

REPORT AND RECOMMENDATION OF THE COMMISSION ON JUDICIAL CONDUCT

APPENDIX I

CERTIFIED HEARING TRANSCRIPT (DAY 1 VIEW)

COMMONWEALTH OF MASSACHUSETTS
COMMISSION ON JUDICIAL CONDUCT

Complaint No. 2019-22

- - - - - x

VOLUME I

HEARING

BEFORE

HEARING OFFICER

DENIS J. McINERNEY, ESQ

- - - - - x

June 9, 2025

ZOOM0001.mp3

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

2 MR. NEFF: Howard Neff and it's 7:30
3 a.m.

4 THE COURT: Okay. Everybody can be
5 seated. Thank you. Good morning, everyone.
6 This is a hearing conducted in connection with
7 the Commission on Judicial Conduct's Complaint
8 2019-22 concerning Judge Shelley Richmond Joseph.

9 My name is Dennis McInerney and I have
10 been appointed as the hearing officer in this
11 matter. I would ask that the attorneys who are
12 representing the parties in this case to please
13 identify themselves and the parties that they're
14 representing for the record.

15 MS. FABRICANT: Good morning. I am
16 Judith Fabricant, Special Counsel for the
17 Commission on Judicial Conduct.

18 MR. NEFF: And good morning. Howard
19 Neff for the Commission on Judicial Conduct.

20 MR. HOOPES: Good morning, Your Honor.
21 Tom Hoopes for Judge Shelley Joseph.

22 MS. MULVEY: Good morning. Elizabeth
23 Mulvey for Judge Joseph.

24 MR. KEATING: Good morning, Your Honor.
25 Michael Keating for Judge Joseph.

1 THE COURT: Thank You. I would like to
2 note at the outset that as the parties are aware,
3 on June 3rd I issued an order regarding media
4 protocol and coverage. If there's anyone here
5 from the media who has not received a copy of
6 that order, it is also available on the CJC's
7 website on the page that has the May 13th press
8 release about this matter.

9 The hearing will begin with a view that
10 will be conducted here at the Newton District
11 Courthouse. After the view is completed, parties
12 will go through with me to the Suffolk County
13 Courthouse at 3 Pemberton Square in Boston,
14 Courtroom 1309, to continue the hearing.

15 With that, unless there are any other
16 matters the parties would like to raise at this
17 time, I will turn it over to the special counsel
18 first and then Judge Joseph's counsel to get a
19 brief opening statements regarding the view.
20 When the hearing resumes at the Suffolk County
21 Courthouse, the parties will have the opportunity
22 to have their full opening statements and to
23 present their evidence.

24 Special Counsel Fabricant, I will turn
25 it over to you now.

1 MS. FABRICANT: Thank you, Mr.
2 McInerney. Is that working properly?

3 THE COURT: Yes.

4 MS. FABRICANT: All right. Good
5 morning.

6 The event that gives rise to this case
7 was an arraignment proceeding in this courtroom
8 while an ICE officer waited in the main lobby
9 that we just came through.

10 After the judge ordered the defendant
11 released from state custody, the court officer
12 escorted the defendant, his lawyer, and the
13 interpreter downstairs through that door into the
14 dock and downstairs through the second secured
15 door down the stairway to the lockup area and
16 released the defendant out the sallyport door to
17 the rear of the building, enabling him to avoid
18 the Immigration and Customs Enforcement officer
19 who was waiting out in the main lobby.

20 The essential question that you will be
21 called upon to decide is what role the judge had
22 in that result.

23 We're going to tour the entire building
24 so as to put each location in context. And as we
25 do, I will ask you to note certain locations,

1 dimensions, and orientations in relation to each
2 other. And I'm sure counsel will have other
3 things they'll want to bring to your attention.

4 After we take note of various aspects
5 of this courtroom, we will go into the dock and
6 follow the path that the defendant and those with
7 him took. Through the secure door, through the
8 second secure door, down a flight of stairs into
9 the lockup. And from there we will see the
10 secure door that leads out to the sallyport in
11 the back of the building.

12 We will look out to see the fenced area
13 outside the door and the parking lot beyond that.
14 And we will hear evidence regarding how the
15 sallyport is used to transfer persons in custody
16 into and out of the courthouse.

17 We will continue through the secure
18 hallway on the lower level, noting two other
19 secure doors that judges and staff use to access
20 the parking lot.

21 We will reach a secure door that opens
22 to a public area where we will see the probation
23 counter. From there, we will proceed up the
24 public stairway, noting the door from the
25 stairway to the main lobby. We will continue up

1 the public stairway to the second floor where we
2 will see the second session courtroom with an
3 adjacent judge's lobby, a jury pool room, and a
4 jury deliberation room. And you will hear
5 evidence that the second session courtroom is
6 used for the jury session one day a week and for
7 certain other proceedings more sporadically, and
8 that when the first justice is presiding in the
9 first session in this courtroom and another judge
10 is also present, the visiting judge sits in the
11 second session.

12 Once we have toured the second floor,
13 we will go back down the public stairway to the
14 main lobby to view the main lobby, the equipment
15 and furnishings there, and the various locations
16 off of it.

17 We will then go back out the front door
18 and down the front steps. And from there we will
19 walk around the building going what I think is to
20 the right, although I may be disoriented, so as
21 to see the lower-level areas, the doors, and the
22 parking lot from the outside as well as the
23 police station next door and the surrounding
24 streets.

25 As we do that, we will see something

1 that was not there at the relevant time, which is
2 a new fence with gates that one has to go through
3 to get to the parking lot from each side so that
4 there is now a fence perimeter around the parking
5 lot that was not there at the relevant time.

6 And at this point I am ready to direct
7 your attention to various things in this
8 courtroom unless counsel wants to first make some
9 remarks.

10 MR. HOOPES: Why don't we do that
11 order. Thank you.

12 Good morning, Mr. Hearing Officer.
13 Some seven years ago, on April 2nd, 2018 in this
14 courtroom and in this courthouse, David Jellinek
15 Attorney Jellinek, devised a scheme with a court
16 officer, Wesley MacGregor, to have his client
17 escape ICE custody. That happened roughly by
18 agreement in this courthouse and in this
19 courtroom about noon. The escape occurred
20 roughly at 3:00 in the afternoon.

21 Some eight months later, David Jellinek
22 spoke with federal authorities for the first time
23 and claimed for the first time that Judge Joseph
24 aided and assisted in his effort.

25 Determining his credibility will be the

1 core of this hearing and the core of underpinning
2 this and the foundation may be your observations
3 of this courthouse as to whether he's got a
4 scintilla of credibility.

5 I am going to ask you to focus on four
6 areas if you would. This courtroom, the various
7 factors that both of us will point out, going
8 down to the dock and out to the sallyport. Third
9 is going to be coming up the steps as an
10 alternative way to access the downstairs section.
11 And the fourth will be the perimeter to see both
12 the parking area in the back and the exit in the
13 front. Those four areas will encompass
14 everything I hope that you need to know. Thank
15 you.

16 MS. FABRICANT: So I am going to ask
17 you while we are here in this courtroom to take
18 note of the size and shape of the courtroom, the
19 proximity of each location to other locations,
20 particularly the judge's bench, the size of the
21 bench, the side of the bench where the sidebar
22 conversation would occur, these stairs where
23 short lawyers might stand for a sidebar
24 conversation, the probation desk where a
25 probation officer might sit, a court officer's

1 desk where a court officer might sit, the clerk's
2 desk where a clerk might sit and might turn
3 around to speak to the judge if there's a need
4 for that to happen. Recording equipment that you
5 will hear evidence is not the same recording
6 equipment that was on the clerk's bench at the
7 time of the event. The audience section of the
8 courtroom, the size of it, the location of it,
9 the seats that are inside it. The counsel
10 tables, their proximity to each other, to the
11 pathway to get to the sidebar, to the judge's
12 bench. And again, a court officer's desk.

13 The dock. The location where a person
14 would speak to someone in the dock if necessary
15 to hand papers to a person in the dock, and the
16 door to and from the dock, the locked, secure
17 door to and from the dock that would be opened or
18 closed by a person with a secure device to open
19 and close it to let a person in or out of the
20 dock area.

21 And I will add two secure doors going
22 to a secure hallway to the judge's lobby, to
23 other secure areas. The one public entry and
24 exit to the courtroom, its proximity to the
25 audience areas, to the -- within the bar areas to

1 the dock, the exit from the dock that leads this
2 direction. And that's what I want to point out
3 in this courtroom. Counsel?

4 MR. HOOPES: Thank you. Good morning,
5 Your Honor. I have four areas that I would like
6 you to pay attention to if you don't mind. The
7 first is what I would call the judge's zone,
8 which is where you are now, which would encompass
9 where you are, this bench, where your clerk is
10 right now, the proximity of I to you, the
11 proximity of the clerk to you, the proximity of
12 probation to you and the judge's zone. When I
13 say proximity, I mean actual distance if you can
14 even measure in your own mind from me to you and
15 from this person to this person, this person to
16 the clerk, and this person here.

17 The second area is what I would call
18 audience zone one, which would be this area back
19 here. The ease of you as a judge to see
20 everybody who is sitting in this particular area,
21 the ease of anybody else in the courtroom to turn
22 around and see everybody who is seated in this
23 area.

24 Audience area number two would be --
25 facing you would be to my left would be this

1 area. The ease of view as the judge, ease of the
2 clerk, the ease of anybody in the courtroom to
3 see who might be seated in this courtroom and
4 actually count the number of benches. One, two,
5 three, four, before you get over there.

6 The fourth and last area is simply
7 where my fellow counsel is standing, which is
8 right here, where an interpreter might speak or
9 where an interpreter might speak, but the actual
10 distance from this person not just to you but
11 over to the left side of the judge's zone.
12 That's all I would have. Thank you.

13 MS. FABRICANT: All right. I would
14 suggest if we're ready that we go into the dock,
15 observe the dock, go through the next secure door
16 (indiscernible).

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

2 MS. FABRICANT: These do not come into
3 the secure area.

4 COURT OFFICER: Correct.

5 UNIDENTIFIED SPEAKER: I would like to
6 be as close as I can. Excuse me. Thank you.
7 Excuse me, John. I'm not press. I'm with Mr.
8 Neff.

9 COURT OFFICER: Okay, thank you. I
10 just want clarification.

11 UNIDENTIFIED SPEAKER: Appreciate it.
12 I can hold that. Make it easier for you.

13 MR. NEFF: Oh, okay.

14 UNIDENTIFIED SPEAKER: I will switch
15 back then.

16 MR. NEFF: Okay.

17 UNIDENTIFIED SPEAKER: It's just easier
18 to have a backup with that.

19 MR. NEFF: Oh, all right. Actually,
20 I'm sorry, I should have explained that. It's --
21 they just don't want -- basically anyone down
22 here because it's a secure --

23 UNIDENTIFIED SPEAKER: You can
24 (indiscernible). We'll (indiscernible). And I
25 have a pocket mount if it's easier for you.

1 MR. NEFF: No, (indiscernible).

2 UNIDENTIFIED SPEAKER: Okay.

3 MR. NEFF: This won't -- this shouldn't
4 be so long.

5 UNIDENTIFIED SPEAKER: And I will give
6 you that. I know you have Eric's, but I'll give
7 that to you.

8 MR. NEFF: Okay, great. Thank you.

9 UNIDENTIFIED SPEAKER: (indiscernible).

10 MR. NEFF: (indiscernible), Howard
11 Neff.

12 MR. HOOPES: I would ask that we slow
13 walk from the doorway where we came in and let
14 you look left and right. In other words, it's a
15 lot to take in. If we -- this is the door. You
16 just got a demonstration of the badge, buzzer,
17 opening the door to go up. And then after you --
18 we're going to -- right to your -- to your right
19 is a holding cell. And then if you go straight
20 ahead and then you went to your left, there's
21 another holding cell. And then if you follow
22 straight ahead to the left, you'll see a storage
23 area. This to the left is the court officer
24 area. And then straight to the back before you
25 look out the sallyport area, you can see there's

1 still a third holding cell. So they have
2 capacity for three.

3 So why don't I stop there before we go
4 anything with the sallyport area.

5 MS. FABRICANT: Okay. And it may be
6 worth just noting what's right behind you there,
7 which I think -- and we may have testimony
8 indicates this is a place for law enforcement
9 officers to check their firearms.

10 MR. MCINERNEY: Okay. Go ahead.

11 MS. FABRICANT: So what I would like to
12 do is just look out this door, just have the door
13 open so that we can look out it. We'll look at
14 it from the outside later on. So I'm not
15 suggesting we go out right now, but just --

16 MR. HOOPES: If you don't mind, if we
17 could just stick our head out -- yeah, yeah.

18 MS. FABRICANT: If there's enough of us
19 that maybe we need to actually step out.

20 MR. HOOPES: Yeah. (indiscernible).
21 After we step out.

22 And then when we are here, I would ask
23 that you note the gate to get into the sallyport,
24 the distance from the wall to the outer edge of
25 the sallyport on the other side, and the length

1 of the sallyport as to what it would look like
2 and feel like if a van was actually parked in
3 here or where two vans or a van and a car could
4 ever fit in.

5 MS. FABRICANT: What you heard earlier
6 about new fencing, I believe the evidence will be
7 that this is not the new fencing, that this
8 fencing was here at the time of the event in
9 issue. We will hear evidence about the position
10 that this gate is usually in. I expect the
11 evidence we will hear is that it is usually not
12 locked, that it is usually not locked because --

13 MR. MCINERNEY: This is not.

14 MS. FABRICANT: This gate. Because of
15 the size of the vans that tend to come in here,
16 that it is usually not kept locked.

17 We will see later on the new fencing.
18 But I am told that this is not it.

19 MS. FABRICANT: (indiscernible) here
20 for just a moment and let's just notice -- let's
21 just notice from here the stairway that we will
22 take later on. So we'll just notice that this is
23 the stairway that goes off of this public hallway
24 and goes up. Public stairway.

25 And this door if I am not mistaken is a

1 secure door.

2 COURT OFFICER: Correct, from the
3 outside, yes.

4 MS. FABRICANT: So that this door
5 requires a key card --

6 COURT OFFICER: To get in.

7 MS. FABRICANT: To get in.

8 COURT OFFICER: Requires a keycard.

9 MS. FABRICANT: Okay. And we will see
10 somewhere along the way another secure door that
11 requires a keycard that is not open to the
12 public.

13 COURT OFFICER: This way.

14 MS. FABRICANT: Okay.

15 MR. HOOPES: So I would ask you to come
16 over just where that gentleman where the tie is
17 is the entrance back into the lockup area that we
18 just came out of. Without a roadmap or a
19 schematic, it's a little hard. But you can see
20 them come out and then you can come up this way.
21 Or with card you can come back down.

22 MR. MCINERNEY: With card meaning
23 through back door.

24 MR. HOOPES: Yeah. And through this
25 door.

1 MR. MCINERNEY: And this door too, you
2 need a card to get in?

3 MS. FABRICANT: Authorized personnel.

4 MR. MCINERNEY: Okay.

5 MS. FABRICANT: Okay.

6 MR. MCINERNEY: Back this way?

7 MS. FABRICANT: Oh, before we go
8 further, this elevator, I believe our evidence
9 will be that this is a secure elevator that can
10 be used to take a person in custody up to the
11 second floor. So this also requires a keycard.

12 MR. MCINERNEY: A manual key --

13 MR. HOOPES: A key, a manual key.

14 MS. FABRICANT: Yes.

15 MR. MCINERNEY: Got it.

16 MR. HOOPES: So we are walking away
17 from the lockup area and taking a right. So you
18 can get into this hallway from the lockup area.
19 It's another way to get into the lockup area.

20 MR. MCINERNEY: Right. Right. And so
21 this is where --

22 MR. HOOPES: This is probation.

23 MS. FABRICANT: So is the chief court
24 officer's office -- so this is the non-public
25 area of probation if I understand correctly.

1 These are -- probation personnel work here, but
2 this is a non-public area. We are now going out
3 to a public area.

4 MR. MCINERNEY: You come out through
5 the lockup (indiscernible) probation and out or
6 through the other area (indiscernible).

7 MR. HOOPES: Yes. Or around the back.
8 So if you hear testimony about walking through
9 probation from the lockup, it's (indiscernible).

10 MS. FABRICANT: So chief court
11 officer's office in the public area. So this
12 area is now open and accessible to the public.

13 MR. HOOPES: Assistant District
14 Attorney's Office right next to the
15 (indiscernible).

16 MS. FABRICANT: And then we are now --
17 now coming to the probation -- public probation
18 counter. And that's this. Public probation
19 (indiscernible).

20 And then public stairway. That
21 elevator right there, is that the same secure
22 elevator?

23 COURT OFFICER: No.

24 MS. FABRICANT: That's a different
25 secure elevator.

1 COURT OFFICER: Public elevator.

2 MS. FABRICANT: That's a public
3 elevator.

4 COURT OFFICER: Yes, ma'am.

5 MS. FABRICANT: Okay. All right.
6 Okay.

7 So this is a secure door.

8 COURT OFFICER: Yes. You need card
9 access. Right behind the cell block.

10 MR. MCINERNEY: Where does that go?

11 COURT OFFICER: Do you want to key it
12 open, sir?

13 MR. MCINERNEY: It's okay. Just
14 generally does this go outside?

15 COURT OFFICER: Yes.

16 MR. MCINERNEY: Okay.

17 COURT OFFICER: It's right behind the
18 sally door.

19 MR. MCINERNEY: Got it. Got it. Thank
20 you.

21 MS. FABRICANT: So from the outside
22 we'll be able to see the --

23 COURT OFFICER: Yes, yes.

24 MR. HOOPES: (indiscernible). So you
25 can see this takes us back to the first

1 (indiscernible) area again and the lobby. You
2 can walk from the lobby down the public staircase
3 to the chief court officer's office to the
4 district attorney's office on the right, or take
5 a left and cut through probation again to get
6 into the lockup.

7 MR. MCINERNEY: You could also go into
8 the courthouse lobby through the other stairwell,
9 correct?

10 MR. HOOPES: Yeah. Yeah. That's not
11 public.

12 MR. MCINERNEY: Okay. Oh, I'm sorry.

13 MS. FABRICANT: A couple of things we
14 should say. I think the evidence will be that
15 that district attorney's office down there is not
16 the district attorney's office, it's really a
17 victim's advocate office. It's available for the
18 broad district attorney's office --

19 MR. HOOPES: Yes. ADA and the victim's
20 advocate both use it.

21 MR. MCINERNEY: Understood.

22 MS. FABRICANT: there's another office
23 for the assistant district attorney over at the
24 police station, and you'll hear that.

25 My suggestion is that we not go out

1 there not but we go upstairs so that we see the
2 second floor and then (indiscernible).

3 MR. MCINERNEY: Sure.

4 MS. FABRICANT: So this we saw an
5 elevator downstairs where a person in custody
6 might be brought upstairs. That's the elevator.
7 And we have here somewhere a jury pool room and a
8 jury deliberation room.

9 COURT OFFICER: Correct.

10 MS. FABRICANT: The evidence will be
11 that nothing relevant to this case happened here
12 but that this is where a visiting judge usually
13 sits if the first justice is present sitting
14 downstairs. So that's really why we're seeing
15 it.

16 MR. MCINERNEY: Understood.

17 MS. FABRICANT: I would ask you to note
18 that there's no dock in this courtroom. So that
19 a person who is released from custody from this
20 courtroom, a person who is in custody in this
21 courtroom is not in the dock, a person who is
22 released from custody in this courtroom is not in
23 a dock.

24 MR. MCINERNEY: Understood.

25 MS. FABRICANT: Okay.

1 MR. MCINERNEY: And during an
2 arraignment, does the person in the courtroom
3 downstairs stay in the dock or do they come
4 outside of the dock during the arraignment?

5 MR. HOOPES: If you're in the dock, you
6 would stay in the dock if you're being arraigned.

7 MS. FABRICANT: I think that's what the
8 evidence will be.

9 MR. MCINERNEY: Understood.

10 MR. HOOPES: Always. Until bail is
11 set.

12 MR. MCINERNEY: Yeah.

13 MS. FABRICANT: All right. So now I
14 think we go downstairs, out into the main lobby,
15 look at the main lobby, notice the furnishings,
16 the equipment. And then we go outside and walk
17 around the building.

18 [OVERLAPPING SPEAKERS]

19 MR. HOOPES: Do you think it would be
20 useful to show the (indiscernible).

21 [OVERLAPPING SPEAKERS]

22 COURT OFFICER: Now or after?

23 MR. HOOPES: I think after. While
24 we're in...

25 UNIDENTIFIED SPEAKER: Thank you.

1 COURT OFFICER: Not a problem.

2 UNIDENTIFIED SPEAKER: I was prepared
3 to say it wasn't that anticlimactic after all the
4 planning, but it turns out no.

5 MS. FABRICANT: (indiscernible).

6 MR. HOOPES: (indiscernible) which
7 would mean we would have to go back
8 (indiscernible).

9 MS. FABRICANT: So the way to get there
10 would be to go back (indiscernible).

11 UNIDENTIFIED SPEAKER: We'll be right
12 back. We're not reconvening. We're going in and
13 coming right back out. Okay? If that helps you
14 all.

15 UNIDENTIFIED SPEAKER: Chief, when will
16 you go outside?

17 UNIDENTIFIED SPEAKER: In ten minutes.

18 MS. FABRICANT: Worth noting just that
19 the judge's lobbies, at least the older ones,
20 have (indiscernible).

21 MS. FABRICANT: So now we're going back
22 out to the main lobby and we'll just notice some
23 things there.

24 UNIDENTIFIED SPEAKER: (indiscernible)
25 we're leaving the (indiscernible).

1 MS. FABRICANT: I'll ask you to take
2 note first of all of the size, the dimensions,
3 how far from the courtroom door to the main
4 entrance and exit, the security equipment that is
5 between the entrance and exit and pretty much
6 everything else. The entrance to the clerk's
7 office to our right as one comes in the door, the
8 entrance to the first session courtroom directly
9 in front as one comes in the door. A bench to
10 wait. The public stairway that we went up and
11 down over to our left, restroom, and a conference
12 room over there which perhaps is worth just a
13 glance in just to see the size of it.

14 MR. MCINERNEY: Sure.

15 MR. HOOPES: So maybe before you do
16 that, so if you might think of it as a cross,
17 which is you get the courtroom, first when
18 looking out the door. And you have the clerk's
19 office across from the stairs. And then you have
20 the benches right here, which you can note are
21 not visible from the outside. And then we have
22 that public conference room.

23 MR. MCINERNEY: Understood.

24 MS. FABRICANT: So I think we're ready
25 to go outside. I think we're going to be

1 escorted. Since it's now now, but not then,
2 necessary to open some locked gates.

3 MR. HOOPES: So it's a simple view.
4 But from these stairs here and then down here,
5 you can look up and -- not to see the courthouse,
6 but you're going to see areas in front of the
7 courthouse above the steps where people might
8 have had conversation. To your left you can see
9 the Newton Police Department, which is directly
10 adjacent, unusually so. And you can see areas to
11 walk over from the courthouse straight to the
12 Newton PD and then around the back.

13 MS. FABRICANT: And I think it's worth
14 noticing while we're in front that the buildings
15 actually are directly adjacent. You can't walk
16 between them.

17 All right. So I think we're going to
18 go that way around the back that way.

19 Back here, these cars parked, public
20 street to the right. Public parking lot on the
21 other side of that public street.

22 MR. HOOPES: (indiscernible) come in
23 here, park the vehicle, the door opens. Prisoner
24 comes in (indiscernible).

25 MS. FABRICANT: And then you showed us

1 another secure door, that one over there.

2 COURT OFFICER: That's the one in the
3 hallway right in front of the steps.

4 MR. HOOPES: Court personnel come in
5 through when they park --

6 COURT OFFICER: Sure.

7 MR. HOOPES: When court personnel park
8 in the back as they used to, which door did they
9 come in?

10 COURT OFFICER: Back in the day I can't
11 confirm. I wasn't here then, sir. So I don't
12 want to give you any bad information.

13 MR. HOOPES: Okay. No problem.

14 MS. FABRICANT: But that door over
15 there that we can see over here I take it is also
16 a secure door (indiscernible).

17 So Newton Police Department. And I
18 think you'll hear evidence that this is the
19 district attorney's (indiscernible).

20 MR. HOOPES: And you can escort people
21 in custody (indiscernible).

22 MS. FABRICANT: More of this
23 (indiscernible).

24 MR. HOOPES: (indiscernible) end it
25 however you want, whenever you want.

1 MR. MCINERNEY: Yeah. So I think we
2 can end it now as far as I am concerned. And I
3 think -- shall we just make it 10:00? Is that
4 easiest for everybody.

5 MR. HOOPES: That's okay.

6 MS. FABRICANT: It's only 8:15. I
7 guess --

8 MR. HOOPES: If we could say ten,
9 that's great. We've got some things to fit in.

10 MS. FABRICANT: All right.

11 MR. MCINERNEY: Okay. So let's make it
12 10:00.

13 MS. FABRICANT: Okay. That's fine.

14 MR. MCINERNEY: And we'll just resume
15 then. And we'll see you back at Suffolk County.

16 MS. FABRICANT: Ready for opening
17 statement at 10:00. All right.

18 MR. MCINERNEY: Good. All right.
19 Thank you.

20 MS. FABRICANT: I'm going to go that
21 way because I'm parked that way.

22 MR. HOOPES: Us too. Us too.

23 MR. MCINERNEY: Thank you very much.
24
25

C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certify that the
foregoing transcript is a true and accurate
record of the proceedings.

Sonya M. Ledanski Hyde

Veritext Legal Solutions
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Date: August 27, 2025

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CERTIFIED HEARING TRANSCRIPT (DAY 1)

COMMONWEALTH OF MASSACHUSETTS
COMMISSION ON JUDICIAL CONDUCT

COMPLAINT NUMBER 2019-22

VOLUME I

HEARING

~ BEFORE ~

HEARING OFFICER

DENIS J. McINERNEY, ESQ.

JUNE 9, 2025

9:00 A.M.

Boston, Massachusetts

Lisa L. Crompton, CSR (MA) (RI), RPR

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Commission on Judicial Conduct

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E X H I B I T S

EXHIBITS	DESCRIPTION	PAGE NO.

(NO EXHIBITS)

1 HEARING OFFICER: I think you
2 can all hear me. Good morning. We're on the
3 record.

4 This is a hearing conducted in
5 connection with the Commission on Judicial
6 Conduct's Complaint Number 2019-22 concerning
7 Judge Shelley M. Richmond Joseph.

8 My name is Denis McInerney, and
9 I'm the hearing officer in this matter.

10 I'd ask that the attorneys for
11 the parties please introduce themselves and the
12 parties they represent.

13 JUDGE FABRICANT: Good morning.
14 I'm Judith Fabricant, special counsel for the
15 Commission on Judicial Conduct.

16 MR. NEFF: Good morning.
17 Howard Neff for the Commission on Judicial
18 Conduct.

19 MR. HOOPES: Good morning, Your
20 Honor. Tom Hoopes for Judge Joseph.

21 MS. MULVEY: Good Morning.
22 Elizabeth Mulvey also for Judge Joseph.

23 MR. KEATING: Good morning.
24 Michael Keating for Judge Joseph.

25 HEARING OFFICER: Thank you

1 very much.

2 Earlier this morning the
3 parties and I conducted a view at the
4 Newton District Courthouse. The hearing will
5 now resume here at the Suffolk County
6 Courthouse.

7 As the parties are aware, on
8 June 3rd, I issued an order regarding media
9 protocol and coverage. If there is anyone here
10 from the media who has not received a copy of
11 that order, it is available on the CJC's
12 website, on the web page where they have their
13 May 13th press release about this matter.

14 This hearing is being conducted
15 to establish the facts related to the formal
16 charges issued by the CJC against Judge Joseph
17 on November 19th, 2024. After the hearing has
18 concluded, I will issue a report containing my
19 findings and recommendations. Should I conclude
20 based on the facts established at this hearing
21 that Judge Joseph violated the code of judicial
22 conduct, and that any such violation would call
23 for discipline to be imposed, I will make
24 recommendations as to what that discipline
25 should be. The Commission bears the burden of

1 proving the charges by clear and convincing
2 evidence.

3 With that, unless there are any
4 other matters that the parties would like to
5 raise at this time, I will turn it over to the
6 special counsel first and then to Judge Joseph's
7 counsel to give their opening statements

8 JUDGE FABRICANT: Thank you,
9 Mr. McInerney.

10 I'm Judith Fabricant, special
11 counsel for the Commission.

12 Before I turn to opening
13 statements, first of all, I want to say good
14 morning to counsel, to Judge Joseph, to
15 Mr. Neff, and to everyone present.

16 And I would like to request
17 that you formally admit in evidence the
18 stipulated appendices, and those are
19 Appendix A through R and V through Z. And you
20 should have on your bench a binder that has all
21 of these in it.

22 Appendices S and T are
23 stipulated for identification only. And I
24 request that you receive them for that purpose
25 only.

1 Appendix U consists of
2 photographs at this point stipulated for
3 identification. As they are testified to, I
4 will ask you to receive them in evidence.

5 HEARING OFFICER: That is all
6 fine with me.

7 JUDGE FABRICANT: Thank you.

8 HEARING OFFICER: And those
9 exhibits that you offered, with the stipulation
10 of respondent, are all accepted.

11 JUDGE FABRICANT: All right.
12 And is my volume working with this microphone?

13 HEARING OFFICER: It's perfect.
14 It's perfect.

15 JUDGE FABRICANT: Thank you.

16 This case is about the
17 integrity, impartiality, and independence of the
18 Massachusetts judiciary and the appearance of
19 integrity, impartiality, and independence that
20 every judge is required to uphold. The facts
21 are mostly undisputed. There is one central
22 dispute, what was said during the 52-second off
23 the record discussion at side bar. You will
24 hear a lot about those 52 seconds.

25 I want to start with,

1 Judge Joseph became a judge of the
2 District Court on November 2nd, 2017. She had
3 been an attorney for some 25 years, the last 20
4 primarily as a criminal defense attorney. As a
5 new judge, Judge Joseph received various
6 training materials, including a copy of the
7 Massachusetts Rules of Court, this volume that
8 I'm holding up. Among the rules in this volume
9 is District Court Special Rule 211, which
10 requires that all court proceedings in the
11 District Court be recorded.

12 In accordance with the policy
13 of the District Court, Judge Joseph spent four
14 weeks in orientation, sitting with about 20
15 other judges, one at a time, to observe a wide
16 variety of proceedings. After completing her
17 orientation, she was assigned to sit in various
18 District Court divisions.

19 On April 2nd, 2018,
20 Judge Joseph was sitting in the Newton
21 District Court and was the only judge there that
22 day. She had sat there as a judge a few times
23 before and she had practiced there often. She
24 was familiar with the courthouse and the
25 practices there. Those practices included the

1 following, which Judge Joseph stipulated to and
2 agreed that she would not contest as a part of
3 the agreement that she had adjudicated with the
4 United States attorney for dismissal of the
5 criminal charges against her. This is at
6 Paragraph 3 of the agreed statement of facts.
7 It's in Appendix M, Pages 163 to 164, and it's
8 also being displayed on the monitor. And the
9 page numbers that I'm using are the red numbers
10 up in the right-hand corner of each page of the
11 appendix so it's sequentially, sequentially
12 numbered throughout the appendix.

13 Judge Joseph knew, -- this is
14 what Paragraph 3 says -- Judge Joseph knew that
15 criminal defendants in Newton District Court
16 custody were kept in the lockup area in the
17 basement of the courthouse and were brought
18 upstairs with a court officer to the courtroom
19 for their court appearance. The normal custom
20 and practice in Newton District Court, subject
21 to certain exceptions, was a defendant would be
22 released from custody into the courtroom.

23 This courtroom had only one
24 public entry/exit which led to the courthouse
25 lobby. You saw each of those places this

1 morning. The courtroom, with its one public
2 exit, the lockup downstairs, and the enclosed
3 dock in the courtroom with its door facing
4 toward the exit.

5 One of the cases that came
6 before Judge Joseph on that date was
7 Commonwealth versus Medina Perez, and there are
8 various names for him in various documents. I'm
9 using the name that appeared in the
10 District Court docket at the time.

11 Mr. Medina Perez faced three charges, a charge
12 of being a fugitive from justice based on a
13 warrant from Pennsylvania and two misdemeanor
14 drug charges.

15 Judge Joseph was informed of
16 the charges and was also informed that ICE, the
17 Immigration and Custom Enforcement Service, had
18 a detainer and warrant of removal for
19 Mr. Medina Perez and that an ICE officer was
20 present to take Mr. Medina Perez into custody if
21 he was released from state custody.

22 When the case was first called,
23 Judge Joseph appointed the duty attorney for the
24 day, Elizabeth Bostwick, to represent him. A
25 Spanish interpreter assisted. The case was

1 called several times through the morning to
2 allow Attorney Bostwick to investigate whether
3 Mr. Medina Perez was the person wanted in
4 Pennsylvania. When court recessed for the
5 lunch, for the lunch break, Attorney Bostwick
6 was still working on that.

7 Mr. Medina Perez's employer and
8 another person associated with him were the
9 present in court. Before court resumed,
10 Mr. Medina Perez's employer retained
11 Attorney David Jellinek to represent him in
12 place of Attorney Bostwick. Attorney Jellinek
13 appeared frequently in the Newton District and
14 he had friendly relationships with the court
15 personnel there. Attorney Bostwick did, too.

16 Attorney Jellinek learned of
17 the charges and of the ICE detainer and of his
18 client's denial that he was the person sought.
19 He set about doing what he could to investigate
20 whether his client was the right person for the
21 Pennsylvania warrant and whether he was the
22 right person for the ICE detainer and to
23 persuade others that his client was not the
24 right person for either.

25 He spoke with Assistant

1 District Attorney Shannon Jurgens, -- now she's
2 McDermott -- and they came to agreement that the
3 evidence was not sufficient to connect
4 Mr. Medina Perez to the Pennsylvania warrant, so
5 that she would dismiss that charge. She was not
6 seeking bail on the drug charges. That meant
7 that Mr. Medina Perez would be released from
8 state custody that afternoon. The problem that
9 remained for Attorney Jellinek was ICE. His
10 goal was to find a way to avoid his client being
11 taken into ICE custody.

12 The ICE officer had been
13 sitting in the courtroom through the morning and
14 was still there at the lunch break.
15 Mr. Jellinek spoke with him, but failed to
16 persuade him that his client was not the right
17 person. The ICE officer remained convinced that
18 Mr. Medina Perez was the right person and
19 planned to take him into custody.

20 Mr. Jellinek also spoke with
21 Court Officer Wesley MacGregor, alone with no
22 one else present. He expressed to
23 Officer MacGregor his concern, that ICE would
24 take his client into custody and would be taking
25 the wrong person. Officer MacGregor told

1 Attorney Jellinek that he would release the
2 person from the sallyport which was downstairs
3 in the lockup area. On that basis, Mr. Jellinek
4 expected that, if he could arrange for his
5 client to go back downstairs, he could be
6 released through the back and avoid ICE.

7 Separately during a lunch
8 break, the clerk informed Judge Joseph that
9 Newton District Court First Justice
10 Mary Beth Heffernan had a practice or policy
11 that ICE officers should be directed to wait
12 outside the courtroom. He asked if she would
13 follow that policy.

14 The Trial Court had a policy
15 for all court personnel regarding interactions
16 with ICE, referred to as the Lunn policy after a
17 decision of the Supreme Judicial Court. That
18 policy is in evidence as Appendix B. And we'll
19 bring it up on the monitor, although it's
20 several pages long.

21 The essence of it is that court
22 personnel should be neutral toward ICE Officers
23 in the courthouses, allow them to perform their
24 duties, and allow them into lockup areas to take
25 custody of a person being released.

1 Judge Joseph was aware that
2 there was a Trial Court policy, but she didn't
3 know what the policy was and she couldn't put
4 her hands on. She consulted with a staff lawyer
5 of the administrative office of the
6 District Court who read the Lunn policy to her.
7 Judge Joseph advised the clerk that she would
8 follow the practice established by the
9 First Justice.

10 Following her instruction, the
11 clerk directed the ICE officer to wait outside
12 the courtroom, and he did.

13 After the lunch break, the case
14 was called 2:48:13 p.m. The clerk advised the
15 judge that Attorney Jellinek filed an appearance
16 and Attorney Jellinek requested to go to side
17 bar. The clerk asked if he wanted to wait for
18 his client, and Attorney Jellinek said no. So
19 the defendant had not yet been brought up into
20 the courtroom when the side bar conference
21 began. That fact will be important when we get
22 to the testimony of Interpreter Eric Mendoza.

23 The conversation at side bar,
24 the part of it that was on the record, is set
25 forth in a transcript that the parties have

1 stipulated is accurate. The transcript is
2 Appendix G, and I direct your attention to
3 Page 40 to 41. Again, these are the red numbers
4 up in the right-hand corner of each page.

5 The beginning just seems to be
6 a slight gap. The next thing that appears is
7 Judge Joseph saying that something is dismissed.
8 There's no dispute that what was dismissed was
9 the fugitive from justice charge. Judge Joseph
10 then said so it's my understanding that ICE is
11 here. Note that she was the first to mention
12 ICE. Then David Jellinek said ICE is convinced
13 that this guy, I went over to ICE, they say
14 there's a biometric match, I went through it and
15 did the research, there's 13 FBI numbers
16 connected to this Social, so something's bad
17 with the, inaudible. My client denies that it's
18 him. ICE is going to pick him up if he walks
19 out the front door. But I think the best thing
20 for us to do is to clear the fugitive issue,
21 release him on a personal, and hope that he can
22 avoid ICE. Judge Joseph responded. The other
23 alternative is, if you need more time to figure
24 this out, hold until tomorrow. Attorney
25 Jellinek said there is an ICE detainer, so if

1 he's bailed out from Billerica -- Middlesex
2 County Jail -- ICE will pick him up. The judge
3 said ICE is going to get him, what if we detain
4 him. At this point Attorney Jellinek said, are
5 we on the record. The judge said to the clerk,
6 can we go off the record for a minute. The
7 clerk, you will hear from his testimony, was
8 busy doing other things and wasn't listening.
9 He said, what's that. The judge then said, are
10 we off the record. The clerk said, no, we're on
11 the record. Attorney Jellinek then said, can we
12 go off the record for a minute. The clerk
13 turned off the recording system, and Judge
14 Joseph conducted an unrecorded discussion with
15 counsel in violation of District Court Rule 211.

16 So far these facts are
17 undisputed. Now comes the dispute, what happens
18 in the 52 seconds when the recording was off.
19 Part of what happened is included in Paragraph
20 10 of the Federal agreed statement of facts.
21 Again, this is Appendix M, Page 163, and it's
22 Paragraph 10, which is being displayed on the
23 monitor. Judge Joseph has stipulated that
24 Attorney Jellinek asked that the defendant be
25 allowed to go back downstairs. That was

1 essentially Mr. Jellinek's plan. The defendant
2 had to go downstairs to be released out the
3 back, rather than being released from the dock
4 into the courtroom to go out the front door, as
5 Judge Joseph has stipulated, was the normal
6 custom and practice in that court.

7 What else happened in that
8 unrecorded discussion? You will hear from the
9 people who participated, Attorney David Jellinek
10 and Assistant District Attorney Shannon Jurgens
11 McDermott. Clerk Okstein was present, but he
12 was occupied with other tasks and he wasn't
13 listening. Interpreter Eric Mendoza was not at
14 side bar, but he was able to hear some of what
15 was said while he waited for the defendant to be
16 brought to the court, and he formed an
17 impression of the substance of the conversation.

18 From the discussion on the
19 record, Attorney Jellinek had reason to think
20 that Judge Joseph was open to helping him with
21 the problem he was trying to solve for his
22 client. Like everything else, that impression
23 factored into what he said off the record. He
24 told the judge that if his client could go back
25 downstairs, he thought he could get him released

1 through the back. The judge said something to
2 the effect of, yes, that's what we'll do. Based
3 on that exchange, Attorney Jellinek believed
4 that he had Judge Joseph's blessing to proceed
5 as he had discussed with Court Officer
6 MacGregor. The defendant would go back
7 downstairs, and Officer MacGregor would release
8 him out the back of the courthouse.

9 Assistant District Attorney
10 Shannon Jurgens McDermott recognized that ICE
11 was outside her role, and she took no position
12 on whether the defendant was the right person
13 for the ICE detainer. She was surprised and
14 disturbed to hear the judge making suggestions
15 to defense counsel regarding ICE. She was
16 further surprised when the discussion went off
17 the record. That was not something that she had
18 seen before in a courtroom proceeding.

19 She remembers the conversation
20 off the record was about what would happen to
21 the defendant with ICE. She does not remember
22 precisely what was said. But she remembers the
23 judge saying something to the effect of, what
24 should we do, and David Jellinek saying
25 something to the effect of, he was all set or I

1 have it under control.

2 The Assistant District Attorney
3 was uncomfortable with the discussion, viewing
4 the judge's statements as an effort to skirt the
5 ICE officer. She did not interpret the
6 conversation to mean that the defendant would
7 leave the courthouse other than through the main
8 public lobby, because she was unaware of any
9 other way a defendant could be released.

10 Interpreter Eric Mendoza heard
11 some of the conversation at side bar. He did
12 not hear all of it and he had no knowledge of
13 what was on or off the record. From what he did
14 hear, he formed the understanding that the
15 substance of the conversation was that
16 Mr. Medina Perez was to be released. He heard
17 the judge say words to the effect of, then we
18 will let him go. He was surprised, since he was
19 aware that an ICE officer was waiting to take
20 him into custody.

21 Judge Joseph has denied that
22 the conversation occurred as these witnesses
23 describe. She has said that what was off --
24 what was said off the record was the same as
25 what was said on the record. There was no

1 difference and no purpose for going off the
2 record.

3 This is the dispute that you
4 will be called upon to resolve, based on the
5 credibility of the witnesses and the reasonable
6 inferences from all of the circumstances,
7 particularly from what occurred on the record.

8 When we get to closing
9 argument, I will suggest the reasons that you
10 should credit David Jellinek's testimony and not
11 Judge Joseph.

12 What came after the unrecorded
13 conversation is also undisputed. The recording
14 came back on and everyone went back to open
15 court. This is Pages 41 to 43 of Appendix G.
16 Attorney Jellinek announced, after some
17 extensive research into the FBI numbers and
18 something about Social Security numbers, as well
19 as obtaining a photo from Pennsylvania, we don't
20 believe that this gentleman is the same
21 gentleman as on the fugitive from justice
22 warrant. Note that it's the defense attorney
23 who says this first. The assistant district
24 attorney then confirmed, saying with the
25 information I have, I don't think there's enough

1 tying him to the Pennsylvania warrant, and she
2 announced that she would dismiss the fugitive
3 from justice charge and would not request bail
4 on the drug charges.

5 So at this point, it was clear
6 to everyone in the courtroom that the defendant
7 would be released on personal recognizance. But
8 as we noted earlier, ICE was not in the
9 courtroom.

10 Attorney Jellinek then said, I
11 would ask that he I believe he has some property
12 downstairs, I'd like to speak with him
13 downstairs with the interpreter, if I may.
14 Judge Joseph responded, that's fine, of course.
15 The clerk and the judge then proceeded with the
16 arraignment process. Mr. Jellinek then said,
17 all set, Mr. Clerk.

18 At this point the clerk, who is
19 right in front of the judge, said something that
20 the transcript reflects as inaudible. The
21 judge, responding to Mr. Jellinek's question as
22 to whether the matter was all set, said wait
23 just a second and turned her attention to the
24 clerk, and told her, there was a representative
25 from ICE here in the court inaudible to visit

1 the lockup. Judge Joseph responded, that's
2 fine, I'm not going to allow them to come in
3 here, but he's been released on this. The clerk
4 advised the defendant of the next date and gave
5 the statutory warning.

6 Then Court Officer MacGregor
7 asked, he's released, Mr. Clerk? The clerk and
8 Judge Joseph both responded, he is. Then
9 Judge Joseph added, Mr. Jellinek asked if the
10 interpreter can accompany him downstairs to
11 further interview him, and I've allowed that to
12 happen. That concluded the proceeding.

13 Court Officer MacGregor
14 escorted the defendant, Mr. Jellinek, and the
15 interpreter through the dock and down the secure
16 stairway, removed the restraints, and opened the
17 sallyport door, allowing the defendant out to
18 the rear of the courthouse while the ICE officer
19 was waiting in the front lobby.

20 Over the next days and weeks,
21 Judge Joseph met first with First Justice
22 Mary Beth Heffernan, then Regional
23 Administrative Justice Stacey Fortes, and
24 finally, on May 8th Chief Justice Paul Dawley.

25 With Judge Heffernan, she did

1 not volunteer that she had gone off the record,
2 and Judge Heffernan did not ask, not yet having
3 heard anything to that effect. Judge Fortes had
4 heard that part of the proceeding was not
5 recorded and she asked what happened. Judge
6 Joseph did not directly acknowledge that she had
7 told the clerk to turn off the recording.

8 What she said in these two
9 conversations was not false. She did not lie to
10 Judge Heffernan or Judge Fortes, but she did not
11 tell them all of what happened. She did not
12 volunteer information that she should have
13 volunteered to meet her obligation of candor.

14 With Chief Justice Dawley, in
15 her sworn interview with me on behalf of the
16 Commission, Judge Joseph acknowledged going off
17 the record, but denied having anything to do
18 with the defendant released out the back.

19 The Commission will ask you to
20 find that those denials were false. On that
21 basis, the Commission will ask you to find that
22 she failed to be candid and honest with court
23 disciplinary authorities and failed to cooperate
24 with court administration.

25 I thank you for your attention.

1 HEARING OFFICER: Thank you,
2 Special Counsel.

3 With that, I'll turn it over to
4 counsel for Judge Joseph.

5 MS. MULVEY: Thank you.

6 Do you mind if I move around a
7 little?

8 HEARING OFFICER: No. Of
9 course.

10 MS. MULVEY: Kind of crowded
11 back there.

12 If you were to walk down
13 Tremont Street and take a survey of the people
14 you meet, 100 percent of them would tell you
15 that Judge Shelley Joseph let an illegal
16 immigrant out the back door of the Newton
17 District Court, 50 percent of them would tell
18 you that she's a criminal and should go to jail,
19 50 percent would tell you she's a folk hero for
20 what she did, but 100 percent would tell you she
21 did it.

22 It has become such a part of
23 local lore in Boston that the media for the most
24 part have dropped the niceties of alleged or
25 charged and they report and make references to

1 this incident as if a dozen people had seen
2 Judge Joseph get off the bench, escort the
3 defendant to the door, give him a hug, and wish
4 him God speed. That's what everybody believes,
5 and they believe it without having heard a
6 single word of public testimony and without any
7 witness ever having been cross-examined. They
8 believe it the based on what the U.S. attorney's
9 office put out in the indictment some six years
10 ago, and that has become established fact.

11 HEARING OFFICER: If I can
12 interrupt one second. Are you able to --

13 MR. NEFF: Just when you move
14 closer to the speaker, you're getting feedback.

15 (PAUSE)

16 MR. NEFF: I can't hear it now.

17 HEARING OFFICER: Perhaps if
18 you walked over on this side.

19 MS. MULVEY: Sure. Thank you.

20 So today in this courtroom and
21 this week we are going to have the opportunity
22 to hear all of the evidence, to have the
23 witnesses testify publicly, to be
24 cross-examined, and to have the full story told
25 not just the 10 percent that has formed the

1 basis for all of the media reports.

2 Judge Joseph, at the end of
3 this proceeding, will be seen in a very
4 different light than the way she's been vilified
5 in the media, and it will turn out that
6 Judge Joseph that day was trying to respect the
7 rights of everybody before her, the defendant,
8 the defense counsel, the prosecutor, the
9 presiding justice of the Newton District Court,
10 and, yes, the ICE agents.

11 On behalf the Judge Joseph, we
12 thank you for the opportunity to present all of
13 the evidence and to have the public hear what
14 actually happened.

15 Now, in many ways, the person
16 with the most knowledge of what happened on
17 April 2nd of 2018, is not Judge Joseph, but
18 Attorney David Jellinek. And there are some
19 undisputed facts about David Jellinek's conduct
20 that cannot be ignored.

21 Before Judge Joseph even knew
22 that David Jellinek was in the courthouse, he
23 had already made a deal with Court Officer
24 Wes MacGregor. He had this deal that if he
25 could get his client back downstairs, the court

1 officer would let him out the sallyport door
2 into the parking lot, that we all saw this
3 morning, and he could make a run for it. And
4 David Jellinek, after the hearing, took his
5 client downstairs and he made that happen.
6 There's no dispute about that. He was the
7 architect of this plan.

8 Now, despite David Jellinek's
9 role as the mastermind of this ill-conceived
10 scheme, he received from the Federal government
11 complete immunity for what he did. And there's
12 no question that he did it. There's a big
13 question about whether she did it. There's no
14 question at all that he did it. He planned and
15 executed this scheme. And yet, while
16 Judge Shelley Joseph has been vilified in the
17 media, David Jellinek has received virtually no
18 publicity, hardly anybody knows his name,
19 nobody's ever focused on what he said or did,
20 and he continues to practice really in blissful
21 obscurity.

22 There's something else
23 important about David Jellinek, and that is the
24 way in which his story has changed over time,
25 from the time when he did not even mention

1 Judge Shelley Joseph or her alleged approval of
2 his plan, to a time when he told the
3 Federal Government that he had no idea what was
4 in Judge Joseph's mind, to after this proceeding
5 started, when he finally said to the special
6 counsel, not only did I tell Judge Joseph my
7 plan, but she explicitly approved it. He had
8 never said that before.

9 Now, from Judge Joseph's
10 perspective, on April 2nd of 2018, she was alone
11 in the Newton District Court. She at that point
12 had been a judge for five months to the day.
13 She had sat in the Newton District Court on
14 handful of occasions, but this was the first
15 time that she was ever there with a full docket
16 of matters and without another judge. She had
17 practiced in the court. She was familiar with
18 the layout and the operations. But there was an
19 important policy that will come into play that
20 she had never heard of.

21 In the afternoon, Judge Joseph
22 again called the Medina Perez matter, and she
23 had the two lawyers in front of her,
24 David Jellinek and the prosecutor
25 Shannon Jurgens McDermott, and they were telling

1 her that they had now developed or the
2 Commonwealth now agreed that Medina Perez was
3 not in fact the subject of the Pennsylvania
4 warrant. And at that point David Jellinek
5 asked, as special counsel read, to go off the
6 record.

7 Now, from Judge Joseph's
8 perspective, that was actually one of the least
9 remarkable things that had happened over the
10 last few hours. The morning had proceeded with
11 several calls of the Medina Perez case, and
12 Judge Joseph had appointed Elizabeth Bostwick,
13 who was the bar advocate, the public counsel,
14 for Medina Perez, who was indigent. And she had
15 been doing a good job. She had sent some faxes,
16 she had raised questions about Medina Perez's
17 identity. And right before the lunch hour, she
18 said to Judge Joseph, I have a medical
19 appointment, could we come back at 2:15 instead
20 of 2:00. And Judge Joseph said, trying to
21 accommodate her, of course.

