13 Q -- this to you on the phone.

14 A Yes. Yes.

15 Q Just to be clear, NCAA 6, there's
16 a paragraph that starts, "Several nights
17 ago, I went down the list of current" --

18 A Right.

19 Q "There is a real chance they
20 would have ended up with a death penalty."
21 Is that -- "they" is Penn State?

22 A "They" -- I think that I was
23 referring to the committee on infractions.

24 Q Oh, got it.

25 A I think. I mean, it's bad

1 language on my part. I think -- I think
2 that I was referring to the committee on
3 infractions.

4 Q Okay.

5 A Again, this is all tempered by
6 the fact that I not long before that had
7 appeared in front of those very people.
8 And, you know, they -- I was on that
9 committee nine years. I know how the
10 chemistry is, and they tend to launch the
11 missiles more than people think.

12 Q Believe?

13 A More than they expect, right.

14 MR. HAVERSTICK: That was it.

15 Thank you, sir. Appreciate it.

16 (The deposition concluded at
17 1:02 p.m.)

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SIGNATURE OF WITNESS

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I, _____, do
hereby certify that on this _____ day
of _____ 2014, I have read the
foregoing transcript and to the best of my
knowledge it constitutes a true and
accurate transcript of my testimony taken
by oral deposition on November 18, 2014.

WITNESS

Subscribed and sworn to
before me this _____
day of _____,
2014.

NOTARY PUBLIC

C E R T I F I C A T E

STATE OF ALABAMA)

JEFFERSON COUNTY)

I hereby certify that the above and foregoing deposition was taken down by me in stenotype, and the questions and answers thereto were reduced to computer print under my supervision, and that the foregoing represents a true and correct transcript of the deposition given by said witness upon said hearing.

I further certify that I am neither of counsel nor of kin to the parties to the action, nor am I in anywise interested in the result of said cause.

Dana Gordon, Commissioner
ACCR #146

Dated: November 19, 2014

1 NAME OF CASE: Jake Corman v. NCAA

2 DATE OF DEPOSITION: 11/18/2014

3 NAME OF WITNESS: Gene Marsh

4 Reason Codes:

5 1. To clarify the record.

6 2. To conform to the facts.

7 3. To correct transcription errors.

8 Page _____ Line _____ Reason _____

9 From _____ to _____

10 Page _____ Line _____ Reason _____

11 From _____ to _____

12 Page _____ Line _____ Reason _____

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16 Page _____ Line _____ Reason _____

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Gene Marsh