22 But over the lunch hour, a
23 bunch of things changed. The first thing that
24 cropped up was that the clerk came to her and
25 told her that the Presiding justice Mary Beth

1 Heffernan had a policy that ICE agents were not
2 allowed in the courtroom. Now, Judge Joseph had
3 never heard of a policy like that. She had
4 never seen it as a lawyer or in any other
5 courtroom. And frankly, she knew that
6 courtrooms were public places, and she was
7 concerned about whether she even had the power
8 to exclude an ICE agent from the courthouse.
9 She asked the clerk if she could see the policy,
10 and he told her it wasn't written down. And so
11 she went into the lobby, she looked through her
12 training materials to see if there was anything
13 that would shed light on this, she looked around
14 in some of the reference materials in the lobby
15 to see if she could find anything, and there was
16 no help to be had. And so she picked up the
17 phone, and she called the administrative office
18 of the District Court and she talked to one of
19 the staff counsel there, and said I have this
20 situation, what do I do. She was trying to be
21 fair to everybody.

22 And the District Court counsel
23 hunted down this Lunn policy, and she read it to
24 Judge Joseph, and later faxed a copy. And they
25 talked about it. It didn't directly apply to

1 this situation. And so the counsel advised her,
2 well, it doesn't say you can't, you're the
3 judge, you make the decision. And so, again,
4 trying to be fair and respectful to everybody,
5 Judge Joseph decided that, when in Rome, you
6 follow the policies of the presiding judge. She
7 wasn't about to say, no, I'm going to do that.

8 And so she said to the clerk,
9 yes, I will follow First Justice Heffernan's
10 policy, please ask the ICE agent to wait out in
11 the hallway. And he did. So that was the first
12 unusual event.

13 Then the clerk advised her that
14 Elizabeth Bostwick, the court-appointed counsel
15 who had been zealously representing
16 Mr. Medina Perez, was being replaced by a
17 retained private counsel, David Jellinek. She
18 couldn't figure out how that came about, given
19 that judge -- that Attorney Bostwick had
20 expected to come back.

21 And finally, when the court
22 convened, she was told that
23 Prosecutor McDermott, who in the morning had
24 been adamant that Medina Perez was the subject
25 of the Pennsylvania warrant, was now agreeing

1 that he wasn't the right guy, without any
2 explanation. And so when David Jellinek said
3 can we go off the record, that seemed to her not
4 all that out of the ordinary in the context of
5 everything else that was going on.

6 You will hear, and there's no
7 question, there is a District Court rule against
8 going off the record. Judge Joseph wasn't aware
9 of the rule. In practice, she had seen judges
10 go off the record. And you will hear from
11 multiple sources that, despite the rule, some
12 people aren't aware of it, and many judges go
13 off the record for one reason or another.

14 And subconsciously Judge
15 Joseph, given the posture of the case at that
16 point, sort of expected that maybe somebody was
17 going to tell her what was really going on here,
18 maybe she'd get some useful information.
19 Certainly there was nothing sinister about the
20 request to go off the record as shown by the
21 fact that the clerk, an experienced clerk
22 readily acquiesced. He didn't wait for
23 Judge Joseph to say turn off the recorder.
24 David Jellinek made the request, and he
25 complied. And that's sometimes something that

1 happens in the District Court.

2 Unfortunately, for Judge
3 Joseph, those 52 seconds really did nothing to
4 clarify what had become a puzzling inconsistent
5 mess in front of her. Yes, there was some talk
6 about ICE. She had offered Attorney Jellinek
7 time to do to ICE what he had apparently
8 successfully done to Shannon Jurgens McDermott,
9 which is to convince them as he had convinced
10 her that this wasn't the right guy.

11 Because that's how she figured
12 he could avoid ICE. If you can convince him
13 he's not the guy, they'd go away, and
14 David Jellinek has done his job. That's what
15 she thought he was looking to do, and that's why
16 she said, if you need more time, why don't we
17 hold him overnight. She wasn't going to put him
18 on bail. She was going to bring him right back
19 in the morning, ICE could come back in the
20 morning, and if David Jellinek hadn't worked his
21 magic to convince ICE that this wasn't the guy,
22 she'd release him and ICE would take him. She
23 was, again, trying to respect the rights of the
24 defendant and of ICE.

25 But after the 52 seconds,

1 nothing was any clearer. They went back on the
2 record, and Medina Perez was arraigned. And at
3 that point, as you heard, the clerk reminded
4 her, said to her, ICE is here, they want to go
5 to the lockup.

6 Now, interestingly enough, that
7 was the Lunn policy, that defendants who came in
8 in custody should be taken into ICE custody in
9 the lockup because it's a securer area, it has
10 less risk to the public than risking a scuffle,
11 particularly when he's got friends there in the
12 front lobby. And so for that reason, the Lunn
13 policy says do this in the lockup. And having
14 just heard the Lunn policy, she was aware of
15 that, perhaps the only person in the courthouse
16 at that point who was.

17 In any event, still trying to
18 respect Justice Heffernan's policy, she said,
19 yes, they can go to the lockup, they can't come
20 in the courtroom, because we're going to keep
21 that rule. And David Jellinek had asked for
22 permission to talk to his client. Given the
23 complicated legal situation in this -- which
24 this defendant found himself, that seemed to
25 Judge Joseph an entirely reasonable request.

1 She wouldn't deny him an opportunity to consult
2 with counsel.

3 David Jellinek asked to consult
4 with him down in the lockup. Well, that seemed
5 reasonable to her as well. There was a
6 courtroom full of people. You saw it this
7 morning. There aren't a lot of places for a
8 private conversation there. And since he was
9 going downstairs to get his property, since she
10 knew that's where ICE should be taking him,
11 again, that's seemed like a logical place for a
12 more private conference.

13 And finally, David Jellinek
14 asked to take the interpreter downstairs as
15 well. Again, a completely reasonable request,
16 given that this defendant spoke virtually no
17 English. And so David Jellinek, the
18 interpreter, and Medina Perez headed down the
19 stairs through the dock to the lockup.

20 Judge Joseph thought that her
21 responsibilities with respect to this defendant
22 were finished, that the security people would
23 take over, that ICE would do their job, and that
24 there was nothing more that she needed to do.

25 She handled two more matters

1 that day, and she left the courthouse at around
2 4:30. Nobody told her that Medina Perez had
3 gone out the back door. She knew nothing about
4 it.

5 Now, this was all seven years
6 ago. Memories fade, memories are shaped or
7 formed by what people thought was important back
8 at the time, they are shaped or formed by what
9 has happened in the interim, and sometimes they
10 are shaped or formed by self-interest.
11 Fortunately, we have a pretty good paper trail
12 of what people involved thought and did back in
13 2018, before there was a Federal indictment or
14 investigation, before there was a CJC
15 proceeding.

16 And the record in that respect
17 shows the following: The day after this all
18 happened, David Jellinek approached
19 First Justice Mary Beth Heffernan ex parte,
20 under circumstances that had never been fully
21 explained, and he told her, he talked to her
22 about this incident. He did not at that point
23 say that Judge Joseph approved his plan, he did
24 not say that Judge Joseph knew anything about
25 it.

1 And Judge Heffernan did not see
2 this at that point as a judge problem. She saw
3 it as a court officer problem, and we know that
4 because of what she did. After talking to
5 everybody involved, she asked the chief court
6 officer, Scott Noe, to implement a new policy
7 that required everybody to go out the front door
8 of the courthouse. Now, again, that doesn't
9 square with the Lunn policy, but there you have
10 it. That's what she did. She treated it as a
11 court officer problem, the court officer did
12 something inappropriate.

13 Judge Fortes, who was the RAJ,
14 the regional administer justice, didn't see this
15 as a judge problem. She talked with
16 Judge Joseph about Rule 211, and in fact
17 Judge Joseph will tell you that's how she first
18 learned there was a rule against going off the
19 record, Judge Fortes took the rule book and
20 showed it to her and said here it is. And
21 Judge Joseph said, I'm sorry, I won't do it
22 again. And they talked, and they left.

23 Now, neither Judge Heffernan
24 nor Judge Fortes disciplined or reprimanded
25 Judge Joseph in any way, they didn't report her

1 to the chief judge, Paul Dawley. They treated
2 this as a court officer problem and a going off
3 the record problem that had been resolved. And
4 in fact, Judge Fortes didn't even tell the
5 Chief Judge Dawley about it for a couple of
6 weeks. And when she told him, and you'll see
7 the e-mail, she said, I know you're going to be
8 meeting with ICE agents in a couple of days and
9 I don't want you to be blind-sided if they bring
10 this up. She didn't see it as a judge problem.
11 She just didn't want him to be surprised if ICE
12 said what about this.

13 And Judge Dawley's response is
14 telling. He wrote, it sounds as if the court
15 personnel were just trying to accommodate the
16 attorney/client relationship through the use of
17 an interpreter, which is precisely what
18 Judge Joseph was trying to do.

19 And then you heard there was a
20 third meeting with Judge Fortes, Judge Dawley,
21 and Judge Joseph in Judge Dawley's office, and
22 they talked about the incident, and
23 Judge Dawley's focus was, again, going off the
24 record. He was instructing a new judge, and he
25 said the record is your friend, it will save

1 you, so don't go off the record. And she said,
2 I understand, I won't. And again, you will see
3 their contemporaneous e-mail exchange
4 immediately after the meeting where Judge Dawley
5 describes this as a learning experience, and
6 Judge Joseph thanks him and says she looks
7 forward essentially to doing better in the
8 future. Nobody treated this as a situation
9 where Judge Joseph had done anything
10 inappropriate other than to go off the record.

11 Now, it would be easy to see
12 this situation as a he said she said situation
13 between Judge Joseph and David Jellinek, because
14 I think you'll find that Mr. Mendoza, to the
15 extent that he wasn't moving over to the dock,
16 really didn't hear anything other than he's
17 being released, which everybody agreed, he was
18 being released.

19 But there was a third person
20 present at that side bar, and I would suggest to
21 you that what she said and what she did back
22 then tells us everything we need to know about
23 what actually happened and whether
24 David Jellinek actually said I'm going to get
25 him out the back door and Judge Joseph said,

1 yes, that's what we'll do.

2 Because once that hearing was
3 finished, Shannon Jurgens McDermott walked out
4 the front of the courtroom, she met the ICE
5 agent in the hall, and she stood there and she
6 waited with him. They were waiting for Medina
7 Perez to come out. And she said this is the way
8 out, he'll be coming out this way. And I would
9 suggest to you that if the Shannon McDermott had
10 heard David Jellinek say we're going to get him
11 out the back door, she would not have gone out
12 front and she would not have essentially lied to
13 the ICE agent.

14 She stood there, and they stood
15 there and they chatted. And after a while, it
16 seemed like it was taking too long, and she
17 asked the victim witness advocate to go down and
18 figure out what was going on. And that person
19 came up and said that Medina Perez was no longer
20 there. And it was then that everybody got
21 upset. The ICE agents were embarrassed or
22 furious, probably a little bit of both, and they
23 went running around trying to find him.

24 And Shannon McDermott was still
25 there when David Jellinek walked up through the

1 courtroom and out through the doors into the
2 lobby. And at that point, she noticed that in
3 his briefcase he had a plastic defendant's
4 property bag hanging out. And she looked at him
5 and she said, I know what you did and it wasn't
6 the right thing. He smiled and he walked away.
7 And it was then and only then that
8 Shannon McDermott figured out what
9 David Jellinek had done, not because of
10 something he said at side bar, but because of
11 how things happened, it became painfully obvious
12 to all.

13 Now, the charges about candor
14 essentially stand or fall with the main charge
15 of what happened at side bar. There really
16 wasn't, as special counsel admits, anything
17 untruthful. Judge Joseph was doing the best
18 that she could to answer questions asked by
19 Judge Heffernan and asked by Judge Fortes, each
20 of whom had different concerns at the time, and
21 neither of whom was asking her did you go off
22 the record or did you let the guy out the back
23 door. She did in fact tell Judge Dawley, when
24 he asked, if she did not have anything to do
25 with it. And that statement, it's true, depends

1 on what happened at side bar.

2 I will ask you, and I'm sure
3 you will, to listen very carefully to the
4 testimony of David Jellinek, not just about what
5 happened at side bar and the way in which that
6 has shifted and evolved over the years, but some
7 of the other details that he has explained at
8 various times that are quite simply not true.

9 And I will suggest to you, at
10 the end of this case, after you've had the
11 opportunity to be the first person to hear
12 everything about this case, we will suggest to
13 you that there is not enough evidence from
14 David Jellinek to support the charges brought by
15 the SJC to any degree, let's alone by clear and
16 convincing evidence.

17 And so, once again, in closing,
18 I thank you, again, for undertaking this
19 assignment and for your time, and we look
20 forward to having the whole truth be told.

21 Thank you.

22 HEARING OFFICER: Thank you
23 very much, Counsel.

24 Special Counsel, I'll leave it
25 to you to call your first witness.

1 JUDGE FABRICANT: All right.
2 David Jellinek.

3 HEARING OFFICER: You may be
4 seated. First, let me swear you in. If you
5 would raise your right hand.

6 DAVID JELLINEK, SWORN

7 HEARING OFFICER: Special
8 counsel.

9 DIRECT EXAMINATION

10 BY JUDGE FABRICANT:

11 Q. Please state your name.

12 A. David Jellinek.

13 HEARING OFFICER: Just one
14 second. Sorry.

15 (PAUSE)

16 HEARING OFFICER: Do you
17 need -- People that are not speaking, do you
18 need them to turn off their lapel mics?

19 MR. NEFF: It should not be an
20 issue. I think it is feedback from the
21 speakers.

22 HEARING OFFICER: Okay.

23 (PAUSE)

24 JUDGE FABRICANT: We'll try to
25 again, see if we get that sound. Sounds okay

1 for the moment.

2 Q. Mr. Jellinek, did you have a medical --

3 HEARING OFFICER: Can I just
4 ask? Is, is your mic on? I'm not sure if
5 people can hear it the way it did when you were
6 giving your opening.

7 JUDGE FABRICANT: I'm sorry.
8 It was off. Thank you.

9 HEARING OFFICER: Okay. Great.

10 JUDGE FABRICANT: Can you hear
11 now?

12 HEARING OFFICER: Yes.

13 JUDGE FABRICAN: Okay. Great.

14 HEARING OFFICER: Thank you.

15 Q. Did you have a medical procedure recently that
16 makes it uncomfortable to sit for a long time?

17 A. Yes. Mild.

18 Q. Okay. And does moving around in your seat help
19 a little bit?

20 A. Yes.

21 Q. Okay. So feel free to do that as you need to.

22 A. Thank you.

23 Q. And please also let us know if you need a break.

24 A. Thank you very much.

25 Q. So Mr. Jellinek, would you please tell us your

1 professional background.

2 A. I'm a lawyer. I --

3 HEARING OFFICER: I'm sorry.

4 Judge, I'm not sure that I'm hearing

5 Mr. Jellinek the same as I'm hearing everybody

6 else.

7 JUDGE FABRICANT: Let's make

8 sure that that's --

9 A. I'm a lawyer.

10 HEARING OFFICER: Yes. just

11 stay close to the mic.

12 THE WITNESS: Sure.

13 HEARING OFFICER: That would be

14 great. Thank you.

15 THE WITNESS: Trying to avoid

16 the feedback from before.

17 A. I'm a lawyer. I've been practicing since

18 2000. I went to BC Law school. I did a one

19 year clerkship in Arizona, state court of

20 appeals, and I started with CPCS in 2001, worked

21 in the Worcester office and Cambridge office in

22 '06, and I went to the Boston Police Department

23 working in the legal affairs division until '08,

24 and then I left for the Obama campaign for a

25 month, and then I went out on my own.

1 Q. And the CPCS, Committee for Public Counsel --

2 A. Yes.

3 Q. The state and public --

4 A. State public defender. Correct.

5 Q. Okay. And in your private practice, did you
6 also serve as a bar advocate?

7 A. Yes. I continued to do bar advocate work,
8 probably half to 75 percent of my practice.

9 Q. And are you still in private practice?

10 A. Yes.

11 Q. And still doing some bar advocate work?

12 A. Yes.

13 Q. Okay. And I want you to take your mind back to
14 April of 2018. And I know that that's a little
15 more than seven years ago, so it's a bit of a
16 challenge. But I'm going to ask you a series of
17 questions that relate to how things were in
18 April of 2018.

19 As of that time, what was your
20 experience in the Newton District Court as to
21 how often you were there, what kind of work you
22 did there?

23 A. Sure. I was a bar advocate there, which
24 meant that I picked up duty days, which are days
25 when you're assigned and you help out anyone who

1 was an indigent client. And I took private
2 cases there. And I was on the drug court team,
3 I believe at that time, which meant every
4 Tuesday afternoon I was in recovery court.

5 Q. Tell us a little bit about the drug court.

6 A. It was every Tuesday afternoon. It was run
7 by Judge Heffernan most of the time. And you
8 were -- essentially anyone who had a lot of
9 difficulty and needed the extra support, it was
10 like an extra level of probation. And the drug
11 court ran most Tuesdays in the afternoon from
12 2:00 to 4:00, and essentially the same routine
13 worked with these individuals every week. There
14 was a defense lawyer, the prosecutor sat in, the
15 same clerk, the same judge, and the same
16 probation officer.

17 Q. And did that team, did that operate in a manner
18 that was a little different from how our formal
19 courtroom proceedings operate?

20 A. Yes. It was less formal. Oftentimes
21 Judge Heffernan would come down from the bench
22 and speak to the clients at the same level. And
23 it was every week. So there were clients you
24 saw every week that came in every Tuesday
25 afternoon. You got to know people a little bit

1 better.

2 Q. Did you feel that you got to know the judge a
3 little bit than --

4 A Yes. Absolutely.

5 Q. Okay. Were you familiar with the courthouse
6 staff?

7 A. Excuse me?

8 Q. Were you familiar with the courthouse staff?

9 A. Yes.

10 Q. And were you friendly with the courthouse staff?

11 A. Not to the extent that we would go out on our
12 own. But friendly in the courthouse, sure.

13 Q. A professional friend.

14 A. Yes.

15 Q. Did you sometimes bring them coffee or other
16 things?

17 A. Yes. Particularly on a Tuesday, I made it a
18 point, because everyone had to stay and work
19 longer for drug court, and usually on a first
20 break or lunch I'd have coffee and some lunches,
21 because oftentimes clients in the afternoon,
22 they hadn't eaten or they had to travel for an
23 hour or two to get there.

24 Q. And so the clients in the drug court, just so
25 we're clear, these are people who had been

1 charged with criminal offenses that at least
2 there was a determination that the charges
3 related in some way to substance use; is that
4 right?

5 A. Yes. And usually they were people that
6 needed sort of extra level of support, so they
7 had already been to programs or they were just
8 in recovery.

9 Q. Okay. And were you familiar with the physical
10 courthouse?

11 A. Yes.

12 Q. Can you give us just -- You were there this
13 morning, so you know that we've seen it. But
14 give us just a brief overview of the courthouse.

15 A. Sure. There's an entryway that's somewhat
16 modern. You walk through that. And there's a
17 metal detector. Clerk's office is off to the
18 right. The main courtroom is ahead of you a
19 little bit to the left. There's a bathroom to
20 the left and elevator to the left as well.

21 There's stairs to go down to probation, all the
22 way to the left, and stairs to go up to the
23 second or third for trial session.

24 Q. And those stairs that you just referred to, are
25 those public --

1 A. Yes. Those are the public stairs.

2 Q. On the screen is Page 509 of the appendix,
3 Appendix U, Page 509. You also have in front of
4 you, you have a binder that has all the
5 appendices, and they are -- the pages are
6 sequentially numbered in the upper right-hand
7 corner.

8 THE WITNESS: Thank you, sir.

9 A. Yes.

10 Q. So let me ask you to look at that photograph and
11 tell us what it is.

12 A. That's the main session of the courtroom.
13 The judge would sit up front. The clerk would
14 be at the next level down. The DA just sat on
15 the left and defense would sit on the right.
16 That glass box to the left was the dock where
17 defendants would be brought up if they were in
18 custody.

19 Q. And let's look at the photograph at Page 511.

20 A. Okay. I can pull up the rest.

21 JUDGE FABRICANT: Does that
22 have a number?

23 MR. NEFF: Here.

24 Q. Okay. What do you see in that photograph?

25 A. That is essentially taken from what would be

1 the witness stand, if you were doing your
2 restraining order or something like that. The
3 probation desk is just to the right. The
4 clerk's chair is that different color, I believe
5 it's blue, black, orange, and then up top would
6 be the desk, and that side area is where the
7 judge would approach through the swinging door.

8 Q. So if you have a side bar conversation with the
9 judge, where would it be?

10 A. It would be at that door essentially on those
11 steps.

12 Q. Okay. And let's look at the photograph on
13 Page 508. What do you see there?

14 A. That is -- In the front, there's the bar, so
15 you're standing where the audience would be or
16 where a defendant would stand, facing court, and
17 that's the dock where, so if you were in
18 custody, would be brought in, and that to the
19 left there's is the court officer's desk.

20 Q. And there's a door --

21 A. Yes.

22 Q. -- that's visible there. Is that the door to
23 the dock in front of the courtroom?

24 A. Yes.

25 Q. And from the dock, the courtroom to the dock?

1 A. Yes.

2 Q. And what is the orientation of that door in
3 relation to where the judge's bench is and where
4 the exit to the courtroom is?

5 A. If you were standing looking at that, the
6 judge's bench would be slightly to your right
7 and the exit to the courtroom would be behind
8 you.

9 Q. Okay. Do those three photographs fairly and
10 accurately represent what you've been -- what
11 you've described?

12 A. Yes, they do.

13 JUDGE FABRICANT: All right.

14 And I offer those three in evidence, please.

15 HEARING OFFICER: No objection?

16 MR. HOOPES: No objection.

17 HEARING OFFICER: They're
18 admitted.

19 Q. If your client is going into or out of the dock,
20 is it that door that your client goes into or
21 out of?

22 A. Depends where they're coming from. If
23 they're in the audience, if they are in custody,
24 then, yes, they would go through that door. If
25 they're leaving the dock, and they're released,

1 most of the time, then they would come out that
2 door, yes.

3 Q. Okay. And you've anticipated a question I'm
4 going to ask. So if you have a client who comes
5 into court in custody, and he's in the dock, and
6 again, we're talking about the April of 2018, --

7 A. Yes.

8 Q. -- your client comes into the courthouse in
9 custody, is in the dock, and then is ordered
10 released from custody, what was the usual
11 practice at the time?

12 A. I'm not a court officer. The usual practice
13 would have been to release them out that door,
14 which is facing the courtroom. Unless they for
15 some reason have property or something like that
16 downstairs, in which case they might go
17 downstairs together.

18 Q. So if somebody needed to check into probation,
19 for example.

20 A. Usually you go out that front door and then
21 down the public stairs, but there is a back way
22 down into the lockup and into probation.

23 Q. And if the person is released out that door into
24 the courtroom, does the court officer then
25 remove the restraints?

1 A. Yes.

2 Q. If the person is leaving, how does the person go
3 out?

4 A. Well, usually they remove the restraints in
5 the dock. And when the person would be
6 released, they would walk out through that
7 little gap there, behind which is the overhang
8 to the public area, and then out the back door,
9 which would --

10 Q. And were there exceptions to that?

11 A. Yes.

12 Q. On April 2nd of 2018, were you in the
13 Newton District Court?

14 A. Yes.

15 Q. And do you remember the reason that you went
16 there that day?

17 A. No, I don't remember the reason I was there
18 initially that day.

19 Q. And over the course of this proceeding and the
20 series of discussions that we've had, have you
21 made some effort to refresh your memory on that
22 point as to what brought you there that day?

23 A. Yes. We checked the court docket from that
24 day and we checked my diary, and I think my
25 computer cuts off the calendar after five years

1 or something, so I couldn't see what brought me
2 there that day. I don't remember.

3 Q. So you don't remember and you haven't been able
4 to refresh your memory.

5 A. No.

6 Q. Sometime during the day, did someone speak to
7 you about Mr. Medina Perez?

8 A. Yes. Approximately 10:30 in the morning, I
9 think.

10 Q. Okay. And we don't necessarily need his name.
11 But who in relation to Mr. Medina Perez was
12 that?

13 A. There were two or three people in the
14 audience who approached me, one of them claimed
15 to be his employer, and said that he was his
16 employer and asked what I thought about him and
17 if I could work with him.

18 Q. And did you have an understanding of why the
19 defendant's friends wanted you instead of the
20 bar advocate who had already been appointed?

21 A. Not initially. I think Ms. Bostwick's a good
22 attorney, and I told him that, I thought they
23 were in good hands. They said they had seen me
24 argue something and thought that I could do a
25 better job getting their friend out.

1 Q. Okay. And just to go back a step. Had
2 Ms. Bostwick been appointed to represent
3 Mr. Medina?

4 A. Yes. She was the bar advocate on duty that
5 day.

6 Q. Okay. After you had that discussion with them
7 and you told them that Ms. Bostwick was a good
8 attorney, did you agree to take the case?

9 A. Yes.

10 Q. And did they pay you?

11 A. Yes.

12 Q. And do you remember what form of payment you
13 received?

14 A. I believe it was a check, and I believe it
15 was a thousand dollars, with the discussion
16 that, if I continued to represent him beyond
17 that day, we'd meet at the office and sign a
18 longer term fee agreement.

19 Q. Once you were retained, what did you do?

20 A. I went downstairs and I told -- I believe
21 almost immediately told Mr. Medina Perez that
22 I'd be his lawyer, and I began to try to
23 understand what was going on with the case.

24 Q. Okay. Did you get some paperwork?

25 A. Yes.

1 Q. And what did you learn as to what he faced?

2 A. Well, he was charged, if I remember
3 correctly, with being a fugitive from justice
4 and with possession of an illegal substance. I
5 believe it was Class B or C. I don't remember
6 clearly. In Newton.

7 Q. And did he have another problem that you were
8 aware of?

9 A. Well, the fugitive from justice charge was
10 from Pennsylvania, and it was apparently a
11 warrant for operating under the influence of
12 drunk driving in Pennsylvania.

13 Q. And was there another problem that he had?

14 A. There was another problem that I heard or
15 learned, that ICE, Immigration, was in the area
16 and apparently he had an immigration detainer as
17 well.

18 Q. And did you make some effort to investigate his
19 identity with respect to the Pennsylvania
20 warrant and the ICE detainer?

21 A. Yes. And what began to become clear was that
22 the Pennsylvania warrant was not the same
23 gentleman that was in the lockup. I don't --
24 I'm not going to refer to him by name because I
25 don't know who was who. But the Pennsylvania

1 warrant, which was apparently verified by
2 fingerprint, the photo and the information of
3 that individual did not match the individual of
4 Mr. Medina Perez who was in lockup. So it
5 appeared to me as I began to look at it that
6 there was some problem in the identification.
7 And whether that was in the photos or the FBI
8 fingerprint database, I didn't know, and I began
9 to look into it.

10 Q. And what about the ICE detainer; did you make
11 some efforts to determine whether he was the
12 right person for that?

13 A. Yes. There was an ICE officer in the
14 courtroom, and I spoke to him and I tried to
15 understand why they thought that it was
16 Mr. Medina Perez who they were after and what
17 the situation was. They showed me an
18 administrative warrant. I tried to explain to
19 them I didn't think it was the right person.
20 And if I remember correctly, the officer showed
21 me his cell phone which had what he claimed was
22 Mr. Medina Perez on the video in a detention
23 center or walking through a detention center.

24 Q. Did he persuade you?

25 A. No.

1 Q. Did you persuade him?

2 A. No.

3 Q. And after your conversation with him, what did
4 you understand he was going to do?

5 A. My understanding, that he would be detaining
6 Mr. Medina Perez when he was released.

7 Q. Did you have a discussion with the assistant
8 district attorney regarding the Pennsylvania
9 warrant?

10 A. Yes. At some point the ADA determined that
11 it was not right gentleman in custody. In other
12 words, the gentleman in custody was not the same
13 person under the Pennsylvania warrant.

14 Q. And did she tell you what she intended to do
15 regarding the fugitive from justice charge?

16 A. She told me that that would be dismissed.

17 Q. So if the fugitive from justice charge was
18 dismissed, that leaves, as state charges, the
19 drug charges.

20 A. Correct.

21 Q. Did she tell you what she intended to do
22 regarding the drug charges?

23 A. Yeah. She said, because he had no state
24 record and because it was a minimal charge, that
25 she would not request bail.

1 Q. So what did that mean? She was going to dismiss
2 the fugitive charge. She wasn't asking for bail
3 on the drug charges. What did that mean as to
4 what would happen regarding state custody?

5 A. It would mean there would be no state custody
6 and you can walk out.

7 Q. Okay. And you had this conversation with the
8 ICE officer. So what was your concern at that
9 point?

10 A. My concern was they had the wrong guy, that
11 ICE was there for the wrong person. And that
12 was essentially because the Pennsylvania warrant
13 was apparently backed by fingerprint data. But
14 again, it wasn't the right person. So I asked
15 for the opportunity to review the Triple I's,
16 which is the interstate FBI record, and at that
17 point we're only allowed to look at them in the
18 courtroom. I believe Mr. Bostwick had already
19 gotten it. So it was provided. It was at
20 counsel table. And I reviewed that to try to
21 figure out what was going on.

22 Q. And did you have some discussion with
23 Ms. Bostwick?

24 A. Very little at that point. I believe she
25 handed me the materials.

1 Q. So you told us about your conversation with the
2 ICE officer, you told us that you were
3 unsuccessful with the ICE officer. Did you have
4 a conversation with Court Officer
5 Wesley MacGregor?

6 A. Not at that point. It wasn't until over the
7 lunch break that I spoke to Officer MacGregor,
8 and that was after I reviewed the Triple I and
9 tried to piece together what was --

10 Q. So when you reviewed the Triple I, did that
11 change anything about your thinking as to the
12 identity issues?

13 A. Yeah. It helped solidify them and
14 crystallize that it wasn't the right person,
15 because there were, by my count, 12 or 13
16 individuals tied to the FBI number. The
17 Triple I has an FBI number and apparently ties
18 to fingerprint data, and there were 12 or 13
19 identities connected to that, all with different
20 physical descriptions. One gentleman didn't
21 have an arm, one had a huge tattoo on his face,
22 that kind of thing. Where you could clearly see
23 that wasn't
24 Mr. Medina Perez. So I was very concerned that
25 somehow they had the wrong person.

1 I had also been shown -- I
2 spoke to his friends in the audience, his
3 employer, a birth certificate with a raised seal
4 on it, as if it were an official document, with
5 a Puerto Rican place of birth. So I was worried
6 they were going to take a U.S. citizen into
7 custody, and I knew that it's hard to get out of
8 ICE custody and hard to get an attorney once
9 you're there. So I was quite concerned for my
10 client.

11 Q. During the lunch break, did you have
12 conversation with Court Officer
13 Wesley MacGregor?

14 A. Yes, I did. I expressed that I was very
15 concerned they had the wrong guy.

16 Q. And where were you, where were you and he when
17 you had this conversation?

18 A. We were in the main courtroom, in that
19 courtroom there. I was sitting off to the
20 right, and he was over by the court officer's
21 desk.

22 Q. So does this show where you were?

23 A. No. I would have been -- Those chairs that
24 are on the left, there's another set on the
25 right. I would have been there.

1 Q. So let go back to Page 509.

2 A. I would have been sitting to the right.

3 Q. Okay. The counsel table chair to the right.

4 A. Yes. Or against the bar to the right, where
5 I usually left my bag.

6 Q. Okay. And so you had this conversation with
7 Officer MacGregor in the courtroom. Was anybody
8 else there?

9 A. No.

10 Q. And tell us about the conversation that you had
11 with Mr. MacGregor.

12 A. To the best of my memory, I said something
13 like I think they have the wrong guy and I'm
14 concerned. He said, you know, is there anything
15 I can do. And I said, I think if he goes out
16 the front, they're going to detain him, and
17 there's nothing we can do about that. He said
18 I'm allowed to let him out the basement if I
19 have permission, basically. I said can we do
20 that. He said if you can get him downstairs
21 with a legitimate reason, I can let him out the
22 back door if it's cleared.

23 Q. So after your conversation -- Is that the whole
24 conversation, that you recall?

25 A. Essentially, yes.

1 Q. After your conversation with Officer MacGregor,
2 did you have a hearing as to how you might solve
3 the problem?

4 A. Yes. I was going to ask the judge if there
5 was any way we could get the gentleman
6 downstairs, I knew that ICE generally in Newton
7 is asked to wait outside of the courtroom in the
8 front lobby, and that if I could get him
9 released downstairs, he might have a chance to
10 avoid ICE.

11 Q. And during the lunch break or at some time
12 around then, did you learn that the ICE officer
13 had been requested to leave the courtroom and
14 wait somewhere else?

15 A. Well, I had been in the courtroom on and off,
16 and I knew they were waiting in the front lobby.
17 I don't know if I heard the judge say it. I
18 don't know if I -- I just knew it was the policy
19 of the court or the clerk said it. But I know
20 that the ICE officers were not at that time
21 allowed to be waiting in the courtroom.

22 Q. And did that affect your thinking about how you
23 would proceed?

24 A. Well, sure. Because if they had been waiting
25 outside or downstairs, I would have wanted to go

1 out the front. The whole point was to avoid
2 them.

3 Q. Did you think at that point, with the ICE
4 officer waiting out front, did you think that
5 your client could be released from the back?

6 A. I was hopeful.

7 Q. And what would be necessary to allow that to
8 happen?

9 A. That would be the judge's permission and I
10 would need the court officer to open the door.
11 I don't have keys or control over them.

12 Q. And did he need to go downstairs?

13 A. Yes.

14 Q. Now, we're going to play the recording of the
15 conversation that occurred starting at
16 2:48.13 p.m. And there is a transcript of the
17 recording as Appendix G in that book in front of
18 you. I'm going to direct your attention to
19 Page 40.

20 So was the case called at that
21 point?

22 A. 2:48 p.m.?

23 Q. No. 2:48:13, sir.

24 A. Yes.

25 Q. Two hours and 48 minutes and 13 seconds.

1 A. Yes, that's when the case was called.

2 Q. Okay. So let's play the recording, and I'll ask
3 you to follow along in the transcript.

4 (RECORDING PLAYING)

5 Q. We'll stop there. And I'm just going to read
6 the transcript. And I'll let you know that the
7 transcript has been stipulated as accurate.

8 So what we've heard so far is,
9 Clerk Okstein says to the court officer can you
10 bring up the next, Mr. Perez. And
11 Officer MacGregor, all right. Clerk Okstein,
12 judge, the next case is Commonwealth versus
13 Jose Medina Perez, Attorney David Jellinek has
14 filed an appearance on behalf of Mr. Perez.
15 Judge Joseph, good afternoon. Attorney
16 David Jellinek, good afternoon, David Jellinek
17 on behalf of Mr. Perez, may we approach briefly.
18 Judge Joseph, yes, please. Attorney Jellinek,
19 thank you. Clerk Okstein, do you want to wait
20 for your client, we're doing it. Attorney
21 Jellinek, no, side bar. Judge Joseph, we're
22 just going to side bar.

23 Is that what you see there at
24 Page 40 of the transcript?

25 A. Yes.

1 Q. And what occurred in the recording. I think we
2 stopped a little bit before the last couple of
3 lines.

4 A. Yes.

5 Q. But up to where we played, is that what you
6 heard on the record?

7 A. Yes.

8 Q. Now, why did you want to go to side bar?

9 A. Because there were so many complex issues in
10 the case. I don't believe the fugitive of
11 justice charges were fully dismissed at that
12 point, and I thought it required a little bit
13 more of an in-depth conversation, and I wanted
14 to alert the judge that we were going to discuss
15 it in a more complicated way.

16 Q. Okay. Let's resume the recording.

17 (RECORDING PLAYING)

18 Q. Let's pause there.

19 Now that is obviously very hard to understand.
20 The volume isn't exactly as we might want it to
21 be. It's hard to understand. But we have a
22 transcript that is stipulated as accurate. You
23 have it in front of you. You do have it in
24 front of you. I want to just read what we've
25 just heard.

1 So the recording -- This clip
2 begins at 2:48:48. Judge Joseph says something
3 inaudible in the transcript and then says it is
4 dismissed, so it's my understanding that ICE is
5 here. Attorney Jellinek says something
6 inaudible and then so there's the fugitive.
7 Judge Joseph, if there's no warrant.
8 ADA Jurgens, yes. Attorney Jellinek, there
9 isn't, something inaudible that we can tie this
10 to him.
11 Attorney Jurgens, oh, I don't think, I don't
12 think it's him. Judge Joseph, okay.
13 Attorney Jellinek, ICE is convinced that this
14 guy, I went over to ICE, they say that they have
15 a biometric match, yes, we did the research,
16 there's 13 FBI numbers connected to this Social,
17 so something's bad with the inaudible, my client
18 denies that it's him, ICE is going to pick him
19 up if he walks out the front door, but I think
20 the best thing for us to do is to clear the
21 fugitive issue, release him on a personal, and
22 hope that he can avoid ICE. Assistant District
23 Attorney Jurgens, I don't think arguing ICE is
24 really my -- Attorney Jellinek, right.
25 Assistant District Attorney Jurgens, my, my.

1 Judge Joseph, something inaudible, and then the
2 other alternative is if you need more time to
3 figure this out, hold until tomorrow.

4 Attorney Jellinek, something inaudible.

5 Judge Joseph, then it's a different --

6 ADA Jurgens, there's a detainer attached to my
7 paperwork, but I feel that's separate and apart
8 from what my role is. Attorney Jellinek, there
9 is an ICE detainer, so if he's bailed out from
10 Billerica, something inaudible, ICE will pick
11 him up. Judge Joseph, ICE is going to get him.

12 Attorney Jellinek, something inaudible.

13 Judge Joseph, what if we detain him.

14 I want to stop there and ask,
15 have I read that correctly?

16 A. Yes, according to the transcript I have in
17 front of me.

18 Q. Now, let's hear the rest of the clip, starting
19 with, are we on the record.

20 (RECORDING PLAYING)

21 Q. All right. And we'll go back to the transcript
22 because it's stipulated it's accurate. And I'm
23 going to read it starting with where I stopped
24 before.

25 Judge Joseph --

1 Attorney Jellinek says, are we on record.
2 Judge Joseph says, Larry, can we go off the
3 record for a moment. Clerk says, what's that.
4 Judge Joseph, are we off the record. The clerk
5 says, no, we're on the record. And then
6 Attorney Jellinek, can with go off the record
7 for a minute.

8 Did I read that correctly?

9 A. Yes.

10 Q. I want to ask you, before we get to going off
11 the record, her statements in that clip, she
12 said if you need more time to figure this out,
13 hold him until tomorrow, she said ICE is going
14 to get him, what if we detain him. Did you get
15 an impression from those statements?

16 A. Yes, I did.

17 MR. HOOPES: Objection.

18 HEARING OFFICER: What's the
19 basis for the objection?

20 MR. HOOPES: What did he say,
21 what did she say. Why is that admissible?

22 JUDGE FABRICANT: Well, I think
23 it's admissible for multiple reasons. One is,
24 the relationship or his impression to what he
25 did next and said next, but it's also admissible

1 because the judge has an obligation to maintain
2 the appearance of impartiality. And if somebody
3 gets an impression that what's going on is not
4 impartial, that's pertinent.

5 MR. HOOPES: That's a
6 reasonable person standard, not a criminal who's
7 admitted that he did it. This does not go to
8 what a reasonable person would say. This is
9 only what he's claiming.

10 JUDGE FABRICANT: Well, I'm
11 going to suggest to you that we have a lawyer
12 practicing law in the Commonwealth, practicing
13 law in the Newton District Court. He's making
14 judgments about what he's going to do, what he's
15 going to say, how he's going to represent his
16 client, he's listening to what the judge says,
17 and making his determinations based on the
18 impression he gets. I'm going to suggest to you
19 that it's relevant.

20 HEARING OFFICER: I understand.
21 I'm going to allow it.

22 Q. All right. Did you get an impression from what
23 she said?

24 A. Yes, I did.

25 Q. And what was your impression?

1 A. My impression was that she also did not want
2 ICE necessarily to pick up the wrong person or
3 pick up Mr. Medina Perez and was trying to find
4 a solution.

5 Q. And did her statements affect your thinking
6 about how you would have proceeded?

7 A. Not necessarily. I was going to proceed
8 however I was going to proceed, but it certainly
9 did give myself some hope that I might be -- I
10 might have an opening to help my client.

11 Q. Okay. Did you think that the judge was
12 sympathetic to your argument?

13 A. Yes.

14 Q. And did you think that the judge was willing to
15 help you solve the problem?

16 A. It certainly felt that way. It sounded that
17 way. Yes.

18 Q. Okay. And why did you want to go off the
19 record?

20 A. I wanted to go off the record because I knew
21 that the next phase of our conversation and what
22 I was going to suggest or ask for as a defense
23 lawyer was perhaps right on the edge of
24 acceptable or appropriate.

25 Q. Okay. Did you -- Were you trying to protect

1 somebody?

2 A. Well, I was trying to protect essentially
3 everybody, but myself and the judge, most
4 primarily, because if we had -- if she had said,
5 no, you can't do that, fine, I never said this,
6 she never said it off the record. If she wanted
7 to help me, it was better that that's off the
8 record than on the record for her protection as
9 well. So it wouldn't have changed how I spoke.

10 Q. And so my question, if she had said, no, we're
11 staying on the record, what would you have done?

12 A. I would have said exactly the same thing.

13 Q. Okay. And when the judge told the clerk to go
14 off the record, to turn off the record, did that
15 affect your thinking?

16 A. Yeah. Yes. It made me feel like she might
17 be more sympathetic to hearing what I had to
18 say.

19 Q. And what did you say off the record?

20 A. I said that I was very concerned that ICE, as
21 I said on the record, ICE had the wrong
22 individual, because this was supposedly
23 biometric data that didn't match up, and that I
24 had spoken to the court officer, and they're
25 allowed to let the gentleman out the basement

1 sallyport door, if I can get him downstairs, and
2 I knew that ICE was out front, so that might be
3 a way for him to avoid getting into ICE custody.

4 Q. And what did she say?

5 A. To the best of my recollection, she said then
6 that's what we'll do, we'll proceed that way or
7 something like that.

8 Q. Did the off the record discussion involve any
9 topics other than ICE?

10 A. Not to my memory.

11 Q. Was there discussion of where the ICE officer
12 was waiting?

13 A. Yes. We both knew he was waiting out in the
14 front lobby, and that's why I said if we can get
15 him downstairs and out the back he won't be
16 caught by ICE.

17 Q. And how did you know that?

18 A. How did I know ICE was in front? Because I
19 had seen them there and that was the standing
20 order of the Newton Court was that ICE had to
21 wait outside the courtroom.

22 Q. And you just said that we both knew. What was
23 it that made you believe that she knew that ICE
24 was in front?

25 A. I believe she ordered them out at some point

1 that day, that they were -- that she or the
2 clerk had said they were not allowed to be in
3 the courtroom. I believe, best of my
4 recollection, that she knew that and ordered it.

5 Q. And what would have happened -- Let me step back
6 a minute. Did you believe that you needed the
7 judge's permission for the defendant to go
8 downstairs?

9 A. To go downstairs, generically, no. I can ask
10 to speak to my client downstairs but -- Yeah. I
11 mean, nothing happens in the courtroom without
12 the judge's say so. So if I want to speak to
13 him downstairs, the judge has to allow it. I
14 don't control where he goes.

15 Q. And if the judge had just said to the court,
16 he's released, what did you think would happen
17 or might happen?

18 A. Well, he'd be released out that glass door
19 into the courtroom and he'd have to walk out the
20 main lobby and he would be arrested by ICE.

21 Q. Did you believe that you had her blessing to
22 have the defendant released out the back?

23 A. Yes.

24 Q. And what would you have done if you didn't think
25 you had her blessing?

1 A. I would not have gone downstairs with him and
2 he would not have been let out the back. He
3 might have not collected his personal property
4 or to speak more to him with the interpreter to
5 say here's my card, give me a call, we'll meet.
6 That would be the extent of it.

7 Q. Now, you went back on the record; is that right?

8 A. Yes.

9 Q. And at that point did everybody go back to open
10 court?

11 A. Yes.

12 Q. Okay. And we're going to resume playing the
13 recording. And this is at 2:50:57. And this
14 is -- And this starts at the bottom of Page 41
15 of Appendix G. So let's resume playing.

16 (RECORDING PLAYING)

17 JUDGE FABRICANT: I'm sorry.
18 We're going to just pause and go back to the
19 beginning of this clip.

20 (RECORDING PLAYING)

21 Q. All right. I think this is audible enough that
22 I don't think it's necessary to read it aloud.
23 We all have it in front of us. But I want to
24 draw your attention to certain things.

25 At one point, and this is about

1 a third of the way down on Page 42, you said, I
2 would ask that he -- I believe he has some
3 property downstairs, I'd like to speak with him
4 downstairs with the interpreter if I may. What
5 did you mean?

6 A. I meant I wanted to go back downstairs with
7 my client so that he could, essentially so he
8 could go out the back door, have a further
9 conversation, and then he could be let out the
10 sallyport door to avoid ICE.

11 Q. Then over again onto the top of Page 43,
12 Clerk Okstein says, there is a representative
13 from ICE here in the court and something
14 inaudible and then to visit the lockup. And
15 Judge Joseph says, that's fine, I'm not going to
16 allow them to come in here, but he's been
17 released on this.

18 Did that exchange give you an
19 impression about what was happening? How did
20 you understand that exchange?

21 A. I understood it to mean that she understood
22 that I would be going downstairs with him and
23 that the ICE agents will remain out front and
24 that he would be released from downstairs.

25 Q. And then further down on Page 43 Judge Joseph

1 says -- After Court Officer MacGregor says he's
2 released, Okstein says he is. You said yup.
3 Judge Joseph says he is. And then Judge Joseph,
4 Mr. Jellinek asked if the interpreter can
5 accompany him downstairs to further interview
6 him. Did you intend to further interview him?
7 A. I wanted to speak to him for a moment, yes,
8 but not an extensive interview.

9 Q. Was there more information you needed from him
10 at this point?

11 A. I didn't have a cell phone number for him, I
12 don't believe. He didn't have my card. I
13 wanted to at least exchange some basic
14 information to prepare for the prefile and I
15 knew how to get in touch with him.

16 Q. And what happened next?

17 A. I went downstairs, the interpreter followed
18 us in later, and Officer MacGregor opened the
19 sallyport door, and Mr. Medina Perez left.

20 Q. Okay. When you spoke with Mr. Medina Perez,
21 with Perez with the interpreter, I don't want
22 you to tell us what you said. What I'm asking
23 for is, how long did it take?

24 A. It was very short. 15 seconds, 30 seconds.

25 Q. Then after he left, what did you do?

1 A. I went back upstairs.

2 Q. And were you done for the day then?

3 A. I believe, yeah, I was done for the day. If
4 my memory is correct, court was pretty much done
5 at that time.

6 Q. And did you leave the courthouse?

7 A. I did.

8 Q. On your way out of the courthouse, did you see
9 Assistant District Attorney Shannon Jurgens
10 McDermott?

11 A. I actually saw her in the courtroom on my way
12 back upstairs. I looked upstairs. I saw her in
13 that main area of the courtroom.

14 Q. Okay. Did you have any conversation with her?

15 A. Very briefly.

16 Q. Okay. And do you remember that conversation?

17 A. To the best of my memory, I said what's
18 wrong, she said ICE is pissed at me, said are
19 you pissed at me, she said something like yes
20 or...

21 Q. Okay. And when you went out to get to your car,
22 did you see Attorney Bostwick?

23 A. I did. We were both walking out at the same
24 time.

25 Q. Did you have a conversation with her?

1 A. Briefly. I had said that I had gotten
2 Mr. Medina Perez out the back and he avoided ICE
3 and I was pleased, I thought it was the right
4 result. And she said she thought it was
5 obstruction of justice and she was just dismayed
6 and not pleased.

7 Q. The next day, were you back at Newton District
8 Court?

9 A. Yes.

10 Q. And were you there perhaps, were you there for
11 the drug court session?

12 A. Yes.

13 Q. And did you have some conversation with
14 Judge Heffernan?

15 A. I did.

16 Q. Tell us first how that came about.

17 A. I believe, if I remember right, I asked to
18 have a moment with her in chambers, and I think
19 I went in before the session started. And I
20 told her what had happened the day before, not
21 in great detail, and she said she already knew
22 about it.

23 Q. And how did the conversation end?

24 A. It was very brief. I believe at the end of
25 it she said don't worry about it, not your

1 problem, something to that effect.

2 Q. Was anyone else present for that conversation?

3 A. No.

4 Q. And why did you have that conversation with her?

5 A. Because she's the presiding judge, and I
6 wanted her to know that something had occurred
7 in the courthouse the day before and that at
8 least some people didn't think it was proper and
9 that ICE had been angry with the district
10 attorney.

11 Q. Did you say anything about going off the record?

12 A. No, not to my memory.

13 Q. Why not?

14 A. It didn't seem relevant at that point. In
15 the earlier part of my practice, in the early
16 2000's, that was not uncommon.

17 Q. This was 2018. Was it common or uncommon at
18 that point?

19 A. I hadn't been off the record in a while at
20 that point. But in the earlier 2000's, with
21 CPCS, we would go off the record frequently or
22 even meet in the judge's lobby, in the chambers
23 for lobby conferences to discuss cases.

24 Q. What's a lobby conference?

25 A. Lobby conference would be, usually the

1 defense lawyer, the prosecutor, probation go
2 into the judge's chambers and discuss the case
3 and frankly and directly without being on the
4 record as a way to sometimes sort it out.

5 Q. What was the purpose of that?

6 A. Often to work out a plea.

7 Q. And did there come a time when that stopped
8 happening off the record?

9 A. Yes. I believe it was 2010, 2012, I just
10 found out that lobby conferences weren't going
11 to be allowed anymore.

12 Q. Would that kind of discussion then happen on the
13 record?

14 A. Yes.

15 Q. And did you become aware that in 2015 the SJC
16 revised Rule 12 of the Rules of Criminal
17 Procedure to require that conferences regarding
18 potential pleas occur on the record?

19 A. Not in 2015. Not in 2018. But I have since,
20 yes.

21 Q. Okay. In your conversation -- Back to your
22 conversation with Judge Heffernan. And by the
23 way, we talked about the judge's lobby. What's
24 the judge's lobby?

25 A. The judge's lobby is the judge's office.

1 Q. Back to your conversation with Judge Heffernan.
2 Did you say anything about your conversation
3 with Officer MacGregor?

4 A. Not to my memory, no.

5 Q. Never?

6 A. Again, it didn't seem relevant. I was just
7 trying to give her the basics that something had
8 happened and that ADA Jurgens said that ICE was
9 mad at her.

10 Q. And did you say anything about the judge and
11 anything you told her or she said or did?

12 A. Not to my memory, no.

13 Q. And why not?

14 A. Again, it didn't seem relevant. It wasn't
15 part of the core facts.

16 Q. Okay. Did you say that you and the defendant
17 were going to probation regarding the
18 Pennsylvania warrant?

19 A. Not to my knowledge, no.

20 Q. Would probation be able to do anything for you
21 regarding the Pennsylvania warrant?

22 A. No. We would have gotten potentially a
23 dismissal on the docket from the clerk's office.
24 But nothing from probation, no. Not on an out
25 of state warrant.

1 Q. Meaning a dismissal of the fugitive --

2 A. Yes. Correct.

3 Q. Okay.

4 A. Correct.

5 Q. At some point did you learn that you would be
6 subpoenaed to the grand jury?

7 A. Yes.

8 Q. And how did you learn that?

9 A. I learned it from a lawyer who called me one
10 afternoon and said he was representing
11 Mr. Okstein, who had been subpoenaed.

12 Q. The clerk.

13 A. Yes. And that he thought I would be as well
14 and that I should come speak to him.

15 Q. And did you hire a lawyer to represent you?

16 A. I did, yes.

17 Q. And who was that?

18 A. Bob Peabody.

19 Q. And is he present?

20 A. He's -- Yes.

21 Q. Did you believe that you would have a
22 Fifth Amendment right to refuse to speak with
23 the U.S. attorney or to refuse to testify to the
24 grand jury?

25 A. That is a difficult question. I don't think

1 that what was done was -- Because at the time
2 was really advocating for my client and, as a
3 defense lawyer, simply presenting what I thought
4 was an argument to help him. It is arguable,
5 according to the Federal Government, that that
6 constituted obstruction. So I was likely to be
7 subpoenaed to the grand jury. I don't think I
8 had been already. And I may have had to assert
9 the Fifth. I may have discussed that with my
10 lawyer.

11 Q. Okay. If you had concluded that you did have
12 the Fifth Amendment right to refuse, would you
13 have asserted?

14 MR. HOOPES: Where are we
15 going, -- Objection -- where are we going with
16 this?

17 JUDGE FABRICANT: Well, I think
18 we're going to hear a lot about the letter of
19 immunity and motive and we're going to hear a
20 lot of questions on credibility of this witness,
21 and I think it's relevant, what he did and why
22 he did it, with respect to speaking to the U.S.
23 attorney, testifying to the grand jury.

24 MR. HOOPES: She can ask
25 that -- She's got another shot.

1 HEARING OFFICER: I agree. I
2 would say let's wait and see and you can
3 certainly cover that on redirect if that happens
4 on the cross.

5 JUDGE FABRICANT: Okay. Thank
6 you.

7 Q. Did you have a proffer session with U.S.
8 attorney on November 8th, 2018?

9 A. Yes.

10 Q. Did you do that based on a proffer letter on
11 that date --

12 A. Yes.

13 Q. -- that you received? And what was your
14 understanding of the effect of the proffer
15 letter?

16 A. The proffer letter essentially, to my memory,
17 said that I wouldn't be prosecuted or -- what I
18 said in that room would not be used against me
19 but that I could still be prosecuted.

20 Q. Okay. Did you have a further interview with the
21 United States attorney on January 14th of 2019?

22 A. I believe that was the date, yes.

23 Q. And did you receive an immunity agreement by
24 letter of January 17th of 2019?

25 A. Yes.

1 Q. And what was your understanding of the effect of
2 the immunity letter?

3 A. That I was not being prosecuted for what had
4 happened with Mr. Medina Perez.

5 Q. And what was the condition as you understood it?

6 A. As I understood it, the condition was that I
7 had to essentially cooperate with them and speak
8 to the grand jury truthfully and tell the truth
9 on any subsequent hearings or anytime they ask
10 me to speak about the case.

11 Q. Did you believe that you would be prosecuted if
12 United States attorney thought that you had made
13 a material false statement?

14 A. Absolutely.

15 Q. Did you believe that you would be prosecuted for
16 perjury if they believed you did that?

17 A. Yes.

18 Q. Did you believe that you would also be
19 prosecuted due to the underlying conduct if they
20 believed that you did that?

21 A. Yes.

22 Q. And are you aware that a Federal agent took
23 notes at the proffer session and later
24 interviews and typed up reports?

25 A. Yes.

1 Q. At the time of the interviews, were you given an
2 opportunity to review the notes to see if they
3 accurately reflected your statement?

4 A. No.

5 Q. Have you since recently in connection with this
6 case had a chance to review those notes and
7 reports?

8 A. Yes.

9 Q. And did you find some things that --

10 MR. HOOPES: Your Honor, this
11 is -- She can pick this up on redirect, too.

12 JUDGE FABRICANT: I can, but I
13 don't know why I can't do it now.

14 MR. HOOPES: So what's her
15 purpose at this point of correcting things
16 before I've had a chance?

17 JUDGE FABRICANT: I think it's
18 fair for the witness to tell us that the first
19 time he's ever had a chance to look at these is
20 recently.

21 HEARING OFFICER: We've already
22 established that. I'm not sure if there's
23 anything more at this point that makes sense.
24 But I think all of this is certainly gain after
25 the cross.

1 JUDGE FABRICANT: Okay.

2 Q. In one of those interviews, did you say
3 something to the effect that you thought that
4 the assistant district attorney didn't
5 understand?

6 MR. HOOPES: Same objection.

7 JUDGE FABRICANT: I want to ask
8 this witness what he meant by that.

9 MR. HOOPES: Why don't you ask
10 him now and then skip the notes and then you
11 come back later.

12 Q. The question is, did you say something to that
13 effect?

14 A. I may have, yes. I don't have a clear memory
15 of it.

16 Q. What did you mean?

17 A. I meant that she was --

18 MR. HOOPES: Objection. Sorry.

19 HEARING OFFICER: He said he
20 doesn't have a clear memory. He has -- I'll
21 allow it.

22 JUDGE FABRICANT: Allow him to
23 answer or...

24 HEARING OFFICER: Yes.

25 Q. What did you mean?

1 A. What I meant was that she was a relatively
2 young district attorney and she didn't work with
3 the Federal system at all and so she was -- I
4 didn't think she fully understood after the
5 Federal -- excuse me -- after the fugitive
6 warrant was dismissed and after no request for
7 bail on the state cases that there was an issue
8 of how to release the gentleman, and that's what
9 I was trying to discuss with the judge.

10 Q. Did you testify at the grand jury on January 2nd
11 of 2019?

12 A. I believe that was the date, yes.

13 Q. And was your testimony truthful?

14 A. Yes.

15 Q. At the time of the Federal criminal
16 investigation and prosecution, did you have any
17 views about what the U.S. attorney was doing?

18 A. Yes.

19 Q. What was your view at the time?

20 A. I thought it was ludicrous. I didn't think
21 it was an appropriate prosecution.

22 Q. In your view, was your conduct on behalf of your
23 client ethical?

24 A. In my opinion, my job is to advocate for my
25 client and in their best interests, and I had

1 done that to the best of my ability. We're
2 supposed to be zealous advocates, and that's
3 what I did. I didn't think it was unethical and
4 I didn't think it was illegal.

5 Q. Did you think it was on the edge of ethical?

6 A. Absolutely.

7 Q. Is that something you have said --

8 A. I have said it in the past. Yes.

9 Absolutely. It's on the edge of ethical and
10 it's on the edge of legal. And that's one of
11 the reasons that we went off the record and it's
12 one of the reasons that I think this came up.
13 It is. It's a little bit in the gray area.

14 Q. After these events, did you continue to practice
15 in Newton?

16 A. Yes.

17 Q. And do you still to this day?

18 A. Yes.

19 Q. And for as long as you continue to work, do you
20 continue to be friendly with
21 Court Officer MacGregor?

22 A. Yes.

23 Q. Did he retire at some point?

24 A. To my knowledge, yes.

25 JUDGE FABRICANT: I have

1 nothing further at this time. Thank you.

2 MR. HOOPES: I ask if we can
3 have a short break so --

4 HEARING OFFICER: Yeah. I
5 think the normal break we'll have for the
6 morning we can take now. 10 minutes?

7 MR. HOOPES: Yes. Thank you.

8 HEARING OFFICER: Okay. So
9 we'll resume at five to 12:00. Thank you.

10 (Recess taken at 11:46 a.m.
11 Proceedings resumed at
12 11:58 a.m.)

13 HEARING OFFICER: We're back on
14 the record.

15 Mr. Hoopes.

16 MR. HOOPES: Thank you,
17 Mr. Hearing Officer.

18 CROSS-EXAMINATION

19 BY MR. HOOPES:

20 Q. So Mr. Jellinek, my name is Tom Hoopes, and I
21 represent Judge Joseph.

22 You told us this morning about
23 a side bar conference that you had there at the
24 Newton District Court with yourself,
25 Judge Joseph, and the ADA Shannon Jurgens; is

1 that right?

2 A. Yes.

3 Q. And you're the one who asked to go to side bar;
4 correct?

5 A. Correct.

6 Q. And nothing unusual about that; correct?

7 A. Not in my opinion, no.

8 Q. And when you got to side bar, it was a side bar;
9 right? It was at the side of her bench;
10 correct?

11 A. Correct.

12 MR. HOOPES: And so with the
13 hearing officer's permission.

14 Q. There's a photo of the courtroom right to your
15 left there.

16 A. Yes.

17 Q. And the judge was on the bench.

18 A. Yes.

19 Q. And you and Ms. Jurgens were right at the side;
20 correct?

21 A. Yes. Right around where the stairs are.

22 Q. So right maybe here; is that correct?

23 A. Yes.

24 Q. And you wanted to go to side bar because you
25 wanted it not out in public; correct?

1 A. Correct.

2 Q. And you wanted to speak reasonably softly; is
3 that right? So the public wouldn't be hearing
4 what you had to say exactly; right?

5 A. Well, there's also white noise that goes on
6 so the public can't hear.

7 Q. Okay. But be that as it may, you were keeping
8 your voice down; correct?

9 A. Yes. Correct.

10 Q. And I assume that you wanted the judge to be
11 able to hear what you were saying; correct?

12 A. Correct.

13 Q. Because that's what you were doing, you were
14 there to try to ask for something; correct?

15 A. Yes.

16 Q. And so when you were speaking, you spoke
17 directly to her so she could see your face;
18 right?

19 A. Correct.

20 Q. And Ms. Jurgens was there because she was the
21 assistant district attorney; right?

22 A. Correct.

23 Q. She had an important role in whatever was going
24 to be said in side bar; correct?

25 A. Yes.

1 Q. The question was, was Pennsylvania going to get
2 him, was he going to be out on bail, was ICE
3 going to get him. Those are important things to
4 you and to her; correct?

5 A. Yes.

6 Q. And you said in the past that Ms. Jurgens was
7 right there next to you; correct?

8 A. Yes.

9 Q. And so right there next to you would have been
10 close; right?

11 A. Yes.

12 Q. And not to intrude any of your space, but if the
13 hearing officer will give me permission, why
14 don't you tell me as I slowly walk towards you
15 how close Ms. Jurgens was.

16 A. Probably about there.

17 Q. Okay. A foot and a half, maybe?

18 A. Yeah.

19 Q. Okay. So you were talking. We can tell from
20 the transcript that counsel read that she is
21 listening, because she responded; correct?

22 A. She responded at certain points. Correct.

23 Q. Yup. Certain points when it was time for her to
24 talk; right?

25 A. Depends on your point of view.

1 Q. Yeah. Well, I mean, you never had a sense that
2 she was hard of hearing; right?

3 A. No, no.

4 Q. You talked to her before.

5 A. Yup.

6 Q. And she understood every word you had to say.

7 A. Yes.

8 Q. She was watching you and watching the judge and
9 keeping track of the whole situation; right?

10 A. Can't speak for her.

11 Q. Yeah. But she was paying attention; correct?

12 A. I can't speak for her.

13 Q. Okay. Did you respond when special counsel
14 asked you about the comment from Ms. Jurgens
15 saying that it wasn't -- ICE wasn't her issue?

16 A. Yes.

17 Q. And you heard her say that; correct?

18 A. Correct.

19 Q. So the transcript is accurate; right?

20 A. Transcript's accurate.

21 Q. So she was listening and hearing certain things;
22 right?

23 A. At least those things, yes.

24 Q. Now, at some point your client was sent
25 downstairs, right, to the lockup?

1 A. Yes.

2 Q. And you went with him.

3 A. Yes.

4 Q. The interpreter went with you.

5 A. Yes.

6 Q. When you left, everybody else was in the
7 courtroom, remained in the courtroom. Nobody
8 came down with you. Correct?

9 A. Correct.

10 Q. And when you were down there, you talked to your
11 client, you said for a short period of time.

12 A. Yes.

13 Q. And one of the reasons you wanted to talk to him
14 was to exchange phone numbers; is that right?

15 A. To my memory, yes.

16 Q. Okay. So that you could prepare for the next
17 time he came back; right?

18 A. Yes.

19 Q. Let me see if I understand this correctly. You
20 have told us and told many people involved with
21 the Federal Government and this prosecutor,
22 special prosecutor, that your intention was that
23 he would escape ICE; right?

24 A. That he would avoid being arrested by ICE,
25 yes.

1 Q. Okay. And so you thought he needed your phone
2 number to be in touch with you to come back
3 again if he's avoiding ICE, escaping ICE?

4 A. Yes. Just because someone is avoiding ICE
5 doesn't mean they won't return to court. I
6 expected him to come back on the next date. I
7 give all my clients my phone number.

8 Q. So you and he talked briefly.

9 A. Yes.

10 Q. The interpreter was there.

11 A. Yes.

12 Q. Officer MacGregor did something at that point;
13 right?

14 A. Yes.

15 Q. Opened the door?

16 A. Yes.

17 Q. Released him?

18 A. Yes.

19 Q. Did you peer out to see if ICE was out back?

20 A. Not to my memory.

21 Q. So if the doors for that day show that you were
22 downstairs for about six minutes, what you did
23 you do to fill the time?

24 A. I believe that I went downstairs, I spoke to
25 my client for a little while, he had to be

1 unshackled, then he was released out the back
2 door. I probably spoke to Wes for 10 to 15
3 seconds, said thank you for the assistance, and
4 went back upstairs.

5 Q. And you went back upstairs with a property bag
6 in your hand; right?

7 A. I don't remember that. I may have.

8 Q. Well, but he had property downstairs; right?

9 A. Yes.

10 Q. And that's what you told the judge; right?

11 A. I believed he had property downstairs, yes.

12 Q. And then you walk back up into the courtroom,
13 came up from the lockup up through and into the
14 courtroom; is that right?

15 A. Yes.

16 Q. And didn't go to the outside through probation.
17 You came right back up the way you went down.

18 A. To my memory, yes.

19 Q. Now, when you came upstairs, you met with
20 Mr. Medina Perez's boss and a friend at some
21 point; correct?

22 A. Yes.

23 Q. And where did you meet with them?

24 A. In the courtroom.

25 Q. They were waiting in the courtroom.

1 A. To my memory, yes. It was in the back of the
2 courtroom.

3 Q. And you had a conversation with them.

4 A. I believe it was a very brief conversation,
5 but yes.

6 Q. And so it was in the back of the courtroom, is
7 your memory.

8 A. To my memory, yes.

9 Q. And where were they in the back of the courtroom
10 and where were you?

11 A. My memory is that they had spent most of the
12 session -- Can't see it from there. But if
13 you're walking into the courtroom, just to the
14 right, in the back row or the second to last
15 row.

16 Q. And what did you say to them and what did they
17 say to you?

18 A. I don't remember specifically, but I think
19 they said something like good job, and I said
20 thank you.

21 Q. Had you been paid by that point?

22 A. Yes.

23 Q. And where was the ADA?

24 A. Probably near her desk or leaving the room.

25 Q. In the same main courtroom.

1 A. Probably.

2 Q. Now, you told us that the ADA was angry at you,
3 pissed off at you; right?

4 A. Seemed that way, yes.

5 Q. And she said something to you like, I know what
6 you did and that was not the right thing to do;
7 right?

8 A. I don't remember if that's what she said or
9 not.

10 Q. Well, you just testified that it was -- I didn't
11 like what you did, that wasn't the right thing.
12 Correct?

13 A. I think she said something along the lines
14 of, ICE is mad at me.

15 Q. She said ICE is mad at me.

16 A. Something like that, yes.

17 Q. And was ICE in the courtroom at the time?

18 A. Not to my knowledge. I don't know.

19 Q. ICE was out in the hallway?

20 A. I don't know where they were.

21 Q. And when you saw the ADA, and she said that, did
22 you say, what are you upset for, you were there
23 when we had the conversation at side bar?

24 A. I don't remember if I said that or not.

25 Q. You didn't say, what are you upset for, I didn't

1 do anything wrong, the judge gave me her
2 blessing. You didn't say that, did you?

3 A. It was not that long a conversation. I don't
4 remember.

5 Q. Well --

6 A. But I don't believe I said that, no.

7 Q. Yeah. Okay. Because she was accusing you of
8 doing something wrong. And if you hadn't done
9 anything wrong, that was the time to let her
10 know; right?

11 A. Not sure I agree with the question.

12 Q. Well, let's go back a little earlier. What
13 time -- Can you tell the hearing officer what
14 time of the morning or the afternoon did you
15 first have a conversation with the assistant
16 district attorney?

17 A. Probably around 10:30 or 11:00.

18 Q. Okay. So just to lock that in. If I can
19 grab... So today you're telling us that this
20 all happened in the morning when you first met
21 her about 10:30; right?

22 A. Could have been 11:00, could have been 11:15.

23 Q. Sometime in the morning before noon.

24 A. Yes. Probably.

25 Q. And the discussion was about Pennsylvania having

1 the wrong guy; right?

2 A. That was probably the initial conversation,
3 yes.

4 Q. You wanted him released; right?

5 A. Yes.

6 Q. You wanted to address the bail issue; correct?

7 A. Yes.

8 Q. And ICE was looking for him; right?

9 A. Yes.

10 Q. And so what time was it of the day on April 2nd,
11 2018, that you and Wesley MacGregor spoke and
12 agreed that MacGregor was going to let him out
13 the back once he came downstairs? What time was
14 that conversation?

15 A. Again, that's not the conversation we had.
16 He and I spoke over the lunch break, but he --
17 That was not an agreement that was made.

18 Q. Oh. Well, over the lunch break, between 12:00
19 and 1:00, between 1:00 and 2:00?

20 A. Between 1:00 and 2:00.

21 Q. And you were in the courtroom?

22 A. Yes.

23 Q. And he said -- You expressed to him that you
24 were upset about the fact that your client was
25 potentially going to ICE custody?

1 A. I was upset that, yes, that ICE might get the
2 wrong guy.

3 Q. And you suggested that they had the wrong guy;
4 correct? You just said that; right?

5 A. I don't believe --

6 Q. And he said, you get him downstairs, I can get
7 him out the back; right?

8 A. He said, if I remember right, if you get him
9 downstairs, I'm allowed to let him out the back.

10 Q. And I'm sure at that point you said no way;
11 right?

12 A. No.

13 Q. Okay. You didn't say you can't do that, did
14 you?

15 A. No. Because I've seen other people released
16 out the back. I knew it was possible.

17 Q. Okay. You had seen other people go out the back
18 with ICE in the courthouse?

19 A. No.

20 Q. Okay. So you told us several times now that you
21 knew that ICE was there; right?

22 A. Yes.

23 Q. And ICE was waiting for him; correct?

24 A. I assume they were waiting for him. I didn't
25 know if they were doing anything else there.

1 Q. And you're telling the hearing officer that you
2 thought going out the back door to avoid ICE was
3 an okay thing to happen.

4 A. Well, as I said earlier, I thought it was
5 right on the edge of what was okay and it was on
6 the edge of what was appropriate, but it was
7 what I advocated for.

8 Q. Well, on the edge. There's on the edge and then
9 there's over the line. You were going to be
10 avoiding Federal agents; right?

11 A. That was the goal.

12 Q. Thank you. That was the goal.

13 A. Uh-huh.

14 Q. Now, tell us, when you talked to Wes, and Wes
15 was saying I'll get him out the back if you get
16 him downstairs, you understood that conversation
17 clearly, there was no misunderstanding, you do
18 X, he's going to do Y; right?

19 A. It wasn't that linear.

20 Q. Well, which circle was it? How did it go not
21 linear?

22 A. It requires the judge's approval for those
23 things to happen.

24 Q. Well, we'll get to that. But you know that, you
25 know, nobody's going to deny a lawyer a chance

1 to go down and talk to his client; right?

2 A. That's true.

3 Q. Now -- So, as I understand it, you talked to the
4 DA and then you talked to ICE, I think; right?

5 A. Correct.

6 Q. And then you talked to MacGregor and said I'm
7 striking out on this; correct?

8 A. That's not quite what I said.

9 Q. Well, you do X -- I'll do X, you do Y; right?

10 A. It was not quite that simple.

11 Q. Well -- So let's get right to the point. Let's
12 see. You're walking over with the ADA, you say
13 can we go to side bar, she comes with you,
14 you're here, you're talking with the judge,
15 she's listening. Before she walked out, had you
16 ever told her about your recent conversation
17 with MacGregor?

18 A. No.

19 Q. Did you think you owed it to her to be honest
20 with her and tell her?

21 A. I didn't believe that I owed it to her, no.
22 I'm always honest with the ADA, but not when it
23 relates to the advocacy of my client.

24 Q. Okay. So there's two sets of rules. You can be
25 always honest with the ADA sometimes but you can

1 be dishonest when it relates to the advocacy of
2 your client; is that correct?

3 A. There are rules and ethical rules about being
4 honest and there are rules about what you have
5 to keep to yourself when you represent an
6 individual.

7 Q. Well, --

8 A. Not dishonesty when it's representing your
9 client.

10 Q. -- Mr. Jellinek, can you tell us what rule you
11 would have been violating that you think is an
12 ethical rule if you had said to her, Shannon,
13 Ms. Jurgens, he's going downstairs and then he's
14 going out the back? What rule prevents you from
15 informing her of that?

16 A. That was part of an attorney/client
17 discussion and it was part of my thinking of the
18 plan for how I was going to handle the case.
19 You don't have to reveal to the DA how you are
20 planning to handle the case.

21 Q. Well, MacGregor's not a lawyer; right?

22 A. No.

23 Q. That was not an attorney/client; right?

24 A. No.

25 Q. So your plan you claim on behalf of your client

1 was that you were going to get him out the back,
2 and you needed to tell him, you didn't need to
3 tell Ms. Jurgens that; right?

4 A. No.

5 Q. Now, you've said before that you thought that
6 Ms. Jurgens might have been angry at you because
7 your suggestion to the judge was subtle; right?
8 Do you remember doing that?

9 A. I don't think I said it was subtle. I think
10 I said she might not have gotten it.

11 Q. I think "subtle enough" is the words that you
12 said. In fact, I think, when you spoke to
13 special counsel here, in the very first visit
14 with her -- Does this refresh your recollection?
15 When asked whether he said something to Federal
16 prosecutors to the effect of it was subtle
17 enough that ADA Jurgens didn't understand,
18 Jellinek responded he might have said that.
19 That was your conversation right here; right?

20 A. Sounds like it, yes.

21 Q. So you're saying that she's a foot and a half
22 away from you, she's listening to the
23 conversation, but whatever you said was so
24 subtle that she didn't understand what you were
25 saying.

1 A. No, it's not what I'm saying.

2 Q. Well --

3 A. I'm saying that, after she had dealt with the
4 matters that related to her, I'm not sure if she
5 was as focused on the conversation about the
6 Federal issues of ICE. And she said -- and I
7 don't remember the exact language -- that's not
8 my business.

9 Q. Oh, because sometimes people are focused on
10 what's important to them and what they're
11 thinking; right?

12 A. Sure. Yeah.

13 Q. But you agree that she's right there when you
14 were continuing talking; right? All about ICE;
15 right?

16 A. Yes.

17 Q. And in fact, she said not my business; right?

18 A. Yes.

19 Q. Now, I think you've also said very recently that
20 you thought she maybe didn't get it because she
21 was inexperienced. Or newish, was the word you
22 used. Right?

23 A. She was a relatively new ADA, yes.

24 Q. So you hadn't met her and talked to her during
25 your two or three months often; right?

1 A. Yes.

2 Q. And you knew that she had been in the district
3 attorney's office now for almost three years;
4 right?

5 A. Yes.

6 Q. And that she had supervised in other courts, up
7 to 10 or 11, ADA's; right?

8 A. I didn't know her report history.

9 Q. And she handled thousands of cases.

10 A. Probably. Most DA's have.

11 Q. Maybe thousands more than you.

12 A. I don't know.

13 Q. Well, that's not newish and inexperienced, is
14 it?

15 A. She was not a Superior Court ADA. She was a
16 supervisor, alone in the Newton District Court.
17 And she said, basically, it's not him, so the
18 Pennsylvania warrant is dismissed and we're not
19 asking for bail. And at that point, I'm not
20 sure she was paying too much attention after
21 that.

22 Q. So your claim today and prior to today is that,
23 if you said something, she might not have got
24 it. She might have not have. It might have
25 been subtle, she might have been inexperienced,

1 you might not have been clear. Any of those;
2 right?

3 A. Possible. She certainly had the right to ask
4 for bail, to ask for the gentleman held if she
5 had any concerns.

6 Q. Now -- So you may have had that dialogue with
7 her and then said, what, goodbye?

8 A. Probably.

9 Q. Well --

10 A. Sorry you're upset, have a nice day.

11 Q. So when you left, did you leave out the front
12 door?

13 A. Yes.

14 Q. And today you've got a very clear memory of
15 that; right? I went out the front door. I did,
16 just went right out the front door. Right?

17 A. That's my memory, yes.

18 Q. And when you went out the front door, where were
19 the ICE agents?

20 A. I don't know.

21 Q. Well, let me see if I can refresh your
22 recollection again. You spoke to
23 Counsel Fabricant, correct, at least twice?

24 A. Yes.

25 Q. And on December 20th, there's a report. There's

1 notes. Have you seen those notes?

2 A. I believe I have, yes.

3 Q. Oh, so then you know that, when asked, Page 5,
4 when asked whether you had any further
5 interaction with ADA Jurgens after coming
6 upstairs from the lockup following
7 Medina Perez's release, Mr. Jellinek responded
8 that ADA Jurgens was in the lobby with the ICE
9 agents, not in the courtroom. Do you remember
10 saying that?

11 A. I believe she was -- had been in the lobby
12 with the ICE agents. She was in the courtroom
13 when I spoke with her. Best of my memory.

14 Q. That's not what you said to Special Counsel.
15 And she's a lawyer. You're supposed to be
16 truthful with her; right?

17 A. Did the best I could.

18 Q. And so -- let's see -- today is June the 9th;
19 right?

20 A. Yes.

21 Q. So six months ago, you put the ADA in the
22 courtroom -- excuse me -- the ADA out of the
23 courtroom and in the hallway with the ICE
24 agents, and today you put the conversation
25 inside the courtroom; right?

1 A. That's my memory.

2 Q. And you said they were all angry with each
3 other.

4 A. Appeared that way.

5 Q. Meaning, somebody was angry with -- the ICE
6 agents were angry with Ms. Jurgens; right?

7 A. What she said to me, yes.

8 Q. And when you saw Ms. Jurgens talking to the ICE
9 agents, did you see any court officer? Did you
10 see Scott Noe? You know who he is; right?

11 A. There's multiple questions there. I do know
12 who he is. I believe he's retired.

13 Q. No. My question is, did you see Scott Noe
14 outside?

15 A. I don't remember.

16 Q. Okay. So when you came out, your memory is that
17 you just saw the ICE guys and Ms. Jurgens;
18 right? And they were angry at her.

19 A. Seemed that way.

20 Q. And you just walked away; right?

21 A. Yes.

22 Q. You didn't say -- walk over to them and say it's
23 not her fault, did you?

24 A. No, not to my memory.

25 Q. You let her just be on --

1 A. To my memory, yes.

2 Q. You didn't walk over to the ICE agents and say,
3 guys, he went out the back, I arranged for him
4 to go out the back. You didn't do that, did
5 you?

6 A. Not to my memory, no.

7 Q. You worked with law enforcement for a couple of
8 years, didn't you? You've been on the Boston
9 PD?

10 A. Yes.

11 Q. Did you think that you owed any duty to any
12 police officer in the Commonwealth of
13 Massachusetts to be open and honest with them?
14 Like the ICE agents there that day? Did that go
15 off in your head? To explain to them that it
16 wasn't the DA who caused this problem, it was
17 you?

18 A. I'm sorry.

19 Q. Let me back it up. You've been in law
20 enforcement before; correct?

21 A. Yes.

22 Q. You've helped law enforcement enforce laws;
23 right?

24 A. Yes.

25 Q. Your feeling here was, not this time, I'm not

1 going to tell ICE anything; right?

2 A. Wasn't my job to tell ICE anything.

3 Q. Well, --

4 A. That's a different role.

5 Q. -- whose job was it? She didn't know that you
6 had planned this with MacGregor; right?

7 A. She was, as you said, standing next to me.
8 If she had been paying attention, she would have
9 heard it.

10 Q. Well, would I be over the top by saying you left
11 her hanging out to dry?

12 A. I don't know how she felt about it. She said
13 she was angry with me. And the next time we
14 met, it was okay.

15 Q. So there's a lot of people who work in the
16 Newton District Court; right?

17 A. Yes.

18 Q. And you take great pride in knowing these
19 people; right? The clerk, Mr. Okstein, other
20 people in the clerk's office?

21 A. Again, it's a multiple part question. I take
22 pride in knowing people who work in the court,
23 yes.

24 Q. Including the clerk's office?

25 A. Yes.

1 Q. Including the probation department?

2 A. Yes.

3 Q. You never walked up to any one of those people
4 prior to the afternoon call list and said, ICE
5 is here, you know ICE is here, and I'm going to
6 arrange for my client to go out the back door.
7 You didn't do that, did you?

8 A. Nope.

9 Q. So afterwards you never said to any of those
10 people, I had the blessing of Judge Joseph;
11 right?

12 A. I didn't speak to any of them after that, no,
13 not that day.

14 Q. Well, before that day in court ended, you saw
15 Ms. Bostwick; correct?

16 A. Yes.

17 Q. Now, Ms. Bostwick was the lawyer who was the bar
18 advocate who was there in the morning; right?

19 A. Yes.

20 Q. And she's the lawyer that you replaced.

21 A. Yes.

22 Q. And you knew that she was in the back of the
23 courtroom in the afternoon; correct?

24 A. Yes.

25 Q. What time did you first notice her?

1 A. I don't remember.

2 Q. But she was certainly there until you walked
3 out.

4 A. We walked out at the same time. I don't know
5 where she was before that. But it was her job
6 to be there that day.

7 Q. And as you walked out with Ms. Bostwick, you
8 weren't shy about the attorney/client privilege.
9 You told her I just got him released out the
10 back; right?

11 A. I said the guy just got released out the
12 back.

13 Q. Oh.

14 A. I might have said I did. I might have
15 said --

16 Q. You don't remember whether you were even
17 truthful with her; right?

18 A. (No response).

19 Q. So tell us, where was this conversation?

20 A. That was in the parking lot off to the side
21 of the building.

22 MR. HOOPES: So if the hearing
23 officer can allow me.

24 Q. So this is a, this is a little bit of a blowup.
25 So this is the back of the courthouse.

1 A. Would you like me to point it out?

2 Q. That'd be great.

3 A. If I'm right --

4 JUDGE FABRICANT: If the
5 witness steps away from the microphone, he won't
6 be amplified.

7 THE WITNESS: I understand.

8 HEARING OFFICER: Mr. Hoopes.
9 If you could. Thank you.

10 A. Looks to me like that is the Newton District
11 Court and that is the police station.

12 Q. And where was your conversation with
13 Ms. Bostwick?

14 A. In this area here.

15 Q. So facing the courthouse, to the right.

16 A. Correct. From Washington Street.

17 Q. And she said to you, you've obstructed justice.

18 A. I don't think it was that clear. More
19 direct.

20 Q. Well, you may have obstructed justice.

21 A. Something along those lines, yes.

22 Q. And if you may have obstructed justice, then you
23 may have engaged in a criminal act; right?

24 A. If you obstruct justice, that's a crime,
25 yes.

1 Q. Now, this discussion with Ms. Bostwick in the
2 parking lot right after court -- which would
3 have been at roughly what time?

4 A. 3:00 or 2:30 probably.

5 Q. That's a conversation that you never shared with
6 Federal investigators, did you?

7 A. I honestly don't remember. I thought I did,
8 but I don't remember.

9 Q. Well, as a matter of fact, did Federal
10 investigators, to your knowledge, ever interview
11 Ms. Bostwick?

12 A. I have no idea.

13 Q. Did Federal investigators ever confront you or
14 ask you about anything with regard to
15 conversations they had with Ms. Bostwick?

16 A. Not to my memory.

17 Q. Now, when Ms. Bostwick said that you may have
18 obstructed justice, what did you say?

19 A. I said -- Again, this was a long time ago.
20 I don't remember my specific language. But I
21 think I said I don't believe I did.

22 Q. Well, did you say to her, I made a deal with
23 MacGregor to let him out the back?

24 A. No.

25 Q. Did you say to her, I didn't obstruct justice,

1 Judge Joseph gave her blessing? That was the
2 time to tell her; right?

3 A. I don't know what you're --

4 Q. Well, did you say that to Ms. Bostwick?

5 A. Not to my memory.

6 Q. So you got in your car; correct?

7 A. I would have, yes, most likely.

8 Q. You drove home. Went back to your office.

9 Which was it?

10 A. Probably home.

11 Q. You walked in the door, right, of your house?

12 A. Yes.

13 Q. Did you talk to your wife about what happened
14 that day? Not what was said. Not what was
15 said. Did you speak to your wife about it?

16 A. I don't believe she was home at that time.
17 Probably later that evening.

18 Q. Speak to your parents that evening?

19 A. No, probably not.

20 Q. Well, that night, thinking about it, did you
21 have any fear whatsoever about what might have
22 happened next, to you, being prosecuted?

23 A. No. I didn't think I'd be prosecuted. I was
24 a little -- I was concerned by what Ms. Bostwick
25 said, and I thought what I had done, and I

1 didn't think it was obstruction.

2 Q. Now, you've been in the Newton District Court
3 now for a number of years; right?

4 A. Yes.

5 Q. And normally you've been there as a bar
6 advocate; correct?

7 A. As a what?

8 Q. As a bar advocate?

9 A. Yes.

10 Q. And some private cases.

11 A. Yes.

12 Q. And it's a smaller courtroom; right?

13 A. Yes.

14 Q. And smaller court generally; right?

15 A. Yes.

16 Q. Fewer cases there than say Waltham; --

17 A. Yes.

18 Q. -- correct? Or even Lowell District Court;
19 right?

20 A. Yes.

21 Q. And a number of people share the bar advocate
22 assignments; correct?

23 A. Correct.

24 Q. But you're one of a very few people who handles
25 the drug court; correct?

1 A. I was back then. I'm not anymore.

2 Q. Okay. But back then, on April 2nd of 2018, it
3 was you and maybe one other person?

4 A. I believe so, yes.

5 Q. And being on the list or being one of the two
6 people who would do the drug court gave you
7 extra cases, extra assignments; right?

8 A. It wasn't necessarily extra assignments. It
9 was to continue the case into the drug court and
10 you took whatever was there.

11 Q. Now, the bar advocate's pay back then was \$53 an
12 hour?

13 A. Sounds about right.

14 Q. And you had a case load typically of 50 to 60
15 cases?

16 A. Sounds about right.

17 Q. But this -- Newton District Court was what you
18 would consider to be a home court for you;
19 right?

20 A. It's one of two courts on the bar advocate
21 routinely.

22 Q. The other one was Waltham; correct?

23 A. Correct.

24 Q. And so the person who's the presiding justice at
25 the Newton District Court would be of some

1 importance to you; correct?

2 A. Yes.

3 Q. And that was Judge Heffernan; correct?

4 A. Correct.

5 Q. And Judge Heffernan had seen you working as a
6 bar advocate now for, by that time, four, five
7 years?

8 A. Probably, yes.

9 Q. Experience with you in regular cases?

10 A. Yes.

11 Q. Experience with you in the drug court?

12 A. Yes.

13 Q. And you were concerned about what she might hear
14 about what happened on April 2nd, so you wanted
15 go see her; correct?

16 A. Loosely, yes.

17 Q. Okay. And you wanted to talk to her; correct?

18 A. Yes.

19 Q. And you went to see her in the morning, I think
20 you've said in the past?

21 A. I believe it was in the morning, yes.

22 Q. And you believe the conversation took place in
23 her first floor chambers?

24 A. If my memory's correct, yes.

25 Q. And there was nobody else at the time in the

1 chambers?

2 A. That's my memory.

3 Q. And the conversation took place around 8:45
4 before she got on the bench.

5 A. That's my memory, yes.

6 Q. And you wanted to tell her that -- Because you
7 knew the ADA and the ICE officer were upset, you
8 thought it would be prudent to talk to
9 Judge Heffernan; right?

10 A. I thought she should know what had happened
11 in her courtroom because there might have been
12 something she should know about, particularly
13 with regards to the ADA.

14 Q. So when you're walking into a judge's lobby,
15 ex parte, by the way; right? Nobody else is
16 there.

17 A. (No response).

18 Q. She's somebody you see every day that you're in
19 Newton District Court; right?

20 A. Whenever she's on the bench.

21 Q. Yup. Which is a lot; correct?

22 A. Not necessarily. Just a couple of days a
23 week.

24 Q. Well, you're in that courtroom twice a week?

25 A. Once or twice a week, yes.

1 Q. Okay. Which can be a lot for most people;
2 right?

3 A. I don't know what other people do.

4 Q. Yeah. So, I mean, she's the presiding justice.
5 Did you think for a minute that you owed her the
6 duty to tell her the whole truth, nothing but
7 the truth, so help you God, as to what happened
8 the day before?

9 A. I would have answered any questions she asked
10 me truthfully. Absolutely.

11 Q. No. You're the one who knocked on the door.

12 A. I asked the clerk to ask her if I could come
13 by.

14 Q. But you're the one who made the approach.

15 A. Yes.

16 Q. You said to her -- Quoting your comments to the
17 Special Counsel. Mr. Jellinek stated that he
18 advised Judge Heffernan there was an issue with
19 Medina Perez's identity and he was let out the
20 back door. He added he didn't recall saying
21 anything to her about going off the record. He
22 also added that he didn't recall saying anything
23 about going back downstairs with the defendant.
24 Mr. Jellinek stated he didn't recall saying
25 anything to Heffernan, Judge Heffernan about

1 going back downstairs with him to probation.
2 Judge Heffernan told him she already knew about
3 the incident and not to worry.

4 That was what you remembered in
5 sum; right?

6 A. Yes. That sounds right.

7 Q. So, I mean, we're beyond attorney/client
8 privilege. This is being honest with a member
9 of the judiciary. Do you think that you owed it
10 to her to tell her that you had had this
11 conversation with her court officer about
12 letting him out the back? Yes or no?

13 A. She said she already knew about it.

14 Q. No. She said she knew about the incident. Are
15 you telling us -- Oh. Are you telling the
16 hearing officer that you interpreted that to
17 mean that she already knew that MacGregor had
18 made this deal with you?

19 A. I don't know what she knew. I -- She said I
20 know about it, basically just go away, and I
21 didn't respond.

22 Q. Well, I would assume that you valued her opinion
23 of you.

24 A. I do, yes.

25 Q. And you valued whether or not she had confidence

1 in your honesty and integrity; correct?

2 A. Yes.

3 Q. And you know under the Board of Bar Overseers
4 ethical rules that you're supposed to be honest
5 and forthright with members of the judiciary at
6 all times; correct?

7 A. Yes.

8 Q. Did you say one word to her about your
9 conversation with MacGregor?

10 A. Not to my memory.

11 Q. So when you left that lobby, she may have known
12 that MacGregor let him out; right?

13 A. She may have.

14 Q. But she didn't know that you were the mastermind
15 of the whole thing; right?

16 A. I don't follow the question. She knew what
17 she knew. I don't know what else she knew.

18 Q. You didn't tell her I had the conversation with
19 MacGregor, we agreed my client was going out the
20 back. You didn't tell her that.

21 A. I don't remember. I don't believe I did.

22 Q. I mean, you wouldn't quarrel with me about
23 mastermind; right? That's -- I mean, it's easy
24 to look online, that somebody controlled it,
25 planned it, directed it. That was you; right?

1 A. It was my idea.

2 Q. Yeah.

3 A. And I argued for my client.

4 Q. And you got a BA and a JD. And you'd never say
5 that MacGregor was the mastermind, would you?

6 A. No, probably not.

7 Q. Okay. I mean, certainly, you certainly didn't
8 say, you certainly didn't say to
9 Judge Heffernan, oh, by the way, Judge Joseph
10 blessed it. You never said that; right?

11 A. Not to my memory, no.

12 Q. And in fact, you came back to that same
13 courthouse on May the 29th, right, for the next
14 date on Medina Perez?

15 A. Yeah. Probably had a few other cases on that
16 day, too.

17 Q. And Judge Heffernan was in the courtroom?

18 A. I don't remember.

19 Q. But you never told any judge who was sitting
20 that day, when Medina Perez didn't show up, that
21 you knew everything that had happened, you knew
22 why he wasn't there, you were involved in it.
23 Anything. Right?

24 A. Again, it's a bit of a compound question.

25 But no. I assumed he was either going to return

1 for court or wasn't, and I don't know whether he
2 was in ICE custody or whether he was simply not
3 coming to court in the fall.

4 Q. So you had conversations I assume on that same
5 day when you back in court on April 3rd, the
6 next day after April 2nd, with other people
7 because you were in court on other cases; right?

8 A. I believe I did, yes.

9 Q. So you would have talked to people in the
10 clerk's office probably?

11 A. Probably spoke to the clerk of the courtroom,
12 yes.

13 Q. Yeah. Spoke to the people in probation
14 probably; right?

15 A. Probably, yes.

16 Q. Nobody talked about this, this disappearance out
17 the back door with your client.

18 A. No.

19 Q. And you didn't initiate it; correct?

20 A. Not to my memory, no.

21 Q. Now, tell us, from the time you left the
22 courthouse on April 2nd until
23 Wesley MacGregor -- the courthouse -- got a
24 grand jury subpoena, did you have conversations
25 with Mr. MacGregor about this incident?

1 A. Potentially brief ones, yes. I might have
2 thanked him or asked if that was -- if he was
3 okay.

4 Q. Well, you knew he had a court appearance for --
5 grand jury appearance; correct?

6 A. It was before I found out about the grand
7 jury subpoena, yes.

8 Q. No. I said between. Yeah. Well -- And you
9 knew he got a subpoena; right?

10 A. At some point I found out, yes.

11 Q. And how long before the subpoena was returnable?

12 A. I have no idea.

13 Q. So if you were to answer how many times you
14 talked to Wesley MacGregor between April 2nd,
15 when you left and when you found out that there
16 was a grand jury subpoena for him, how many
17 times did you talk to him?

18 A. In general or about this?

19 Q. About this.

20 A. Maybe twice.

21 Q. And what was your conversation?

22 A. What I just said, I probably thanked him at
23 one point. And then when I found out that ICE
24 was upset or there might be things happening, I
25 asked him if he was okay in his job.

1 Q. Now, I assume you were sort of tracking this
2 grand jury; right? I mean, you knew MacGregor
3 had gone in.

4 A. I didn't know when he went in.

5 Q. But you knew somebody hit him with a subpoena.

6 A. Yes.

7 Q. And it couldn't have been a mystery to you as to
8 what the subpoena was for.

9 A. I was told it was for this case.

10 Q. So if they're going to subpoena MacGregor, then
11 it's very possible somebody's going to subpoena
12 you.

13 A. Yes.

14 Q. So were you tracking other people in the
15 courthouse who got subpoenaed before you did?

16 A. I had no access to any grand jury. I don't
17 what you mean by "tracking."

18 Q. Did you know that Scott Noe got a grand jury
19 subpoena?

20 A. No.

21 Q. Did you know that Mike Walsh got a grand jury
22 subpoena?

23 A. No.

24 Q. Did you know that Clerk Okstein got a grand jury
25 subpoena?

1 A. Yes.

2 Q. When was that?

3 A. I don't remember.

4 Q. Before his attorney had called you.

5 A. No.

6 Q. When his attorney called you.

7 A. When...

8 Q. So you go in to see, you go in to see Federal
9 authorities on or about November 8th, 2018;
10 correct?

11 A. Yes. That sounds right.

12 Q. And so if this event happened on April 2nd, and
13 if MacGregor was in testifying in the middle of
14 July --

15 A. I don't know when he testified.

16 Q. But you knew he got a subpoena to go testify.

17 A. I was told he did, but I don't know when it
18 was for or when he testified.

19 Q. How'd it make you feel?

20 A. When he got a subpoena?

21 Q. Yeah.

22 A. I was upset. I didn't like the idea. I
23 liked the guy. Didn't think it was fair.

24 Q. Well, as we said, you must have been thinking
25 they were coming for you, too; right?

1 A. I didn't have a fear for my own subpoena
2 until I spoke to the attorney who called me,
3 after he had spoken with Mr. Okstein.

4 Q. And that was maybe two weeks before
5 November 8th; correct?

6 A. I don't remember the timeline, but probably
7 two weeks to a month before, yeah.

8 Q. And when the attorneys spoke to you, he was
9 calling to tell you that they were looking --
10 the Federal authorities were looking to subpoena
11 you; right?

12 A. He mentioned that I might be a target and I
13 should get a lawyer.

14 Q. And I assume at that point you began to be
15 concerned; right?

16 A. Yes. Sure.

17 Q. And in fact, you called the lawyer; right?

18 A. Yes.

19 Q. Mr. Peabody, right?

20 A. Correct.

21 Q. Who was a friend; right?

22 A. Good mentor of mine. Yes.

23 Q. And based on what you heard from Mr. Okstein's
24 lawyer, you were afraid of potential jail time;
25 right?

1 A. Not in that moment, no.

2 Q. Well, would it be fair to say that you talked to
3 some people in town? Right? Lawyers who are
4 friends?

5 A. I spoke to Mr. Peabody.

6 Q. You talked to nobody else.

7 A. Not to my memory, no. I did speak to one
8 other lawyer who I knew and gave a brief rundown
9 of the situation. I didn't talk about my role
10 in it. She quoted me her price. And I called
11 Mr. Peabody. I was closer with him.

12 Q. So you talked to Mr. Peabody. As far as you
13 know, Mr. Peabody contacted Federal authorities;
14 correct?

15 A. That's my understanding.

16 Q. And then arranged for you to go have a
17 conversation with them; correct?

18 A. Correct.

19 Q. And you went in to speak with them pursuant to
20 what's called a proffer letter; right?

21 A. Yes.

22 Q. Or sometimes queen for a day letter; right?
23 Which is you --

24 A. Never heard it referred to that.

25 MR. HOOPES: So pop that up.

1 So can we go to the second page? Yeah.

2 Q. So it's a two-page letter; right?

3 A. One page of substance. Yes.

4 Q. Two-page letter. And your signature's on the
5 second page; right?

6 A. Yeah.

7 Q. And that's your signature?

8 A. Yes.

9 Q. That's Mr. Peabody's signature?

10 A. Yes.

11 Q. And I'm sure that the Federal prosecutors ran
12 through the letter with you before they started
13 talking; right?

14 A. To my memory, yeah.

15 Q. So they said that you needed to give an accurate
16 and complete proffer; right?

17 A. They -- Yeah. That's the goal. As complete
18 as I could.

19 Q. And then you spoke to them.

20 A. Yes.

21 Q. And then you went back and you spoke to them a
22 second time; is that right?

23 A. I believe so, yes.

24 Q. And that would have been January 15th, I think
25 special counsel referenced, correct?

1 A. 14th or the 15th. Yes.

2 Q. And that is pursuant to the proffer letter. The
3 same terms; right?

4 A. I believe so, yes.

5 Q. Have to be accurate, detailed, and complete.

6 A. I'm not sure that it says that in the proffer
7 letter, but that was the intent.

8 Q. And then your grand jury testimony was nine days
9 later, on January the 24th; right?

10 A. Sounds right.

11 Q. And before you went in for the grand jury
12 testimony, you got what we call letter of
13 immunity; correct?

14 A. Say that again.

15 Q. You got what's called letter immunity; right?

16 A. Yeah. I received an immunity letter. Yes.

17 Q. An immunity letter. And that letter is a little
18 more detailed. Again, you have to give
19 complete, truthful information.

20 A. I believe it's to be honest to the best of
21 your ability.

22 Q. Well, let's go to Paragraph 1. See that?
23 Second sentence. You must provide complete and
24 truthful information --

25 A. Yes.

1 Q. -- to all law enforcement personnel. If his
2 testimony is requested, he must testify
3 truthfully and completely before any grand jury.
4 Correct?

5 A. Yes.

6 Q. The next sentence. You can't withhold any
7 information; correct?

8 A. That's what it says in the letter, yes.
9 That's what I signed.

10 Q. And you must not attempt to protect any person
11 or entity through false information or
12 admission. Correct?

13 A. Correct.

14 Q. Including yourself.

15 A. That's the idea of the immunity letter, yes.

16 Q. So is it fair to say, sir, that before you went
17 in to speak to them on November 8th, you were
18 afraid of doing jail time?

19 A. No. It really hadn't -- Jail hadn't occurred
20 to me at that point. I was more worried about
21 the subpoena and career issues.

22 Q. Career issues. Meaning, losing your livelihood.

23 A. Possibly. That was my biggest worry at that
24 point, yes.

25 Q. Not being able to support your family.

1 A. Correct.

2 Q. But I'm sure that you knew at some point before
3 you were immunized that they were investigating
4 Federal crimes; right?

5 A. Yes.

6 Q. Federal crimes that were punishable by
7 incarceration in a Federal prison; right?

8 A. In the statute, yes, it's punishable by
9 prison.

10 Q. Yeah. In fact, one of the indictment counts was
11 punishable by 20 years; right?

12 A. To my memory, yes.

13 Q. Conspiracy, five years; right?

14 A. I'm not an expert in those statutes. But
15 yes, I believe so.

16 Q. So for you to get this get out of jail free
17 card, this immunity letter, you needed to have
18 something to offer them; right?

19 A. Yes. I'd offer my truthful testimony.

20 Q. Okay. You were going to tell them that you were
21 the mastermind; right?

22 A. I was going to tell them that it was my idea,
23 yes.

24 Q. In return for something, they were going to give
25 you a complete pass. When I say "complete

1 pass," you understand, before we finish that
2 question, that there were all kinds of ways that
3 they could have rewarded you but for your
4 attorney's efforts, they could have done what's
5 called a 5K, plea, and do a reduced sentence.
6 You understand that; right?

7 A. We didn't discuss those things.

8 Q. Could have been placed on probation; correct?

9 A. I assume that's an option, yes.

10 Q. But you didn't get either of those.

11 A. No.

12 Q. You got complete immunity.

13 A. Yes.

14 Q. Did anybody explain to you how rare it is for
15 the mastermind of any crime Federally to ever be
16 immunized, --

17 A. No.

18 Q. -- as in testify against somebody else?

19 JUDGE FABRICANT: Can we have
20 one person speaking at a time, please.

21 Q. Go ahead. What were you going to say?

22 A. I was going to say no, I never had that
23 conversation.

24 Q. So the only thing that you needed to give them
25 really was the judge blessing it in those

1 52 seconds; right?

2 A. Not sure I follow the question.

3 Q. Well, they had a tape that had before the
4 52 seconds, they had a tape that had the after
5 the 52 seconds. The only piece of evidence that
6 you could provide them that they didn't have on
7 tape was your version of what happened in those
8 52 seconds; right?

9 A. There were other things we discussed. But
10 yes. That was the core --

11 Q. That's the core. Correct. And so they traded
12 immunity for you for the core, which was those
13 52 seconds; right? Yes?

14 A. If you'd like to phrase it as a trade, sure.

15 Q. Did you tell them or did they tell you that
16 Ms. Jurgens was there and didn't know anything
17 about that this guy was going to go out the
18 back?

19 A. Not to my memory, no. We didn't discuss
20 that.

21 Q. I mean, she's the only other witness to the
22 52 seconds; right?

23 A. Not the only other witness, no.

24 Q. Oh. Well, clerk Okstein?

25 A. Correct. And Judge Joseph.

1 Q. And Judge Joseph.

2 Now, you sort of quickly discussed with us this
3 morning that fee arrangement which you had with
4 the boss of Mr. Medina Perez. Do you remember
5 that? Right? You made a fee arrangement with
6 him; right?

7 A. With his employer, yes.

8 Q. Yeah. And in that fee arrangement, you said
9 that you were going to be paid a thousand
10 dollars; right?

11 A. Correct.

12 Q. And you said this morning and you said
13 previously that the employer paid you by check;
14 right?

15 A. That's my memory of it, yes.

16 Q. Now, did the U.S. attorney's office ever ask you
17 for your checks to confirm that?

18 A. Not to my memory, no.

19 Q. Did they ever say what's my bank account --
20 what's your bank account?

21 A. Not to my memory, no.

22 Q. And you told them about that information pretty
23 early on. I mean, you talked to them about that
24 in January before you went into the grand jury;
25 right? You said the employer paid you by check;

1 right?

2 A. Again, that's my memory of it and that's my
3 memory of what I told them.

4 Q. And then, in fact, you went in to the grand jury
5 and testified a few days later; right?

6 A. That's my memory, yes.

7 Q. And so when you go in front of a grand jury,
8 13 to 23 people in a room; right?

9 A. It was -- Yeah. There were a lot of people
10 in the room.

11 Q. And it's you along with the prosecutors; right?

12 A. Yes.

13 Q. Mr. Chow was with you; correct?

14 A. Yes.

15 Q. And you raised your right hand and you swore to
16 tell the truth, the whole truth, and nothing but
17 the truth, just like you did today; right?

18 A. Yes.

19 Q. And you told them that the boss paid you right
20 there by check.

21 A. That was my memory of it, yes.

22 Q. Now, on December the 20th of 2024, just six
23 months ago, you went and spoke in person with
24 Attorney Fabricant, did you not?

25 A. No. The judge and I spoke via Zoom.

1 Q. Oh, by Zoom. Okay. And was Mr. Neff there?

2 A. I believe so, yes.

3 Q. And whether or not it was by Zoom or in person,
4 you understood that she was asking you questions
5 and expecting that you were going to tell her
6 the truth.

7 A. Yes.

8 Q. The whole truth and nothing but the truth.

9 A. To the best of my recollection, yes.

10 Q. So on Page 2 of the report, it says Mr. Jellinek
11 stated that they gave him a thousand dollars in
12 cash for his work that day and that he planned
13 to work out the details of his ongoing
14 representation later. In fact, they followed up
15 and they said, when asked whether went before
16 the Federal grand jury, he testified that the
17 people who hired him wanted him to get
18 Medina Perez out of custody, and they paid him a
19 thousand dollars, and he said yes. When asked
20 whether they said person paid by check, he
21 responded yes.

22 So six months ago you told the
23 former chief justice of the Massachusetts
24 Trial Court that it was by check.

25 A. Well, I was -- Yeah.

1 Q. And then cash; right?

2 A. My memory six months ago was not as clear as
3 it was in the grand jury. When she refreshed my
4 memory as to what I said in the grand jury, that
5 made sense.

6 Q. Well, when she refreshed your memory. You said
7 cash. And in fact, you promised to go back to
8 your bank records to confirm whether the payment
9 you received was check or cash, and you said I'm
10 waiting on the bank for the 4/20/18 statement.

11 A. Correct.

12 Q. And so that would have been two months ago.

13 A. Yes.

14 Q. And I take it, you hadn't gotten that statement;
15 right?

16 A. No, I have not.

17 Q. That's the same statement that the Federal
18 authorities didn't ask you for back then seven
19 years ago; right?

20 A. They didn't ask me for anything about my
21 banking, no.

22 Q. And you're not denying that you said it was cash
23 when you talked to the special prosecutor.

24 A. When I spoke to special prosecutor, I didn't
25 say cash at first, yes.

1 Q. So your attorney's here in the courtroom today.

2 A. Yes.

3 Q. You know with him or without him that you have
4 an obligation in front of this hearing officer
5 to tell the truth, the whole truth, and nothing
6 but the truth; right?

7 A. That's the oath I took, yes.

8 Q. And if you got cash, that's not what you told
9 the grand jury.

10 A. No. I told the grand jury I got a check.

11 Q. Because if it was cash, then you would have
12 committed perjury.

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

14 Q. Well, if it was cash, and you told them it was a
15 check, that's not perjury?

16 A. I believe that would have been a mistake.
17 And I believe it was by check. My memory was
18 not as clear seven years after the fact when I
19 first spoke to Judge Fabricant.

20 Q. So, I mean, it's kind of an important thing;
21 right? You kind of want to be able to say I got
22 paid X amount of money, that's all it was worth,
23 and you should believe me. Right? I mean, I'm
24 assuming you had that check, if you actually had
25 one, back in November of 2018 when you first

1 talked to Federal authorities; right?

2 A. When you say I had the check, what do you
3 mean?

4 Q. You would have gotten it back from the bank.

5 A. No. I --

6 Q. You would have bank statements that had the
7 deposit on it; right?

8 A. If they asked for it, I'm sure I could have
9 found it.

10 Q. So did you deposit the check?

11 A. Yes.

12 Q. Did you declare the check?

13 A. Yes.

14 Q. Did the Federal authorities ask you to account
15 for that particular check in any documents that
16 you had reporting your income?

17 A. No.

18 Q. So without the check, we have no way of knowing
19 if it was a thousand dollars or \$10,000; right?

20 A. No, you do not.

21 Q. We don't know whether you took all the money or
22 you split the money, some of it to somebody
23 else; right?

24 A. I, I -- You don't -- I don't know what you
25 know or don't know. I know what I testified to.

1 Q. Well --

2 MR. HOOPES: Want me to keep
3 going?

4 HEARING OFFICER: I think we're
5 to the point where we could take a lunch break,
6 if now's a good point from your perspective?

7 MR. HOOPES: I think, at the
8 risk of holding everybody up, I'd say yes.
9 Thank you. Yeah.

10 HEARING OFFICER: It would be
11 best to take a break now?

12 MR. HOOPES: I think so.

13 HEARING OFFICER: Okay. Is
14 that okay from your perspective, Special
15 Counsel?

16 Okay. So we're going to take
17 our lunch break. I'd ask the witness,
18 Mr. Jellinek, not to speak to anybody about your
19 testimony or about this hearing in general
20 during this break.

21 THE WITNESS: Yes.

22 HEARING OFFICER: And we're
23 going to resume again at 2:00. Thank you All.

24 (Luncheon recess taken at
25 1:03 p.m.)

1 Proceedings resumed at
2 2:00 p.m.)

3 HEARING OFFICER: So we're back
4 on the record.

5 Back to you, Mr. Hoopes.

6 MR. HOOPES: Thank you very
7 much, Mr. Hearing Officer.

8 Q. So at the end of the morning, just before lunch,
9 you told us that it wasn't cash but it was a
10 check; right?

11 A. I told you that was my memory, and that's
12 what I told the grand jury, and that's the best
13 of my recollection, yes.

14 Q. Well -- But as we've been over, you spoke to
15 special counsel on December 20th of 2024, just
16 six months ago; correct?

17 A. Yes.

18 Q. Okay. And you said to the special counsel that,
19 in the first interview meeting with Federal
20 authorities, you didn't have immunity, that it
21 was a proffer session, you explained you did not
22 feel entirely comfortable, and was concerned at
23 the time of the November 28th proffer meeting
24 that you'd be indicted. You said that to them;
25 correct?

1 A. That was a long question. But I believe
2 you're asking if I said I was worried at the
3 proffer meeting that I could be indicted.

4 Q. Yes.

5 A. And that is correct. Yes. Of course. I
6 didn't have immunity. I had no proffer letter.

7 Q. Well, you went on to add that you weren't
8 comfortable and that the only reason you could
9 have hedged on your answers to the prosecutor
10 during that meeting about cash versus check was
11 because you didn't have immunity.

12 A. I don't believe that I said I hedged on that
13 particular point. I may have not remembered
14 exactly what I said to the special counsel.

15 Q. Well, you used the word "hedge"; right?

16 A. I just said I don't remember my exact
17 language to special counsel.

18 Q. But you wouldn't have used the word "hedging"
19 with Federal prosecutors unless you had
20 something specific in your mind; correct?

21 A. No.

22 Q. Well, would you share with us what you thought
23 you hedged on?

24 A. I honestly don't know exactly what you're
25 talking about at this point.

1 Q. Well, on Page 5 of your interview with
2 special counsel, you said the only reason you
3 could think that you would have hedged on your
4 answers to prosecutor during that meeting, that
5 first meeting, was that you didn't have
6 immunity.

7 A. Yes. The only reason that I could think that
8 I might have hedged about anything. That
9 doesn't mean I did or that I didn't. The only
10 thing I can think of in speaking to the judge
11 when she asked for the first time, said I might
12 have hedged when I didn't have a proffer letter,
13 but I don't believe I did.

14 Q. Just to make it clear. So you want to go back
15 from having received cash and making, today in
16 front of the hearing officer, you want to make
17 it, it was a check; right?

18 A. To the best of my recollection, that's what I
19 said at the grand jury, which was nearer in
20 time. So yes, I believe it was a check.

21 Q. So what was it that you saw denotes to the
22 prosecutor that Judge Fabricant referred to this
23 morning that you didn't agree with? She asked
24 you a question. She said denotes notes and you
25 didn't agree with them.

1 A. I honestly don't remember what she was
2 referring to. There may have been a moment when
3 the FBI agent wrote something down that was
4 different than what I said. I don't remember.

5 Q. So now going back to the afternoon session of
6 April 2nd, 2018. That was the first time that
7 you had contact that day with Judge Joseph;
8 correct?

9 A. I don't remember. I may have had -- I may
10 have appeared before her in the morning. I
11 don't remember.

12 Q. And so you had known Judge Joseph a little bit
13 when you both were in private practice, --

14 A. Yes.

15 Q. -- as much?

16 A. A little bit.

17 Q. You had been out to coffee with her once to get
18 some advice on something?

19 A. Correct.

20 Q. And you had seen her around a handful of times
21 prior as when she was the judge.

22 A. That's correct. And the coffee was a
23 follow-up to an MCLE that she and I went to.

24 Q. And so she was somebody that, you know, would
25 smile at you and say hello when she saw you?

1 A. As much as I remember, yes.

2 Q. Okay. Now, you told us that, this morning that
3 the point of release for people in custody, who
4 are released in custody would be out the front,
5 except if they had property; right?

6 A. Not necessarily only if they had property.

7 Q. Yes. Only if they had property.

8 A. No. There might be other reasons --

9 Q. So going down the stairs was not that unusual;
10 right?

11 A. No.

12 Q. And you were familiar with the Lunn policy at
13 that point, were you not?

14 A. No, I wasn't.

15 Q. Okay. So --

16 MR. HOOPES: Can we call up...

17 Q. Okay. So what you're looking at is the Lunn
18 policy. And it's from stipulations here by
19 counsel. And it's stipulation -- It's
20 Appendix B. And I'm assuming it's been moved
21 into evidence.

22 And so you know that there was
23 a case called Lunn back in July of 2017.

24 A. Yes.

25 Q. And the Trial Court made efforts to put that

1 case into effect by developing standards.

2 A. I -- No, I didn't know. Not a judge.

3 Q. So looking at this, this is the first time that
4 you've seen this thing called the Lunn policy.

5 A. I may have seen it once or twice before, but
6 I don't -- I haven't memorized it, no.

7 Q. So if we go to APP007, at B, and we go down to
8 Subsection A where it says, individuals over
9 whom the Trial Court has custody, and then it
10 says, consistent with Chapter 2, Section XIV and
11 XV of the Court Officer Manual, when an
12 individual is brought into court in custody is
13 subject to release after his or her court
14 proceeding, court security personnel shall
15 process that individual out of lockup in the
16 normal course regardless of whether the
17 individual is the subject of a civil immigration
18 detainer or warrant. Did you read that?

19 A. That's what it says, yes.

20 Q. So that means that regardless of whatever
21 deviant practice or practice deviating from this
22 was going on in Newton District Court, that
23 under the Lunn policy, your client was supposed
24 to go downstairs no matter what. Did you
25 realize that?

1 A. I'm not sure I follow your question.

2 Q. So your client was brought in to the
3 Newton District Court from the Newton Police
4 Department; correct?

5 A. To my knowledge, yes.

6 Q. And since he was on a -- being detained at least
7 on a warrant, among other things, he would have
8 been brought in in custody; correct?

9 A. Yes.

10 Q. And he would have been brought in the back door
11 through the sallyport area; correct?

12 A. Yup.

13 Q. And placed in lockup.

14 A. Yup.

15 Q. So technically, he was brought into court in
16 custody; right?

17 A. Yes.

18 Q. Okay. Well -- So this policy, which is the Lunn
19 policy, which governs all the courts in
20 Massachusetts as of November 2017, required that
21 defendants who came into custody -- came into
22 the courtroom and courthouse in custody, go out
23 again the way they came in, through the lockup.

24 A. Again, I'm not a judge to know about what it
25 is.

1 Q. Okay. But if I'm correct, then there was no
2 magic in Judge Joseph sending him downstairs;
3 correct? That's where he was supposed to go.

4 A. Not necessarily. That's not where a lot of
5 the releases happened.

6 Q. Well, if he was -- Not where they happen. Where
7 he was supposed to go, would have been
8 downstairs; right?

9 A. What I'm telling you is I don't know where he
10 was going to go. I'm not a court officer or a
11 judge.

12 Q. Okay. But in your head, you thought you had to
13 do something, like ask in order for him to go
14 downstairs. Is that right?

15 A. Because I had seen a lot of individuals
16 released directly out of that glass portion in
17 the courtroom. Yes, upstairs. Released out of
18 the glass portion upstairs. And so I felt I
19 needed to arrange for him to be back downstairs.

20 Q. Well, but not when ICE was involved; right? I
21 mean, the Lunn policy is specifically addressing
22 people who come in in ICE.

23 A. Again, I don't know the policy. I had
24 nothing to do with it.

25 Q. And you told us this morning that you didn't

1 think it was unusual for you to be able to go
2 downstairs and to speak to your client before
3 being released; correct?

4 A. No, no. That happens sometimes.

5 Q. As a matter of fact, he'd been given these drug
6 rights; right? Those hadn't been explained to
7 him.

8 A. Correct.

9 Q. As well as the fact that ICE was looking for
10 him; correct?

11 A. Correct.

12 Q. So you asked to go to side bar, you went to side
13 bar, and there's the recording pieces that we
14 heard this morning.

15 MR. HOOPES: Will you pull that
16 up, please.

17 Q. And on Page 33 --

18 A. Could you tell me --

19 Q. APP033. Page 4.

20 A. Of which tab?

21 Q. Tab G.

22 A. You're on 33?

23 Q. Yes. At the bottom, it says recording starting
24 at 2:48.

25 A. Sure.

1 MR. HOOPES: Okay. If I could
2 just have one moment.

3 HEARING OFFICER: Do you want
4 APP33 or APP40? I want just to make sure that
5 we're all --

6 MR. HOOPES: Yup. That's a
7 good point by special counsel. I see. They're
8 double-sided.

9 HEARING OFFICER: Yup.

10 MR. HOOPES: Yup. Okay. Thank
11 you.

12 Q. So in Number 40. Page 40. APP040. Page 40.

13 A. Okay. Yes.

14 Q. So they ask you whether or not you want your
15 client up and you said no. You said you're
16 going to side bar.

17 A. Yes.

18 Q. You say ICE is convinced that this guy and you
19 say again that you've been through this and you
20 think that there's 13 FBI numbers connected to
21 the Social, something's bad with inaudible, my
22 client denies, ICE is going to pick him up if he
23 walks out the door, I think the best thing for
24 us to do is to clear the fugitive issue, release
25 him on personal, and hope that he can avoid ICE.

1 The ADA says I don't think arguing ICE is really
2 my -- you say right, the ADA says my, my, and
3 the Judge Joseph says the other alternative is,
4 if you need more time to figure this out, hold
5 until tomorrow. Right?

6 A. That's what the transcript says, yes.

7 Q. Okay. So this comment by you about releasing
8 him on personal met the response or the
9 alternative is to hold him until tomorrow.
10 Correct?

11 A. I don't know if it met that response. There
12 are few overlapping conversations. That's what
13 the transcript reads as.

14 Q. Okay. So you don't doubt the transcript;
15 correct?

16 A. No. Transcript I don't doubt. Not at all.

17 HEARING OFFICER: Could I ask
18 that you speak a little bit closer to the
19 microphone.

20 THE WITNESS: Oh, I apologize.

21 HEARING OFFICER: Thank you.

22 A. I agree, the transcript is as it reads.

23 Q. And then it goes on. ADA Jurgens says there's a
24 detainer attached to my paperwork but I feel
25 like that's separate and apart from what my role

1 is. Attorney Jellinek says there's an ICE
2 detainer so if he's bailed out from Billerica,
3 ICE will pick him up. And Judge Joseph says ICE
4 is going to get him. You say something. And
5 she says what if we detain him. Right? So
6 she's not responding to any suggestion by you
7 that anything other than detaining him is what
8 she's offering; right?

9 A. I don't know what was in her mind. I'll tell
10 you that I didn't hear it that way.

11 Q. Okay. But you, again, you don't know what was
12 in her mind. But that's what's in the
13 transcript; right?

14 A. That is one way to read the transcript, yes.

15 Q. But you didn't want that; correct? You didn't
16 want him detained overnight.

17 A. No. I was advocating for my client.

18 Q. No. That's not what I asked you. I said you
19 didn't want him detained overnight; right?

20 A. No. I was advocating for my client. He
21 wanted to be released. That's what I was
22 arguing for.

23 Q. And so if he had been detained and held
24 overnight, then you would have come back the
25 next day; correct?

1 A. Possibly.

2 Q. ICE would have come back the next day; right?

3 A. Or ICE would have removed him from Billerica
4 that night.

5 Q. Well, if ICE didn't have him at that point,
6 right, if ICE didn't have him, then they're
7 coming back to court the next day?

8 A. Right.

9 Q. Because the fugitive warrant then would be
10 dismissed; right?

11 A. As far as I understand, yes.

12 Q. Okay. She could have held him on the fugitive
13 warrant, he could have been there on the
14 warrant, and then come back the next day; right?

15 A. Yes. Unless ICE picked him up in Billerica
16 that night.

17 Q. Well, they can't pick him up if he's on a
18 fugitive warrant; right?

19 A. I don't know.

20 Q. You don't know the law. Okay.
21 Now, at that point you say can we go off the
22 record.

23 A. I believe I asked, as the transcript's
24 stipulated to, are we on the record.

25 Q. Are we on the record. And from there, you

1 wanted to go off the record; right?

2 A. Actually, it was judge Joseph who said can we
3 go off the record.

4 Q. Well, you said are we on the record.

5 A. Correct.

6 Q. And she said can we go off the record. Right?

7 A. Correct.

8 Q. Now --

9 HEARING OFFICER: I'm sorry.

10 But you also said can we go off the record;
11 correct?

12 A. Later on, yes.

13 HEARING OFFICER: Later on.

14 A. Yes. Absolutely.

15 HEARING OFFICER: Okay.

16 Q. So you just said now that you didn't understand
17 what she was thinking when she said that;
18 correct?

19 A. Which part?

20 Q. The part about let's detain him.

21 A. No. I did have an inkling as to what she was
22 meaning.

23 Q. Well, I think that your comment was is that --
24 And when I asked you, was she agreeing with you,
25 you said you didn't know what she was thinking;

1 right?

2 A. I don't know what was in her head. All I
3 know is how I heard what she was saying. I said
4 this is one reading of this transcript and I had
5 a different one in the moment.

6 Q. So then we have the off the record conversation;
7 correct?

8 A. Yes.

9 Q. And two things get raised on the off the record
10 conversation. Right? The first is, you're,
11 again, advocating for him to be released; is
12 that right?

13 A. Yes.

14 Q. And you also raised issue of you going
15 downstairs to see your client; right?

16 A. Yes.

17 Q. Now, as to the part that has to do with what you
18 said when the tape recording was shut off, that
19 you asked that he be able to go downstairs and
20 be released to the lockup area; correct?

21 A. That was essentially what I was arguing for,
22 yes.

23 Q. And under the Lunn policy, that's what was going
24 to happen anyway; correct?

25 A. I don't know. I was unaware of the policy.

1 Q. Now, when you spoke to Federal prosecutor the
2 first time on November 1st -- November 8th,
3 2018, you said that you requested Judge Joseph
4 release him through the lockup area because you
5 thought it was okay for the defendant to be
6 released from the lockup area; correct?

7 A. Yes.

8 Q. Okay. Now, you gave a number of different
9 statements over time; correct? You gave -- You
10 were back for three more interviews and one
11 grand jury appearance; correct?

12 A. Yes, I did. I spoke to them at those times.

13 Q. And then you spoke to special counsel again in
14 December of 2024; correct?

15 A. I believe so, yes.

16 Q. And you told special counsel that there was --
17 your recollection is that essentially that --
18 you said to her that -- said to Judge Joseph,
19 that if ICE was waiting out front, you thought
20 it would be best to be released out the back
21 door. Is that correct?

22 A. Yes. Yes. Essentially what we were
23 discussing.

24 Q. Okay. So in other words, you were asking for
25 essentially what was in the ICE policy; correct?

1 A. Again, I don't -- I didn't know the policy.
2 In my reading of that the way you described it
3 just now is released in the normal course. And
4 I would say the majority of releases in Newton
5 occurred through the courtroom and out of that
6 glass lockup.

7 Q. Now, just a little bit ago you said that you
8 weren't sure what was in Judge Joseph's mind
9 when you were doing your conversation with her,
10 with Ms. Jurgens present at side bar; correct?

11 A. I don't believe you could ever know
12 completely what's in someone else's mind, but I
13 certainly knew what felt like it was she was
14 agreeing to.

15 Q. So when you were interviewed in February of
16 2012, you said as much as that to Federal
17 authorities -- 2019. I'm sorry. February 12,
18 2019, Jellinek stated that he had no idea what
19 was in Joseph's mind during and after the side
20 bar conversation in the courtroom. That'd be
21 accurate; right?

22 A. Yes.

23 Q. You spoke to special counsel on December 20th,
24 2024. And when you were asked whether you
25 believed that Judge Joseph understood what was

1 being said during the side bar, you responded
 2 yes. When asked what Judge Joseph did or said
 3 that caused him to say that she understood the
 4 side bar discussion, you responded, yeah, she
 5 said that's what we'll do.

6 A. Essentially, yes.

7 Q. And yeah, that's what we'll do is that he'll go
 8 down the stairs and be released from downstairs;
 9 right?

10 A. Correct.

11 Q. Which is exactly conforming with the Lunn
 12 policy; correct?

13 A. Again, I don't know the policy. I don't know
 14 how it conforms or doesn't.

15 Q. Now, at some point right after that, because the
 16 matter was only 52 seconds, you went back on the
 17 record; correct?

18 A. Yes.

19 Q. And when you were on the record, you asked for
 20 certain things to be read into the record. She
 21 read certain things into the record. Correct?

22 A. What are you saying I asked to be read into
 23 the record?

24 Q. Well, did you -- You asked her to be put on the
 25 record, sir, that you be allowed to go

1 downstairs to speak to your client?

2 A. Yes.

3 Q. When you were on side bar. Yeah. Okay.

4 So we have this back on the recording at
5 2:57 p.m. The clerk says, judge, we're back on
6 the record. There's a recitation of everything
7 that's going to happen; right?

8 A. Yes. That's what the transcript says.

9 Q. And then at the end there's a section where, a
10 little bit farther down, where the clerk says to
11 her, essentially, ICE is here and would like to
12 take custody. And he says that to her. And she
13 responds, he's released on this, that's okay,
14 but they're not coming in here, essentially;
15 right?

16 A. Yes. According to the transcript, yes.

17 Q. And you of anybody is familiar with
18 Newton District Court; right? You know the
19 places that can be accessed to the lockup;
20 right? You can go down the step, come into the
21 main courtroom, and go down the stairs; right?

22 A. Yes, you can.

23 Q. You can go around the back and come in through
24 the sallyport; right?

25 A. I've never gone that way, but you could.

1 That's the way prisoners come in.

2 Q. You can go through probation and go in that way;
3 right?

4 A. No. There's keycards. I can't. But you
5 could.

6 Q. But an officer, an officer could.

7 A. Yes. Sure.

8 Q. Now, you've told us that you came to the
9 Newton District Court that morning, but you
10 don't know why you were there.

11 A. I don't remember, no.

12 Q. At one point you told the grand jury that you
13 believed you had other cases there that day.

14 A. I believed I do -- I believed I did, yes.

15 Q. At another point you said that you were there
16 for your own case that day?

17 A. I thought so, yeah. I believe I was.

18 Q. And at another point you said that you were
19 there and Medina Perez's friends, the boss, had
20 seen you perform and liked what they saw;
21 correct?

22 A. Yes.

23 Q. But the fact is that you didn't perform anything
24 that day. Right? You never were heard in the
25 morning. On any transcript or any audio.

1 Right?

2 A. I was shown a transcript that doesn't include
3 anything from me, but I believe I was there and
4 did argue.

5 Q. So are you saying you think that the transcript
6 is wrong?

7 A. It could be. My memory is that I was in the
8 court that morning.

9 Q. Well, at one point you said that you thought
10 that you were there perhaps on the
11 Pamela Hodgkin case, which was on the list that
12 day.

13 A. Could have been. My understanding is that I
14 didn't inherit that case until a little bit
15 later. And because the way Masscourts work, my
16 name is attached to it now as opposed to then.

17 Q. Well, were you shown the docket entries for the
18 case that day, for the Hodgkin case, that you
19 filed your appearance the next month?

20 A. Yes.

21 Q. Okay. So that you couldn't have been
22 representing her on that day; right?

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

24 Q. Now, Ms. Bostwick was there as the bar advocate;
25 correct?

1 A. That's my understanding, yes.

2 Q. Well, did you see her there in the morning?

3 A. I believe I did, yeah.

4 Q. And where did you have contact with her?

5 A. I don't believe we had any substantive
6 contact.

7 Q. Well, where would you have been sitting in the
8 Newton District Court on that day?

9 A. Typically, if you go through the middle bar
10 area, I sit off to the right, and she was
11 probably sitting over there as well. That's
12 where the defense lawyers tend to sit.

13 Q. So you would have been somewhere over here.

14 A. Correct.

15 Q. And --

16 A. Usually, I think. Don't remember that date
17 specifically. But yes, that's usually where I
18 sit.

19 Q. And you would have recognized her and she would
20 have recognized you?

21 A. Most likely, yes.

22 Q. And did you talk about this client Medina Perez?

23 A. Not much, to my memory, no.

24 Q. And -- Not much. What did you talk about with
25 her?

1 A. I probably said good morning.

2 Q. About Medina Perez.

3 A. I probably didn't even ask her about it until
4 I was approached by his friends.

5 Q. Well, you told us this morning that you thought
6 you were approached by his friends about 10:30?

7 A. Yeah, 10:30 probably, yeah.

8 Q. And so when you talked to them, where did you
9 talk to them? Is that inside the courtroom or
10 outside the courtroom?

11 A. Best recollection I have is it was in the
12 back of the courtroom during a break.

13 Q. And the conversation was that we want you as the
14 lawyer and we'll make some financial
15 arrangements with you.

16 A. That was to my memory, yes.

17 Q. And so you would have completed that discussion
18 by what time?

19 A. I really don't remember. 11:00, 11:15.

20 Q. And did you tell Ms. Bostwick that you had been
21 retained at 11:00, 11:15?

22 A. Yes.

23 Q. You did.

24 A. I did.

25 Q. And where did you tell her that you had been

1 retained at 11:00, 11:15?

2 A. I don't remember. Probably in the courtroom.

3 Q. And after you told her that you had been
4 retained at 11:00, 11:15, why did she keep on
5 working on the case?

6 A. Maybe it was later. I don't remember the
7 exact time.

8 Q. So maybe 11:00 isn't correct. Maybe it was
9 later than 11:00.

10 A. Might have been closer to 12:00. I don't
11 remember her last appearance when she stood up
12 last on the case.

13 Q. If she was still working on the case after
14 12:00, and you had been retained, why would she
15 do that?

16 A. She wouldn't. I don't remember the exact
17 time I was retained.

18 Q. So are you sure you were there in the morning,
19 sir?

20 A. To the best of my memory, I was there in the
21 morning, yes.

22 Q. Okay. Well, to the best of your memory. So
23 you're saying that it's possible that you
24 weren't there in the morning.

25 A. I know I was there before the lunch break,

1 which qualifies to me as the morning. I don't
2 remember if I got in at 9:00, 9:30, but it was
3 in the morning.

4 Q. Well -- So the lunch break was about 12:45 or
5 so.

6 A. Correct.

7 Q. And so you're saying you were there before
8 12:45.

9 A. Yes.

10 Q. And you spoke with Ms. Bostwick before 12:45.

11 A. It's entirely possible at the break I'm
12 remembering when they hired me was the beginning
13 of lunch break and I talked to her during the
14 lunch break. Like I said, I don't remember the
15 specific timing. They approached me during a
16 break in the session.

17 Q. So Ms. Bostwick left and went to a doctor's
18 appointment at 12:45, and they set the case down
19 for her to come back a little bit late. So at
20 12:45 she couldn't have known that you were on
21 the case; right?

22 A. If that's what you say the order of events
23 was, sure.

24 Q. So in fact, you weren't there before let's say
25 12:30; right?

1 A. Again, I think I was there, and I think
2 that's why his friends approached me, because I
3 made an argument. To the best of my memory, I
4 was there making argument that morning.

5 Q. So if there's nothing on the transcript that
6 says you were there in the morning, and
7 Ms. Bostwick has no memory of you being there in
8 the morning, why do you remember you were there
9 in the morning?

10 A. That's my memory.

11 Q. Well, if you didn't get to represent
12 Medina Perez because they saw your work because
13 you're nowhere on the transcript and you don't
14 have any cases for that day, how is it that
15 these people got to you of all people?

16 A. You'd have to ask them. I don't know.

17 Q. Well, no. You've already told us that -- you
18 say they liked the way I dealt with the prior
19 case. There was no prior case for you.

20 A. My memory is there was.

21 Q. But again, why you, sir? Meaning, you weren't
22 the only lawyer who was standing up on cases
23 that day; right?

24 A. Probably not.

25 Q. There were other lawyers, good lawyers.

1 Arthur Kelly was there; correct?

2 A. I don't remember if he was there or not, but
3 he's a good lawyer.

4 Q. And so if they had asked around and said who's a
5 good lawyer, we don't like this bar advocate,
6 why you?

7 A. I don't know. I would have told them to hire
8 Arthur Kelly.

9 Q. Well, they came to you, and you didn't tell them
10 to hire Arthur Kelly, did you?

11 A. They had gone by that point, if I remember
12 right. And they asked for me, so I said sure,
13 I'll represent him. Said I think you've got a
14 really good lawyer, I wouldn't do anything about
15 it, can't change the situation, but if you want
16 to, you can hire me.

17 Q. Well, you certainly could have given
18 Arthur Kelly's number and they could have come
19 back; right?

20 A. Sure.

21 Q. But you're firm with the hearing officer, that
22 they approached you; right?

23 A. Yes.

24 Q. And are you firm that nobody pointed him in your
25 direction?

1 A. Not to my knowledge, no.

2 Q. Do you think Mr. MacGregor pointed him in your
3 direction?

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

5 Q. So tell us, your office is about seven- to
6 nine-minute drive --

7 A. Yes.

8 Q. -- from the courthouse; right?

9 A. Yes.

10 Q. It's right there in Newton; --

11 A. Yes.

12 Q. -- right? Somebody picks up the phone, you're
13 in your office, you're in court seven minutes
14 later.

15 A. Yeah. Depending on whether I have to put a
16 tie on. Absolutely.

17 Q. And so you want to leave it with the hearing
18 officer in hearing that they picked you for some
19 reason that you don't know, because you weren't
20 working that day, you didn't have any cases on
21 that day, you weren't on any transcript for that
22 day, it's just random that they got to you.

23 A. No. That's not -- Everything I said is
24 accurate.

25 Q. So what's not accurate?

1 A. It was multiple things you said there. And I
2 was working that morning. I just don't remember
3 exactly what case I was on.

4 Q. Well -- So you told Federal authorities you
5 carry an iPad; correct?

6 A. Yes.

7 Q. And you have a habit of writing on it or
8 doodling on it when you're in court; correct?

9 A. I don't doodle on it, but I write on it,
10 yeah.

11 Q. And they knew that you had an iPad, right,
12 because you told them?

13 A. Yes.

14 Q. And did any Federal authority ask to see your
15 iPad?

16 A. Not that I remember, no.

17 Q. To check whether or not you're telling the truth
18 about whether you were there in the morning or
19 not?

20 A. They did not ask, no.

21 Q. To tell us whether -- To help tell whether
22 you're telling the truth about how you got the
23 case?

24 A. I didn't hear -- Is -- What's the question?

25 Q. The question is, you didn't offer to show your

1 iPad to anybody, nobody checked on it; correct?

2 A. Nobody checked on it, no.

3 Q. So when the boss, when the boss of -- How did
4 you know he was the boss of Mr. Medina?

5 A. He told me he was his employer.

6 Q. He was his employer. Did he tell you what
7 company that was?

8 A. I don't remember.

9 Q. But when he said he was going to hire you, you
10 demanded that there be some sort of fee
11 arrangement; correct?

12 A. Well, ethically, you have to have some
13 agreement before you represent someone. He had
14 all the documents for Mr. Medina Perez, so I
15 said, yeah, I'll represent him, but we're going
16 to need some kind of agreement going forward.

17 Q. Yup. And as a matter of fact, you wouldn't --
18 you said you wouldn't represent this individual
19 unless you got paid; right?

20 A. Generally, that's how private counsel works,
21 yes.

22 Q. Yeah. Well, you weren't doing it because you
23 were in service of some cause; right? You were
24 doing it because you were going to get paid.

25 A. Yes.

1 Q. And of all the people who were representing
2 Mr. Medina Perez that day, which is only two of
3 you, Ms. Bostwick was court-appointed, and so
4 she was going to get \$53 an hour, but you were
5 the guy that got a thousand dollars for three
6 hours work. Right?

7 A. I don't remember if it was three. Could have
8 been four.

9 Q. You're the one that got the thousand dollars;
10 right?

11 A. Yes.

12 Q. Now, you told special counsel you couldn't
13 remember if you signed a fee agreement with them
14 at the time or left that until another day.

15 A. Correct.

16 Q. That's kind of ridiculous, isn't it? I mean,
17 were you carrying fee agreements with you in
18 your pocket?

19 A. Generally don't carry them. But I sometimes
20 I have one available on my iPad that I could
21 have shown them. But I didn't that day.

22 Q. Well, if it's available on your iPad, then it's
23 always on your iPad; right?

24 A. No. Sometimes I have blank ones that I leave
25 like in a desktop location I could get to

1 easily, but I didn't have one with me that day
2 that they could sign.

3 Q. Now, if you arrived there at whatever time you
4 arrived, you were hired, you got the documents,
5 you reviewed them, and you spoke again with his
6 employer, did you ever, did you ever meet with
7 Medina Perez that morning?

8 A. Yes.

9 Q. What time?

10 A. I don't remember.

11 Q. Well --

12 A. Probably just before the lunch break or
13 during the lunch break.

14 Q. And that would have been -- You don't speak
15 Spanish; right?

16 A. No.

17 Q. And that would have been you and the
18 interpreter; right?

19 A. To the best of my recollection, yes.

20 Q. So you would have met Medina Perez with the
21 interpreter by going downstairs; correct?

22 A. It's possible we had a brief conversation in
23 the lockup upstairs. I don't remember the
24 details of my first conversation with
25 Mr. Medina Perez.

1 Q. But you would have had the interpreter there
2 with you.

3 A. To my memory, yes. It's possible he knew
4 enough English to say minor things to me. It's
5 possible that I understood most of it from his
6 friends at that point and what the assignment
7 was.

8 Q. Now, you told various people at various times
9 that you got the paperwork related to
10 Medina Perez from different people. From the
11 ADA.

12 A. Yes.

13 Q. From the court clerk.

14 A. Yes.

15 Q. And from the probation officer.

16 A. Yes. Probably with Gloria.

17 Q. And, also, you got material from Ms. Bostwick.

18 A. Yes.

19 Q. Now, you knew ICE was in the building.

20 A. Yes.

21 Q. And you had heard -- You would have heard
22 Judge Joseph say no ICE in the courtroom during
23 the morning session; right?

24 A. I believe so, yes.

25 Q. So would it surprise you to note that the whole

1 transcript has been reviewed and never a word
2 from Judge Joseph about that in the morning?

3 A. As I said, it was my memory. It might have
4 been the clerk. It might have been someone else
5 that told me.

6 Q. Instead of putting it on the record, somebody
7 told you.

8 A. Again, I said I don't remember exactly how I
9 found that out that morning.

10 Q. Now, when you spoke to MacGregor, that was just
11 before -- it was during the lunch break; right?

12 A. When I spoke to him substantively about this,
13 yes, that was during the lunch break.

14 Q. And was ICE in the courtroom when that happened?

15 A. No, they were not.

16 Q. Now, you know that the ICE agent says he didn't
17 see you there in the morning at all.

18 A. I don't know that, no.

19 Q. Well, either you're correct or the ICE agent is
20 incorrect. Either you were there or you just
21 told us a half a dozen stories. Which is it?

22 A. I don't think I follow your question. I
23 don't believe it's answerable.

24 JUDGE FABRICANT: The witness
25 said he didn't know what the ICE agent said

1 about this, so I have to object to the question.

2 HEARING OFFICER: If you could
3 rephrase the question, please.

4 Q. You're saying to us that -- So let me phrase it
5 a different way. You've recounted a story about
6 what happened between you and MacGregor that
7 nobody witnessed, just the two of you; right?

8 A. Yes.

9 Q. And you're recounted a story about what happened
10 on the off the record conversation for those
11 52 seconds; correct?

12 A. Yes.

13 Q. So are you as sure about the fact that you were
14 there in the morning as you are about those
15 other two things, what MacGregor said?

16 A. Well, let me answer it this way. I believe I
17 was there in the morning. I know the transcript
18 doesn't show that. So I don't know what you're
19 getting at and what your theory is as to how or
20 why I got there. But I know that day I was
21 there, for some reason, whether I was advancing
22 a case or arguing something, and they approached
23 me during a break. That's all I remember.

24 Q. Well, no. The point is, is that -- I guess my
25 question is, are you making up the fact that you

1 were there in the morning or not?

2 A. As I said, the best of my recollection, I was
3 there in the morning.

4 Q. So it's possible your recollection is not
5 correct.

6 A. Of course.

7 Q. Of course.

8 A. Yeah, of course. It's eight years ago.

9 Q. Well, it's been -- It's eight years ago when you
10 first spoke to Federal authorities. And
11 memories tend to disintegrate quickly. We know
12 that from the most recent research; correct?

13 A. I don't know what we know as a community. I
14 know that the defense bar knows what memories
15 tend to do and become unreliable over time.

16 Q. And that may have happened to you.

17 A. Can happen to anybody. Of course.

18 Q. But that may have happened to you.

19 A. As I just said, it could happen to anybody.
20 Of course.

21 Q. That may have happened to you, too.

22 A. Could happen to anyone. Of course. It could
23 happen to you. It could happen to you.

24 MR. HOOPES: Can I just have a
25 moment, Your Honor?

1 (PAUSE)

2 Q. So Mr. Jellinek, you said I think on questions
3 from special counsel that you were trying to
4 protect the judge; is that right?

5 A. That was part of my motivation to go off the
6 record or to attempt to go off the record, yes.

7 Q. But the DA was there to protect the judge;
8 correct?

9 A. I don't know -- No. The DA's there to
10 prosecute.

11 Q. Well, but the DA was hearing everything that was
12 being said; right?

13 A. Again, I don't know what the DA...

14 Q. And when you went down to talk to
15 Judge Heffernan the next morning, it was the
16 same issue, which is, you weren't trying to
17 protect anybody when you went to see her except
18 yourself. You weren't trying to protect the
19 judge. Correct?

20 A. No, that's not my motivation. That wasn't my
21 motivation to talk to Judge Heffernan. It was
22 to tell her what happened.

23 Q. But you didn't tell her everything that
24 happened; correct?

25 A. No. I didn't spend 20 minutes talking to

1 her, no.

2 Q. So let's go back to your first interview with
3 Federal authorities on November 8th. You say
4 that you requested that the judge release
5 Medina Perez through the lockup area because you
6 thought it was okay for a defendant to be
7 released from the lockup area; correct?

8 A. I thought it had happened and it was okay for
9 it to happen, yes.

10 Q. And you didn't give them anything that she said
11 back at that point. She made no statement back
12 to you; correct?

13 A. I'm sorry. I don't follow the question.

14 Q. She didn't make any statement one way or
15 another.

16 A. Who would --

17 Q. Judge Joseph.

18 A. At what time?

19 Q. At that time. Right? So you're talking to
20 Federal authorities.

21 A. Yes.

22 Q. And you said to them, I asked her --
23 specifically, you requested that Judge Joseph
24 release Medina Perez through the lockup area
25 because you thought it was okay for defendant to

1 be released from the lockup area. That's what
2 you said; right?

3 A. I believe so, yes.

4 Q. Yeah. And you gave no response from
5 Judge Joseph; correct?

6 A. If it's not in my notes, I probably didn't.
7 But I might have said something. I don't know.

8 Q. If it's not in the notes, then you didn't say
9 it.

10 A. Well, no, that's not quite what I said. I
11 may have said something but it's not in their
12 notes. That's a different statement.

13 Q. Oh, so if you said something -- You may have
14 said something but they didn't put it in their
15 notes.

16 A. Correct.

17 Q. Well, they would be interested, would they not,
18 in whatever Judge Joseph had to say in response?
19 Correct?

20 A. I don't know what they were interested in at
21 that point.

22 Q. So if you had said to them that she responded in
23 some affirmative way that signaled that she was
24 fine with him going out the back door, they
25 would have put that in the notes, don't you

1 think?

2 A. They also would have probably asked me
3 directly, and I don't remember that they asked
4 me directly. I don't think that's in the notes
5 either. I think what is in the notes is parts
6 of a full conversation.

7 MR. HOOPES: That's all I have
8 at this time. Thank you.

9 HEARING OFFICER: Special
10 Counsel, do you have follow up?

11 JUDGE FABRICANT: Yes, please.

12 REDIRECT EXAMINATION

13 BY JUDGE FABRICANT:

14 Q. Mr. Jellinek, I want to turn to the immunity
15 letter.

16 JUDGE FABRICANT: And can you
17 bring back up...

18 A. Which tab?

19 Q. It's not in the appendix, but Mr. Neff will post
20 it on the monitor.

21 A. Sure.

22 JUDGE FABRICANT: And while
23 he's setting that up, Mr. McInerney, I'm going
24 to want to offer this in evidence. I don't have
25 a clean copy of it right now. I will have a

1 clean copy of it tomorrow. So unless there's
2 objection, I'd like to bring it in tomorrow and
3 offer it in evidence.

4 HEARING OFFICER: That's fine.
5 I see there's no objection.

6 MR. HOOPES: None.

7 JUDGE FABRICANT: And that
8 would be both the immunity letter and the
9 proffer letter.

10 HEARING OFFICER: That's fine.

11 Q. What we have on the screen now is the immunity
12 letter. Mr. Jellinek, can you see it?

13 A. Yes.

14 Q. So I'd like to call your attention to numbered
15 Paragraph 1. Mr. Hoopes read part of it. I'd
16 like to read all of the sentence that begins:
17 He must not attempt to. Do you see that? It
18 starts around the middle of --

19 A. Yes.

20 Q. -- the line.

21 (Reading) He must not attempt to protect any
22 person or entity through false information or
23 omission or, -- and this is the part that
24 Mr. Hoopes did not read -- or to implicate
25 falsely a person or entity. Do you see that?

1 A. I do.

2 Q. Did you attempt to implicate falsely any person
3 or entity?

4 A. No.

5 Q. Did you tell the truth to the grand jury?

6 A. Yes.

7 Q. And did you tell the truth to the U.S attorney
8 in your interviews with them?

9 A. Yes.

10 Q. And when you spoke with me on December 20th, and
11 Mr. Neff was there, did you talk a little bit
12 about -- did you say that the only reason you
13 could think of that you would have hedged on
14 your answers to the prosecutor during that
15 meeting was you did not have immunity?

16 A. Correct.

17 Q. And did you add that you did not remember ever
18 having a different memory from what was in the
19 transcript of your grand jury testimony?

20 A. Correct.

21 Q. And did that have anything to do with whether
22 you were paid in cash or by check?

23 A. No.

24 Q. Did you go on to say -- Mr. Dunn explained that
25 the immunity -- Did you go on to say that the

1 immunity made you more comfortable, but you do
2 not think it changed anything about what you
3 remember?

4 A. That's correct.

5 Q. Now, this event happened on April 2nd of 2018;
6 correct?

7 A. Yes.

8 Q. So that's now a little more than seven years
9 ago.

10 A. (Witness nods head).

11 Q. So in that time, have certain aspects of your
12 memory faded?

13 A. Of course. Yes.

14 Q. The matters that were the focus of your grand
15 jury testimony, that is what happened at side
16 bar, what happened off the record, your
17 conversation with Mr. MacGregor, and your client
18 going out the back, has your memory changed
19 about that?

20 A. No.

21 Q. And let's turn to your role in representing your
22 client there that day. Tell us what you view as
23 your role.

24 A. I view my role that day like I do all the
25 time. It's to, as zealously as possible,

1 advocate for my client.

2 Q. And what in particular were you trying to
3 accomplish?

4 A. On that day, he was adamant that it wasn't
5 him, he was adamant that this person they were
6 attempting to detain through immigration was not
7 him, as I said, his boss or his friend were
8 viably with a birth certificate that appeared
9 authentic, and the ICE paperwork was not a
10 judicial warrant, it was an administrative
11 warrant directed to Newton, that had no
12 biometric data that linked it to the gentleman
13 in custody. So at that time my job was to try
14 to get him out of custody and away from anything
15 that might endanger him.

16 Q. So when the judge made suggestions about
17 detaining him, did that, in your view, serve
18 purposes you were trying to serve?

19 A. It implied that she understood the problem,
20 but not fully, because that did not serve the
21 purpose I was trying to achieve.

22 Q. Did you think that you had an obligation to tell
23 anybody other than the judge what your approach
24 was to in trying to achieve your purpose?

25 A. No. In fact, I think it's the opposite. I

1 think I shouldn't be telling anybody else, like
2 the prosecutor, what my approach was going to
3 be.

4 Q. And if you told the prosecutor before this side
5 bar conference, before the off the record
6 conference, what did you think might happen?

7 A. I imagine that ICE would put one person down
8 by the lockup and one person up in front of the
9 building.

10 Q. And if you talked around the courthouse about
11 it, clerk's office or in probation or anywhere
12 else, what do you think would happen?

13 A. The same. That ICE would be more prepared to
14 get him.

15 Q. As a lawyer representing clients, is it your
16 practice to talk about your strategy in general?

17 A. No.

18 Q. Did you think that what you were doing that day
19 was a crime?

20 A. No.

21 Q. Do you think so now?

22 A. No.

23 Q. You did say earlier, though, that you thought it
24 was on the edge of ethical.

25 A. Yes. And, you know, Federal indictment makes

1 you think that some of the things you've done
2 might be on the edge of ethical and legal.

3 Q. And do you still think it was on the edge of
4 ethical?

5 A. Absolutely.

6 Q. You told us about a series of conversations with
7 the ICE officer, the assistant district
8 attorney, court officer MacGregor. Can you try
9 to put those in sequence?

10 A. My initial conversation would have been with
11 the district attorney to get the paperwork
12 together, and at that point she probably said
13 something like I'm investigating whether this is
14 really him. I believe the transcript reflects
15 that she did mention on the record she wasn't
16 sure if she was investigating him. I believe I
17 got the paperwork from Ms. Bostwick. So my
18 conversation probably would have been with the
19 ADA, then with Ms. Bostwick, and then I would
20 have checked in with the ADA, I would have
21 spoken to probation to get the Triple I, I
22 believe I got permission from the ICE to do
23 that, and review it in the courtroom, and then I
24 would have spoken with Officer MacGregor during
25 the lunch break after I reviewed the Triple I.

1 Q. So you think that was the sequence.

2 A. Yes.

3 Q. Assistant district attorney, Ms. Bostwick, the
4 ICE officer, and Officer MacGregor.

5 A. Well, yeah. And probation in between to get
6 the documents.

7 Q. To get the Triple I.

8 A. Yes.

9 Q. You made reference earlier to a CORI. What's a
10 CORI?

11 A. A CORI is a Massachusetts, criminal.

12 Q. Massachusetts, criminal.

13 A. Yes.

14 Q. And you get that from probation.

15 A. Yes.

16 Q. When you spoke with Judge Heffernan the next
17 day, what did you think she already knew?

18 A. I don't know what she already knew and what
19 she was thinking. I know that, when I went in,
20 it was a very brief conversation, and the
21 implication I got was that she understood
22 everything that happened, I had given her a full
23 briefing, and I was okay and go away.

24 Q. Did she seem willing to spend more time with you
25 that morning?

1 A. Not that morning, no.

2 Q. On May 29th, so that would have been the next
3 date, the date for pretrial conference in the
4 case, you told us earlier that Mr. Medina Perez
5 didn't show up.

6 A. Correct.

7 Q. Did you know where he was?

8 A. No.

9 Q. Did you know whether he was or wasn't in ICE
10 custody?

11 A. I did not.

12 Q. And I'm not asking you the substance of any
13 communications you had with him, but had you had
14 communication with him in the interim?

15 A. Not to my knowledge, no. And one of the
16 problems that I had to deal with that day was
17 ICE doesn't always tell you where they are, how
18 to get them back to court.

19 Q. When you go to lockup to talk with your client,
20 if you have a client in custody, how do you get
21 there?

22 A. Usually I would say 99 percent of the time
23 you go to the court officer's station next to
24 the glass box and then they open the door and
25 let you go downstairs. Usually they radio down

1 and say attorney coming down.

2 Q. You said 99 percent of the time. So what would
3 be the other percent?

4 A. I've had some major knee surgeries, and there
5 were times I couldn't get down those stairs. So
6 there is a way to get into the lockup through
7 probation, and occasionally I had to take the
8 elevator and ask to be let in through probation
9 and escorted into lockup.

10 Q. And would that still require a court officer to
11 let you in?

12 A. Absolutely. Yes. Someone -- The probation
13 department has to let you in probation and the
14 court officer would have to meet you at the back
15 and unlock that door.

16 JUDGE FABRICANT: All right.
17 That's all I have. Thank you.

18 HEARING OFFICER: Anything
19 further, Mr. Hoopes?

20 MR. HOOPES: Just a little bit,
21 if I may.

22 RE-CROSS EXAMINATION

23 BY MR. HOOPES:

24 Q. So three things, if I can. So go back, sir, and
25 talk a little bit about what was in -- what you

1 thought was in Judge Joseph's mind. Right?
2 When you first spoke to the Federal authorities
3 about that issue, it was the February 12th,
4 2019. And you said, and I'm quoting you,
5 Jellinek stated that no idea what was in
6 Judge Joseph's mind during and after the side
7 bar conversation in the courtroom.

8 A. Again, that's correct. I did not know what
9 was in her mind. I only knew what my reading of
10 statements of the implications were. I had made
11 inferences.

12 Q. So that was in February of 2019; right?

13 A. Yes.

14 Q. So if we advance from 2019 to 2020, '21, '22,
15 '23, when you spoke to special counsel in
16 December of 2024, you said, and I'm quoting,
17 when asked whether he believed Judge Joseph
18 understood what was being said at side bar,
19 Mr. Jellinek responded yes.

20 A. That's correct.

21 Q. And you had no idea what was in --

22 JUDGE FABRICANT: Can he finish
23 his answer, please?

24 A. I made an inference, yes, that I understood
25 her intent.

1 Q. So when asked what Judge Joseph did or said that
2 caused him to say that she understood the side
3 bar discussion, Mr. Jellinek responded, she
4 said, yeah, that's what we'll do.

5 A. That's correct.

6 Q. Question by special counsel; right?

7 A. Yes.

8 Q. Okay. And you were asked about that same topic
9 in 2019, six years prior, you never said, yeah,
10 that's what we'll do. You never quoted a single
11 word from her in response; right?

12 A. I don't remember saying -- I don't remember
13 the details of the meeting. If that's what the
14 report from the FBI said, as I said earlier, I
15 believe those are fragments of our
16 conversations. The whole thing may have been
17 slightly different. But if that's what it says
18 there, then you can read that.

19 Q. Now, the second point is what you said to her.
20 So your very first interview, November 8th,
21 2018, with Federal authorities. You requested
22 that Judge Joseph release Medina Perez through
23 the lockup area because you thought it was okay
24 to be released from the lockup area. Is that
25 correct?

1 A. I got a little lost in your question. But
2 yes, I believe it was okay to be released from
3 the lockup area.

4 Q. And as we've discussed today, being released
5 from the lockup area was the place that they
6 were supposed to take him, into the lockup;
7 right?

8 A. Again, I don't know that policy. My reading
9 of the paragraph you put up is that he should be
10 released in the normal course. In Newton, that
11 would be up through the glass box on the first
12 floor.

13 Q. But you testified in front of the grand jury on
14 January 24th, 2019. You said that you thought
15 that Medina Perez could be released out the back
16 door if he was received from downstairs.

17 A. That's correct.

18 Q. You never said that in your first interview in
19 November; correct?

20 A. I don't remember what I did or didn't say. I
21 said that in that interview. I don't remember
22 every detail of the interview, but they may not
23 have written down every single word that I said.

24 Q. You didn't say anything in the second interview
25 on January 14th; correct?

1 A. Again, same answer. I don't have a specific
2 memory of what was said every word for word. I
3 do think I said it at some point. It may not be
4 in their notes.

5 Q. You just think that the Federal authorities who
6 were investigating the case missed something
7 that you said that was reported.

8 A. They may have. I don't know.

9 Q. So you remain practicing in Newton District
10 Court; correct?

11 A. Yes.

12 Q. And you knew that Mr. MacGregor had been called
13 to the grand jury; correct?

14 A. I found that out at some point, yes.

15 Q. And that he continued working for some period of
16 time.

17 A. Yes.

18 Q. And you'd see him almost every time you came
19 over to Newton; correct?

20 A. I don't remember exactly when he left Newton,
21 but I saw him a number of times after that day.

22 Q. Until he left.

23 A. Yes.

24 Q. And did you tell him that you were in talking to
25 Federal authorities in November?

1 A. I don't believe I told him that, no.

2 Q. Did you tell him you were in talking with
3 Federal authorities in January?

4 A. No, I don't believe I said that.

5 Q. Did you tell him you testified in front of the
6 grand jury?

7 A. No, I don't believe I told him that.

8 Q. Did you tell him that you were interviewed again
9 by Federal authorities in February?

10 A. Not to my memory, no.

11 Q. How about March; did you tell him you were in
12 for the last time in March of 2019?

13 A. I don't believe I told him. I don't
14 remember.

15 Q. But there was a retirement party for
16 Mr. MacGregor in the spring, right after your
17 last testimony; correct?

18 A. I don't know the timing of it. I know there
19 was a retirement, yes.

20 Q. And you were there.

21 A. I believe I was.

22 Q. You were there, shook his hand. Do you remember
23 that?

24 A. I might have been. Was it at the courthouse
25 or was it at a different location?

1 Q. Courthouse.

2 A. I probably was in the courthouse, yes.

3 Q. And you didn't say anything to him then.

4 A. I don't remember, no.

5 MR. HOOPES: No other
6 questions. Thank you.

7 JUDGE FABRICANT: Nothing
8 further. Thank you.

9 HEARING OFFICER: If I may, I
10 just have a couple clarifying questions.

11 Sir, if you -- I'll just read
12 it to you. I'm sure you remember it. From the
13 transcript. It APP043. This is after the off
14 the record conversation that Clerk Okstein says,
15 quote, there is a representative from ICE here
16 in the court inaudible to, to visit the lockup.
17 Judge Joseph, that's fine, I'm not going to
18 allow them to come in here but he's been
19 released on this.

20 I believe you testified that
21 your understanding from that was that ICE would
22 remain upstairs.

23 A. Yes.

24 HEARING OFFICER: What's --
25 Could you explain that to me.

1 A. By saying that I'm not going to allow them to
2 come in here, I understood that to mean within
3 the courtroom and within the lockup, because
4 that's sort of one space, versus the lobby,
5 which is another space.

6 HEARING OFFICER: But they were
7 specifically being -- asking to visit the
8 lockup, and she said that's fine.

9 A. I don't believe the "that's fine" refers to
10 them visiting the lockup.

11 HEARING OFFICER: Okay. Just
12 so I'm clear, the language, again, is
13 Clerk Okstein saying that there's a
14 representative from ICE here in the court
15 inaudible to, to visit the lockup. Judge
16 Joseph, that's fine, I'm not going to allow them
17 to come in here, but he's been released on this.

18 A. If that's what the transcript says, that
19 might be what she meant. That's not what I
20 interpreted.

21 HEARING OFFICER: Okay. You
22 interpreted it to mean that the ICE people
23 should stay upstairs in the lobby --

24 A. Yes.

25 HEARING OFFICER: -- of the

1 courthouse.

2 A. Yes.

3 HEARING OFFICER: Okay. The
4 other thing is, on April 3rd, when you were
5 speaking to Judge Heffernan, I believe you said
6 that you thought that she knew what had
7 happened -- that you thought that she should
8 know what happened, and I think you said
9 something to the effect particularly with
10 respect to the ADA.

11 A. Yes.

12 HEARING OFFICER: Could you
13 explain that.

14 A. Sure. The ADA has to be in front of the
15 judge every day in that court. And the ADA was
16 upset by the way things had happened the day
17 before, and I thought the judge should know that
18 someone in her courtroom had been aggrieved and
19 she'd have to see that person that day.

20 HEARING OFFICER: The ADA had
21 been aggrieved?

22 A. Yes.

23 HEARING OFFICER: Did you
24 explain how the ADA had been aggrieved?

25 A. Not in any great detail, no.

1 HEARING OFFICER: In any
2 detail? There was no --

3 A. If my memory's right, I said ADA Jurgens was
4 upset yesterday, ICE got mad at her, and she was
5 upset, I thought you should know about it.

6 HEARING OFFICER: And she
7 didn't ask what was she upset about?

8 A. No, not to my memory.

9 HEARING OFFICER: Okay. And by
10 the way, Mr. Medina Perez, he had property in
11 the lockup area.

12 A. Yes, he did. I believe he did.

13 HEARING OFFICER: Okay. And
14 finally, were you aware of the special Rule 211
15 that said you should not be going off the
16 record?

17 A. Not at that time, no, I wasn't aware that we
18 were not allowed to go off the record.

19 HEARING OFFICER: Anything
20 further, Counsel?

21 JUDGE FABRICANT: Nothing
22 further. Thank you.

23 MR. HOOPES: Nothing.

24 JUDGE FABRICANT: May this
25 witness be excused?

1 HEARING OFFICER: Yes. Thank
2 you.

3 JUDGE FABRICANT: And I'm sorry
4 to say, we don't have our next witness present,
5 because Mr. Hoopes was more efficient than we
6 predicted.

7 So we will try very hard to
8 have Ms. McDermott here at 10:00 tomorrow
9 morning. As you know, we are scheduled to have
10 Mr. Mendoza on Zoom at 11:00. We had asked
11 Ms. McDermott to come at 2:00, but we'll try to
12 get that moved up to 10:00.

13 HEARING OFFICER: Okay. That
14 would be very good, if you could.

15 MR. KEATING: 9:00?

16 HEARING OFFICER: No. We're on
17 for 10:00 tomorrow. Normally we'll be starting
18 at 9:00, but tomorrow we're starting at 10:00.

19 So with that, we're adjourned.
20 Thank you All.

21 (The proceedings adjourned
22 at 3:07 p.m.)
23
24
25

C E R T I F I C A T E

I, LISA L. CROMPTON, Registered
Professional Reporter, hereby certify that the
foregoing is a true and accurate transcript of my
stenographic notes of the proceedings in this
matter on the date and time specified in the
caption hereof.

IN THIS WITNESS WHEREOF I have hereunto
set my hand this 27th day of August, 2025.



LISA L. CROMPTON

REGISTERED PROFESSIONAL REPORTER

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CERTIFIED HEARING TRANSCRIPT (DAY 2)

COMMONWEALTH OF MASSACHUSETTS
COMMISSION ON JUDICIAL CONDUCT

COMPLAINT NUMBER 2019-22

VOLUME II

HEARING

~ BEFORE ~

HEARING OFFICER

DENIS J. McINERNEY, ESQ.

JUNE 10, 2025

10:00 A.M.

Boston, Massachusetts

Lisa L. Crompton, CSR (MA) (RI), RPR

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1 THE HEARING OFFICER: Good
2 morning Everybody. We're on the record.

3 My name is Denis McInerney.
4 I'm the hearing officer in this matter.

5 We're here in connection with
6 the Commission on Judicial Conduct's Complaint
7 Number 2019-22 against Judge Joseph.

8 Yesterday we had a viewing at
9 the Newton District Courthouse first thing in
10 the morning, and then we resumed here at the
11 Suffolk County Courthouse for opening statements
12 and testimony.

13 At the beginning, I would like
14 to ask both parties, to have counsel identify
15 themselves for the record, please.

16 JUDGE FABRICANT: Judith
17 Fabricant, special counsel for the Commission on
18 Judicial Conduct.

19 MS. MULVEY: Elizabeth Mulvey
20 for Judge Joseph.

21 MR. HOOPES: Tom Hoopes for
22 Judge Joseph.

23 MR. KEATING: Michael Keating
24 for Judge Joseph.

25 MR. NEFF: And Howard Neff for

1 the Commission on Judicial Conduct.

2 HEARING OFFICER. Thank you.

3 So with that, we concluded at
4 3:00 yesterday with the first witness, and I'll
5 ask special counsel to call the next witness.

6 JUDGE FABRICANT: All right.
7 And I'm about to do that.

8 I'd like to just offer the
9 document that we referred to late in the day
10 yesterday, proffer letter and the immunity
11 agreement, and I'd like to hand up -- So I have
12 a copy ready for marking and a copy with holes
13 punched in case you want to put it in your
14 binder. And if you would like to have it in the
15 electronic form, we can certainly send that.

16 HEARING OFFICER: Great. Thank
17 you very much.

18 No objection?

19 MR. HOOPES: No.

20 HEARING OFFICER: Thank you.
21 You're good.

22 JUDGE FABRICANT: And with
23 that, the Commission calls Shannon Jurgens.

24 And Mr. McInerney, I want to
25 again ask your permission. We have the next

1 witness ready on Zoom, which we expect to have
2 ready on Zoom at 11:00. And if he's ready at
3 11:00, we'll want to interrupt this witness.

4 HEARING OFFICER: Yes.

5 MS. MULVEY: That's fine.

6 HEARING OFFICER: Yes.

7 JUDGE FABRICANT: Thank you.

8 DIRECT EXAMINATION

9 BY JUDGE FABRICANT:

10 Q. Good morning.

11 A. Morning.

12 Q. Please state your name.

13 A. Shannon McDermott.

14 Q. And Ms. McDermott, please tell us your
15 professional background.

16 A. I started as an assistant district attorney
17 in 2015 for the Middlesex County DA's office,
18 where I worked for four years, then in September
19 of 2019, I worked at Keney & Sams, a small
20 office in Boston, until March of 2020, then I
21 went to the Suffolk District Attorney's office,
22 and then in May of 2021 I became an assistant
23 clerk magistrate at Malden District Court, which
24 I still am today.

25 Q. I'm going to ask you a lot of questions about

1 April of 2018. And I know that that's nearly --
2 actually, it's a little more than seven years
3 ago, so it's challenging to take your mind back
4 to that time, but that's what I need to ask you
5 to do.

6 As of April 2nd of 2018, what
7 was your position?

8 A. I was the only district attorney at the
9 Newton District Court.

10 Q. In that capacity, did you have a title of
11 supervisor?

12 A. Yes.

13 Q. And what was your role? What did you do?

14 A. So as I said, I was the only assistant
15 district attorney in Newton District Court, so I
16 was assigned to prosecute all of the cases that
17 came through that courthouse, supervise myself,
18 and the victim witness advocate, and then there
19 was one, you know, staff, support staff that
20 helped as well. That was really our whole
21 office there.

22 Q. So were you in the courtroom every day?

23 A. Yes.

24 Q. And every time a case was called before the
25 court, were you the person standing up?

1 A. Yes.

2 Q. Where was your office?

3 A. My office was in the Newton Police Station,
4 which the building is connected to the
5 Newton District Court. I was on the second
6 floor, which is within the detective bureau.

7 Q. Was there another office in the courthouse
8 associated with district attorney's office?

9 A. Yes.

10 Q. Who used that office?

11 A. The victim witness advocate.

12 Q. Did you ever work in that office?

13 A. I did not.

14 Q. As of April 2nd of 2018, how long had you been
15 in that role in the Newton District court?

16 A. I believe I went to Newton in March, so about
17 a month, few weeks.

18 Q. About how many arrests were there in the
19 Newton District Court? Say, how many a week?

20 A. Not many. Not many at all. Five, maybe,
21 would be average. I guess I could bring it up
22 to 10, but I think that would have been rare.
23 Just roughly. My best guess.

24 Q. When in court you worked in, not regular.

25 A. Exactly.

1 Q. Did you have occasion to deal with ICE
2 detainers?

3 A. Yes.

4 Q. And what was the practice about ICE detainers,
5 about the paperwork, who would get it, when,
6 how?

7 A. There is a couple ways. Sometimes I would
8 get it when I got the packet in the morning from
9 the police department, the police prosecutor,
10 with the new arrests for that day, sometimes it
11 would be in it, sometimes I know it gets sent to
12 the clerk's office, so sometimes I would get it
13 from them. There was a couple of different ways
14 that I could have obtained that paperwork.

15 Q. Would it be something that you would get?

16 A. Yes, yes, at that time.

17 Q. And were you aware in the course of the day who
18 else would get it, who else would have it?

19 A. I know that the clerk's office got it and
20 that it was always something given to the
21 security department, the court officer. I don't
22 know who else got it.

23 Q. When you're in the courtroom in Newton, where do
24 you sit or stand?

25 A. Well, the main courtroom, as you walk in,

1 there's a left -- there's a table on the left,
2 table on the right, and mine was on the left.

3 Q. And let's bring up the Photograph 509, which was
4 received in evidence yesterday.

5 Okay. So you see photograph on the monitor.
6 And can you just indicate on the photograph
7 where would be your place?

8 A. I think I was on the left.

9 Q. Okay. And what is -- If you're on the left, at
10 that chair and table, what's immediately to your
11 left?

12 A. With the glass?

13 Q. Yes.

14 A. That would be the dock, we call it, where a
15 custody comes up from lockup.

16 Q. So a person in custody would be in that dock.

17 A. Correct. Now that I'm looking at this, I
18 could have been in the left or right chair. I
19 don't remember.

20 Q. Do you see in the glass in the dock something
21 that looks like a metal circle?

22 A. Yes.

23 Q. What is that?

24 A. I don't know if it was a speaker or if it was
25 amplified it all. I can't remember. But it was

1 just a way for the person in the dock to hear
2 better in that area.

3 Q. And if an interpreter was helping a defendant in
4 the dock, where would the interpreter stand?

5 A. They would be outside along, you know, that
6 small alleyway on the left talking through that
7 metal piece.

8 Q. So when you say "outside," you mean outside the
9 dock?

10 A. Correct.

11 Q. And talking through that metal piece?

12 A. Correct.

13 Q. Again, taking your mind back to April of 2018.
14 When a defendant was in custody and was then
15 released from custody, how would that happen?

16 A. If they were going to be released, the court
17 officer, who -- you can't see it, but there
18 would be a little seat to the left outside the
19 photo where there's a court officer seat, and
20 they would just unlock the door to the dock and
21 they would walk right out.

22 JUDGE FABRICANT: Let's bring
23 up photo Number 513, Page 513.

24 Q. Does this show what you were just talking about?

25 A. Yes.

1 Q. And was what you can see, the piece of furniture
2 that you can see on the left, is that the court
3 officer's station that you're talking about?

4 A. Yes.

5 Q. And the door that you can see there that looks
6 like it's slightly ajar in the photo, is that
7 the door that you're talking about?

8 A. Yes.

9 Q. And -- So you said the court officer would go in
10 there and pick up restraints and would the
11 person just come out?

12 A. Yes.

13 Q. And then when the person's leaving the
14 courtroom, how does the person leave the
15 courtroom?

16 A. The door in the back of the courtroom.

17 JUDGE FABRICANT: And why don't
18 we bring up -- We'll get to the photograph that
19 shows that. There it is. And what number is
20 this?

21 Q. All right. So this is numbered Page 512 of the
22 appendix. Does this show the door that you're
23 referring to?

24 A. Yes.

25 Q. And Photograph 509 was already received in

1 evidence yesterday. Photograph 513 and 512, do
2 those fairly and accurately depict what you
3 described?

4 A. Yes.

5 JUDGE FABRICANT: And I offer
6 those in evidence.

7 MS. MULVEY: No objection.

8 Q. What if a defendant had property downstairs?
9 We're talking now about a defendant who doesn't
10 have to go check in with probation, doesn't need
11 the bail posted, is being released. What is the
12 property -- How would the defendant get the
13 property?

14 A. My best memory is one of the court officers
15 would just run it up to them.

16 Q. On that date, April 2nd of 2018, I want to draw
17 your attention to a case involving a
18 Mr. Medina Perez. Do you remember the charges?

19 A. Yes.

20 Q. What were the charges?

21 A. There was a possession of a drug charge, I
22 think it was B, but I don't remember, and a
23 fugitive from justice charge.

24 Q. And what's a fugitive from justice charge?

25 A. It's a mechanism to kind of hold somebody

1 when they have an out of state warrant, so the
2 language of the charge is fugitive from justice
3 from X state for Y charges.

4 Q. So it's a Massachusetts criminal charge for the
5 purpose of effectuating a warrant from another
6 state.

7 A. Correct.

8 Q. On that day, with respect to Mr. Medina Perez,
9 you said he had a drug charge and a fugitive
10 from justice charge. Were you also aware of an
11 ICE detainer?

12 A. Yes.

13 Q. And was there an ICE officer in the courtroom
14 for part of the day?

15 A. Yes. At some point they arrived.

16 Q. And did you speak with him?

17 A. Yes, at some point.

18 Q. And did he show you a photograph or a video or
19 something to that effect?

20 A. I don't remember a video. He had paperwork
21 that he showed me.

22 Q. Okay. Did you notify others of the presence of
23 ICE and the detainer?

24 A. I'm sure I mentioned the detainer. I don't
25 know whether I told others about the ICE officer

1 or not. There wasn't very many people there.

2 Q. Did you become aware at some point in the course
3 of the day that the ICE officer left the
4 courtroom?

5 A. Yes.

6 Q. And do you know what caused the ICE officer to
7 leave the courtroom?

8 A. My understanding is he was asked to wait
9 outside.

10 Q. Do you know who asked him to wait outside?

11 A. I think it was the judge asked someone to ask
12 him. I don't remember exactly how it happened,
13 I guess is my answer.

14 Q. Do you know where he went?

15 A. I think he just went right in the hallway.

16 Q. In the hallway, the main lobby of the
17 courthouse?

18 A. Correct.

19 Q. Was the case called, the Medina Perez case
20 called a number of times over --

21 A. Yes.

22 (INTERRUPTION)

23 HEARING OFFICER: Okay. It's
24 not playing anymore; so...

25 JUDGE FABRICANT: Okay.

1 Q. So the case was called a number of times over
2 the course of the day?

3 A. Yes.

4 Q. And was it then put on for further call?

5 A. Several times, yes.

6 Q. And during the course of the morning, what
7 information did you have about the Pennsylvania
8 warrant?

9 A. I knew that it was not -- I guess
10 Pennsylvania OUI/DUI charge. I'm sure I had a
11 piece of paper reflecting that. I don't
12 remember what other supporting documents I had
13 for that.

14 Q. Did you at some point in the morning inform the
15 court that you were going to ask to detain the
16 defendant on the fugitive from justice charge?

17 A. Yes, at first I did.

18 Q. And why was that your position at that point?

19 A. So generally the practice that we were taught
20 in the DA's office when there's a fugitive from
21 justice charge, you reach out to the out of
22 state body, sheriff's office, the police and see
23 if it's something that they want to come
24 extradite, come pick the person up for. Most
25 times they say yes. Sometimes they say no.

1 When they say yes, we ask that we hold without
2 bail pending the out of state authorities coming
3 to pick up the person to face the warrant in the
4 other court -- in the other state.

5 Q. And in the course of the morning, when you were
6 taking that position, had you yet been in touch
7 with the Pennsylvania authorities?

8 A. I don't recall. I don't remember.

9 Q. At some point later on in the course of the day
10 did you get more information? Did you get a
11 photograph?

12 A. Yes.

13 Q. And did you review the photograph with the
14 defendant's attorney?

15 A. I reviewed it with a couple of people. But
16 it was the booking photo from Pennsylvania is
17 what someone gave me and I can't remember who.
18 That is what I reviewed with definitely a couple
19 people.

20 Q. And in the course of the morning, did you take a
21 position regarding bail on the Massachusetts
22 charges?

23 A. Yes. I was not going to be asking for bail
24 on the possession charge.

25 Q. And why was that?

1 A. At the time in my office, the mandate was on
2 nonviolent misdemeanors. We were not to ask for
3 bail.

4 Q. And I want to just call your attention to a
5 transcript of the proceeding. This is
6 Appendix G. I want to take a look at Page 39 at
7 the bottom of the page and going into Page 40.
8 And you have in front of you a book that has all
9 of the appendices that have been received in
10 evidence. So if it's easier to look at that,
11 rather than refer to the monitor, that's fine.

12 So looking at Page 39, at the
13 bottom and going over to the top of Page 40, so
14 do you see where, five lines from the bottom,
15 the judge asks Commonwealth with respect to new
16 charges, is there going to be a request? What
17 did you understand, is there going to be a
18 request?

19 A. A bail request.

20 Q. Okay. And what did you say?

21 A. I said no, Your Honor.

22 Q. And the judge says okay. And what did you say?

23 A. I said, well, not on the drug possession.

24 Q. And the judge says that the possession that --
25 and then what did you say?

1 A. If they're treated separately, I'm not going
2 to ask that he's held without.

3 Q. And what did you mean by "if they're treated
4 separately"?

5 A. The state charges are the Newton -- I don't
6 remember if it was state police or Newton. The
7 charge versus the fugitive from justice charge.

8 Q. And then the judge says, right on the fugitive.
9 What did you say?

10 A. But if he's not, I would have bail request.

11 Q. So if he's not what?

12 A. So sometimes you argue -- Sometimes a judge
13 won't hold somebody without bail on a fugitive
14 charge, in which case I would have asked for a
15 number on the same.

16 Q. Bail on the fugitive charge.

17 A. Correct.

18 Q. But not bail on the misdemeanors.

19 A. No.

20 Q. All right. Now, in the afternoon, did
21 Attorney Jellinek appear for the defendant?

22 A. Yes.

23 Q. And at the beginning of when he appeared, did
24 you and he go to side bar?

25 A. At some point we went to side bar. I don't

1 recall at what point that was.

2 Q. So we're going to bring up a transcript again,
3 starting at Page 40, and we're going to go to
4 2:48:13 p.m. And we're going to play the
5 recording. The initial part of the recording is
6 pretty good, but you can see the transcript. So
7 we're going to play the recording at
8 2:48:13 p.m. until the end of that first clip.

9 (RECORDING PLAYING)

10 Q. So does that refresh your memory that
11 Mr. Jellinek asked to go to side bar and you
12 went to side bar?

13 A. Yes.

14 Q. Did you have an understanding of why you were
15 going to side bar?

16 A. No, not before.

17 JUDGE FABRICANT: Let's put up
18 Photograph Number 511 if we could.

19 Q. Is this where -- This is Number 511 of
20 Appendix U. This was admitted in evidence
21 yesterday. Does this show where you would be at
22 side bar?

23 A. Yes.

24 Q. And where would the judge be when you're at side
25 bar?

A. The judge would just stay in the chair and kind of shuffle over to the, closer to the right side of the photograph, and the attorneys would stand on the outside, on the right side.

Q. And is there a microphone for the recording system at that part of the bench?

A. Yes. I can't see it in the photo, but there's the little black microphone.

Q. Now, we're going to go back to play the recording. Now that we're at side bar, it's much harder to hear. But again, we have the transcript starting with at the bottom of Page 40 and going over to page 41.

(RECORDING PLAYING)

Q. So looking at the transcript, at the beginning, Judge Joseph says something inaudible is dismissed. What was it that was being dismissed?

A. The fugitive from justice charge.

Q. And then she says, so it's my understanding that ICE is here.

A. Yes.

Q. Attorney Jellinek says, so there's fugitive.
Judge Joseph says, if there's no warrant. What
did you understand that to be referring to?

1 A. If I was going to dismiss the fugitive from
2 justice charge, then there's no out of state
3 Pennsylvania warrant.

4 Q. And you then said yes; is that right?

5 A. Yes.

6 Q. And then Attorney Jellinek says, there isn't
7 something inaudible that we can tie this to him.
8 What do you understand that to refer to?

9 A. I believe the Pennsylvania warrant.

10 Q. And then you said, I don't think it's him. Is
11 that right?

12 A. Yes.

13 Q. And was that also in reference to the
14 Pennsylvania warrant?

15 A. Correct.

16 Q. And Judge Joseph said, okay. And then
17 Judge (verbatim) Jellinek says, ICE is convinced
18 that this guy, and he goes on and talks about
19 his discussion with the ICE agent and what he
20 saw in the records. And he says, ICE is going
21 to pick him up if he walks out the front door,
22 but I think the best thing for us to do is to
23 clear the fugitive issue, release him on a
24 personal, and hope he can avoid ICE. You said,
25 I don't think ICE is really my -- Is that right?

1 Is that what you said?

2 A. Yes.

3 Q. What did you mean by that?

4 A. I think I finished it somehow in the
5 transcript saying, ICE has nothing to do with my
6 role as a prosecutor.

7 Q. And so what was your view about any discussion
8 relating to this?

9 A. That I did not have an opinion or a standing,
10 it's not my job, doesn't have anything to do
11 with my job.

12 Q. Were you neutral about it?

13 A. Yes.

14 Q. So a little later the judge says, the other
15 alternative is if you need more time to figure
16 this out until tomorrow. Attorney Jellinek says
17 something inaudible. Judge Joseph says,
18 difference. And then you said, there's a
19 detainer attached to my paperwork but I feel
20 like that that's separate and apart from what my
21 role is. Was that a reiteration of you're
22 neutral about it?

23 A. Yeah. I think I was finishing my thought
24 that ICE isn't my business.

25 Q. And then Attorney Jellinek says, there's an ICE

1 detainer, so if he's bailed out from Billerica,
2 ICE will pick up him. Judge Joseph says, ICE is
3 going to get him. Judge Joseph -- says
4 something inaudible. Judge Joseph says, what if
5 we detain him. What was your understanding of
6 what was going on in that conversation between
7 Attorney Jellinek and Judge Joseph?

8 A. Just --

9 MS. MULVEY: Objection.

10 Q. Well, did you have an impression of what
11 Judge Joseph was conveying in that conversation?

12 MS. MULVEY: Objection.

13 HEARING OFFICER: I'm going to
14 allow it. I'm going to allow it.

15 JUDGE FABRICANT: Allow the
16 witness to answer.

17 HEARING OFFICER: Yes.

18 A. Just for both Judge Joseph and
19 Attorney Jellinek, just options to have him not
20 to leave with ICE, to be walked out into the
21 hallway.

22 Q. Discussing options.

23 A. Yes.

24 Q. Then Attorney Jellinek says, are we on the
25 record. Judge Joseph says, Larry, can we go off

1 the record for a minute. Larry is
2 Clerk Okstein?

3 A. Correct.

4 Q. And Clerk Okstein says, what's that.
5 Judge Joseph says, are we off the record.
6 Clerk Okstein says, we're on the record.
7 Attorney Jellinek says, can we go off the record
8 for a minute.

9 Going off the record in the
10 course of a matter on a case, was that something
11 you had experienced before?

12 A. No.

13 Q. Do you have a feeling about that?

14 A. I had never experienced that before while a
15 case is being discussed.

16 Q. Were you concerned about it?

17 A. Yes.

18 Q. And the conversation that had occurred with
19 respect to the options to have him leave without
20 encountering ICE, did you have a feeling about
21 that, an impression about that?

22 A. I just -- It wasn't my role. I didn't
23 think it was not really a proper conversation,
24 but I stayed out of it.

25 Q. But you didn't think it was a proper

1 conversation.

2 A. Correct.

3 Q. Did it make you uncomfortable?

4 A. Yes.

5 Q. When you went off the record, the three of you
6 went off the record, tell us everything you can
7 remember about the discussion off the record.

8 A. I don't remember a lot of what was on the
9 record and what was off the record. The best I
10 can say was sort of a continuation of the last
11 few pieces of conversation. You know, just ICE
12 being there. Like I don't remember any quotes
13 or any direct statements at all. It was just a
14 continuation of the same type of conversation.

15 Q. So without quotes, do you have a general sense
16 of the substance or do you have a general sense
17 of the substance of the conversation?

18 A. Yes.

19 Q. What was your sense -- What is your sense of the
20 substance of the conversation?

21 A. Just different options to have the individual
22 not be taken by ICE.

23 Q. And what sort of options?

24 A. To the best of my memory, I think like if
25 there is a bail put on him. I, I can't be

1 certain. I don't remember.

2 Q. Okay. Would looking at your grand jury
3 testimony help you?

4 A. Yes.

5 Q. So let me ask you to look in particular --
6 There's copy of your grand jury testimony. I
7 would ask you to look particularly at
8 Pages 45 to 46.

9 HEARING OFFICER: Yes.

10 Q. And just to establish, did you testify before
11 the Federal grand jury on January 10, 2019?

12 A. I did.

13 Q. And this is, as far as you can tell, an accurate
14 representation of your testimony?

15 A. Yes, it is.

16 Q. So 45 to 46. And the bottom of 45 is where I
17 think the most pertinent part starts, but look
18 at however much you need to make sure you
19 understand the contents.

20 (PAUSE)

21 A. My memory's refreshed.

22 Q. Okay. So what's the best you can remember now
23 that your memory's refreshed of what you heard?

24 A. Now that I reviewed this, I remember also
25 saying at that time -- I didn't remember any

1 direct quote or statements -- but that was the
2 gist was Attorney Jellinek saying I have a plan.
3 I don't know if he used the word "plan." But
4 that was the impression that I got.

5 Q. Okay. And do you remember --

6 HEARING OFFICER: If I can just
7 interrupt one second. I'm hearing another
8 person speaking, and I'm just not following what
9 that could be.

10 If we could take a two-minute
11 break so that we can try to solve this, that
12 would be helpful. Sorry to interrupt.

13 JUDGE FABRICANT: Okay.

14 HEARING OFFICER: We're off the
15 record for a minute while we try and solve this.
16 Thank you.

17 (PAUSE)

18 HEARING OFFICER: We're back on
19 the record.

20 And we think Mr. Neff has
21 solved this particular riddle, so you may
22 continue with your questioning. Sorry to
23 interrupt.

24 Q. Ms. McDermott, I think what you had just told us
25 was that you remembered Mr. Jellinek saying

1 something to the effect of, but not the exact
2 words, I have a plan.

3 A. Yes.

4 Q. Is that your best memory of what he said off the
5 record?

6 A. Yes.

7 Q. And did you hear Judge Joseph saying something
8 off the record?

9 A. Just I think before he said that, it was
10 something to the effect of, you know, what could
11 we do and him saying, I have a plan, it's all
12 set. Logistic.

13 Q. And again, did you have concern about that?

14 A. Yeah. The conversation made me
15 uncomfortable.

16 Q. And why did it make you uncomfortable?

17 A. Because my training was that ICE, that just
18 didn't play a calculus in a criminal case.

19 Q. In the course of the discussion at side bar,
20 whether on or off the record, was there
21 discussion about where the ICE officer was
22 waiting?

23 A. At some point in the day there was. I don't
24 remember when.

25 Q. So you're not sure whether it was during that

1 side bar.

2 A. I don't remember.

3 Q. Did you say anything -- Was there any reference
4 to an immigration lawyer, that you recall?

5 A. Not that I recall.

6 Q. And now I want to turn back to the recording and
7 back to the transcript, starting when everybody
8 went back on the record and everybody went back
9 to open court. So we're going to play the
10 recording starting at 2:50:17 p.m., and this
11 appears at Appendix G, Pages 41 and 43. It's
12 2:50:57. Pardon me.

13 (RECORDING PLAYING)

14 Q. So Ms. McDermott, at the beginning of that
15 section Mr. Jellinek says, after a search of the
16 various FBI numbers, Social Security numbers, as
17 well as obtaining a photo from Pennsylvania, we
18 don't believe that this gentleman is the same
19 gentleman as on the fugitive from justice
20 warrant. And then you said, with the
21 information I have, I don't think there's enough
22 tying to the Pennsylvania warrant but that there
23 are other out of state records, I do believe
24 that some of them belong to this individual, but
25 that's not what's at issue, and then shortly

1 thereafter you said you were going to dismiss
2 the fugitive from justice charge.

3 Was there something a little
4 off sequence in his saying it and then you
5 saying it?

6 A. I mean, yes. I am the only person that can
7 move to dismiss it.

8 HEARING OFFICER: I'm sorry.
9 Could you speak into the microphone.

10 THE WITNESS: Oh, sorry.

11 A. I just said that the ADA is the only person
12 that can make a decision to dismiss it. I mean,
13 obviously an attorney can ask for something to
14 be dismissed. But I moved to dismiss it, so
15 usually I would be the one to say that.

16 Q. And then later on, a little bit further out on
17 Page 42, Mr. Jellinek says, I would ask that he,
18 I believe he has some property downstairs, I'd
19 like to speak with him downstairs with the
20 interpreter if I may.

21 In your experience, was it
22 unusual at the Newton District Court, was it
23 unusual for a defendant and the interpreter,
24 after the defendant had been ordered released,
25 to go back downstairs?

1 A. Yes.

2 Q. Then over on the top of Page 43, the clerk says
3 to the judge, there was a representative from
4 ICE here in the court to, to visit the lockup.
5 And the judge says, that's fine, I'm not going
6 to allow them to come in here but he's been
7 released on this. How did you understand that?

8 A. Just that the clerk was alerting that --
9 everyone that the ICE officer was there, and
10 that the judge said that's fine, but he's not
11 going to come into the courtroom or I guess
12 lockup, if that's what the clerk is referencing
13 as well.

14 Q. So I want to make sure I understand what you
15 just said. Did you understand the judge to be
16 saying something about whether ICE could go into
17 lockup?

18 A. I don't have a memory of that. In reading
19 the transcript, it was just that the ICE officer
20 wasn't going to be permitted to come into the
21 courtroom.

22 Q. And then later on, about six bullet points from
23 the end, the judge -- the court officer asks,
24 he's released, the judge says he is,
25 Mr. Jellinek asked if the interpreter can

1 accompany him downstairs to further interview
2 him.

3 In your experience in the
4 Newton District Court with a defendant who has
5 been ordered released, was that unusual?

6 A. Yes.

7 Q. All right. Now, what happened next?

8 A. I don't know how long it took me, but I
9 finished my business, and then I was going to
10 walk back to my office, so I went out into the
11 hallway, I saw the ICE officer was still there.
12 I don't recall how much later after this
13 recording ended at 2:55. I just was, oh, you're
14 still here. And that's when I learned that the
15 individual hadn't come out -- come up out of
16 lockup.

17 Q. So before that, did the court officer open the
18 door to the dock and let Mr. Jellinek and the
19 interpreter in and let everybody go downstairs?

20 A. Yes.

21 Q. And did you see that happen?

22 A. I'm sure I did. I can't remember.

23 Q. Okay. So when you went out into the hallway,
24 you saw that the ICE officer was still there,
25 did you have some conversation with the ICE

1 officer?

2 A. Yeah. I just, oh, you're still here, has he
3 not come up yet, you know, they could still be
4 talking, something like that.

5 Q. After what you had heard in the courtroom, did
6 you have any -- what was your expectation as to
7 where the defendant was going to come out?

8 A. Right up the back door of that main courtroom
9 that you showed in one of the earlier exhibits.

10 Q. What you had previously experienced in Newton.

11 A. Correct.

12 Q. Did you have any thought that there was another
13 way he might be released?

14 A. No.

15 Q. Did you say anything to the ICE officer as to
16 where he would come out?

17 A. I just said he has to come out this way.
18 Kind of didn't know what to tell him. This is
19 the only way out.

20 Q. Were you aware of any other way out?

21 A. I mean, unless you're leaving in custody, no.

22 Q. And did you wait with him for some period of
23 time?

24 A. I did.

25 Q. Did you become concerned?

1 A. Yeah. It was just a really long time. So I
2 decided, huh, I wonder what's going on.

3 Q. Did you do something to inquire?

4 A. At some point I -- The victim witness
5 advocate's office is downstairs. I think he
6 came up. And I just said, I was like, Mike, is
7 there another door that they can -- you know,
8 down there. I think he just said I don't think
9 so.

10 Q. And did he go to check?

11 A. He may have. I can't remember.

12 Q. Okay. Did you see Mr. Jellinek again that day?

13 A. Yes.

14 Q. Did you have some interaction with him?

15 A. Yes.

16 Q. Tell us about that, please.

17 A. At some point he came out the way I expected
18 everyone to come out of the main courtroom, to
19 the door, and he had a property bag in his hand.
20 And then I can't remember if I said something to
21 him before or after he went into one of the
22 conference rooms in the hallway, and came back
23 out and left. And at some point I put it
24 together what had happened. And I don't recall
25 if somebody else said something, too, or if I

1 just figured it out and I -- At some point -- I
2 can't remember if it was still inside the
3 hallway or right outside the front door, but I
4 said I know what you did and that was not the
5 right thing to do.

6 Q. What did you figure out?

7 A. That he had somehow facilitated the
8 individual leaving.

9 Q. After that happened, did you call your
10 supervisor?

11 A. Yes.

12 Q. And why then?

13 A. Because it was a very unusual day, and the
14 ICE officer is very upset, it was not, you
15 know -- An individual was let out the back door,
16 and it was something that I felt I needed to
17 report to my supervisor, because I was
18 uncomfortable with what had happened.

19 Q. What was your overall impression of what had
20 happened?

21 A. Just that it was wrong. He was -- Yeah.

22 Q. Did it affect -- Did the experience affect your
23 view of the court?

24 A. Of the -- In general? No, not really.

25 Q. Did you have a view about Judge Joseph's role?

1 A. I mean, I think I've said it before.
2 Misjudgment, misguided, attempted to do what she
3 thought was right.

4 JUDGE FABRICANT: All right.
5 Thank you. I have nothing further for this
6 witness.

7 What I'd like to do, if
8 everyone is in agreement, is have her step down
9 and take Mr. Mendoza on Zoom if he's here.

10 HEARING OFFICER: I assume that
11 makes sense from your perspective as well.

12 MS. MULVEY: Yes. That's fine.

13 HEARING OFFICER: So we'll take
14 a two-minute break while you try to plug us in
15 by Zoom.

16 JUDGE FABRICANT: Thank you.

17 HEARING OFFICER: I'd ask that
18 the witness -- if I could ask the witness not to
19 talk about your testimony to anybody or this
20 hearing during this break for you. We'll see
21 you back probably in an hour or so. Thank you.

22 (PAUSE)

23 HEARING OFFICER: We're back on
24 the record.

25 JUDGE FABRICANT: We're back on

1 the record?

2 HEARING OFFICER: Yes, we're
3 back on the record.

4 And I'll leave it to you to
5 call the witness, and then I'll swear him in.

6 JUDGE FABRICANT: All right.
7 So the Commission calls Eric Mendoza.

8 HEARING OFFICER: Thank you.

9 Mr. Mendoza, can you hear me?
10 Mr. Mendoza, can you hear me? Hello?

11 MR. NEFF: The only
12 microphone --

13 HEARING OFFICER: Is there only
14 one microphone?

15 JUDGE FABRICANT: Mr. Mendoza,
16 are you able to hear the hearing officer?

17 THE WITNESS: No. I can hear
18 you.

19 HEARING OFFICER: I'll try one
20 more time. Mr. Mendoza, can you hear me?
21 Mr. Mendoza? Can you hear me?

22 MR. NEFF: The only microphone
23 is on the laptop.

24 HEARING OFFICER: If you could
25 just bring the laptop up, that would be probably

1 the best.

2 (PAUSE)

3 HEARING OFFICER: Can you hear
4 me, Mr. Mendoza?

5 THE WITNESS: Yes, sir.

6 HEARING OFFICER: If it's okay,
7 under these circumstances, just for this
8 particular part of the proceeding.

9 Good morning, Mr. Mendoza.
10 First, let me swear you in. If you would please
11 raise your right hand.

12 ERIC MENDOZA, SWORN

13 HEARING OFFICER: All right.
14 Thank you.

15 I just have -- Because this is
16 the only Zoom testimony, I have a few additional
17 questions just to make sure we've covered these
18 things. And we do this, Mr. Mendoza, for any
19 witness who is testifying remotely.

20 Could I ask, where are you
21 physically located at this time?

22 A. I'm presently in Las Cruces, New Mexico.

23 HEARING OFFICER: Okay. Is
24 anyone physically in the room with you at this
25 time?

1 A. No, Your Honor.

2 HEARING OFFICER: And what
3 materials and devices do you have with you right
4 now?

5 A. I think just my phone. I'm not too sure
6 about my laptop because it's old.

7 HEARING OFFICER: Got it.
8 And please tell us, what is
9 currently on your screen?

10 A. I see you and I believe I'm on the screen
11 with my name on it.

12 HEARING OFFICER: Okay. And
13 are you in communication with anyone other than
14 the people who are conducting your examination
15 and myself today right now?

16 A. No, no.

17 HEARING OFFICER: Okay. If
18 anything changes in this regard during your
19 testimony, please let us know.

20 A. Yes, Your Honor.

21 HEARING OFFICER: Thank you.
22 With that, I will return the
23 laptop.

24

25

1 DIRECT EXAMINATION

2 BY JUDGE FABRICANT:

3 Q. Good morning, Mr. Mendoza.

4 A. Good morning.

5 JUDGE FABRICANT: We're going
6 to pause for just a moment while Mr. Neff plugs
7 in the computer in a different location.

8 (PAUSE)

9 Q. All right. Mr. Mendoza, you recall, we met on
10 Zoom before. I'm Judith Fabricant. I'm serving
11 as special counsel for the Commission in this
12 case.

13 A. Yes.

14 Q. And now would you tell us what you see on your
15 screen besides yourself.

16 A. Well, I'm in the top corner and you're in my
17 main screen with -- I don't know -- maybe people
18 in the background or a jury. I'm not sure.

19 Q. Okay. You see me and people in the background.

20 A. Yes, ma'am.

21 Q. All right. Thank you.

22 Mr. Mendoza, would you please tell us your
23 professional background.

24 A. Well, I was a certified or vetted interpreter
25 for about, about 20 years.

1 Q. And in Massachusetts, with the Massachusetts
2 court system, what was your role?

3 A. Pretty much a vetted interpreter where I was
4 able to do certain cases, like moving
5 violations, things that dealt with domestic
6 issues. But major trials was -- although I may
7 have been able to do them, I wasn't there in the
8 process yet. So I was a vetted, like I was a
9 vetted interpreter.

10 Q. So was vetted a credential that was not at the
11 level of certified?

12 A. According -- Based on the courts. Correct.
13 Yes.

14 Q. Okay.

15 A. But I was certified in other aspects of
16 interpretation.

17 Q. And what is the role of an interpreter in a
18 courtroom?

19 A. To basically give the information or
20 interpret what is being said in and around the
21 defendant or the client.

22 Q. And who are you interpreting for?

23 A. Usually -- I forget the, I forget the acronym
24 that they use. But it's basically people who do
25 not speak or have difficulty communicating in

1 English from Spanish.

2 Q. So the person who needs assistance with English,
3 is that the person who you are interpreting for?

4 A. Yes. Yeah. If it has to do with Spanish,
5 yes.

6 Q. And when that person speaks to the court, to the
7 judge, to the lawyer, are you then interpreting
8 what that person says?

9 A. Correct. Yes.

10 Q. Did you for some period of time serve as an
11 interpreter in the Newton District Court?

12 A. In the Newton District Court?

13 Q. Yes.

14 A. Yes.

15 Q. Okay.

16 A. Yeah.

17 Q. And how long a period did you do that?

18 A. I don't know. Like maybe half a dozen to a
19 dozen times I was in that courtroom.

20 Q. Okay. And I should put the question a little
21 differently. How long a period did you serve as
22 an interpreter for the Massachusetts court
23 system?

24 A. Oh. I don't know. Anywhere between a year
25 and a half, two years, maybe.

1 Q. Okay. And then you said you were in the
2 Newton District Court, you said you thought half
3 a dozen times?

4 A. Yeah. Newton. Maybe more. Yeah.

5 Q. In the Newton District Court, do you remember
6 the physical arrangement of the courthouse?

7 A. Yeah. Yes.

8 Q. And I want to take you back to April of 2018.

9 A. All right.

10 Q. I know that's a little more than seven years
11 ago.

12 A. Yeah.

13 Q. A lot has happened since.

14 A. Yeah.

15 Q. But I'm going to ask you to put your mind back
16 into that time frame.

17 A. Okay.

18 Q. So in that time frame, if you were interpreting
19 in the first session in the Newton District
20 Court, the main courtroom on the first floor, --

21 A. Yes.

22 Q. -- if there was a defendant in custody, and if
23 the defendant was in the dock, where would you
24 be?

25 A. Before or while I'm interpreting?

1 Q. While you're interpreting, if the defendant is
2 in the dock.

3 A. Okay. If the defendant's in the dock, it's
4 like a concealed area, like some type of
5 plexiglass or something like that, and then
6 there's a little cutout area, and I would stand
7 usually facing the courtroom and listening to
8 the judge or listening to whoever is speaking or
9 proceeding and letting the client know through
10 the, through the little hole in the dock, the
11 dock.

12 Q. If the defendant is not in the courtroom, is
13 being brought up, you're waiting for him, but
14 he's not yet in the courtroom, he's not yet in
15 the dock, and there is something going on, where
16 would you be?

17 A. Well, in Newton, it was, it was different.
18 It was set up differently. Like there was a
19 chair specifically set up for the interpreters.
20 So that was usually -- you're facing the court,
21 usually on the left side. There could have been
22 one on the right side as well, but usually on
23 the left side in that particular courtroom.
24 Normally, in most courtrooms you're sitting
25 behind the defendant -- the defense or the

1 prosecuting attorney, they have a section for
2 you to sit at.

3 Q. And is that always where you were or did you at
4 times move around?

5 A. Yeah. I was able to move around. And as the
6 hearings went through the day, I might sit
7 closer towards either the attorneys, just to be
8 able to listen and approach the court quicker.

9 Q. I want to call your attention to April 2nd of
10 2018.

11 A. Okay.

12 Q. Were you serving as interpreter in Newton that
13 day?

14 A. I believe so, yes.

15 Q. And do you remember a case involving a
16 Mr. Medina Perez?

17 A. Yes.

18 Q. Do you remember that that case was called
19 several times over the course of the day --

20 A. Yes.

21 Q. -- and then set for further call?

22 A. Yes.

23 Q. Were you aware that there was an ICE officer
24 present?

25 A. Yes.

1 Q. Were you aware that there was a detainer for
2 Mr. Medina Perez?

3 A. Only because it was shown to me, yes.

4 Q. It was shown to you.

5 A. Yes.

6 Q. Now, in the afternoon, the afternoon session,
7 after a series of calls in the morning, I want
8 to call your attention to the afternoon session,
9 and do you recall that at one point in the
10 afternoon session the lawyers went to side bar
11 and spoke with the judge at side bar?

12 A. Yes.

13 Q. And at that point, when they started the side
14 bar conversation, was the defendant,
15 Mr. Medina Perez, was he in the dock or not in
16 the dock?

17 A. I, I don't believe he was.

18 Q. Okay. And when they started, when he was not in
19 the dock, where were you while you were waiting
20 for the defendant?

21 A. Towards the left, close to the table of where
22 the attorneys sit, kind of set away. Like you
23 don't -- I don't have to listen to what's being
24 said or what the judge is doing at side bar.
25 Sometimes you can hear. Sometimes you can't.

1 But I was trying to set back -- I don't know --
2 just being respectful. I wasn't right there.
3 Nobody had to say, hey, move away or anything.

4 Q. Were you able to hear some of what was being
5 said at side bar?

6 A. A little bit.

7 Q. Who did you hear speaking?

8 A. I heard the judge speaking. And both
9 attorneys were there, but the gentleman was
10 speaking to her more. That's what I recall.

11 Q. The male attorney more than the female attorney?

12 A. Yes, ma'am.

13 Q. And what did you hear?

14 A. I mean, I -- It was a while ago. I know that
15 the judge wasn't happy with ICE being there,
16 wasn't happy with the fact that he might have to
17 be released or let go or -- and that he was
18 going to be detained. So yeah. That's pretty
19 much what I heard.

20 Q. When you say "the judge wasn't happy," what was
21 it that gave you the impression that the judge
22 wasn't happy with that situation?

23 A. She didn't like the fact that ICE was around.
24 I don't even think they were in the courtroom.
25 But the fact that ICE was there, I don't think

1 she was like happy about that.

2 Q. Was there -- Were there words or tone that gave
3 you that understanding?

4 A. Yeah. Yeah. I don't -- I can't say
5 specifically what she said. But she didn't like
6 the fact, regardless of what he did, this person
7 was going to be detained by ICE.

8 Q. And tell us -- I know you don't remember exact
9 words. We all understand that it was a long
10 time ago.

11 A. Yeah.

12 Q. The best you can, what was the substance of what
13 you heard?

14 A. What was the what?

15 Q. The substance of what you heard. The gist of
16 what you heard, the best --

17 A. Oh, the gist of what I heard was that she
18 wasn't happy, and there was possibly an
19 agreement to -- instead of the client -- You're
20 usually released out the front. So if somebody
21 leaves the courtroom, that's, that's -- those
22 case has been heard. They usually leave the
23 front of the court. Maybe go and sign some
24 papers or something. But she was suggesting
25 that this particular person be let go out the

1 back. Now, I -- That's like the gist of what I
2 heard. But that he'd be let go out the back or
3 a different way.

4 Q. After the proceeding came to its conclusion and
5 the defendant was ordered released, what
6 happened?

7 A. Well, I believe, I believe the defendant had
8 to be brought out and then notified that
9 something was going to happen or that he was
10 going to be released. But I don't think he knew
11 that he was going to be released out the back
12 door. So when he came back up, there was that
13 discussion, and then when he went back down, and
14 that's when, that's when he was released.

15 Q. Who went back down?

16 A. I believe the court officer was in front, the
17 defendant was in front of me, I was in back of
18 the defendant, and the attorney was behind me.

19 Q. And had you previously had occasion to go down
20 to the lockup after a defendant had been ordered
21 released?

22 A. In Newton or --

23 Q. Yeah, in Newton.

24 A. -- in the court at all? No.

25 Q. In the Newton District Court.

1 A. No, no.

2 Q. And on the way downstairs, did you have any
3 conversation with the attorney?

4 A. The attorney asked me if I was good with all
5 this. And I just said to him, that's not for me
6 to make a decision or judgment on what the judge
7 decides, I'm just here to like interpret and be
8 unbiased.

9 Q. When you went -- When you were downstairs, --

10 A. Yes.

11 Q. -- did you interpret something briefly? And I'm
12 not asking for what. Did you interpret
13 something briefly before the attorney and the
14 defendant -- I'm not asking for what was said.
15 But did you interpret something briefly?

16 A. Yes.

17 Q. And about how long did that take?

18 A. Couple minutes.

19 Q. Okay. And then what happened?

20 A. Are you asking me what I interpreted and what
21 the reaction was when I interpreted or...

22 Q. No. I don't want to, I don't want you to tell
23 us what you interpreted. But after you
24 interpreted, what was the next thing that
25 happened?

1 A. The defendant went down the hallway, took a
2 right, the door was open for him, and he went
3 out the back door.

4 Q. Did what happened there that day affect your
5 view of the court?

6 A. Yes, ma'am.

7 Q. Tell us how.

8 A. You're doing your job for like justice and to
9 do the right thing. And when a decision is
10 made, especially coming from a judge, you kind
11 of like wonder if everything you see or hear --
12 you kind of like lose faith in the system a
13 little. You'd like to think that it's a
14 certain -- it's just happening right there, but
15 I've noticed that it's happening throughout the
16 country.

17 JUDGE FABRICANT: All right.
18 Thank you, Mr. Mendoza. I have nothing further.
19 Mr. Hoopes will have some questions for you.

20 THE WITNESS: Okay.

21 CROSS-EXAMINATION

22 BY MR. HOOPES:

23 Q. Good morning, Mr. Mendoza.

24 A. Good morning.

25 Q. My name is Tom Hoopes, and I represent

1 Judge Joseph.

2 A. Okay.

3 Q. And sir, you said you were a vetted court
4 reporter -- or court interpreter in the
5 Massachusetts system for about a year and a
6 half; right?

7 A. Yes, sir.

8 Q. And that would have been from when to when?

9 A. I'm not sure of the dates. It would have
10 been about, about a year and, about a year and
11 four months prior to this, prior to this case.

12 Q. And you were working at the time for a woman
13 named Ms. Barrios; is that correct?

14 A. Correct.

15 Q. And --

16 A. Well, it's kind of -- That was -- It's kind
17 of complicated. Because in the courts, I worked
18 for her. But at the same time, when I wasn't in
19 the courts, I was working for an agency that
20 would allow or that was allowed to send in
21 vetted interpreters. So I was kind of working
22 for both the state and for a private agency.

23 Q. Okay. So you had two places that you were
24 working, one private and one the state; is that
25 right?

1 A. Correct.

2 Q. And your employment, I think you've told us or
3 you made statements in the past, didn't work out
4 with Ms. Barrios; right?

5 A. Right. Yes.

6 Q. And so you never followed through to become a
7 certified interpreter.

8 A. I was basically not allowed to.

9 Q. Okay. And if I can, you spoke at some point to
10 the -- to Ms. Fabricant or to special counsel;
11 correct?

12 A. Yes.

13 Q. And the date of that I believe was February 24th
14 of 2025. Does that sound about right?

15 A. I'm sorry. What was that for?

16 Q. So you spoke to the attorney who was just asking
17 you questions in the past; right?

18 A. Yes.

19 Q. Yeah.

20 A. Yes, yes.

21 Q. And the date of that was after the beginning of
22 this year; correct?

23 A. Yes.

24 Q. Now, that morning at the Newton District Court,
25 what time did you arrive?

1 A. What time did I arrive to the court in
2 Newton?

3 Q. Yes.

4 A. I don't recall. But if the session started
5 at 8:00 or 9:00, I was usually there about a
6 half hour, 45 minutes before.

7 Q. Okay. And so were you interpreting that day
8 just for one case, for Mr. Medina Perez, or were
9 you interpreting for other cases?

10 A. I was interpreting for other cases.

11 Q. And on the Medina Perez case, do you have a
12 memory as you are with us today as to what time
13 you first interpreted on that case?

14 A. No. No. It was, it was definitely -- There
15 was definitely -- He was definitely called first
16 session, but that could have been between
17 anywhere between 9:00 and 11:00.

18 Q. Okay. And so the case was called originally,
19 and Mr. Medina Perez was brought up for you to
20 do the interpreting; correct?

21 A. Yes.

22 Q. And there was an initial discussion, appearance
23 in front of the judge, and you interpreted that;
24 correct?

25 A. Yes.

1 Q. And there was a prosecutor, who is a woman, who
2 was present for that; correct?

3 A. I'm not sure, I'm not sure what you mean.
4 There was a what?

5 Q. There was a -- So there's two sides. You know
6 that.

7 A. Yes.

8 Q. There's a prosecutor --

9 A. Yeah.

10 Q. -- and a defense attorney; correct?

11 A. Yes.

12 Q. And the prosecutor that morning for
13 Mr. Medina Perez's case was a woman; right?

14 A. I believe so. I'm not sure which attorney
15 was which. I'm sorry.

16 Q. So in the morning, the attorney representing
17 Mr. Medina Perez was also a woman, in the
18 morning. You remember that.

19 A. I'd say so, yes.

20 Q. And that person was different than the person
21 who appeared in court in the afternoon; correct?

22 A. Yeah. I believe, I believe, I believe one of
23 the attorneys stepped in for her or something
24 happened where another attorney came in.

25 Q. Okay. And so in the morning you were up in the

1 first session courtroom in Newton; yes?

2 A. I was, yes.

3 Q. And Mr. Medina Perez was brought up; yes?

4 A. Yeah.

5 Q. And you did the interpreting. And then there
6 was a recess after that; correct? Or they
7 continued the matter to allow some time. You
8 recall that.

9 A. Yes. Yes. Afterwards.

10 Q. Yeah. And so they brought Mr. Medina Perez back
11 downstairs; right?

12 A. I believe so, yes.

13 Q. To the lockup.

14 A. Yeah.

15 Q. Okay. And the next time that you had contact
16 with Mr. Medina Perez was in the morning or in
17 the afternoon?

18 A. You tell me.

19 Q. You're the witness, sir.

20 A. No. Because you're talking in the morning or
21 you're talking in the afternoon? Because if
22 we're talking in the afternoon, I had one final,
23 I had one final time with Mr. Medina upstairs
24 and then I communicated or interpreted for him
25 downstairs.

1 Q. And so let's -- Thank you. Let's go back to the
2 morning. Was that first time the only time in
3 the morning that you had contact
4 with Mr. Medina Perez, in the morning?

5 A. No. I believe he was brought up twice.

6 Q. And so both times that you had contact were
7 there in the courtroom in the morning.

8 A. Was in the courtroom in the morning, yes.

9 Q. In the morning. So it was in the courtroom with
10 the judge on the bench and the attorneys right
11 there in the courtroom; correct?

12 A. Yes.

13 Q. And that was the only contact that you had in
14 the morning with Mr. Medina Perez; right?

15 A. I believe so. I think so, yeah.

16 Q. Okay. And it would be fair to say that you
17 never saw him again until he was brought up in
18 the afternoon; right?

19 A. Correct.

20 Q. So in the morning there was a discussion that
21 you interpreted about whether they had the right
22 individual that Pennsylvania wanted; correct?

23 A. Yeah. They needed --

24 Q. I'm sorry?

25 A. Yes. They needed to confirm because

1 everybody was worried of the fact that ICE was
2 there. So they wanted to make sure who he was
3 and what was going to be done.

4 Q. Well, so you say they were worried about ICE
5 being there. Did you hear any discussion about
6 ICE in the morning?

7 A. Yes. Well, we were kind of -- I'm kind of
8 like a court employee. So we're somewhat
9 notified just for safety sake that ICE may be
10 present.

11 Q. Okay. So ICE was there. But what did you hear
12 that there was some concern that ICE was there?
13 And from whom?

14 A. I guess our concern was from the employees or
15 people that were there that ICE was present.

16 Q. Okay. But you never heard anything said by the
17 judge in the morning about ICE; correct?

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

19 Q. And do you remember, was there an announcement
20 that ICE was not allowed in the courtroom in the
21 morning or not?

22 A. I don't remember that announcement.

23 Q. Okay. And so did you see anybody that was --
24 that you knew to be an ICE officer in the
25 courtroom in the morning?

1 A. I would have to say I was guessing.

2 Q. Okay. And so what is your memory? Were there a
3 few people in the audience in the morning or
4 almost nobody or a lot of people?

5 A. You mean general population --

6 Q. Yeah.

7 A. -- in the audience?

8 Q. Yeah.

9 A. People in the audience?

10 Q. Yeah, number of people.

11 A. There was several.

12 Q. I'm sorry?

13 A. There was several.

14 Q. Several people in there. Between one and five,
15 between 1 and 10?

16 A. Maybe more. But I'll say 1 and 10, but more
17 closer to 10.

18 Q. Okay. And over time in the morning, the number
19 of people in the courtroom thinned out,
20 diminished as cases were called, as cases were
21 resolved; correct?

22 A. Yes.

23 Q. And so you, sitting where you are sitting in the
24 courtroom, you wouldn't have had any problem
25 looking around to your right or behind you and

1 actually seeing anybody who was in the
2 courtroom; right?

3 A. Correct.

4 Q. Because the distance from where you were sitting
5 to the audience is only a matter of a few feet;
6 correct?

7 A. Yes.

8 Q. Now, so can I ask you, had you ever heard at any
9 time from 2017 until today about what's called a
10 Lunn policy, L-u-n-n policy?

11 A. A what policy?

12 Q. I'm going to say Lunn or Lunn. Sounds like
13 Lunar. But it's L-u-n-n in English and it's
14 pronounced the Lunn or the Lunn policy. Have
15 you ever heard of that before?

16 A. No.

17 Q. And so were you given any training as an
18 interpreter as to policies and procedures and
19 things in court just besides -- in addition to
20 the language issues?

21 A. Yes.

22 Q. Okay. And in any of that training did anybody
23 draw to your attention that there was a thing, a
24 document, a policy in Massachusetts beginning in
25 November of 2017 into 2018, that policy was

1 called the Lunn policy?

2 A. A Lunn policy?

3 Q. Lunn, yes. L-u-n-n.

4 A. I'm not sure if that was presented to me.

5 But not -- Ms. Barrios was pretty thorough. And
6 if I had to read something, I'm sure I would
7 have gotten it.

8 Q. So this policy deals with how to handle people
9 in custody when ICE is there to take custody.
10 So sounds like you never read that policy.

11 A. I -- Probably not.

12 Q. Okay. And so you wouldn't know that that policy
13 requires that individuals who are in custody
14 that ICE is waiting for or advises that they be
15 taken into custody by ICE in the lockup.

16 JUDGE FABRICANT: Objection.
17 The witness says he doesn't know anything about
18 the policy.

19 HEARING OFFICER: I'll allow
20 it.

21 Q. Let me rephrase.

22 A. I had been, I had been present with
23 authorities taking clients, taking clients in
24 lockup, yeah. I've been, I've been exposed to
25 that, yes.

1 Q. Okay. And had you ever seen ICE take custody in
2 the front lobby at the Newton District Court?
3 Yes or no? If you remember, you remember. If
4 you don't, you don't. If the answer's yes, it's
5 yes. If it's no, it's no. That's okay.

6 A. No. The screen, the screen shut off. So you
7 may want to go back approximately two minutes
8 and let me know what you were saying.

9 Q. It didn't like my question.

10 A. Excuse me?

11 Q. So I'll ask the question again.

12 A. Yes.

13 Q. So you had interpreted at the Newton District
14 Court a half a dozen or so times?

15 A. Yeah. Maybe a little more, yeah.

16 Q. Okay. And in any of those times were you
17 interpreting when ICE was there to take custody
18 of somebody?

19 A. I don't think so.

20 Q. So for you to say that a policy was that ICE
21 takes custody out of the front lobby of the
22 Newton District Court, you wouldn't have any
23 basis for that because you've never seen it
24 before; right?

25 A. What -- The procedures that ICE do is what

1 ICE does, not -- I had nothing to do with the
2 policy.

3 Q. Okay.

4 A. And whether I know it or not, they're going
5 to operate either way whether the judge lets it
6 or not or whether ICE, ICE is going to do
7 something or not.

8 Q. Okay. Now, in the afternoon session, you were
9 there for the afternoon because Medina Perez was
10 still an active case; correct?

11 A. In the afternoon session, I'm still there,
12 whether there's -- until I'm dismissed by the
13 judge.

14 Q. Understood. And in the afternoon, was
15 Medina Perez the only case that you were there
16 for?

17 A. Oh, yeah. That was, that was the only or
18 last Spanish case.

19 Q. And so when the case was called, you told us
20 earlier that you were sitting at the special
21 desk or carrel that they had for interpreters?

22 A. I may have been sitting closer. That's what
23 I mentioned, that there's a, there's a legal
24 desk where the prosecutor or defender -- I'm not
25 sure in Newton which one it is back there, but I

1 may have been like leaning up against that table
2 or sitting right, right at that table.

3 Q. But you weren't over by the dock because there
4 was nobody in the dock when the case was first
5 called; correct?

6 A. Correct.

7 Q. And so do you remember whether or not, when the
8 case was called, the parties stayed talking to
9 the judge in the open court or do you remember
10 if they went to side bar?

11 A. I'm not sure what you're asking.

12 Q. Do you have any memory of where the conversation
13 between the two lawyers and the judge first took
14 place in the afternoon about Medina Perez?

15 A. It started open and then it went to side bar.

16 Q. And so when it was open, you would have been
17 next to the conversation or next to the lawyers;
18 correct?

19 A. I was kind of behind the attorney, because
20 the defendant wasn't out there yet.

21 Q. Yup. And there was no interpreting for you to
22 do.

23 A. Excuse me?

24 Q. There was -- No defendant means there was no
25 interpreting for you to do; correct?

1 A. Correct.

2 Q. And so when they moved the side bar, they moved
3 away from you to your right and up next to the
4 judge; right?

5 A. No. They moved closer.

6 Q. Closer to the judge? Or closer to you?

7 A. No. Closer to me.

8 Q. Oh. Because you were on the right side now or
9 on the left side facing the judge?

10 A. Facing the judge, I'm on the left side.

11 Q. So in your memory, the side bar was on the left
12 side, not the right side of the courtroom.

13 A. When you're looking at the court, on the left
14 side.

15 Q. That's where you remember the side bar to be.

16 A. Yes.

17 Q. And so do you recall, was there -- when they
18 moved to side bar, was there any white noise in
19 the courtroom? Do you know what white noise is?

20 A. Yes, there was.

21 Q. And there was white noise in Newton at that
22 time?

23 A. That's what I just said. Yes.

24 Q. And so when they moved the side bar, and they're
25 talking, there's white noise in the courtroom.

1 I just want to make sure I understand that.

2 That's a yes; correct?

3 A. I'm not sure if it's in the whole courtroom.

4 I thought -- From what I recall, was right at
5 the, at the little system itself. But it could
6 have been throughout the whole courtroom.

7 Q. And the purpose of the white noise is to make it
8 harder for people in the audience to hear the
9 conversation; correct?

10 A. I don't believe there was an audience.

11 Q. Oh, you think there was nobody else in the
12 courtroom at that point.

13 A. I don't believe there was.

14 Q. Okay. But the white noise was on anyway; right?

15 A. Yes.

16 Q. And are you saying that the white noise had no
17 impact on your ability to hear what was being
18 said at side bar?

19 A. No, I'm not saying that.

20 Q. And --

21 A. I'm saying I didn't hear everything that was
22 being said, because there was white noise and it
23 was side bar. It's not my position to be
24 listening.

25 Q. Okay. So today do you have a memory as to

1 whether or not the whole conversation at side
2 bar was being recorded or not being recorded?

3 A. I don't believe side bar is recorded,
4 especially if there is white noise. I'm not
5 sure, though.

6 Q. But you don't know.

7 A. If I was a gambling man, I would say that it
8 wasn't recorded.

9 Q. Now, you've said that you heard the judge say
10 something about the defendant being sent
11 downstairs; is that right?

12 A. Being let go. Not being sent downstairs.

13 Q. About being let go.

14 A. Yes.

15 Q. So if the judge used words "he's released," that
16 would be consistent with what you heard.

17 A. If the judge said what?

18 Q. He's being released, Medina Perez is released,
19 that would be consistent with what you heard.

20 A. Yes.

21 Q. And if the judge said to the lawyers, why don't
22 we detain him overnight, that would be
23 consistent with what you thought the judge was
24 saying about avoiding ICE; right?

25 A. No.

1 Q. So tell us, why did you think that the judge was
2 concerned about Medina Perez avoiding ICE?

3 A. It was -- I'm not hearing you well. But you
4 mentioned something about having -- something
5 having to be overnight, and I don't know what
6 that has to do with...

7 Q. Well, let's break it into two parts. I think
8 you've told us that you couldn't hear the
9 conversation very well; right?

10 A. Correct.

11 Q. You could hear bits and pieces; right?

12 A. Correct. Right.

13 Q. And from those bits and pieces, that's why you
14 drew the inference that there was some effort on
15 the judge's part to avoid ICE, from those bits
16 and pieces; right?

17 A. To let the client out, to let the -- to
18 release the client.

19 Q. To release the client. So you heard the judge
20 say to release the client; is that right?

21 A. No. I heard a judge say let the client go.

22 Q. And that was still at side bar?

23 A. I believe she might have said it even before
24 that, but I recall at side bar.

25 Q. And how about -- At some point the conversation

1 moved back to the open court; right? Or do you
2 not remember?

3 A. Not -- I don't -- Yeah. Because they have to
4 finish the session.

5 Q. And would it be fair to say that it's hard for
6 you to remember what you heard from side bar and
7 what you heard said at open court? Seven years
8 ago? I'm sorry.

9 A. It may not be exactly the time frame that it
10 occurred.

11 Q. Okay. So in the afternoon there were two
12 lawyers speaking to the judge; correct?

13 A. Correct.

14 Q. One was a woman; right?

15 A. Yes.

16 Q. And one was a male; correct?

17 A. Correct.

18 Q. And you said previously that you thought that
19 the male was the district attorney, the
20 prosecutor, because he was doing all the
21 talking; right?

22 A. Correct.

23 Q. So if you thought he was the prosecutor, it's
24 pretty fair to say that you never talked to
25 Medina Perez with him alone prior to going

1 downstairs after court completed; right?

2 A. I believe I may have. I don't, I don't
3 recall.

4 Q. You have no memory.

5 A. I said I don't recall. I said I believe I
6 may have, but I'm not entirely sure during the
7 first session.

8 Q. During the first session in the morning or in
9 the afternoon?

10 A. In the morning.

11 Q. And so -- But it's fair to say you thought the
12 man there in the afternoon was the prosecutor at
13 the beginning; right?

14 A. Yes.

15 MR. HOOPES: May I just have a
16 moment, Your Honor?

17 HEARING OFFICER: Sure.

18 JUDGE FABRICANT: Mr. Mendoza,
19 we're just pausing just for a minute. Just stay
20 with us, please.

21 (PAUSE)

22 MR. HOOPES: Mr. Mendoza,
23 that's all I have. Thank you very much.

24 JUDGE FABRICANT: Mr. Mendoza,
25 I'm going to be very brief.

REDIRECT EXAMINATION

BY JUDGE FABRICANT:

Q. You said that in the course of your time working as an interpreter in the Massachusetts court system that you had been exposed to situations in which ICE went to the lockup to take custody of someone. Did I understand that correctly?

A. Yes.

Q. Did that happen, --

A. Yes.

Q. -- did that happen in Newton or in other courthouses?

A. In other courthouses.

Q. Did you ever see that happen in Newton?

A. No.

JUDGE FABRICANT: That's all I have.

Perhaps Mr. Hoopes has more, perhaps the hearing officer has questions for you, so stay with us a little longer.

THE WITNESS: Okay.

MR. HOOPES: Yes. You're back with me again, Mr. Mendoza.

RECROSS-EXAMINATION

BY MR. HOOPES:

Q. So you told us, when I asked you questions earlier, that there were two lawyers in the morning dealing with the Mendoza -- Medina Perez case, -- I'm sorry -- the Medina Perez case, both of them were women; correct?

A. Both of them are what?

Q. Women. Female lawyers.

A. There was a man and a woman and one of the women was switched. One of the attorneys came in and there was another -- there was a different attorney.

Q. So the one --

A. That was a woman.

Q. So there was a woman initially and then there was a man; is that right?

A. That's not what I said.

Q. I'm not understanding you. In the morning, who was representing Mr. Medina Perez, a man or a woman?

A. I was under the assumption it was a man.

Q. Oh.

A. So it's irrelevant for me because I just need to do the interpreting. So whether it's a

1 prosecutor or defendant, it's almost irrelevant.
2 I just have to interpret for the client.

3 Q. So would it be fair to say that today you don't
4 remember in the morning whether Mr. Medina Perez
5 was represented by a woman or a man or do you
6 believe it was a man?

7 A. I believe it was a man.

8 MR. HOOPES: Thank you. No
9 other questions.

10 JUDGE FABRICANT: Just stay
11 with us a little longer just in case the hearing
12 officer wants to ask you anything.

13 THE WITNESS: Okay.

14 HEARING OFFICER: Yes. It may
15 easiest if I just go down there.

16 JUDGE FABRICANT: Mr. Mendoza,
17 just stay with us a little longer. The hearing
18 officer has some questions for you.

19 THE WITNESS: Okay.

20 HEARING OFFICER: Can you hear
21 me, Mr. Mendoza?

22 A. Yes, sir.

23 HEARING OFFICER: So my only
24 question relates to your location during the
25 proceedings. And I don't know how easy it is

1 for us to do this. But in Exhibit U -- And this
2 is -- We'll start with page APP 508. Are you
3 able to see this?

4 A. Yes.

5 HEARING OFFICER: Okay.

6 A. Wait. Yes.

7 HEARING OFFICER: So can you
8 describe, looking at this page, where you were
9 located before Mr. Medina Perez came upstairs?
10 So we're in the afternoon session. At the
11 beginning of the session, before there is a side
12 bar, I believe you said that you were behind
13 where the attorneys were. Is that correct? Is
14 that what you said?

15 A. On the -- So if -- I believe the little, the
16 little hole where you speak to the client, that,
17 that -- the major thing on that picture is the
18 dock itself. So there's the desk right, right
19 there, I believe -- Nope. Closer. Right around
20 there. There's a sign in the picture. I can't
21 see the picture. There you go. So I believe, I
22 believe that's, that's the attorney's desk. I
23 was like standing right on the corner of the
24 dock.

25 HEARING OFFICER: Do you see

1 where I'm pointing with my pen?

2 A. Yes, sir. Right around there. That's what I
3 recall.

4 HEARING OFFICER: I see. And
5 so -- And I'm pointing now to the area where, if
6 somebody were inside the dock, you would be
7 speaking through this hole right here? Is that
8 right?

9 A. Is that, is that -- I can't see the hole.
10 But if that's where the hole was, yes.

11 HEARING OFFICER: It's just to
12 the right of the door to the dock.

13 A. Yes. And normally I'd be sitting,
14 approximately diagonally towards the back there
15 would be a chair.

16 HEARING OFFICER: Okay. I
17 understand what you're saying.

18 Do you see where there's a
19 place for the court officer, there's a location?
20 Do you see where I'm pointing?

21 A. Okay.

22 HEARING OFFICER: Is that where
23 the court officer often sits?

24 A. If you say so. I would be sitting around,
25 right around him.

1 HEARING OFFICER: Okay. So my
2 understanding from what you're saying is you
3 basically would have been located somewhere
4 between that location where the court officer
5 typically sits and that door to the dock.

6 A. Yes. But during the side, during the side
7 bar, I was, I was closer, because it was the end
8 of the day, they were making a decision as to
9 what they were going to do with the client, so I
10 was standing a little closer, but I wasn't able
11 to hear everything. Either way, I had to notify
12 the client of what was going to happen, and a
13 decision was made for him to be let go out the
14 back door. So whether I know who the prosecutor
15 was or who the defendant was or what the
16 decision was made, I had to tell the client what
17 was going to happen, and the client had to
18 decide whether he was going to go with what was
19 agreed upon.

20 HEARING OFFICER: Okay. I was
21 just asking you about your physical location,
22 sir. But I understand you.

23 With that, I've got no further
24 questions.

25 JUDGE FABRICANT: All right.

1 I'm going to ask one more question, if I may.

2 REDIRECT EXAMINATION

3 BY JUDGE FABRICANT:

4 Q. Mr. Mendoza, I'm going to try and hold up the
5 same photo. Can you see it again?

6 A. Yup. Yes. That's a little clearer.

7 Q. You can see that there's the door to the dock.

8 A. Yes.

9 Q. A little bit on the same side. The dock is a
10 rectangle.

11 A. Yes.

12 Q. On that same glass wall of the dock, right next
13 to the door, there's a little metal circle.

14 A. I don't remember where the stairs were inside
15 the dock or outside. I think they're inside
16 there.

17 Q. Okay. So what I want to direct your attention
18 to is -- Again, the dock is a rectangle.

19 A. Yes.

20 Q. On the other wall of the dock.

21 A. Yes.

22 Q. The wall that is not where the court officer
23 sits is not where the door is.

24 A. Correct.

25 Q. The other wall, there's another little metal

1 circle. If the client is in the dock, which one
2 of those little metal circles do you speak
3 through?

4 A. The one, the one around the corner, the one
5 in the middle that you just mentioned.

6 Q. In the middle, meaning along the longer wall?

7 A. Yes.

8 Q. Not the one next to the door; is that right?

9 A. No.

10 Q. All right.

11 A. Correct.

12 JUDGE FABRICANT: Thank you.
13 Stay with us a little longer just in case
14 anybody else wants to --

15 HEARING OFFICER: That was a
16 very helpful clarification. Thank you for that.

17 JUDGE FABRICANT: All right. I
18 think we're all finished.

19 May this witness be excused?

20 HEARING OFFICER: Yes.

21 JUDGE FABRICANT: Thank you
22 very much, Mr. Mendoza.

23 THE WITNESS: Thank you.

24 JUDGE FABRICANT: You have
25 completed your testimony. Thank you.

1 HEARING OFFICER: At this
2 point, we've been going for a couple hours. I
3 think it probably makes sense to take a
4 10-minute break.

5 JUDGE FABRICANT: Yes.
6 Before we do that, may counsel
7 approach side bar just very briefly?

8 HEARING OFFICER: Sure.

9 SIDE BAR CONFERENCE

10 HEARING OFFICER: Let me make
11 sure. Do we have any white noise --

12 JUDGE FABRICANT: I think the
13 hearing officer -- I mean the court reporter is
14 hearing us directly, not through any device.

15 HEARING OFFICER: Fine.

16 JUDGE FABRICANT: We're having
17 a little trouble remembering whether
18 Shannon McDermott was sworn -- now, I am aware
19 of SJC authority that it actually is not
20 essential as long as they're aware of necessity
21 to tell the truth.

22 HEARING OFFICER: I will swear
23 her in as she comes back.

24 JUDGE FABRICANT: I thought you
25 did.

1 HEARING OFFICER: I will
2 confirm that everything she's already testified
3 to is the truth.

4 JUDGE FABRICANT: Thank you.
5 Maybe you did.

6 HEARING OFFICER: I'm not sure.
7 I'll do it again. Thank you.

8 (SIDE BAR CONFERENCE ENDS)

9 (Recess taken at 12:05 p.m.
10 Proceedings resumed at
11 12:20 p.m.)

12 JUDGE FABRICANT: Can we have
13 Ms. McDermott come back, please.

14 (PAUSE)

15 HEARING OFFICER: Thank you,
16 Ms. McDermott. Apologies for interrupting your
17 testimony.

18 THE WITNESS: Okay.

19 HEARING OFFICER: It has been
20 brought to my attention that I likely didn't
21 swear you in at the beginning. So if I can ask
22 you if you solemnly swear that the testimony
23 you've already given and will be giving is the
24 truth, the whole truth, and nothing but the
25 truth?

1 THE WITNESS: yes.

2 HEARING OFFICER: Can you
3 please raise your right hand and swear to that?

4 THE WITNESS: Yes, I do swear.

5 HEARING OFFICER: Okay. With
6 that...

7 CROSS-EXAMINATION

8 BY MS. MULVEY:

9 Q. Good afternoon, Ms. McDermott.

10 A. Hi.

11 Q. My name is Liz Mulvey. We've never met before;
12 is that right?

13 A. That's right.

14 Q. And can I apologize now to you for when I call
15 you Jurgens?

16 A. Oh, that's fine, too.

17 Q. Okay. I'm going to do the best I can, but
18 you've been Jurgens for six years. Okay.

19 You told the special counsel
20 that, after kind of everything that was over,
21 you saw David Jellinek in the front lobby of the
22 courthouse; is that right?

23 A. Yes.

24 Q. And you said to him, I know what you did and it
25 wasn't the right thing.

1 A. Yes.

2 Q. Did David Jellinek say to you, Shannon, what are
3 you talking about, I told the judge the court
4 officer was going to let him out the back door?

5 A. No.

6 Q. Did he say to you, Shannon, what you are talking
7 about, Judge Joseph said this was okay?

8 A. No.

9 Q. Did he say, Shannon, come on, you knew what was
10 going to happen?

11 A. No.

12 Q. Did you know what was going to happen?

13 A. No.

14 Q. What did David Jellinek do or say when you said
15 I know what you did and it wasn't the right
16 thing?

17 A. He smiled and he didn't say a word.

18 Q. Now, when you said to David Jellinek, I know
19 what you did, what did you mean?

20 A. Helped facilitate Mr. Perez leaving the
21 courthouse.

22 Q. All right. And what did you mean when you said
23 it wasn't the right thing?

24 A. Well, I think by that time I knew that it had
25 been from the security door downstairs somehow

1 and just -- that wasn't okay to do.

2 Q. All right. And I think you told us on direct
3 that you had either figured it out or somebody
4 had told you --

5 A. Yeah. I can't remember how I learned, but by
6 that time, I had learned.

7 Q. All right. By the time you learned that he went
8 out the back door, he was long gone and hard to
9 find; right?

10 A. Correct.

11 Q. All right. You were present at side bar for
12 both the on the record and off the record
13 conversation; is that right?

14 A. Yes.

15 Q. And I think you told us that in your mind they
16 kind of blend together?

17 A. Yes.

18 Q. You said off the record was kind of a
19 continuation of the on the record?

20 A. Yes.

21 Q. And you had trouble kind of sorting out in your
22 mind what was on the record and what was off the
23 record?

24 A. That's fair, yes.

25 Q. And if you didn't have a transcript, you

1 wouldn't be able to tell at all. Is that fair?

2 A. Yes.

3 Q. It all kind of blends in?

4 A. Yes.

5 Q. And one thing that you did remember that was new
6 off the record was David Jellinek asking to go
7 downstairs to speak with his client in the
8 lockup; is that right?

9 A. Yes, he did ask that.

10 Q. That was the part you remembered as being new;
11 is that true?

12 A. I don't know -- I always remembered him
13 asking to go back downstairs. I don't think I
14 could have told you it was on or off the
15 record --

16 Q. Okay.

17 A. -- before seeing a transcript.

18 Q. Okay. So we know from the transcript that it
19 wasn't before you went off the record, so it
20 must have been while you were off the record;
21 true?

22 A. Yes. Must have been. Yes.

23 Q. Now, you also told us that you don't have a real
24 clear memory of what was actually said at side
25 bar. Is that true?

1 A. True.

2 Q. And I'm going to ask you a little bit more in
3 detail later. But is it fair to say that,
4 whatever it was that David Jellinek said, you
5 walked out the door thinking that Medina Perez
6 was coming out the front door. Is that true?

7 A. I did, yes.

8 Q. And certainly, as an assistant district
9 attorney, you weren't going to go out and lie to
10 ICE, were you?

11 A. No.

12 Q. And you wouldn't be part of a plan to avoid ICE;
13 right?

14 A. I would not.

15 Q. And so if there were a plan discussed at side
16 bar on or off the record to help Medina Perez go
17 out the back door and avoid ICE, you wouldn't
18 then go out to the ICE agents and say he's
19 coming out the courtroom door, would you?

20 A. I would not.

21 Q. You would have, if you heard anything like that,
22 done something; right?

23 A. Probably.

24 Q. Now, if David Jellinek had said at side bar, the
25 court -- if I take him downstairs, the court

1 officer will let him out the back door, and the
2 judge said, yes, that's what we'll do, is there
3 any way you would have gone out to the hall and
4 told ICE he's coming out this door?

5 A. No.

6 Q. So is it fair to say that, without remembering
7 exactly what was said, it wasn't that?

8 A. Correct.

9 Q. All right. And it wasn't anything that would
10 have given you that impression; right?

11 A. Correct. I did not have that impression.

12 Q. And in fact, you have spoken with
13 Special Counsel Fabricant, haven't you?

14 A. Yes.

15 Q. And she pretty much asked you that same
16 question; right? Whatever was said, what did
17 you think after it. Right?

18 A. Yes.

19 Q. And you said I thought he's coming out the front
20 door.

21 A. Yes.

22 Q. And that's the truth, isn't it?

23 A. It is.

24 Q. Now, if somebody in that courtroom had said,
25 either at side bar or out loud, we've made a

1 decision that he's going to go out the back
2 door, that's the kind of thing you'd remember,
3 isn't it?

4 A. Yes.

5 Q. Did that happen?

6 A. Not to my memory.

7 Q. Would you forget something like that?

8 A. I don't think I would have.

9 Q. Now, you said about Judge Joseph, in response to
10 one of Special Counsel Fabricant's questions,
11 you thought that she had made a misguided
12 attempt to do what she thought was right?

13 A. I did say that.

14 Q. And you had no reason to believe, having been
15 present at side bar, that she knew that
16 David Jellinek was going to have released out
17 the back door, do you?

18 A. I do not.

19 Q. And when you say a misguided attempt to do what
20 she thought was right, are you referring to the
21 idea that maybe there was a way that ICE
22 wouldn't get him?

23 A. Right.

24 Q. Okay. Now, at side bar David Jellinek was
25 claiming very vociferously that his client was

1 not the guy ICE was looking for; right?

2 A. Yes.

3 Q. And certainly, no one would want ICE to take the
4 wrong guy, would they?

5 A. No.

6 Q. That's not a good thing, is it?

7 A. It is not.

8 Q. All right. And so what Judge Joseph was
9 actually doing was offering David Jellinek time
10 to try to convince ICE this wasn't the guy.

11 A. I don't know if that's what the offer was for
12 or not.

13 Q. Well, you know that that's what she had been
14 doing all morning, right, giving more time?

15 A. The more time, for me, I thought was to
16 figure out the Pennsylvania warrant.

17 Q. All right.

18 A. But...

19 Q. But not just you, but Attorney Bostwick was
20 asking for more time; right?

21 A. Correct. Yeah. Absolutely.

22 Q. And there was a second call and a third call --

23 A. Absolutely.

24 Q. -- and a fourth call?

25 A. Many, yes.

1 Q. All right. And all of those were with you and
2 Attorney Bostwick; is that right?

3 A. I don't remember at which point
4 Attorney Bostwick withdrew because of the
5 private appearance by Attorney Jellinek, but
6 Attorney Bostwick was certainly there in the
7 morning, and at some point, that I can't recall,
8 Attorney Jellinek came in.

9 Q. Well, let's see if we can try to shed a little
10 light on that. Do you have the book of exhibits
11 there?

12 A. I do.

13 Q. And would you take a look at Exhibit H, please.
14 And Exhibit H is a transcript of the full day.
15 Can you take my word for that?

16 A. Yes. I am with you.

17 Q. All right. And if you could, would you look at
18 Page 147.

19 A. I'm sorry. Are we talking about within the
20 transcript?

21 Q. Yes.

22 HEARING OFFICER: Can you give
23 us the --

24 Q. The transcript page, not physical page.

25 A. Okay. I'm here.

1 Q. All right. And if we look at Line 16, the clerk
2 is saying, and that's just, Judge, that leaves
3 us with Mr. Perez and Attorney Bostwick, are you
4 still, and Ms. Bostwick says I just sent a fax?

5 A. Yes, I see that.

6 Q. Do you remember that happening?

7 A. Not specifically but...

8 Q. All right. But we can tell from the transcript
9 Ms. Bostwick was still there representing
10 Medina Perez and she was trying to sort out the
11 identity issue; --

12 A. Yes.

13 Q. -- is that right?

14 A. Yes.

15 Q. All right. And then Judge Joseph asked
16 Mr. Harrington whether he needed more time.
17 Right? Do you see that, the next line?

18 A. I do see the next line that says that as
19 well.

20 Q. All right. And if we flip over to two pages
21 later, 149, there's a period where Judge Joseph
22 and the clerk are talking to Mr. Harrington; is
23 that right?

24 A. Yes.

25 Q. And again, you would be there because you'd be

1 representing the Commonwealth on that case,
2 whatever it was?

3 A. Correct.

4 Q. All right. And then if we get to Page 149, and
5 we look at Line 18, do you see that?

6 A. Yes.

7 Q. All right. Then Ms. Bostwick is speaking again?

8 A. Yes.

9 Q. And she says, I will, and then she says, I
10 think, Your Honor, I have an appointment this
11 afternoon and I wanted to ask if we could have
12 a -- I understand that the interpreter has to be
13 somewhere as well, if maybe we could have
14 Mr. Medina's case called at 2:15 or so, so that
15 would give me time and then we're not just
16 waiting, and the clerk says, at 2:15.

17 A. Yes.

18 Q. Do you recall that happening?

19 A. Not specifically, but it sounds right.

20 Q. All right. And then if we flip to Page 150,
21 Ms. Bostwick says, somewhere, and then the clerk
22 interrupts and says, and the interpreter's okay
23 with that, too, 2:15, and Ms. Bostwick says, I
24 have a medical appointment at 1:30, Judge Joseph
25 says, not a problem, Ms. Bostwick says, so I

1 don't know if I'm going to be able to get back
2 at 2:00, Judge Joseph says, not a problem, the
3 clerk says, that's fine, court says, we'll hold
4 it, do you have to be somewhere else today. And
5 now she's talking to Mr. Harrington?

6 A. Yes, I see that.

7 Q. And if we slide down to Line 18, all of that
8 happened just before 12:40 in the afternoon; is
9 that true?

10 A. Yes.

11 Q. Okay. So does that refresh your recollection
12 that at least as of the lunch break
13 Attorney Bostwick was actively representing
14 Jose Medina Perez?

15 A. Yes.

16 Q. All right. And you don't have any recollection
17 of interactions with David Jellinek before that,
18 do you?

19 A. I don't.

20 Q. Now, Attorney Bostwick was doing things, like
21 she said, sending a fax, and at one point do you
22 recall she asked for something called a
23 Triple I?

24 A. That makes sense that she would.

25 Q. Help us out. What's a Triple I?

1 A. It's an out of state record.

2 Q. All right. And is that something a defense
3 lawyer might want to see if they're trying to
4 investigate identity?

5 A. Yes.

6 Q. And you understood Ms. Bostwick had some
7 questions about her client's identity, who was
8 he really; --

9 A. Yes.

10 Q. -- right? And appropriately she was trying to
11 figure it out.

12 A. Correct.

13 Q. And appropriately Judge Joseph was giving her
14 time, repeated calls, to try to figure it out.

15 A. Yes.

16 Q. And she gave her the lunch break to try to
17 figure it out.

18 A. Yes.

19 Q. And there's nothing wrong with a judge giving a
20 lawyer time to do his or her job; right?

21 A. No.

22 Q. Okay. Now, would you take a look at the
23 transcript. And why don't we look at the typed
24 version because I think it's a little cleaner.
25 That's Exhibit G. And --

1 JUDGE FABRICANT: G?

2 MS. MULVEY: G. I'm sorry. G,
3 like girl.

4 Q. And it's App 34?

5 HEARING OFFICER: Are we using
6 the A or the B transcript?

7 MS. MULVEY: It's A.

8 HEARING OFFICER: So don't you
9 want to use the B or...

10 MS. MULVEY: Oh, I'm sorry.
11 Sure. Let's go to 40. I didn't realize they
12 were in here one after the other. I apologize.

13 HEARING OFFICER: Thank you.

14 Q. At 40.

15 A. 40, yes.

16 Q. And if we look, we see 2:48, and that's the
17 beginning of the afternoon call for Mr. Medina
18 Perez's case?

19 A. Yes.

20 Q. All right. And the clerk says,
21 Attorney Jellinek filed an appearance. And
22 everybody's in open court at that point; is that
23 right?

24 A. Yes.

25 Q. And then Attorney Jellinek asks to go to side

1 bar.

2 A. Yes.

3 Q. All right. And you all go up to side bar?

4 A. Yes.

5 Q. Okay. And if we look at the picture up here, is
6 that where we all are?

7 A. Yes.

8 Q. All right. Now, you said that the judge would
9 sort of scooch over, roll the chair over to
10 here?

11 A. Yes, generally.

12 Q. And then you and David Jellinek would stand
13 there?

14 A. Yes.

15 Q. All right. And there's some stairs here?

16 A. Yes.

17 Q. I don't know how tall you are. Do you climb up
18 on the stairs?

19 A. I'm pretty tall. I don't remember if I stood
20 on the stairs or not.

21 Q. Okay. But either way, you and David Jellinek
22 are standing side by side at the side bar; --

23 A. Yes.

24 Q. -- is that right? And the clerk's over here
25 somewhere?

1 A. Yes.

2 Q. All right. Now, at that point the first part of
3 this side bar was on the record; is that right?

4 A. Yes.

5 Q. And we see Judge Joseph, is dismissed, so it's
6 my understanding that ICE is here. That's the
7 part that starts at side bar; is that right?

8 A. Yes.

9 Q. Okay. And we know you're there because you say
10 yes?

11 A. Right.

12 Q. And Attorney Jellinek, again, starts saying this
13 is the wrong guy?

14 A. Right.

15 Q. And if we continue onto Page 49, he's pleading
16 his case that this is the wrong guy?

17 A. Yes.

18 Q. Okay. And you said, and you pointed it out, I
19 don't think arguing ICE is really my, and that
20 means you're not getting involved in is he the
21 guy ICE is looking for or not.

22 A. Correct.

23 Q. All right. And David Jellinek at the end says,
24 I think the best thing for us to do is to clear
25 the fugitive issue, release him on a personal,

1 and hope that he can avoid ICE. Now, did you
2 interpret that as meaning I'm going to let him
3 out the back door?

4 A. I did not.

5 Q. What did you think that meant?

6 A. That he was going to try to figure a way for
7 him to avoid the ICE officer, but I didn't know
8 how.

9 Q. And one way would be to convince the ICE officer
10 this isn't the guy; right?

11 A. Sure.

12 Q. He's successfully done that with the
13 Pennsylvania warrant, hadn't he?

14 A. He had.

15 Q. All right. So if he's done it once, he could
16 very well think he could do it again; true?

17 A. True.

18 Q. And if we look at what Judge Joseph says is, the
19 other alternative is, if you need more time to
20 figure it out, hold until tomorrow.

21 A. That is what it says, yes.

22 Q. And did you understand that Judge Joseph was
23 once again offering this defendant's lawyer time
24 to do whatever he could on the issue of
25 identity?

1 A. Yeah.

2 Q. All right. And again, nothing wrong with that,
3 is there?

4 A. Not, not necessarily, no.

5 Q. All right. And she says, hold until tomorrow?

6 A. Yes.

7 Q. All right. And then they say, if he's bailed
8 out from Billerica, ICE will pick him up, and
9 she says, ICE will pick him up?

10 A. Right.

11 Q. And what all that means is, Billerica is the
12 overnight pretrial place?

13 A. Yes.

14 Q. Is that where they send them?

15 A. Yes.

16 Q. All right. And if somebody goes to Billerica
17 and posts bail, they walk out the door but ICE
18 can take them right then; right?

19 A. Right.

20 Q. Whereas if they bail, et cetera, they don't make
21 bail, they're held in custody and they're
22 brought back for the next appearance.

23 A. Correct.

24 Q. And so if he were held at Billerica overnight
25 and brought back in the morning, you'd be there;

1 right?

2 A. Yes.

3 Q. David Jellinek could come back.

4 A. Yes.

5 Q. ICE could come back.

6 A. Yes.

7 Q. And we can pick up where we left off and see if
8 David Jellinek had had any luck convincing ICE
9 this wasn't the guy; right?

10 A. Yeah.

11 Q. All right. And there would be nothing wrong
12 with that, would there?

13 A. Well, holding someone without bail on an ICE
14 detainer I don't think is part of the bail
15 consideration. So that's -- What I thought was,
16 maybe we were still talking about the
17 Pennsylvania warrant. I don't recall. It could
18 have been both.

19 Q. Okay. But there's a couple of parts there.
20 First, if his lawyer says, yes, I'd like you to
21 hold him, there's no problem; right?

22 A. It depends what the reason is to hold
23 someone. You need a reason.

24 Q. Well, one reason, if you're talking about bail,
25 is to make sure he's going to show up for the

1 next appearance.

2 A. Absolutely. Yes.

3 Q. And one of your roles as the district or
4 assistant district attorney is to make a bail
5 request?

6 A. Yes.

7 Q. But the judge isn't bound by your request, --

8 A. No.

9 Q. -- is she?

10 A. No.

11 Q. And if you say, Judge, I want bail, the judge
12 can say, no, I'm going to release him on
13 personal?

14 A. Absolutely.

15 Q. And vice-versa. You could say I'm not asking
16 for bail and the judge can say I have concerns
17 I'm going to set bail.

18 A. Sure.

19 Q. That's the judge's role.

20 A. Absolutely.

21 Q. And one of the things that might make a
22 defendant likely not to show up is if he's not
23 the guy everybody's talking about.

24 A. Sure.

25 Q. And so if you had concerns about or if a judge

1 had concerns about a defendant's identity, it
2 wouldn't be unreasonable to impose bail to make
3 sure he shows up, whoever he is.

4 A. Right.

5 Q. And that would have been a reasonable thing,
6 again, for Judge Joseph to be thinking, wouldn't
7 it?

8 A. Yes. To set bail, yup.

9 Q. Now, she then says, what if we detain him;
10 right?

11 A. Yes.

12 Q. And did you understand, again, that meant kind
13 of hanging onto him while David Jellinek tried
14 to sort things out?

15 A. Yes.

16 Q. All right. And then David Jellinek basically
17 said, no, I don't want any of that to happen;
18 right?

19 A. Yes.

20 Q. Okay. And he asked to go off the record.

21 A. Yes.

22 Q. He didn't say why?

23 A. No.

24 Q. You didn't know why?

25 A. No.

1 Q. And you don't anticipate Judge Joseph would have
2 known why.

3 A. No. I can't speak to that. But I don't know
4 why.

5 Q. All right. And there was an exchange and the
6 clerk turned off the recording.

7 A. Yes.

8 Q. The clerk didn't say, Judge, what are you doing,
9 there's a rule against this.

10 A. No.

11 Q. You told us you're a clerk magistrate now.

12 A. Yes.

13 Q. Could you tell us what that is in the
14 Massachusetts system?

15 A. Sure. An assistant clerk magistrate, we have
16 a number of roles. One of them is to assist in
17 the courtroom session, facilitating calling
18 cases on the record. That's one of many things.
19 That would be what Mr. Okstein was doing on that
20 date. We also order search warrants, do
21 applications for criminal complaints, small
22 claims. Many, many other things. But one of
23 the roles is to assist in the courtroom, calling
24 a list.

25 Q. Sort of half courtroom clerk and half type of

1 judge?

2 A. Sure.

3 Q. All right. And when you're sitting as a clerk
4 magistrate, one of the things you do, try to
5 help the new judge?

6 A. Yes, sometimes.

7 Q. And do new judges sometimes say --

8 A. Sometimes.

9 Q. -- how do I handle this?

10 A. (Witness nods head).

11 Q. And you know that's something that happens
12 between clerks and judges; right? Clerks who
13 are experienced try to help new judges not to do
14 something they shouldn't do.

15 A. Sure.

16 Q. And Clerk Okstein didn't say, no, you can't go
17 off the record, did he?

18 A. No.

19 Q. Then there was this 52 seconds off the record;
20 right?

21 A. Yes.

22 Q. And the only firm memory you have is
23 David Jellinek asking to go speak with his
24 client downstairs?

25 A. In terms of like a statement, yes.

1 Q. Okay. Now, you've been dragged into this and
2 asked questions on a number of occasions; is
3 that right?

4 A. It is.

5 Q. All right. Now, the first time you were
6 interviewed by somebody from the U.S. Attorney's
7 office; is that right?

8 A. Yes.

9 Q. And if I suggested to you that was in October of
10 2018, does that sound about right?

11 A. Yes. That could be right.

12 Q. And that was a phone call?

13 A. I don't remember, but probably.

14 Q. Okay. And at that point did you know that
15 David Jellinek was talking to the U.S.
16 attorney's office?

17 A. I did not.

18 Q. Did you know that he -- Well, he hadn't yet.
19 You didn't know anything about his interactions;
20 is that right?

21 A. I did not.

22 Q. Did you know anything about Clerk Okstein's
23 interactions with the U.S. attorney's office?

24 A. I did not.

25 Q. And do you recall telling the U.S. attorney in

1 October of 2018 that you remembered the
2 defendant's attorney asking at side bar to speak
3 to his client in the lockup and thinking that it
4 was odd?

5 A. Yeah, that sounds, that sounds accurate.

6 Q. Do you remember at that point saying anything
7 about a plan or anything like that?

8 A. I don't recall.

9 Q. Okay. And then you had another interview with
10 the U.S. attorney's office; is that right?

11 A. At some point, yes.

12 Q. And this was January 9th of 2019. Does that
13 sound about right?

14 A. Yes. Yes, it does.

15 Q. And you went there?

16 A. I did.

17 Q. And at this point you had counsel representing
18 you?

19 A. I did.

20 Q. All right. And you were asked again some
21 questions about the side bar?

22 A. Yes.

23 Q. And you said at this point that you found the
24 side bar discussion weird or sketchy. Does that
25 sound like something you would say?

1 A. Yeah, I guess so, yeah.

2 Q. Okay. And that Jellinek and Joseph discussed
3 options to avoid defendant being turned over to
4 ICE?

5 A. Yes.

6 Q. And was that the bail and the detainer and the
7 holding him overnight?

8 A. Right.

9 Q. Is that what you meant by that?

10 A. I believe so, yes.

11 Q. You weren't suggesting that you heard
12 David Jellinek say, well, why don't we avoid ICE
13 by taking him out the back door?

14 A. No.

15 Q. And the next day you testified to the grand
16 jury; is that right?

17 A. Yes.

18 Q. All right. And is it fair to say that your
19 memory of that side bar was probably better in
20 January of 2019 than it is in June of 2025?

21 A. Yes.

22 Q. All right. And did you tell the grand jury at
23 that point, so I don't have a memory of what was
24 on and off the record, but having heard the
25 recording now, what else was discussed at side

1 bar was Attorney Jellinek's request to have
2 Mr. Medina Perez brought back downstairs to
3 lockup, there was also a short discussion and,
4 again, I remember zero direct quotes, but there
5 was the continued discussion between
6 Judge Joseph and Attorney Jellinek of sort of
7 what can we do, and I just have a memory again,
8 I can't remember any direct words of
9 Attorney Jellinek, but saying something to the
10 effect of, is he all set, I have a plan, I don't
11 remember him saying I have a plan, but it was
12 the gist and it was that -- that is what I got
13 from their exchange was, you know, what should
14 we do, and he is like I've got it under control,
15 that sort of thing. Again, I don't remember any
16 words, but that was the impression that I was
17 getting at side bar, and after that is when he
18 asked still at side bar if his client could be
19 brought back downstairs to speak with him.

20 A. Yes.

21 Q. Does that sound like the most accurate you're
22 going to do?

23 A. It's a lot of words. But yes, that is what I
24 said.

25 Q. And certainly, nothing about any plan or I've

1 got it, meaning I'm going to get him out the
2 back door.

3 A. Right.

4 Q. Now, in terms of going back down to speak to his
5 client -- Have you ever been a defense lawyer?

6 A. No.

7 Q. Okay.

8 A. Actually, one case, for about a week.

9 Q. Did you have trouble finding a place in the
10 courthouse to have a private talk with your
11 client?

12 A. No. Because I had been an ADA in that
13 courthouse.

14 Q. Okay. Well, for the rank and file, there aren't
15 a lot of private places to speak to a defendant,
16 are there?

17 A. It depends on the courthouse, but that's
18 fair.

19 Q. In Newton. I'm sorry.

20 A. There's actually conference rooms out in the
21 hallway.

22 Q. There's a conference room?

23 A. Yeah. I think there might be one.

24 Q. But, for example, if you're in a courtroom, and
25 you need an interpreter, there's not really a

1 good place to huddle and have a private
2 conversation.

3 A. In the courtroom, no. It's small.

4 Q. Okay. And everybody knew that ICE was in the
5 front hall, --

6 A. Yes.

7 Q. -- is that right, --

8 A. Yes.

9 Q. -- waiting for Mr. Medina Perez?

10 A. Yes, I believe so.

11 Q. And would it be a legitimate concern that, if he
12 walked out the doorway with his lawyer, they
13 might not be quite as respectful of the
14 attorney/client privilege and they might not
15 give him a chance to talk to his counsel?

16 A. That's fair.

17 Q. And so there would be a legitimate reason to
18 think, well, we don't want to walk out in the
19 hall because he may get grabbed before I get a
20 chance to talk to him.

21 A. Maybe.

22 Q. And that leaves the lockup, doesn't it?

23 A. It does, yeah.

24 Q. There wouldn't be really any other place he
25 could go.

1 A. Well, there was no one else in the courtroom
2 but...

3 Q. Well, there was one more matter, wasn't there?

4 A. Oh. I don't remember. I don't remember
5 there being anything else, but there could have
6 been.

7 Q. If you look at the transcript --

8 A. If the transcript says there was, then there
9 may have been another one.

10 Q. All right. And his friends were there? Do you
11 remember --

12 A. I believe there was one person there.

13 Q. Okay. And he had some property in the lockup?

14 A. Yes.

15 Q. All right. And so sometimes defendants would go
16 down and get their own property?

17 A. Not in my memory but... That's just my
18 memory.

19 Q. Not in a month there?

20 A. Yeah. Exactly.

21 Q. Okay. Now, in the month that you were there or
22 in the time that you were there, had you had ICE
23 take into custody any other defendants?

24 A. I don't have a memory of, at Newton, that
25 happening prior to this case.

1 Q. Okay. So fair to say you didn't have any
2 experience with how or where ICE did that in
3 Newton?

4 A. Correct.

5 Q. Were you, as an assistant district attorney,
6 familiar with something called a Lunn policy?

7 A. I am not.

8 Q. As a clerk magistrate, are you familiar with a
9 policy about how defendants should be taken into
10 ICE custody?

11 A. We just got a new one. I don't know what
12 it's called. But I'm familiar with it.

13 Q. Okay. And did you know that there was a prior
14 version?

15 A. I'm sure that there was.

16 Q. Take a look at page -- I'm sorry -- Exhibit B in
17 the book in front of you.

18 A. Okay.

19 Q. And this is a transmittal memo. Do you -- As a
20 clerk magistrate now, are you on the receiving
21 end of these sometimes?

22 A. Yes.

23 Q. All right. And it says chief judges, clerks,
24 registers, chief probation officers, and all
25 staff?

1 A. Yes.

2 Q. From the chief justice of the Trial Court and
3 court administrator?

4 A. Yes.

5 Q. And it says policy and procedures regarding
6 interactions with the Department of Homeland
7 Security?

8 A. Yes.

9 Q. Is that similar to the one that you said you
10 just got a new one?

11 A. Yes.

12 Q. All right. And if we turn to App 7, which is
13 the third page.

14 A. Okay.

15 Q. Do you see a Section 3, DHS? That's
16 Department of Homeland Security?

17 A. Yes.

18 Q. Officials taking custody of individuals at a
19 courthouse?

20 A. Yes.

21 Q. And Section A is individuals over whom the
22 Trial Court has custody?

23 A. Yes.

24 Q. All right. And it says, consistent with
25 Chapter 2, Sections --

1 A. Uh-huh.

2 Q -- 14 and 15 of the court officer manual --

3 A. Yes.

4 Q. I assume that's not something you had; --

5 A. I did not.

6 Q. -- is that right? Okay. When an individual who
7 was brought into court in custody and subject to
8 release after his or her court proceeding,
9 that's Mr. Medina Perez; right?

10 A. Yes.

11 Q. All right. Court security personnel shall
12 process that individual out of lockup in the
13 normal course regardless of whether the
14 individual is subject to a civil immigration
15 detainer or warrant; right?

16 A. Yes.

17 Q. Okay. And then it says, if, during the process,
18 processing of an individual subject to release
19 out of the courthouse, -- Again, that's
20 Mr. Medina Perez?

21 A. Yes.

22 Q. -- a DHS official is present in the courthouse
23 and seeks admission to the courthouse's holding
24 cell area in order to take custody of the
25 individual. Now, the holding cell area, is that

1 what we've been calling the lockup?

2 A. Yes.

3 Q. Okay. Court officers shall permit DHS officials
4 to enter the holding cell area; right?

5 A. Yes.

6 Q. And what that means is, if the DHS officials, if
7 ICE wants to go to the lockup, they may.

8 A. Yes.

9 Q. And that's exactly what Judge Joseph said.

10 A. I don't remember. I don't recall what --

11 Q. Do you recall special counsel reading you, when
12 the clerk said ICE is here, they want to visit
13 the lockup, and she said that's fine, but they
14 can't come in here?

15 A. Oh, yes.

16 Q. All right. And so she was complying with that
17 policy, wasn't she?

18 A. Yes, yes.

19 Q. And if we keep going there, it says they can
20 enter once trial court personnel had finished
21 processing that individual out of the court
22 security personnel custody.

23 A. Yes.

24 Q. If a security department supervisor determines
25 that the DHS official would otherwise take

1 custody of the individual inside or immediately
2 outside of the courthouse. And again, that's
3 Mr. Medina Perez; right?

4 A. Yes.

5 Q. All right. And then the last paragraph there
6 says, to the extent possible, court security
7 personnel should require that DHS officials
8 transport any individuals taken into custody
9 through the prison or transport entrance and
10 avoid taking the individual through the public
11 areas of the courthouse. Right?

12 A. Yes.

13 Q. And the prisoner transport entrance is this
14 sallyport that we've talked about?

15 A. Yes.

16 Q. And you knew that was there. There was a place
17 where vans would pull up and they take the
18 people in custody directly from the van 5 feet
19 to the door?

20 A. Yes.

21 Q. And that would be called the sallyport? Does
22 that sound --

23 A. Yes.

24 Q. And what this policy is saying is, if ICE is
25 taking somebody, they should go out through that

1 door; right?

2 A. Yeah, that is what this says.

3 Q. And that you understand is a security thing,
4 it's not great to have ICE try to take custody
5 of people in public areas?

6 A. Right.

7 Q. Because you just don't know what's going to
8 happen?

9 A. Sure.

10 Q. Okay. And so in terms of Mr. Medina Perez going
11 down to the lockup, that's exactly where, per
12 the policy, he was supposed to go, isn't it?

13 A. I think if he was still in custody, yes.

14 Q. Okay. They were supposed to process him for
15 release down there?

16 A. Well, I'm just reading the section,
17 individual whom the Trial Court has custody.

18 Q. Right. And it says, people who are brought into
19 court in custody and is subject to release.

20 A. Okay.

21 Q. Right. That's him; right?

22 A. Yes, yes.

23 Q. Okay. And ICE should have been permitted to go
24 down there, should have been required to go down
25 there and take him; right?

1 JUDGE FABRICANT: I think this
2 calls for an interpretation of the policy.

3 A. I'm not -- I'm trying to read it quickly.

4 Q. All right. The last paragraph says, to the
5 extent possible, court security personnel should
6 require that DHS officials transport any
7 officials taken into custody through the
8 prisoner transport entrance?

9 A. That is what this says.

10 Q. All right. And so if ICE had been permitted to
11 go down to the lockup, as they had asked, all of
12 that would have happened; right?

13 A. I would assume so.

14 Q. And it wasn't Judge Joseph that prevented them
15 from going to the lockup, was it?

16 A. From going to lockup.

17 Q. She said that's fine; right?

18 A. If that's what the transcript says. I don't
19 remember this part at all; so...

20 Q. Okay. All right. Now, the rest of the
21 appearance for Mr. Medina Perez was pretty
22 routine; right? He was arraigned and he was
23 given drug warnings?

24 A. Yes.

25 Q. And then he and David Jellinek and the

1 interpreter went downstairs to the lockup?

2 A. Yes.

3 Q. And you gathered up your stuff and at some point
4 you went out to the lobby?

5 A. Yes.

6 Q. And you saw the ICE agent there.

7 A. Yes.

8 Q. And you told him he's coming out this door.

9 A. Yes.

10 Q. And you stood there and you waited with him.

11 A. Yes.

12 Q. And at some point you thought, gee, this is kind
13 of taking a long time; --

14 A. Right.

15 Q. -- right? And at that point you asked somebody
16 to go check.

17 A. Yeah. I don't remember if I asked him to
18 check or I may have -- I just remember it was
19 Michael Owens, the advocate, and I was just kind
20 of asking any other doors.

21 Q. When you say "advocate," you mean the victim
22 witness advocate?

23 A. Yes.

24 Q. Is that somebody who works with your office?

25 A. Correct.

1 Q. All right. Then you're standing there and
2 David Jellinek comes out with his property bag?

3 A. Yes.

4 Q. And everything kind of gets disrupted. The ICE
5 agents weren't happy?

6 A. Oh. Yes.

7 Q. Somebody goes running around to the back. Do
8 you recall that?

9 A. That sounds like probably what happened. I
10 don't specifically recall.

11 Q. And at some point, after you figured out what
12 had happened, you called your supervisor; --

13 A. Yes.

14 Q. -- is that right? And the reason you called
15 your supervisor was because of this escape;
16 right?

17 A. Yes.

18 Q. Okay. And you were actually asked a question
19 about that call at the grand jury.

20 A. Yes.

21 Q. Do you recall that?

22 A. Yes.

23 Q. And did you say -- You were asked, a member of
24 the grand jury wants to inquire as to why it is
25 at that time that you -- Where am I? With the

1 context there. A member of the grand jury
2 asked, getting back to the side bar conference
3 when the recording was turned off and you had a
4 feeling of discomfort, a member of the grand
5 jury wanted to inquire as to why it is at that
6 time that you did not go and immediately contact
7 the supervisor about the recording shut off and
8 the discussion about this way to get
9 Medina Perez out while avoiding ICE. And you
10 said probably because I didn't think he was
11 going to escape, I thought he was going to get
12 released and go with ICE and then it would be
13 just sort of another day, and that was weird
14 but, well, you know, it happened. So once it
15 didn't happen, I immediately called my boss.

16 A. Yes.

17 Q. Is that true?

18 A. Yes.

19 Q. All right. And so up until the time you learned
20 he had gone out the back door, it was just, you
21 know, kind of an odd day; right?

22 A. Yeah. It was something I didn't feel I had
23 to immediately report.

24 Q. All right. And once he went out the back door,
25 that changed everything, didn't it?

1 A. Yes.

2 MS. MULVEY: May I have one
3 moment, Chair?

4 (PAUSE)

5 MS. MULVEY: I have nothing
6 else. Thank you.

7 JUDGE FABRICANT: Very briefly.
8 Very briefly, Ms. McDermott.

9 REDIRECT EXAMINATION

10 BY JUDGE FABRICANT:

11 Q. You said, in response to one of Ms. Mulvey's
12 questions, that an ICE detainer was not part of
13 bail conditions. What -- Take your mind back to
14 the spring of 2018. What were legitimate
15 considerations for an ICE consideration,
16 condition, what were legitimate considerations
17 for setting bail on the law as it stood at that
18 time in Massachusetts?

19 A. So, I mean, what I would consider in asking
20 for bail is default history, sentence that they
21 might be facing, motivation not to return to
22 court, whether they had other open cases,
23 whether they had a strong defense. There's a
24 number of factors.

25 Q. So had there been a decision of the SJC a few

1 months earlier regarding the issue of what was
2 proper to consider in setting bail?

3 A. Yes. Commonwealth versus Brangan.

4 Q. Can you tell us the essence in your view what
5 the teaching of that case was?

6 A. It was to -- Bail is meant to ensure the
7 defendant return to court. For instance, DA can
8 argue dangerousness associated with bail. One
9 way it affected my job.

10 Q. And just to make sure we've got it here on the
11 record. That's Commonwealth versus Brangan,
12 B-r-a-n-g-a-n?

13 A. B-r-a-n-g-a-n, yes.

14 Q. And the essence of the holding was the
15 legitimate purpose of bail is to ensure the
16 defendant's return to court.

17 A. Correct.

18 Q. And not other things.

19 A. Yes.

20 Q. Now, if somebody has an ICE detainer, and ICE
21 takes custody of the person, person -- ICE might
22 bring the person back to court or might not.

23 A. Sure.

24 Q. Assuming it's the right person for ICE to take,
25 ICE might bring the person back and might not.

1 And if it's not the right person for ICE to
2 take, ICE might bring the person back and might
3 not; correct?

4 A. Correct.

5 Q. So on that issue of how ICE relates to whether
6 the person is going to appear, it doesn't matter
7 whether it's the right person or it isn't the
8 right person, does it?

9 A. I guess not. What I'm -- It's not part of my
10 calculus in requesting bail.

11 Q. So you as an assistant district attorney would
12 not take into consideration whether there was or
13 wasn't an ICE detainer, whether the person was
14 or wasn't the right person for an ICE detainer.
15 That wouldn't be part of your consideration as
16 to whether you requested bail or not.

17 A. Correct.

18 Q. And in your view, again, back in the spring of
19 2018, was that a legitimate part of
20 consideration with respect to bail?

21 A. I mean, the view on ICE and detainers in the
22 courtroom has changed so many times. I mean,
23 our office has always said it's not part of the
24 district attorney's job to consider that, and we
25 know what the judge's policies are, I don't

1 know. I just know that, you know, for the
2 criminal case is what I consider when I'm asking
3 for bail and other factors.

4 Q. The criminal cases that you prosecuted, criminal
5 charges that you were prosecuting, were the
6 focus of your attention; correct?

7 A. Correct.

8 JUDGE FABRICANT: Okay. Thank
9 you.

10 I have nothing further.

11 MS. MULVEY: I have nothing
12 else. Thank you.

13 JUDGE FABRICANT: May this
14 witness be excused?

15 HEARING OFFICER. Yes. Yes.
16 Thank you very much.

17 HEARING OFFICER: Given the
18 hour, does counsel agree this is a good time to
19 prepare for lunch?

20 JUDGE FABRICANT: Yes.

21 HEARING OFFICER: So we'll
22 resume at 2:00. Thank you.

23 (Luncheon recess taken at
24 1:03 p.m.

25 Proceedings resumed at

1 2:01 p.m.)

2 HEARING OFFICER: Good

3 afternoon.

4 I'll defer to you,
5 Special Counsel, to call your next witness.

6 JUDGE FABRICANT: Thank you.

7 And the Commission calls
8 Lawrence Okstein.

9 (PAUSE)

10 JUDGE FABRICANT: While he's
11 coming to the witness stand, Mr. McInerney,
12 counsel have now agreed that the whole set of
13 photographs that's in Appendix U should be
14 received in evidence with your permission.

15 HEARING OFFICER: Absolutely.
16 Got it, Judge.

17 JUDGE FABRICANT: Thank you.
18 And there's another
19 photograph --

20 MR. HOOPES: Yes. And I will
21 bring that in the morning to add. So that will
22 be the collection of photographs.

23 HEARING OFFICER: That's fine.

24 JUDGE FABRICANT: Thank you.

25 MR. HOOPES: And they all come

1 from one set of photos. This one was missing.

2 HEARING OFFICER: Understood.

3 Thank you very much.

4 Would you please raise your

5 right hand.

6 LAWRENCE JOSEPH OKSTEIN, SWORN

7 HEARING OFFICER: Thank you.

8 Please have a seat.

9 DIRECT EXAMINATION

10 BY JUDGE FABRICANT:

11 Q. Good afternoon.

12 A. Good afternoon.

13 Q. Tell us your name, please.

14 A. Lawrence Joseph Okstein.

15 Q. And what is your occupation?

16 A. I am the first assistant clerk magistrate at
17 the Newton District Court.

18 Q. And going back through your career, can you give
19 us a brief overview of your professional
20 history?

21 A. Sure. From 1993 to 1995 I was an assistant
22 district attorney in Norfolk County,
23 William Delahunt, from 1995 to 2014 I was in
24 private practice, general law practice, and then
25 from December 29th of 2014 to present I've been

1 in the Newton District Court, first as an
2 assistant clerk magistrate and now as the first
3 assistant clerk magistrate.

4 Q. And what's your role as first --

5 A. So I conduct criminal show cause hearings, so
6 when the police are seeking criminal complaints
7 against individuals, I hold hearings to
8 determine whether there is probable cause to
9 issue a criminal complaint, I conduct small
10 claims trials, I handle CMVI or civil motor
11 vehicle infractions hearings, I process appeals
12 to the various courts, decisions of the court, I
13 also issue search warrants upon finding probable
14 cause, arrest warrants upon finding probable
15 cause, and that's generally -- and I sit in the
16 session to assist the judge when the session
17 clerk is otherwise unavailable.

18 Q. And you said that before you became first
19 assistant clerk, you were an assistant clerk.
20 When you were assistant clerk, were you more
21 frequently sitting in the session?

22 A. I, again, we have a session clerk. So we are
23 a small court. If the session clerk is
24 unavailable due to sickness, vacation, or any
25 other reason, I would sit in the session to

1 assist.

2 Q. Okay. I'm going to ask you to give us a general
3 description of the physical layout of the
4 building and the courtroom. We're going to put
5 up some photographs to assist in this. So let's
6 start with Photograph 509, Page 509, Appendix U.

7 And Mr. Okstein, in front of
8 you on the witness stand is a binder that has a
9 set of exhibits that have been received in
10 evidence. The photographs are at Tab U. So you
11 can look at them there or you can look at them
12 on the screen, whatever is easier. And there
13 are page numbers in the upper right-hand corner,
14 and those are the page numbers that I'm going to
15 refer to.

16 So what do you see here in
17 Photograph Number Page 509?

18 A. So -- Page 509. Are they marked page
19 numbers?

20 Q. In the upper right-hand corner, there's a red
21 number. Actually, in the book --

22 A. I see the numbers. Okay.

23 So on Page 509 I see what appears to be the
24 first session of the Newton District Court.

25 Q. And what are we looking at from the perspective

1 of this photograph?

2 A. So you're looking at a shot of where the
3 judge sits, which is the far back, with the
4 seat, what appears to be the false bookcase, if
5 you will, in the back with two flags, and then
6 in front of where the judge sits is where the
7 session clerk or whoever's covering for the
8 session clerk would sit, and then the litigants
9 would be at the table that you see where -- with
10 the two chairs, and then if there was a custody,
11 the person in custody would be where you see the
12 glass enclosure up close.

13 Q. Is that referred to as the dock?

14 A. The dock, yes.

15 Q. And let's pull up Photograph Page 506. And what
16 do you see here?

17 A. So Page 506 is a picture, a photograph of the
18 entranceway to the clerk magistrate's office, so
19 the first floor of the Newton District Court.

20 Q. If you're coming out -- Looking at this
21 photograph, if you're walking out the door of
22 the courtroom, the public door of the courtroom,
23 where are you in this photograph?

24 A. So you can just make out the bench that's on
25 the left-hand side. The door to the first

1 session is just past that bench, on the
2 right-hand side.

3 Q. And so you'd be coming out and turning to your
4 left to go into the clerk magistrate's office if
5 you're coming out of the courtroom?

6 A. Yes. Yes. If you walk out of the first
7 session courtroom, you walk out and you turn to
8 your left, that's what you would see. This is
9 the view.

10 Q. If you're in the clerk's office, in your office,
11 and you're going into the courtroom, is there
12 another way to get there?

13 A. There is. So if you walk through the clerk's
14 office, there is a back entranceway into the
15 courtroom.

16 Q. And does that lead to a secure door on the side
17 of the courtroom?

18 A. Yes. So the only people that are allowed
19 back there are court personnel, court officers,
20 clerks, judges. And so, yes, that was the
21 secure area back there.

22 Q. And do you need a security pass to open that
23 door?

24 A. Yes, you need a pass and you put it up to the
25 little reader.

1 HEARING OFFICER: Could I ask
2 that you speak a little closer to the
3 microphone, sir.

4 THE WITNESS: Sorry. Yes.

5 HEARING OFFICER: Thank you.

6 JUDGE FABRICANT: It is partly
7 probably because I'm having him turn to the
8 photograph.

9 Q. Let's bring up Photograph 512, Page 512. So
10 what do you see here?

11 A. So on Page 512 you have a photograph of the
12 exitway of the first session. So if you were
13 leaving the first session, you would walk
14 through those double doors and into the main
15 corridor where you just saw the clerk's office
16 to your left.

17 Q. And what are those benches that you see back
18 there behind the bar?

19 A. So the benches are for the public, it's where
20 the public would sit, or if there are observers
21 of the court, if you will.

22 Q. And let's just bring up Photograph 513. What's
23 that?

24 A. So Page 513 is a photograph of the dock, if
25 you will. So that's where people in custody

1 would sit, where there's a little bench there,
2 and stand before the judge, they approach the
3 glass that faces the bench so the judge could
4 hear them.

5 Q. And let's bring up 512. Is this the same one we
6 just looked at?

7 Do part of your responsibilities, if you're
8 serving as the clerk in the courtroom, do part
9 of your responsibilities include managing the
10 recording system?

11 A. Yes.

12 Q. And back in spring of 2018 -- And now everything
13 else I'm going to ask you is going to relate to
14 April of 2018, which I realize is seven years
15 ago, but I'm going to ask you to put your mind
16 back to that time frame.

17 A. Sure.

18 Q. In that time frame, what kind of recording
19 system did you have?

20 A. It was called JAVS. I'm not sure what JAVS
21 stood for. It's J-A-V-S. It was -- That was
22 the recording system that we used.

23 Q. Has that since been replaced by something else?

24 A. It has. It has.

25 Q. And the new system, what's that called, For?

1 A. I believe it's called FTR, For the Record.

2 Q. So focusing on JAVS. If you needed to get
3 access to a recording after a proceeding, what
4 did you have to do?

5 A. So what I personally did was ask someone in
6 our office who was well versed in the technology
7 side to make a copy of a proceeding, they would
8 come into the courtroom, they could pull up the
9 proceeding through JAVS, make a recording on a
10 CD or disc, if you will.

11 Q. So you'd get it in the form of a CD?

12 A. Yes.

13 Q. Nowadays, with the FTR system, what do you do?

14 A. Now it's all online. You request a copy
15 online, pay for it online.

16 Q. And for you, if you want to listen to
17 something --

18 A. I go on For the Record, I have a pass, and I
19 can listen to the proceeding that was detected.

20 Q. So turning to April 2nd of 2018. Before that
21 day, had you had experience with ICE detainers?

22 A. I had seen them before, yes, so I'd seen both
23 detainers and warrants.

24 Q. And how often?

25 A. If felt like they were coming fairly

1 regularly around that time frame. So I'd see
2 them a few times a week.

3 Q. And if you were serving as the clerk for the
4 session, would you get the detainer?

5 A. Yes. They would make their way to me.
6 Typically, I believe the court officer probably
7 got them from the police. I'm not sure how it
8 came to be in the court's possession. But
9 someone would give it to me, I would then
10 distribute a copy if I had, and I would let the
11 judge know that we have one.

12 Q. And up to that day, had you had experience with
13 ICE taking custody of someone from
14 Newton District Court?

15 A. I had seen individuals taken into custody
16 outside of the courthouse by ICE.

17 Q. Outside the courthouse. Outside what part?

18 A. The front. Outside the front door, on the
19 street.

20 Q. And prior to that day, and it was 2018, had you
21 had -- had you seen ICE going to the lockup in
22 the Newton District Court?

23 A. I personally had not seen that.

24 Q. Were you aware of that happening?

25 A. I was not aware if it happened or not. I --

1 Typically, I wasn't in the courtroom. But I had
2 never heard of it happening. I've never seen it
3 happen.

4 Q. On that day, were you working as a clerk in the
5 courtroom with Judge Joseph?

6 A. I was. The session clerk was unavailable, so
7 I was covering.

8 Q. During the course of the day, were there times
9 when things were active in the courtroom and
10 then breaks?

11 A. Yes. We would call the list to start the
12 day, find out who is present, who wasn't
13 present, judge would get a handle on how much
14 business there was and how much time she or he
15 needed to allot to the cases, so -- and then we
16 would take a break so that the attorneys could
17 talk to their clients or the DA's office or --
18 judge would come back out when the session clerk
19 or in this case myself would tell the judge that
20 we had business for her, to side bar.

21 Q. And were you in and out of the courtroom --

22 A. I was.

23 Q. -- during times?

24 A. I was.

25 Q. During the course of that morning, did you see

1 an ICE officer in the courtroom?

2 A. I did. I did see an ICE officer in the
3 courtroom.

4 Q. And how did you become aware that that person
5 was an ICE officer?

6 A. So I think I first saw the ICE officer in the
7 hallway. I can't remember precisely how I knew
8 he was an ICE officer. Typically, they had a
9 tag on or they identified themselves, introduced
10 themselves. But I don't recall on that day how
11 I knew, but I knew that the gentleman, one of
12 the gentleman sitting in the bench that I
13 pointed out in the courtroom was from ICE.

14 Q. Who was the first justice at Newton District
15 Court?

16 A. Judge Mary Heffernan.

17 Q. And was she the judge who would be sitting there
18 most often?

19 A. Yes.

20 Q. Did she have a practice regarding ICE agents in
21 the courtroom?

22 A. So it was her practice, my understanding of
23 the practice, was that, if the ICE officer was
24 present in the court indicating that he or she
25 wanted to take custody of a litigant, that they

1 would -- she would ask that they wait outside
2 the courtroom so that they're not in the
3 courtroom, and that if they're going to take
4 custody of the person, that they do it outside
5 the courtroom, so it's not to interfere with the
6 business of the court.

7 Q. And would she speak to the ICE officer --

8 A. No.

9 Q. -- or would she have you do it?

10 A. No. She would let the session clerk know, or
11 if I was in the session, she would tell me to
12 let the ICE officer know that that was the
13 preference of the court.

14 Q. And was that preference, that practice, ever put
15 in writing anywhere?

16 A. No. Each judge that came in had their own
17 way of doing things, so to speak. So it wasn't
18 something that other judges had to follow, but
19 some judges did follow it and some judges had
20 their own idea of how things should go, and we
21 would follow that judge and whatever that judge
22 wanted.

23 Q. On April 2nd, 2018, --

24 A. Yes.

25 Q. -- you're serving as the session clerk,

1 Judge Joseph is sitting in the first session
2 courtroom. Was Judge Heffernan in the building
3 that afternoon?

4 A. No, Judge Heffernan was not present on
5 April 2nd, 2018.

6 Q. Did you talk to Judge Joseph about ICE being
7 there?

8 A. I did. We had a conversation about the ICE
9 officer being present in the courtroom.

10 Q. And did you have a conversation with her about
11 Judge Heffernan's practice?

12 A. I did. I did.

13 Q. Tell us that conversation as much as you can.

14 A. So I spoke to Judge Joseph, and I let her
15 know that there was an ICE officer in the
16 courtroom, and we talked a little bit about it.
17 Judge Joseph -- I asked her how she wanted to
18 handle the situation, and she in turn asked me
19 what Judge Heffernan's custom was, that she
20 wanted to follow whatever Judge Heffernan did
21 typically, and I advised her what
22 Judge Heffernan did typically, and she said
23 that's what we want to do here today.

24 Q. Do you know when in the course of the day that
25 conversation occurred?

1 A. I think it was probably a little past
2 10:00 a.m., maybe, or -- around that time, but
3 I'm not positive of the exact time.

4 Q. Did you have one conversation with her or more
5 than one conversation about ICE and how to
6 handle ICE being there?

7 A. I believe we had just that one conversation
8 where I just wanted -- I knew that, you know,
9 she was fairly new to the bench, and I wanted to
10 inform her of the ICE officer, and I think she
11 was trying to make a reasonable decision, so I
12 think following the first justice was a way
13 that...

14 Q. And did you at some point communicate with the
15 ICE officer what you understood to be the
16 preference of the court?

17 A. I did. After I left Judge Joseph, I walked
18 to the ICE officer and let him know the
19 preference of the court was that he, if he
20 intended to take custody of the individual he
21 was there for, that it was preferred to do so
22 outside of the courtroom.

23 Q. And did you give him direction or make a request
24 to him regarding where he would physically be?

25 A. He asked should he wait in the hallway. I

1 said that's fine, you can wait in the hallway.

2 I think he asked me about which door the person
3 come out of, and I just pointed to the front of
4 the building, which is right in the hallway.

5 And he said, okay, I'll wait out in the hallway.

6 Q. At some point later in the day did you have
7 further conversation with the ICE officer?

8 A. Yes. I had -- So toward the very end of the
9 day, so late, later in the afternoon, almost
10 toward the ending time of court, he asked me if
11 the defendant was going to be released and go to
12 lockup or downstairs in the basement to where
13 the cells are to get, to get the person he was
14 interested in taking custody of, and he asked me
15 to ask the judge if he could do that.

16 Q. Did you tell you would ask the judge?

17 A. I did tell him I would ask the judge.

18 Q. We're going to come back to that.

19 At this point what I want to do is play the
20 recording of the afternoon call of the
21 Medina Perez case.

22 A. Okay.

23 Q. So we're going to play that recording.

24 What you have in front of you, in the binder in
25 front of you is a transcript, which is at

1 Appendix G and starts at Page 40 in Appendix G.
2 So you can turn to that. We'll also have the
3 transcript on screen. So you can refer to the
4 screen or binder in front of you.

5 (RECORDING PLAYING)

6 Q. So in this first clip, counsel says he wants to
7 go to side bar and yet to wait for his client.
8 Is that your understanding of what happened?

9 A. That's my understanding, yes.

10 Q. Is that your memory of what happened?

11 A. That is my memory.

12 Q. Do they at that point go to side bar?

13 A. They did.

14 Q. The two attorneys and the judge?

15 A. And I believe someone was present from
16 probation as well.

17 Q. Okay. And would that often happen that --

18 A. Yeah. Some of the people, they often changed
19 out who was there during the lobby -- during
20 this -- little conferences. So one person could
21 be there and then leave and another officer --
22 But usually probation is somewhere in that mix.

23 Q. When they were at side bar, what were you doing?

24 A. I was marking cases from cases that we had
25 already done, so I was filling out the docket

1 sheets, next dates, what had happened in the
2 court proceeding, attorneys were asking me for
3 dates or, you know, whispering to me about
4 something, so I was really taking care of what I
5 needed to do from a clerk's perspective.

6 Q. Were you paying attention to the conversation at
7 side bar?

8 A. No.

9 Q. All right. We're going to play the next clip.

10 (RECORDING PLAYING)

11 Q. So that conversation that appears in the
12 transcript and we heard on the recording,
13 although it's a little difficult to hear, until
14 we get to the point where the judge says, are we
15 on the record, did you hear any of that
16 conversation?

17 A. No.

18 Q. And then when she said, are we on the record,
19 the first time she said that, did you hear her
20 say it?

21 A. I think I wasn't paying attention, so I asked
22 her to repeat herself, because I just wasn't
23 paying attention.

24 Q. And then the transcript indicates you said,
25 what's that. Is that your memory of --

1 A. Yes. That was my way of asking what
2 happened, what she wanted me -- because I just
3 wasn't paying attention.

4 Q. And then, according to the transcripts, she
5 says, are we off the record. You say, no, we're
6 on the record. And then Mr. Jellinek says, can
7 we go off the record for a minute.

8 A. Yes.

9 Q. Had you had previous experiences in
10 District Court with going off the record?

11 A. Do you mean Newton District Court
12 specifically or just in general?

13 Q. Well, let's start with Newton.

14 A. So I think that there were other judges that
15 would go off the record to greet an old friend
16 or to talk about something that was personal.
17 So that happened on occasion. And from my
18 experience in Newton, it didn't happen a
19 tremendous amount, but it did happen. Different
20 judges coming into the court.

21 Q. Did you have experience in Newton with judges
22 having conferences off the record about the
23 substance of a case or about matters in a case?

24 A. No. Well, typically, it was to discuss
25 something a little -- something personal,

1 personal to the judge and whoever they were
2 talking to.

3 Q. Meaning personal to the lawyers or --

4 A. Yeah, personal to the lawyers. So if they
5 had an old college roommate or a friend or
6 somebody they hadn't seen in many, many years,
7 and they were appearing in Newton and they
8 wanted to say hello or asked about their family,
9 they didn't want that to all be part of the tape
10 recording record, so that could you shut that
11 off for a second, they say hello, and put it
12 back, they ask that it be back on.

13 Q. Going back earlier in your career to when you
14 were a new lawyer in your earlier years of your
15 law practice.

16 A. Uh-huh.

17 Q. Had you had experience with conversations with
18 judges off the record?

19 A. Yes. As a practitioner, I definitely had
20 experiences with judges more often, because I
21 practiced with my father who had been a
22 practicing attorney for 50 years, so a lot of
23 judges knew him or knew my mother and they want
24 to say hello or asked how they were or something
25 like that. So oftentimes it was much more

1 common. It's not common now. But it was common
2 that a judge would say, hey, let me ask you a
3 couple of questions and it would all be not
4 taped.

5 Q. And back in those early years of your career,
6 had you had experience with substantive
7 conversations off the record?

8 A. Only in lobby conferences. So going back to
9 the lobby conferences, which was earlier in my
10 career, they were not tape recorded. It would
11 be in a lobby of a judge, the judge, the
12 prosecutor, usually a criminal case, the defense
13 attorney. And oftentimes, a judge would have
14 somebody else just sit in the room to make sure
15 that there was somebody else in the room other
16 than defense attorney and prosecutor. But those
17 weren't -- And then at some point they started
18 to recommend that those conferences be taped, so
19 judges would have tape recorders and tape the
20 lobby conference.

21 Q. And in the 2018 time frame, April 2nd of 2018
22 frame in particular, were the judges doing lobby
23 conferences off the record that you knew of?

24 A. No, not that I'm aware of.

25 Q. And were judges doing other kinds of conferences

1 other than what you've described off the record?

2 A. Not off the record. Sometimes they would
3 hold side bar -- lobby conferences but on the
4 record in the courtroom.

5 Q. On the record.

6 A. On the record. But they would conduct that.

7 Q. Were you aware of a rule about recording?

8 A. I wasn't at the time this all happened. I of
9 course now am aware.

10 Q. And when the judge asked you to go off the
11 record, what did you do?

12 A. I went off the record.

13 Q. And did you have any concern about that at that
14 point?

15 A. Not at that point, no.

16 Q. When you went off the record, when you turned
17 off the recording, and the judge and the lawyers
18 were talking, what were you doing?

19 A. I was just marking my cases and dealing with
20 the clerk -- clerical part of my job, of being
21 in the courtroom, marking paperwork and --

22 Q. Were you listening to their conversation?

23 A. No.

24 Q. Did you hear any of their conversation?

25 A. No.

1 Q. And then at some point did you go back on the
2 record?

3 A. I did.

4 Q. And let's play the back on the record part.

5 (RECORDING PLAYING)

6 Q. Mr. Okstein, if you look on Page 42 of the
7 transcript, and you go about a third of the
8 page, about a third of the way down the page,
9 Mr. Jellinek says, I would ask that he, I
10 believe he has some property downstairs, I'd
11 like to speak with him downstairs if I may. Was
12 that something that was usual in your experience
13 in the first session in the District Court?

14 A. Well, I wasn't in the first session all that
15 often. But I hadn't seen an interpreter go down
16 into custody for -- with the defendant like
17 that, but that doesn't mean it didn't happen. I
18 just, I hadn't seen it.

19 Q. It wasn't in your experience.

20 A. In my experience, I hadn't seen it.

21 Q. Okay. Now, at the bottom of the page where we
22 just stopped, and Judge Joseph says wait just a
23 second, let's go -- let's play a little more.

24 (RECORDING PLAYING)

25 Q. Mr. Okstein, you said to the judge, there is

1 representative from ICE here in the court to
2 visit the lockup.

3 A. Yes.

4 Q. What did you intend to be asking her or
5 conveying to her at that point?

6 A. So I was conveying the ICE officer's or
7 agent's request to visit the lockup to take the
8 individual he was interested in into custody.

9 Q. Was that the request you told us about a little
10 while ago?

11 A. Yes.

12 Q. And her response, that's fine, I'm not going to
13 allow them to come in here, but he's been
14 released on this, how did you understand that
15 response?

16 A. I understood that response to be following
17 the practice of the court, that officer was an
18 agent, wasn't coming into the courtroom, wasn't
19 coming into the courtroom to go down into the
20 lockup, but she was releasing the prisoner and
21 he was free to leave, and whatever happened
22 after that was between him and ICE.

23 Q. And did you have any understanding as to whether
24 ICE could go to the lockup another way?

25 A. I think at that time there was a policy that

1 indicated that ICE agents were permitted to go
2 to lockup. I had never seen them in Newton go
3 to the lockup. I had never seen that. But I
4 think under the policy that the court put out to
5 all the clerks and judges, I think that a judge
6 could allow it.

7 Q. And did you understand that Judge Joseph was
8 allowing it?

9 A. No. As I understood it, Judge Joseph was
10 saying the agent was not permitted to come into
11 the courtroom down the stairs through the
12 courtroom to lockup but that she was releasing
13 him and he was, the individual was free to
14 leave, and then she was just following the
15 practice of the court, that this gentleman would
16 leave and if the ICE agent wanted to take him
17 into custody he would.

18 Q. And the practice of the court, are you referring
19 to Judge Heffernan's practice?

20 A. Yes. Well, refer to Judge Heffernan's
21 practice, but more specifically, that's what I
22 believe that Judge Joseph was following.

23 Q. And what was the practice of the court as to how
24 a defendant would leave the courtroom when the
25 defendant was released from custody?

1 A. So my experience is that the defendant would
2 leave through the front door. So they get their
3 possessions, and the court officer would walk
4 with them up the stairs, and they literally
5 would walk right out the front door.

6 JUDGE FABRICANT: Let's
7 continue playing.

8 (RECORDING PLAYING)

9 Q. Now, when the judge says, Mr. Jellinek asked if
10 the interpreter can accompany him downstairs to
11 further interview him, was that something in
12 your view consistent with the practice you had
13 seen previously in that courtroom?

14 A. Well, in the limited time that I'd been
15 serving as the session clerk in the courtroom
16 covering for a clerk, I hadn't seen that.

17 Q. Hadn't seen that.

18 A. I had not.

19 Q. You told us earlier that the ICE agent asked you
20 if he could go to the lockup and you said you
21 would ask the judge. Did you convey back to him
22 an answer?

23 A. I did. I let him know.

24 Q. So let's try to get as close as we can when you
25 conveyed that back to him.

1 A. So after we were done with, with my reading
2 what happened in the case, and Attorney Jellinek
3 walked down the stairs to the lockup with the
4 court officer and the interpreter and then a
5 defendant, I -- the hearing was over, I went out
6 of the courtroom, the ICE officer was waiting in
7 the hallway, and I conveyed to him that the --
8 you know, what had happened, that he could not
9 go down to the lockup, that the individual would
10 be -- was released from custody and would be
11 coming up and going out the front door.

12 Q. And what was the basis for your telling the ICE
13 officer that he couldn't go to the lockup?

14 A. That's how I understood -- That's what I
15 understood Judge Joseph's decision to be in that
16 respect.

17 Q. At some point did the ICE officer express a
18 concern to you?

19 A. He did. He didn't say anything specifically.
20 He was more speaking of, there was another
21 individual in the courtroom with the defendant,
22 and he expressed that he was alone that day at
23 the Newton District Court and he was going to
24 call another agent to come assist him so he --
25 That's what he expressed initially.

1 Q. Did he express concern about being alone?

2 A. Yes. He expressed concern about being alone
3 and that the defendant had a friend, he wasn't
4 sure who the friend was, but he was in the
5 courtroom waiting for him; so...

6 Q. And did you do something about that?

7 A. So yeah. When he expressed his concern about
8 that situation, I called the chief court
9 officer, who was in his office downstairs, and
10 expressed to him that I'd be more comfortable if
11 he came upstairs and stayed with the ICE agent
12 to make sure that there was no confrontation to
13 occur, and he did, he came up.

14 Q. And at some point -- That conversation you just
15 talked about, you have an officer who's
16 concerned, so you called the chief court
17 officer, can you place that in time?

18 A. So, again, that would have been after the
19 hearing was conducted, that would have been
20 while the defendant, the defense attorney, the
21 interpreter, the court officer were downstairs.
22 So that's -- When they were all downstairs, I
23 was on the first floor by the front door in the
24 hallway area, and that's where the ICE
25 representative was. So it was sometime after

1 the hearing concluded but before the court
2 closed at 4:30.

3 Q. And the chief court officer --

4 A. He came right up, yeah.

5 Q. And did you or the chief court officer tell the
6 ICE officer where you expected the defendant to
7 come out?

8 A. So yeah. Definitely one of us did. I don't
9 remember if it was me. I definitely, if I was
10 asked, I would have said the front door. I just
11 don't remember if it was the chief who said the
12 front door or myself. But I would have said
13 that if I was asked.

14 Q. And the front door of what?

15 A. The front door of the courthouse. So
16 opposite the courtroom, when you walk out of the
17 first session, you literally walk right out the
18 courthouse right through the doors.

19 Q. When you're having this conversation, are you
20 outside the building or inside the building?

21 A. I'm inside the building in the hallway with
22 the ICE officer and at that point with the chief
23 court officer.

24 Q. And where -- How were you expecting the
25 defendant to come into that hallway, what we've

1 been referring to as the main lobby of the
2 courthouse?

3 A. I was expecting that the defendant would
4 be -- I guess not -- "supervise" isn't the right
5 word, but accompanied by a court officer,
6 brought up the steps, and then they would walk
7 out the front door.

8 Q. So is that the stairway that comes from the
9 probation counter?

10 A. Yes. That's where the public would go down.

11 Q. At some point that day did you become aware that
12 the defendant wasn't coming out into the main
13 lobby?

14 A. So I stayed with the chief court officer and
15 the ICE officer for probably about five or 10
16 minutes, and then I left to do other things that
17 I needed to do to close up the court. But in
18 that five or 10 minutes, the prosecutor had come
19 out of the courtroom. I don't know what she had
20 been doing prior. But she came out of the
21 courtroom and she asked, you know, whatever they
22 were still doing here. I asked the ICE officer
23 what he was still doing here. I was somewhat
24 surprised that he was still there. And he said
25 that he was waiting for the defendant to come

1 out through the door that we told him was going
2 to happen. So...

3 Q. And did you at some point learn what had
4 happened?

5 A. Yes. So it became clear as we approached the
6 4:30 time frame, when the court's closing up,
7 that the defendant wasn't coming out. We also
8 saw the defense attorney came up and walked by
9 the ICE agent and the prosecutor and the chief
10 court officer and walked out the door for the
11 day. So he was leaving. So I wasn't sure where
12 his client was, but he was leaving.

13 Q. The next day, was Judge Heffernan back in
14 Newton District Court?

15 A. I believe it was the next day. I don't --
16 I'm not a hundred percent sure. I believe it
17 was the very next time I saw Judge Heffernan, I
18 think it was the next day.

19 Q. So you're not sure which day the next time --

20 A. No. I think it was April 3rd, the next day,
21 but it could have been April 4th. I just don't
22 remember exactly.

23 Q. Did you have a conversation with her?

24 A. I did.

25 Q. Tell us about that conversation, please.

1 A. So typically, when Judge Heffernan is not in
2 the court, when she comes back to the court,
3 she'll ask did everything go okay, is there
4 anything I should know about or any problems,
5 because she's just trying to monitor how the day
6 went for everybody. And I let her know that
7 there was an issue, I didn't quite understand at
8 that time the magnitude fully, but I said there
9 was an issue with this person leaving the court
10 not through the front door and the ICE agent was
11 waiting and wasn't able to take him into
12 custody.

13 Q. And did you talk to her at all about the
14 recording?

15 A. I did. I let her know that -- She asked me a
16 little bit about the hearing and what had
17 happened, and I was trying to remember what had
18 happened and in my mind tell her. And I did, I
19 did say at some point the tape was off, and
20 that's it.

21 Q. Did you at some point listen to the recording?

22 A. I did. I listened to the recording. Because
23 I was trying to figure out, I was trying to
24 figure out if I had said anything or if the
25 judge said -- I was trying to figure out why the

1 defendant didn't come up through the front, and
2 I thought if I listened to the tape maybe I
3 missed something that the judge said or I said
4 or the defense attorney said, and so I listened
5 the tape and I didn't hear anything that
6 addressed that issue.

7 Q. Sometime later, did Judge Joseph ask you for a
8 copy of the recording?

9 A. Yes. I believe I bumped into Judge Joseph
10 maybe a week or so after, could have been two
11 weeks, sometime in that time frame, when she was
12 visiting the court, and she asked me for a copy
13 of the tape.

14 Q. And did you have someone make a copy for her?

15 A. I did. Well, I had had multiple copies made
16 anyway, so I just gave her one that we had.

17 Q. And who else did you give a copy to at some
18 point?

19 A. Judge -- Well, I took one to listen to,
20 Judge Heffernan asked for one, I think the
21 Trial Court asked for several. They wanted it
22 several different ways, because it was a little
23 choppy, start, stop, start, stop, and a couple
24 times the tape captured some but not all. So we
25 made sure that the whole day proceedings was

1 captured on tape so whoever was listening could
2 hear the whole day, not just a part of the day.

3 Q. That request that came from the Trial Court, can
4 you place that in time at all?

5 A. I would say it was probably a couple of weeks
6 after my seeing Judge Joseph maybe or a week
7 after seeing Judge Joseph or somewhere -- It was
8 sometime after that week that I saw
9 Judge Joseph.

10 Q. And was that Dan Sullivan, general counsel for
11 the Trial Court, who made that request?

12 A. My best recollection is, it might have been
13 Joe Jackson from the administrative office, and
14 sometime Dan Sullivan, general counsel, had made
15 a request, but requested not just the day, they
16 wanted the day before, the day after. So they
17 were changing up what they wanted from the
18 clerk's office; so...

19 Q. And to the best of your memory, that request
20 that was changing and asking for the day before,
21 the day after, the whole day, did that come from
22 Joe Jackson or from Dan Sullivan?

23 A. I don't recall. I think that the ultimate
24 request came from Dan Sullivan, from the general
25 counsel's office, but I don't know why he was

1 requesting -- That's what he requested. That's
2 my recollection.

3 Q. Was Joe Jackson in the administrative office of
4 District Court?

5 A. I think so. At the time, yes. I think he
6 dealt with those like tape issues and stuff like
7 that.

8 Q. So was he working for working for
9 Chief Justice Paul Dawley?

10 A. I believe so. The administrative office.

11 JUDGE FABRICANT: That's all I
12 have for you at this time. Counsel may have
13 some questions for you.

14 HEARING OFFICER: Mr. Hoopes?

15 MR. HOOPES: Thank you.

16 CROSS-EXAMINATION

17 BY MR. HOOPES:

18 Q. Good morning.

19 A. Good morning, sir.

20 Q. My name is Tom Hoopes, and I represent
21 Judge Joseph. Nice to meet you.

22 A. Nice to meet you, too.

23 Q. Thank you for your testimony so far.
24 But I'd like to go back a little bit --

25 A. Sure.

1 Q. -- and ask you some questions, if I might.

2 A. Sure.

3 Q. So let's go straight to April 2nd. Event
4 happens on that day that you've described, some
5 events happened after that day.

6 A. Right.

7 Q. That was some seven years ago?

8 A. Yes.

9 Q. And so it would be fair to say that you remember
10 some things, some things you don't remember;
11 correct?

12 A. Yes.

13 Q. And at the time, it didn't seem like to you
14 something you needed to take notes on, so you
15 don't have any notes; correct?

16 A. Correct.

17 Q. And nobody asked you to make notes at that
18 point?

19 A. No.

20 Q. So did you start out as the session clerk at the
21 very beginning of the morning?

22 A. I'm trying to remember. Because when I
23 looked at the transcripts that were from the
24 hearings, it starts around 10:00. We usually
25 start the day at 9:00. So I wasn't sure if I

1 started out the day or when the -- The session
2 clerk's mother had passed away, so I'm not sure
3 if she found that out and left or how I ended up
4 going into the session. But the first that I
5 had of going into the session here on the tape
6 is 10:00.

7 Q. So you started when you heard it; right?

8 A. Yeah.

9 Q. But you were the session clerk for the entire
10 day.

11 A. Yes. Yup.

12 Q. And so talking about it today, you seem to have
13 some specific memories of this case,
14 Medina Perez.

15 A. Yes.

16 Q. Okay. And do you remember today that initially,
17 when the case was called, Medina Perez was
18 represented by Ms. Bostwick?

19 A. Yes.

20 Q. And you, I assume, are familiar with
21 Ms. Bostwick?

22 A. I am.

23 Q. She's a bar advocate?

24 A. Yes.

25 Q. She's been a bar advocate there for a number of

1 years; --

2 A. Yes.

3 Q. -- right? She's there often, to say the least?

4 A. She was at that time, yes.

5 Q. Yup. And the ADA was Shannon Jurgens?

6 A. Yes.

7 Q. And she had been there just about a month or so
8 at that point?

9 A. Yes. They change over fairly quickly. I
10 think she had been there for a little while,
11 yeah.

12 Q. Just so I have it in time. So this is 2018,
13 April of 2018. How long had you been the
14 clerk -- been a clerk there?

15 A. I started December 29th of 2014. So maybe
16 four years, a little over.

17 Q. Okay. And you've been promoted. So you've been
18 the first assistant clerk on that day for --

19 A. From 2015 -- November of 2015 I was promoted.

20 Q. Okay. And so Ms. Bostwick represented Mr. Perez
21 for the morning essentially; correct?

22 A. Yeah. She was appointed in the morning by
23 Judge Joseph, yes.

24 Q. And when you listen to the tape for the day, you
25 don't hear any reference to ICE by you in the

1 morning.

2 A. No. No. I don't think I reference ICE ever
3 other than asking the judge about the lockup,
4 going downstairs. The conversation I had with
5 Judge Joseph was in her lobby.

6 Q. And do you have a firm memory as to when that
7 conversation took place? Could have been in the
8 morning, could have been at the lunch break?

9 A. I don't have a firm recollection. I thought
10 it was in the morning hour. When I say
11 "morning," I mean around the 9:00, 10:00 area,
12 but I don't -- I couldn't tell you the exact
13 time.

14 Q. Okay. And the first time you noticed ICE in the
15 courthouse was you thought sometime in the
16 morning.

17 A. Yes. I saw him in the hallway.

18 Q. And later on that morning you saw him actually
19 in the courtroom.

20 A. I did.

21 Q. And he was sitting in the courtroom.

22 A. He was.

23 Q. So if I showed you a blow-up, if I can, of the
24 courtroom. Do you have a recollection -- So
25 we've got two. We've got -- This is a blow-up

1 from the bench view out the door to the left
2 side and this is a blow-up of the other side.

3 A. Yes.

4 Q. And I'll just put this one here. Do you have a
5 recollection today of where you saw --

6 A. I do. He was sitting in the front row on the
7 right-hand side.

8 Q. So right up here.

9 A. That's the left-hand side.

10 Q. I'm sorry. The left. Well, okay. So we're --

11 A. I think. If I'm looking at it correctly. So
12 I'm looking at the one behind that.

13 Q. When you say "left-hand side," looking at the
14 bench --

15 A. I'm sorry. You're correct. So if I'm
16 looking at the bench walking into the courtroom,
17 it would be on the left-hand side, front row.

18 Q. Okay. So it would be fair to say that he would
19 have had a front row seat.

20 A. Yes.

21 Q. And do you have a recollection of how many
22 people were in the courtroom that day, like
23 spectators --

24 A. I don't, I don't recall how many. It wasn't
25 the busiest day. There definitely were other

1 people. I just don't remember how many.

2 Q. It was a Monday.

3 A. It was -- I don't, don't remember. But like
4 I said, it wasn't the busiest day, but there was
5 definitely other court business.

6 Q. Yup. And it would be fair to say that
7 oftentimes in District Courts Monday's an
8 arraignment day for arrests over the weekend and
9 some other --

10 A. Traditionally it's the busiest day.

11 Q. Now, do you have a memory of whether the ICE
12 agent was there the entire time before you said
13 something to him or not?

14 A. I think when I came out -- when I came into
15 the courtroom to handle cases, I saw him sitting
16 there, and I think that's what prompted me to
17 have a conversation with Judge Joseph, just to
18 make sure I knew what she expect and wanted.

19 Q. So was this a conversation during the course of
20 the morning? Again, I'm asking the same
21 question. Or could this have been a
22 conversation that was over the lunch?

23 A. I believe it was in the morning hours.

24 Q. But you're not sure.

25 A. I'm not sure.

1 Q. Okay. And the conversation was about ICE being
2 in the courtroom?

3 A. Yes. I let her know that there was a
4 representative from ICE present in the
5 courtroom.

6 Q. And you also told her, as I understood it, that
7 Judge Heffernan's policy was no ICE in the
8 courtroom.

9 A. It was not -- I would say her practice.

10 Q. Her practice.

11 A. Yeah.

12 Q. Well --

13 A. Yeah. Because every judge is a little
14 different. So it wasn't a policy you had to
15 follow, but it was definitely Judge Heffernan's
16 practice.

17 Q. And not everybody had to follow it because the
18 judge is the judge of that particular court that
19 particular day.

20 A. Yes. Yeah.

21 Q. But you knew that that was Judge Heffernan's
22 preference.

23 A. I did know, yeah.

24 Q. And you had known it was her preference, you
25 would have said something to Judge Joseph.

1 A. Well, I said, I said something to
2 Judge Joseph when I saw the ICE agent. I knew
3 that Judge Joseph was a fairly new judge, so I
4 wanted to alert her of it and ask her what she
5 wanted me to do, if anything. And she in turn
6 asked me, well, what was Judge Heffernan's usual
7 practice, what did Judge Heffernan usually do,
8 so I told her, and she said let's just follow
9 what Judge Heffernan usually does; so...

10 Q. And you knew that Judge Joseph was a fairly new
11 judge because -- a rookie judge, so to speak;
12 right? Because you had seen her practice in
13 that court before as a lawyer; right?

14 A. I'd seen her a couple times, but I knew she
15 was a lawyer for sure.

16 Q. And -- So you had that conversation. Do you
17 recall her saying anything to you about she
18 wanted to check on the policy by calling the
19 administrative offices?

20 A. I do remember that, yes.

21 Q. And so in fact she did call; correct?

22 A. Yes. I think I left at the point she was
23 starting to call, but she did indicate to me --
24 I think she asked me if I had a copy of the
25 policy handy. I went to my office, I couldn't

1 put my hands on the actual policy. So she said
2 don't worry about it, I'm going to call anyway
3 to make sure I understand the policy.

4 Q. So based on your experience, limited experience
5 as a session clerk, but experience as the first
6 assistant clerk, some judges follow that
7 practice, but not all.

8 A. Correct.

9 Q. When they were at the Newton District Court.

10 A. Correct.

11 Q. Were you aware of that practice of asking ICE to
12 step out of the courtroom being utilized or
13 practiced in any other District Court?

14 A. I didn't know one way or another.

15 Q. Okay. Now, the policy that she was asking you
16 about, that was called the Lunn policy; correct?

17 A. You mean Judge Joseph was asking?

18 Q. I'm sorry. Judge Joseph, yes.

19 A. Yes. It was a fair case.

20 Q. And you went to look for it?

21 A. Yes.

22 Q. And it would be fair to say that clerks have
23 their own organization, right, where they
24 transmit documents and policies and things like
25 that, that keep you updated?

1 A. Association of clerks and magistrates. Yes.
2 Oftentimes we'll get transmittals of important
3 cases or rules. But this was a policy that was
4 generated and transmitted by the Trial Court to
5 all the clerks.

6 Q. To all the clerks.

7 A. All the clerks.

8 Q. So whatever you had, you were the first
9 assistant.

10 A. Yup.

11 Q. And I suppose in some ways very responsible in
12 that courthouse for running the daily sort of
13 functions.

14 A. I try to, I try to do my best.

15 Q. And I'm sure -- The clerk himself is a little
16 older; correct?

17 A. He's a little older, yes.

18 Q. And so he relied on you to sort of be at the
19 mouth of the information coming in from both of
20 those sources.

21 A. I would imagine that's true.

22 Q. Now, after, did she get back to you and tell you
23 exactly what the results were, the
24 communications?

25 A. Did Judge Joseph?

1 Q. Yes.

2 A. I think she said that she was able to get
3 someone in town or she -- I knew she was calling
4 in town. I think she got to talk to somebody.
5 I'm not sure who. But I think she said she was
6 all set. Because I continued to look for the
7 policy. She said don't worry about it, that she
8 had -- I think she said she had spoken to
9 someone, she now knew the answer to her
10 question.

11 Q. So you've read the Lunn policy?

12 A. A while ago, but yes.

13 Q. Okay. And so it would be fair to say, with
14 regard to that policy, that that policy doesn't
15 say anything about whether ICE can be in the
16 courtroom; correct? It has to do with ICE
17 getting custody of individuals to whom they want
18 to take custody; correct?

19 A. Correct. It was kind of differentiated
20 between the detainers and the warrants and
21 taking them into custody and when the judge
22 should hold someone in custody and whatnot.

23 Q. And so without us reading through this, --
24 though we can -- it's, as you know it now, that
25 Lunn policy mandates that District Court

1 personnel allow, permit, and require ICE to go
2 into a lockup in order to take custody of an
3 individual in District Court; correct?

4 A. Yes. I think we received the transmittal to
5 that effect. That's a -- if requested, they
6 should have access. And I think there's a whole
7 protocol, that the court officer should take
8 them into, take them into prison or cell block
9 and transfer --

10 Q. So that was the policy that was in effect on
11 April the 2nd, 2018; correct.

12 A. I believe so.

13 Q. Yeah. And so when you went in to see
14 Judge Joseph, you went in to see her about this
15 issue of whether ICE could be in the courtroom;
16 correct?

17 A. Whether she wanted the ICE agent to be in the
18 courtroom.

19 Q. And she answered yes, you could, after you
20 pointed the administrative District Court that
21 you could follow, we could follow, she could
22 follow the practice of Judge Heffernan and ask
23 ICE to stand out; correct?

24 A. Yeah. So that was -- She told me in her
25 lobby, in her lobby. She said that she

1 preferred to just follow what Judge Heffernan
2 customarily did.

3 Q. And she said nothing, that you could recall,
4 about asking -- telling ICE that they couldn't
5 take custody down to the lockup.

6 A. No. Because at that point there was no
7 question -- like the ICE officer hadn't
8 requested that and that wasn't part of our
9 conversation at that point.

10 Q. Okay. Now, Ms. Bostwick stayed representing
11 Medina Perez all the way up to the lunch break.

12 A. Yes.

13 Q. Like just before 1:00?

14 A. Yes. Lunch break was 1:00 to 2:00.

15 Q. And she was allowed to come back a little late
16 because she had a medical appointment that day?

17 A. Yes.

18 Q. But at some point Jellinek showed up in court;
19 correct?

20 A. My recollection is that he filed an
21 appearance at the lunch break.

22 Q. Okay.

23 A. Sometime over the 1:00 to 2:00 mark.

24 Q. And -- So you would have seen him around there
25 or you would have heard that he filed an

1 appearance?

2 A. I don't recall if he was there earlier in the
3 day, but he definitely was there right at 2:00
4 when we were starting after lunch. So I assume
5 he was in the courthouse doing something,
6 whether it be he had court business or other
7 filings or -- I don't recall specifically
8 whether he came to the courtroom at all prior to
9 the lunch break.

10 Q. And there were court officers there that day;
11 correct?

12 A. I believe there were two court officers there
13 that day, one who sat with the custody, one in
14 the courtroom, and then at some point the chief
15 came from another court, he kind of supervised
16 three different courts, and he showed up, too.

17 Q. So we can talk about that for a minute. So
18 Wesley MacGregor was there that day?

19 A. Yes.

20 Q. And he was handling the custody?

21 A. Yes.

22 Q. And Michael Walsh was there that day as a --

23 A. Yes. I had met him a couple of times. He
24 was retired.

25 Q. Retired. He was there as what we call a per

1 diem?

2 A. Yes.

3 Q. And -- But the chief, name is Scott Noe, --

4 A. Yes.

5 Q. -- Scott Noe, was not there until later; right?

6 A. I didn't see him until later. I think I --
7 My best recollection is that he came from some
8 other court at some point during the day. I
9 don't know when. I was told he was in the
10 building.

11 Q. And the Lunn policy requires that the chief
12 court officer, which would have been Noe, would
13 do at least two things, one would be to make
14 sure that there's notice given to the presiding
15 justice of the court that ICE was there; right?

16 A. Correct.

17 Q. But the presiding justice was out.

18 A. Correct.

19 Q. And to make sure that the Lunn policy was
20 followed with regard to access to ICE in the
21 lockup; correct?

22 A. Yes. I wasn't in the session too often, but
23 that's my understanding.

24 Q. Okay. So if I'm understanding it correctly,
25 your communication to the ICE agent, there was

1 only one at that point.

2 A. Correct.

3 Q. It was two-fold. One is, they're being asked to
4 step outside of the courtroom.

5 A. Yes.

6 Q. And second -- And that was directly from
7 Judge Joseph; right?

8 A. Correct.

9 Q. But the second was, that, no, he couldn't take
10 custody in the lockup. But that was your
11 interpretation of what Judge Joseph was saying.

12 A. So the second communication with the ICE
13 officer would have been after we concluded for
14 the day. And the answer to your question is,
15 yes, that's what I interpreted Judge Joseph's
16 directive to be.

17 Q. So -- Okay. Thank you. So -- But sitting here
18 today, you have no memory of having one more
19 conversation with the ICE agent.

20 A. I don't recall having any other -- other than
21 which door he'd be going out of initially, and
22 then secondarily, the -- when he asked for
23 permission to go to the lockup. I don't recall
24 having other communications with him.

25 Q. So you indicated, when special counsel asked you

1 some questions, your previous memory is that ICE
2 had taken custody out on the street in the front
3 door area.

4 A. I had seen that once before.

5 Q. You had seen that.

6 A. I actually saw it, yeah.

7 Q. Now, court ends; right? Before court ends --
8 Judge Fabricant, special counsel, ran you
9 through the transcript of the end of that
10 proceeding; right?

11 A. Yes.

12 Q. And we heard already that you said something to
13 Judge Joseph about ICE being there, right, and
14 wanting to take custody in to lockup.

15 A. Yes. I was just, I was just reminding her
16 that the ICE officer was there, because he was
17 waiting out in the hallway, and I conveyed his
18 request to go down to lockup.

19 Q. And you actually put -- It's on the record that
20 you conveyed that, and she said that's fine,
21 they're not coming in here, in essence; correct?

22 A. Correct.

23 Q. So it would be fair to say that there were at
24 least two or three other ways at the
25 Newton District Court that could have access to

1 the lockup. One is, to go around the back.

2 A. Yeah.

3 Q. They can come in the sallyport --

4 A. Yeah. They could gone around the back of the
5 courthouse and knocked on the door and have the
6 court officer provide access or they could have
7 just walked down the public stairs -- well, they
8 could have gone through the back way and there's
9 the -- where the lockup is situated, they could
10 have walked through -- You're right. There's
11 two different ways other than the way down the
12 stairs.

13 Q. Or third, unless you're including the one you
14 just relayed, go downstairs, have someone escort
15 them through probation.

16 A. Correct.

17 Q. So there were several different ways.

18 A. Sure.

19 Q. And with the sallyport, were you aware that
20 there was a van, pickup van inside the sallyport
21 that afternoon?

22 A. No, I was not aware.

23 Q. So if there were no van there, then they could
24 have just driven in.

25 A. Sure.

1 Q. With their unmarked vehicle, whatever it is.

2 A. Sure.

3 Q. And then take into custody.

4 A. Sure.

5 Q. Now, we talked about Ms. Bostwick. You knew
6 David Jellinek, too; correct? You had seen him
7 from time to time.

8 A. I think they were calling, because they were
9 both on duty attorneys.

10 Q. Both bar advocates.

11 A. Both bar advocates.

12 Q. Got it. And you saw him there. He came in for
13 the drug court on Tuesday afternoon?

14 A. Typically, he did. He did the drug court.

15 Q. And so he was there fairly frequently, at least
16 once a week; right?

17 A. For sure.

18 Q. And I mean, he'd say hi to you, you'd say hi to
19 him.

20 A. Typically. I try to say hi to everybody.

21 But yes.

22 Q. Yup. And he was at least friendly, as far as
23 you could see, with many of the court personnel.

24 A. He was familiar with all the court personnel,
25 yes.

1 Q. And so were you present when the conversation
2 between David Jellinek and Wesley MacGregor
3 letting Medina Perez out the back?

4 A. No.

5 Q. And did David Jellinek approach you before the
6 2:00 session after he filed his appearance and
7 tell you that he had a conversation with
8 Wesley MacGregor?

9 A. No.

10 Q. When you saw him walk out, when you were with
11 the ICE agents, did David Jellinek come over to
12 you and say I had the judge's blessing to let
13 him out, anything like that?

14 A. No. He just walked straight by us.

15 Q. Didn't say a word?

16 A. No.

17 Q. He was there the next morning?

18 A. Was he there the next morning? Is that what
19 you just said?

20 Q. Yeah. David Jellinek.

21 A. I have no idea. I don't know.

22 Q. From that day, April 2, until today, has he ever
23 said Wesley MacGregor and I together conspired
24 to let him out?

25 A. No. I have not talked to him about it.

1 MR. HOOPES: Can I just have a
2 moment?

3 (PAUSE)

4 MR. HOOPES: Thank you very
5 much. No other questions.

6 JUDGE FABRICANT: I just want
7 to clarify one point.

8 THE WITNESS: Sure.

9 REDIRECT EXAMINATION

10 BY JUDGE FABRICANT:

11 Q. The ways to get to the lockup, if not through
12 the courtroom and into the dock and down the
13 stairs, how many other ways are there?

14 A. So you could go through the -- where the
15 clerk's office and the judge has her lobby, you
16 go down the set of stairs, that's a secure area,
17 you could come back that back stairwell and that
18 leads to the lockup. You could go, as counsel
19 indicated, you could go around the building and
20 knock on the door. They could open the
21 sallyport door for you. And the other way you
22 could do it, I suppose, is you could, -- just
23 trying to think -- you could go through -- come
24 down the front stairs. You'd have to go through
25 probation, I believe; so...

1 Q. And once you went through probation, would you
2 have to get through a secure door?

3 A. Yeah. There was a secure door. You would
4 have to even use your pass or you'd have to
5 knock and they'd have to let you in the
6 courthouse.

7 Q. So each of those ways that you've described,
8 would you have to get through a secure door?

9 A. Yes.

10 Q. So you would need somebody with a pass --

11 A. Yes.

12 Q. -- to let you through.

13 A. Yes. You couldn't just walk through.

14 JUDGE FABRICANT: That's all I
15 have.

16 MR. HOOPES: That's all I have.

17 HEARING OFFICER: So I just
18 have one clarifying question for me.

19 When you spoke to the ICE agent
20 after the proceeding, did you tell the ICE agent
21 that they were not -- that he was not allowed to
22 go to the lockup period or did you say you're
23 not allowed to go to the lockup through the
24 courtroom?

25 A. I think what I said was just what the judge

1 said, which is, you're not allowed to come in
2 here and go to the lockup.

3 HEARING OFFICER: I'm sorry.
4 Say that again.

5 A. I said you're not allowed to go in the way
6 they had all gone down through the courtroom. I
7 think I said to the ICE agent that he could not
8 go in any courtroom down to the lockup.

9 HEARING OFFICER: Did you tell
10 him there are other ways to get to the lockup?

11 A. I didn't discuss it with him, no.

12 HEARING OFFICER: You knew he
13 wanted to go to the lockup.

14 A. I did overhear. He made it clear.

15 HEARING OFFICER: And were you
16 clear with him? Do you believe that you told
17 him you just can't go to the lockup through the
18 court?

19 A. I didn't say just. I think I was under the
20 impression he couldn't go to the lockup at all.

21 HEARING OFFICER: Based on
22 what?

23 A. Based on, when I asked the judge, I said
24 there was someone here to visit the lockup, I
25 think is how I phrased it, to get the person

1 intended to be taken. And she said something
2 like, okay, but I'm not going to allow him in
3 here but he's released. I took that to mean
4 that she was following Judge Heffernan's
5 practice of releasing him, he'd walk out the
6 court front door, and if they wanted to take him
7 to custody, that's where they would take him
8 into custody. So that's what I was under the
9 impression.

10 HEARING OFFICER: Okay. And so
11 your impression was that he was not going to be
12 allowed to go to the lockup area from any
13 direction.

14 A. Correct. I didn't go over with him the
15 different ways. I didn't think he would be
16 going to the lockup area.

17 HEARING OFFICER: But you did
18 understand Judge Joseph to be saying he can't go
19 to the lockup area through the court.

20 A. Yeah. I understood that just how she said
21 it. Because I listened to the tape, too.
22 That's how she said it. And that's how I took
23 it. But I took her to mean I'm -- when she said
24 I'm releasing him, what she meant was, he's
25 going to walk out, and so if they want him, they

1 can take him, but it's not my, not my issue.

2 HEARING OFFICER: Okay. I have
3 no further questions.

4 Any follow-up?

5 JUDGE FABRICANT: May this
6 witness be excused?

7 HEARING OFFICER: Yes.

8 JUDGE FABRICANT: Thank you,
9 sir.

10 And again, Mr. Hoopes is much
11 more efficient than predicted. And so we don't
12 have a next witness ready. We will have
13 Scott Noe at 9:00 in the morning,
14 Judge Heffernan at 11:00, and Judge Fortes,
15 Chief Justice now, Chief Justice Fortes at 2:00
16 tomorrow.

17 HEARING OFFICER: Okay. So
18 with that, unless the parties have anything else
19 to cover, we're recessed for the day.

20 (The proceedings adjourned
21 at 3:16 p.m.)

22 EXHIBIT AA (DOCUMENT
23 SUBSEQUENTLY MARKED AS
24 EXHIBIT AA)

25

C E R T I F I C A T E

I, LISA L. CROMPTON, Registered
Professional Reporter, hereby certify that the
foregoing is a true and accurate transcript of my
stenographic notes of the proceedings in this
matter on the date and time specified in the
caption hereof.

IN THIS WITNESS WHEREOF I have hereunto
set my hand this 27th day of August, 2025.



LISA L. CROMPTON

REGISTERED PROFESSIONAL REPORTER

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CERTIFIED HEARING TRANSCRIPT (DAY 3)

COMMONWEALTH OF MASSACHUSETTS
COMMISSION ON JUDICIAL CONDUCT

COMPLAINT NUMBER 2019-22

VOLUME III

HEARING

~ BEFORE ~

HEARING OFFICER

DENIS J. McINERNEY, ESQ.

JUNE 11, 2025

9:00 A.M.

Boston, Massachusetts

Lisa L. Crompton, CSR (MA) (RI), RPR

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E X H I B I T S

EXHIBITS	DESCRIPTION	PAGE NO.
EXHIBIT 1	Court Officer Manual Page 2-9, 1 page	437
EXHIBIT 2	Chief Noe's Revised Policy, 1 page	447
EXHIBIT 3	History Report, 5 pages	450
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1 JUDGE FABRICANT: The
2 Commission now calls Scott Noe, who, I take it,
3 is in the hallway.

4 HEARING OFFICER: We're on the
5 record. And if counsel could just introduce
6 themselves for the record.

7 JUDGE FABRICANT: I'm sorry for
8 jumping the gun here.

9 Judge Fabricant for the
10 Commission on Judicial Conduct.

11 MR. NEFF: Howard Neff for the
12 Commission on Judicial Conduct.

13 MR. HOOPES: Tom Hoopes for
14 Judge Joseph.

15 MS. MULVEY: Elizabeth Mulvey
16 for Judge Joseph.

17 MR. KEATING: Michael Keating
18 for Judge Joseph.

19 HEARING OFFICER: Great. Thank
20 you very much.

21 JUDGE FABRICANT: He'll be
22 right with us, I'm told. Apparently the highway
23 that comes up from the South Shore is
24 problematic this morning.

25 HEARING OFFICER: Totally

1 relate to those issues. No issue whatsoever.

2 (PAUSE)

3 HEARING OFFICER: Good morning.

4 PAUL SCOTT NOE, SWORN

5 HEARING OFFICER. Thank you.

6 Please be seated.

7 DIRECT EXAMINATION

8 BY JUDGE FABRICANT:

9 Q. Good morning.

10 A. Good morning.

11 Q. Please tell us your name.

12 A. First name is Paul, middle name is Scott,
13 last name is Noe, N-o-e.

14 Q. And do you go generally by Scott?

15 A. I do.

16 Q. Thank you.

17 And Mr. Noe, would you tell us briefly your
18 professional background?

19 A. I began my career in law enforcement with the
20 Norfolk County Sheriff's Department, and I
21 became a court officer six years into that.
22 Still stand at Norfolk County, worked nights,
23 was a court officer until I retired between
24 '15, in 2019, became chief court officer in
25 Concord, Waltham, Newton courts in 2015.

1 Q. So I want to just make sure we've got the
2 sequence there. So in 2015 you became the chief
3 court officer for three courts, Newton, Waltham,
4 and Concord?

5 A. Yes.

6 Q. And then in 2019 you retired from the court
7 officers.

8 A. Correct. The start to the end of 2019.

9 Q. And what do you do now?

10 A. Retired from the courts and the sheriff's
11 department and I work for NAGE, National
12 Association of Government Employees. I'm a
13 union rep for the court officers.

14 Q. So NAGE represents the court officers in
15 Massachusetts.

16 A. Yes, court officers, probation officers.

17 Q. Court officers and probation officers.

18 A. Yup.

19 Q. I'm going to ask you to give us a general
20 virtual tour of the Newton District Court, and
21 we have some photographs that we're going to
22 show assist in that process, and that binder in
23 front of you has a set of exhibits that are
24 appendices that have already been admitted in
25 evidence. Appendix U is the photographs. So

1 look at them in the binder or look at them on
2 the screen as is more convenient for you.

3 So let's start with what's
4 right in front of you here, which is Page 526 of
5 the appendix. What is this?

6 A. This is the front door of the Newton
7 courthouse.

8 Q. And --

9 HEARING OFFICER: If you could
10 just be a little closer to the mic. Much
11 appreciate that. Thank you.

12 A. That's the front door to the Newton District
13 Court.

14 Q. And what level is that when you enter the door?

15 A. Well, the picture is taken from the street
16 level. You climb up those 10 steps and you're
17 at first level of the courthouse.

18 Q. So once you're in the courthouse and go in those
19 doors, how many levels does the courthouse have?

20 A. You have one down below, which is at ground
21 level, when you go out in the back of the
22 courthouse, it goes downhill from there. So you
23 have lower level, that first level, and then the
24 second floor level.

25 Q. So three floors altogether.

1 A. Yes.

2 Q. One of which is below ground at the front and at
3 ground level at the back.

4 A. Yes.

5 Q. When you enter from the front, through this
6 door, where are you?

7 A. You're in the main lobby of the courthouse at
8 the security entrance.

9 Q. And let's go to 523. And what do we see there?

10 A. So the right would be coming through the
11 front doors to the courthouse, and that's the
12 security station, security office to your right.

13 JUDGE FABRICANT: And his voice
14 loud enough at this point?

15 HEARING OFFICER: It's pretty
16 good. If you could get just a little closer to
17 the mic for everybody in the court, I think that
18 would be great. Thank you.

19 Q. So that's the security equipment you come
20 through if you come through that main door.

21 A. Yes.

22 Q. And what else do you see in this main hallway?

23 A. That's the entry door from the main entrance
24 off of the main road. That door to your right
25 is the security office, a lot of administrative

1 things are done.

2 Q. And let's go to the Number 506. What do you see
3 there?

4 A. That's -- To your right would be that main
5 door that you come in through and that door in
6 front of you is the entrance to the clerk's
7 office.

8 Q. Do we see here some of the security equipment?

9 A. Yes.

10 Q. So if you just come through the security
11 equipment, you've got the clerk's office just to
12 your right?

13 A. Correct.

14 Q. And you see that bench along the left wall
15 there?

16 A. Yes.

17 Q. If you got to the end of the bench where the
18 picture doesn't show, what would be there?

19 A. That would be the entrance to courtroom one
20 of Newton District Court.

21 Q. And let's go to 525. What's that?

22 A. That is the entrance to courtroom one on the
23 first floor.

24 Q. And the chair, the bench that we see there, is
25 that the end of the bench that we saw in the

1 last picture?

2 A. Yes. Same bench.

3 Q. And then there's a chair next to it?

4 A. Yes.

5 Q. Was that chair usually there?

6 A. I believe it was.

7 Q. Let's go to 509. What do you see here?

8 A. That's courtroom one of Newton District
9 Court, the judge's bench, clerk's seating area,
10 DA's table, and defense attorney's table.

11 Q. And which side are the DA and the defense
12 attorney usually?

13 A. Typically, the DA would be on the left side
14 of that picture, and defense attorney would be
15 on right, on the left side of the dock.

16 Q. So the DA, if there's a defendant in custody,
17 the DA would be closer to the defendant than the
18 defense lawyer is.

19 A. Yes. Typically.

20 Q. And do you see, along that glass wall of the
21 dock, do you see a little, a little metal
22 circle?

23 A. Oh, yes.

24 Q. What's that, what's that used for?

25 A. That's the opening so you could hear clearly

1 from the dock. It's not -- I don't think it's a
2 microphone on it, but it would be for that.

3 Q. It's a space for hearing?

4 A. Yes.

5 Q. If there's an interpreter, would the interpreter
6 use that to speak to the person in the dock?

7 A. Yes.

8 Q. Let's look at 510. What do we see here?

9 A. That's the right side of the same courtroom.
10 That's the two exit doors.

11 Q. Those two exit doors there, are those for public
12 or for other people?

13 A. Those are for employees. The one on the
14 right is typically -- almost leads you directly
15 into the clerk's office, along the left brings
16 you to the employee elevator and entrance to the
17 judge's lobby.

18 Q. And those two desks that we see there, who uses
19 those?

20 A. Typically, probation would sit at one and the
21 other one is used for administrative duties.

22 Q. If there's a witness in the courtroom, where
23 would the witness be?

24 A. The witness stands back in the bar.

25 Q. Okay. Let's bring up 512 -- 511. What do you

1 see here?

2 A. That's the view from those same pictures you
3 just looked at looking at from the judge's
4 bench, on the side of the bench.

5 Q. If there's a side bar conference, is that where
6 it would occur?

7 A. Yes. And there's a swinging door that
8 brings -- gives access to the judge's bench.

9 Q. And is that how the judge goes in and out,
10 through that swinging door?

11 A. Yes.

12 Q. And let's go to 512. What do you see here?

13 A. That's a view looking back from where we just
14 were, looking back at the exit of courtroom one.

15 Q. So if you were standing at the judge's bench or
16 at the clerk's bench, is this what you would
17 see?

18 A. Yes. The defendant stands in the block box.
19 There's a microphone there.

20 Q. So if the defendant is not in custody, is that
21 where the defendant would stand, just behind the
22 bar?

23 A. Correct.

24 Q. And are there seats for spectators on both sides
25 of the entrance?

1 A. Yes.

2 Q. And if you look down, is that the audience
3 section on the other side?

4 A. Correct.

5 JUDGE FABRICANT: I don't know
6 that this has a number yet.

7 MR. HOOPES: Nope.

8 JUDGE FABRICANT: We'll get it
9 in.

10 Q. Let's go to 513. And we're going to go through
11 a series starting with 513. So what is this
12 that you see here?

13 A. That's the custody dock and the second -- the
14 first door brings you into the custody dock, the
15 second door brings you into the lockup.

16 Q. So two doors.

17 A. Correct.

18 Q. Are those both doors that you need a keycard to
19 open and close?

20 A. Neither door has a keycard. They're both key
21 open.

22 Q. So help me understand the distinction there.

23 A. Manual keyed open.

24 Q. So an old-fashioned key.

25 A. Yes.

1 Q. Physical key.

2 A. Right.

3 Q. And are they -- You could see here that both of
4 them look like they're a little bit ajar.

5 A. Yes.

6 Q. Would that be the normal condition for those
7 doors?

8 A. Typically, they're kept ajar, to give access
9 for us to come up and down or maintenance.

10 Q. If there's a person who's in custody who's in
11 the dock, would they be ajar?

12 A. No. They'd be secure.

13 Q. And who's responsible for securing?

14 A. The court officers.

15 Q. And then let's go to 514. What do we see there?

16 A. That's a view from inside the dock.

17 Q. So if a person is inside the dock, is that --
18 would the person be standing or sitting in that
19 location?

20 A. Correct. It looks to be looking at the
21 judge's bench.

22 Q. Let's go to 515. What's that?

23 A. That's the stairwell bringing you down to the
24 lockup, exiting the dock.

25 Q. So look to the left of that photograph, looks

1 like there's an open door. Is that that second
2 secure door?

3 A. Yes, it is.

4 Q. And let's go to 516. What's that?

5 A. That brings you down to the door that gives
6 you access to the lockup area.

7 Q. And then 517. What's that?

8 A. That is from inside the lockup. Not sure
9 which direction that's in. Oh, I believe, when
10 you enter that door that we just saw, it would
11 be straight in. And so it was typically used
12 for storage. And one of the prisoner cells to
13 the right.

14 Q. Then let's go to 527. Now, can you describe
15 what that is generally?

16 A. Yes. That's the rear of the building. The
17 building to the left is the Newton District
18 Court. It's ground level from behind now. And
19 the building to the right is Newton Police
20 Department.

21 Q. And can you see a sort of fenced area there
22 between the two buildings?

23 A. Yes. That's the sallyport.

24 Q. And what is a sallyport?

25 A. Sallyport is where custodies are brought in,

1 transported in. And in this particular case,
2 the arrest could be walked over from the
3 Newton Police Department or, typical, brought in
4 from the sheriff's department, they back in the
5 van and deliver the prisoner that way.

6 Q. So that fenced area, is that for the purpose of
7 putting a van in --

8 A. Yes.

9 Q. -- for transporting people in custody?

10 A. Yes.

11 Q. And what characterizes a sallyport as opposed to
12 any other kind of exit and --

13 A. A sallyport, typically they're secured to
14 keep the public from gaining access to them or
15 from somebody escaping while they're being
16 transported in, if they're brought in to the
17 courthouse. That particular sallyport had a
18 door. It had fencing that was on an electronic
19 runner that locked up, but there was problems
20 with the -- with that door. It would get jammed
21 closed sometimes. So typically, when I was
22 chief, that door was left open.

23 Q. Okay. Now, taking our virtual tour back inside.
24 So we're now back in that -- in the lockup area.
25 From there, if you wanted to go inside to a

1 public area, where would you be going?

2 A. Well, at the end of this first brick wall,
3 there's an access door for employees, and
4 electronically access to the back stairwell,
5 which would bring you up to the judge's lobby
6 and all the way to the second floor to the
7 courtroom.

8 Q. So you're now talking on the outside of the
9 building.

10 A. Yes. Prior to going into the sallyport,
11 there's an employee entrance, only accessed
12 electronically.

13 Q. And is there actually more than one in different
14 locations along the back of the building?

15 A. On the back of the building, there's one
16 there, yes, there's one behind the sallyport,
17 where there's a parking area, and then on this
18 side of the building there's a maintenance
19 entrance you can electronically access.

20 Q. And each of those doors that would bring you
21 into the secure area, do you need a security
22 pass to get in and out of those?

23 A. Yes.

24 Q. So envisioning that we're back inside the
25 building and you're in that secure hallway, if

1 you go down the secure hallway, and you've got
2 those secure doors that are there, but you need
3 a security pass to go in and out, so envisioning
4 that we're going down that secure hallway, where
5 do you eventually get?

6 A. Coming in through that employee entrance I
7 just mentioned?

8 Q. Once you're inside.

9 A. Okay. Once you're inside of this first
10 entrance, at the end of that brick, you'll enter
11 a stairwell, and the stairwell you can take up
12 to both floors or you can use your electronic
13 access card to go in behind the probation
14 department or another door that brings you into
15 the lockup area.

16 Q. So that first stairwell that you just referred
17 to, is that within the secure space?

18 A. It's not a lockup area but it's secured for
19 employees only.

20 Q. So you can't get into that stairwell without a
21 security pass.

22 A. Correct.

23 Q. If you walked down that secure hallway to
24 eventually get to a place where, at that lower
25 level, without going up or down, you could with

1 a security pass get out of the secure area into
2 a public area?

3 A. You'd have to go through several doors to
4 get -- you'd have to go through probation
5 department or somehow go through the lockup area
6 and back up to the courtroom.

7 Q. So if you go through the probation department,
8 if you have -- if you're escorted by somebody
9 who has a security pass, can you go through a
10 secure door and end up in the public area of
11 probation?

12 A. Yes, yes.

13 Q. And let's look at Photograph 519. What's that?

14 A. That's the lockup officer's office.

15 Q. Where is that?

16 A. Located in the lockup on the lower level.

17 Q. Is there also an office somewhere in the lower
18 level for the chief court officer?

19 A. Yes.

20 Q. Where's that?

21 A. That's back out through probation, back out
22 to the public area, and it's a locked office.

23 Q. So is that on the public side of that secure
24 door in the downstairs --

25 A. Yes.

1 Q. -- location? Is there a phone in the chief
2 court officer's office?

3 A. Yes.

4 Q. Is there also a phone in this office in the
5 lockup?

6 A. Yes.

7 Q. Now, if you went to where -- to the chief court
8 officer's office, you went through that secure
9 door, so you're now in the public space, you're
10 at the location where the probation, the public
11 probation desk is, is there a way to get
12 upstairs from there?

13 A. Yes.

14 Q. Tell me about that.

15 A. It's a public hallway.

16 Q. Okay.

17 A. So if you came out of the chief court
18 officer's office, to the right there's an
19 entrance into the counter area for probation,
20 and then there's a stairwell that brings you
21 back up to the first floor or the second floor.

22 Q. Public stairway.

23 A. Yes, public stairway.

24 Q. Going back to the sallyport. How many vehicles
25 fit there? Now I want you to -- Things of

1 course could have changed. -- take your mind
2 back to be April of 2018. That's a long time
3 ago. So that's what these questions are about,
4 April of 2018.

5 A. Yes.

6 Q. How many vehicles would fit?

7 A. One vehicle.

8 Q. And the sheriff's vans, the vans that came from
9 the sheriff's department that transported people
10 in custody, how big were they?

11 A. They're long. They have extended bumpers on
12 the back. I don't know the length of them. But
13 very long. I think one in and secure the
14 sallyport.

15 Q. Was the fence at the back of the sallyport
16 usually kept opened or closed?

17 A. The gate itself was typically kept open.

18 Q. And why was that?

19 A. Because it had jammed -- I was told when I
20 became chief it had a history of jamming and
21 vans couldn't get out once they were in there,
22 they'd secure the sallyport and the van couldn't
23 get out. Manually.

24 Q. So it was usually kept open.

25 A. Yes.

1 Q. And you told us earlier that the police
2 department is next to the courthouse.

3 A. Yes.

4 Q. We saw that photograph with the police
5 department back there.

6 A. Yes.

7 Q. Now, I'm going to ask you about some practices.
8 Again, I'm asking about the way things were done
9 in April 2018. So you became the chief court
10 officer you said in 2015.

11 A. Yes.

12 Q. So you had been the chief court officer for
13 about three years at that point?

14 A. Yes.

15 Q. So in that time frame, what was the standard
16 practice if a defendant who had been in custody
17 was being released from custody and didn't need
18 to go check in with probation and didn't need to
19 wait for somebody to post bail, was just being
20 released? What was the standard practice?

21 A. Standard practice would be that he was
22 released from the courtroom, from that dock.

23 Q. And how was that -- I'm sorry.

24 A. From the dock in the courtroom.

25 Q. How exactly would that work?

1 A. Typically, they'd bring the custody up, bring
2 his property up with him, the lockup officer
3 would stay in the dock with him, there would be
4 a court officer in the courtroom, the case would
5 be resolved, if it was determined that the
6 custody was to be released, then the court
7 officer would bring the custody out, and
8 depending on what the property bag had in it,
9 they could just hand him his property bag and
10 tell him he was all set to go, or he would have
11 to check in to probation from there, if he had
12 something in there that was unacceptable inside
13 the courthouse, then it would be brought to the
14 front door security, the front door security
15 would hold onto the bag until he did any
16 business he had to do inside the courthouse, in
17 the clerk's office and anything in probation,
18 and when he exited, he received his property.

19 Q. When the person is in the dock, is the person
20 usually in restraints?

21 A. Yes.

22 Q. When in that sequence of events would the
23 restraints be removed?

24 A. He'd be seated inside the dock, the cuffs
25 would be removed, and he'd be escorted out.

1 Q. Before April 2nd of 2018, in your experience,
2 was anybody ever released through the sallyport
3 door?

4 A. Never.

5 Q. Why not?

6 A. Never when I was the chief. And I inquired
7 with prior chiefs when I became chief and then I
8 inquired after this incident occurred.

9 Q. Why would that not be the way that someone would
10 be released?

11 A. Because you'd be releasing them into the
12 police department's parking lot.

13 Q. And what would you want to prevent there?

14 A. Well, typically, there are weapons involved
15 and the police are coming in and out of work.
16 You don't want them to run into a police officer
17 who arrested them early in the day, the night
18 before. Could be running -- could be dropped
19 off by his wife. Could be a bad scene releasing
20 him out to the police department's parking lot.

21 Q. Before April 2nd of 2018, was there in the
22 Newton District Court any written policy or
23 written instructions about how anybody was to be
24 released?

25 A. No. There's a standard in the

1 policy/procedures for Trial Court. It didn't --
2 Each building's different. I supervised in
3 three buildings at the time, and they all
4 release different.

5 Q. And was that because of the physical situation?

6 A. Correct.

7 Q. Before April 2nd, 2018, did you have experience
8 with ICE coming to the Newton District
9 Courthouse?

10 A. Yes.

11 Q. And how often did that happen in Newton?

12 A. Very rare.

13 Q. Would you become -- When it did happen, would
14 you be informed of a detainer?

15 A. Typically, the van arrives with the custody.

16 Q. So from the police station or from the sheriff's
17 department?

18 A. Yes. And copies would be distributed. In
19 the normal circumstance, from my experience and
20 all of my years in the many different courts
21 that I've worked in, typically, the detainer
22 would arrive with the custody.

23 Q. On April 2nd of 2018, when did you arrive in
24 Newton?

25 A. Sometime in the afternoon. I'm not certain

1 of the time. If I was to guess, I'd say
2 2:00 p.m.

3 Q. Okay. So we don't want guesses. But your best
4 estimate, if you can.

5 A. Yeah. Afternoon time. It was in the
6 afternoon I arrived on that day.

7 Q. Okay. And when you arrived, what did you do?

8 A. I came in through that employee entrance in
9 the back, went straight up to first session
10 through the probation department, I believe I
11 dropped off things in my office, then I went
12 straight up to the first session and entered the
13 first session courtroom.

14 Q. And when you went into the first session
15 courtroom, was anything happening there?

16 A. No. They were waiting for the judge to take
17 the bench.

18 Q. And was there any person present?

19 A. Court Officer Mike Walsh was seated in the
20 courthouse.

21 Q. Did you have any conversation with him?

22 A. Yes. I said, hi, Mike, how's everything
23 going. He said, good Chief, we have one case
24 left, it should be done in a few minutes.

25 Q. Okay. And did he give you any more information?

1 A. He said the custody that's downstairs has the
2 ICE detainer, should be coming up, he's going to
3 be released on our case.

4 Q. So he had that information at that point. He
5 gave you that information.

6 A. Correct. Typically, in Newton Court, being
7 such a small setup and not that many custody
8 cases in particular, you would know before you
9 even bring the custody up if he was going to be
10 released.

11 Q. So if the court officers would know before the
12 custody -- before bringing the person in custody
13 up that the person was going or was likely to be
14 released, would that have indications for how
15 property would usually be handled?

16 A. Correct. If you know he's not being
17 released, if he's -- the sheriff's department is
18 not going to be returning to them, then you
19 just -- there would be no property typically
20 coming in from the sheriff's department unless
21 he was going to be released. A new arrest has
22 the property. But you find out in advance if
23 they're asking for bail, and then that would
24 dictate if you bring the property up to custody.

25 Q. How would you find that out if they're asking

1 for bail?

2 A. Typically, the court officer that's assigned
3 to the courtroom would know from speaking to the
4 district attorney, the clerk, the defense
5 attorney.

6 Q. After you spoke with Officer Walsh, what did you
7 do?

8 A. He, he informed me of the case that was --
9 the one case that we had remaining in custody,
10 what was going on, he said the ICE agent's
11 outside for him, outside the courtroom.

12 Q. And then what did you do?

13 A. I went out to the public hallway. There was
14 the associate court officer Tony Caruso at his
15 station, and the ICE agent was leaning up
16 against the wall next to what we saw, he would
17 have been looking just like we're looking at
18 this picture right now. Would be at the
19 courtroom. His back was at the wall next to the
20 security office looking at the courtroom.

21 Q. And did you have conversation with him?

22 A. Yes.

23 Q. Tell us about that conversation.

24 A. I introduced myself as the chief, told him
25 the custody would be coming up soon, I believe

1 the last name was Perez Medina, said he would be
2 coming up soon, said he's going to get released
3 on the charges here, you can go to the
4 sallyport, back in the sallyport if you'd like
5 to pick him up, or you can wait right here, he's
6 going to be released from here. I informed him,
7 when I come in, there was a van in the
8 sallyport. So there's a van in the sallyport,
9 you can go around there, if you'd like, or you
10 can wait here, he'll be released from here.

11 Q. With the van in the sallyport, would ICE have
12 been able to put a vehicle in the sallyport?

13 A. No.

14 Q. What would they have had to do with the vehicle?

15 A. They would either have had to walk to the
16 sallyport, go to a regular parking space.

17 Q. And what was his response when you told him
18 that?

19 A. He said, no, I'm fine, as long as he's coming
20 out from there.

21 Q. And did you tell him anything about where you
22 expected the person would come out?

23 A. I had already told him you could go around
24 or --

25 Q. And would you normally be in uniform?

1 A. Yes. I was.

2 Q. And then after you had that conversation with
3 the ICE officer, what did you do?

4 A. I spoke -- I believe I gave Tony Caruso a
5 bathroom break, so he could use the restroom,
6 just to the left of those doors.

7 Q. So did you cover the equipment while he was
8 doing that?

9 A. Yes. And then I went back down to my office.

10 Q. And when you were down in your office, did you
11 receive a phone call?

12 A. Yes. Approximately 10 minutes after getting
13 back to my office, I got a call from
14 Clerk Okstein.

15 Q. And what did Clerk Okstein say?

16 A. Clerk Okstein said, the custody with the ICE
17 detainer is being released, has to sign papers
18 with probation, but he has several friends in
19 the building, there could be a problem, and any
20 chance you could go out there. I'm literally 20
21 feet away from the probation counter. Hung up
22 the phone.

23 Q. And what --

24 A. There was nobody in there at the counter.
25 There was a young lady Ashley Medeiros working

1 there. And I said, did the ICE custody come out
2 yet to sign papers, and she said he doesn't have
3 to sign papers.

4 Q. And so then what did you do?

5 A. I said, okay, and I headed up to the first
6 floor.

7 Q. And what --

8 A. Through the stairwell.

9 Q. And what did you do? The public stairwell?

10 A. Yes. The ICE agent was leaning against the
11 wall where I had left him 15 minutes earlier. I
12 said to him, where is, where is your custody.
13 He said he hasn't come up yet. And I looked
14 through the glass of the doors and saw that
15 there was nobody on the bench. Called on my
16 radio to the lockup court officer. He didn't
17 respond. Called again. He didn't respond. I
18 went over to the phone at the security desk,
19 called lockup, Officer MacGregor answered the
20 phone.

21 Q. And tell us about your conversation with
22 Officer MacGregor.

23 A. I asked him where the ICE custody was.

24 Q. And what did he answer?

25 A. After a little delay, he said he was

1 released. I think I had asked him twice. Where
2 is he, where is he. And he said I released him
3 out the back.

4 Q. And how did you respond to that?

5 A. I was upset. I said, why would you do
6 something like that. And I hung up the phone
7 quickly, looked at the ICE agent, said he was
8 released out the back.

9 Q. Over the next few days or weeks, did you have
10 further conversation with Officer MacGregor?

11 A. Yes.

12 Q. Did you get varying answers to the question of
13 why?

14 A. Yes.

15 Q. And what he did?

16 A. Yes.

17 Q. Can you tell us what the varying answers were?

18 A. The initial statement he made to me was, I
19 didn't have the detainer in hand.

20 Q. And then did you get a different kind of answer?

21 A. I followed that up with, you knew there was a
22 detainer. He said yeah. And I said, well,
23 could you explain it to me. He said, no. And
24 then we had another conversation at a different
25 time. Could have been the same day. Could have

1 been the morning. But he proceeded to tell me
2 that he didn't bring the person up through the
3 courtroom because the judge was on the bench. I
4 guess to say that he didn't want to disturb the
5 courtroom with the judge on the bench. And then
6 later on in that day, the next day, he said that
7 he had a feeling that the, he had a feeling that
8 the judge wanted the person to be released.

9 Q. And did you have a further conversation, did you
10 have any further conversation with him about
11 that at some point?

12 A. I believe that was it. I gave -- Weeks
13 later, I gave him a written warning for what
14 happened. There was really no discipline to be
15 involved in it. There was nothing in the policy
16 that said he couldn't do what he did. Just had
17 never happened.

18 Q. And then did you prepare a written policy?

19 A. Yes.

20 Q. When was that, to the best of your memory?

21 A. Within a couple of days. I contacted my
22 supervisor immediately after the incident that
23 day, immediately after the ICE agent left and
24 immediately after speaking with
25 Officer MacGregor, I contacted my supervisor

1 and...

2 Q. Who was your supervisor?

3 A. It was Michael McPherson, the regional
4 director of security at the time.

5 Q. And is he now the director of security?

6 A. He's now the director of security.

7 Q. And after you had consultation with
8 Mike McPherson, what was the policy that you
9 prepared?

10 A. We changed it to indicate that nobody gets
11 released out -- through the back of the
12 courthouse, and we adjusted property issues in a
13 little bit more detail. Everybody had known,
14 but didn't have it in writing.

15 Q. And did you at some point show that policy to
16 First Justice Heffernan?

17 A. I believe that I did. Correct.

18 Q. And what did you do with the policy?

19 A. It was posted in the lockup and shared with
20 the regional director of security and eventually
21 the director of security.

22 Q. And then sometime a few weeks later was there
23 some other directive from the higher-ups in the
24 security department about what the policy should
25 be?

1 A. I believe there was. I believe it was a
2 reissuing of a policy that give a broad view,
3 just a general view of how ICE custodies are
4 handled.

5 Q. At some point did you get a directive from
6 Mike McPherson that people should be released
7 out the back?

8 A. He may have said that to me. I don't
9 remember a directive, if he did.

10 Q. Did you think that that would work in Newton, --

11 A. I did not.

12 Q. -- released out back?

13 A. I remember having a conversation with him
14 about it and sharing my thoughts that it
15 wouldn't work in Newton or shouldn't work.

16 Q. And did Newton ultimately adopt a policy of
17 people being released out the back?

18 A. Not when I was chief.

19 Q. Did Officer MacGregor retire sometime
20 thereafter, that you recall?

21 A. Yes. I don't know how much longer. Maybe
22 six months.

23 Q. And do you remember a party for his retirement?

24 A. Yes.

25 Q. Do you remember anybody who you saw there?

1 A. I remember -- Yes.

2 Q. Tell us who you remember that you saw there.

3 A. The party took place, that probation office
4 that I mentioned on the lower level, had an
5 office off to the side of it where they would
6 meet with probationers, if need be, they had a
7 little party in there with cake,
8 Officer Trocchio, Officer MacGregor, of course,
9 Officer Patterson was there, and
10 Attorney Jellinek was there.

11 Q. And have you had any further communication with
12 Officer MacGregor since then?

13 A. Yes. Up until his retirement. I haven't
14 spoken to him since his retirement.

15 Q. Since his retirement.

16 A. No. No.

17 JUDGE FABRICANT: Very good.
18 Thank you. That's all I have.

19 HEARING OFFICER: Mr. Hoopes.

20 MR. HOOPES: Thank you, Your
21 Honor.

22 CROSS-EXAMINATION

23 BY MR. HOOPES:

24 Q. Good morning, Mr. Noe.

25 A. Good morning.

1 Q. As you know, I'm Tom Hoopes, and I represent
2 Judge Joseph.

3 So you said that you had been
4 at Newton or supervising Newton for roughly
5 three years prior to this incident --

6 A. Yes.

7 Q. -- of April 2nd, 2018; right?

8 A. Yes, I believe so.

9 Q. And you characterized the frequency of ICE
10 agents coming to the Newton District Court to
11 make arrests as infrequent.

12 A. Yes.

13 Q. And would it be fair to say that that may have
14 been one, two, three times a year? Would that
15 be an accurate number?

16 A. I think so.

17 Q. Now, from 2015, '16, and '17, there was no real
18 court policy giving you direction on how to
19 interact with ICE. Would that be fair to say?

20 A. There had been policies throughout the years
21 in reference to detainers and how court officers
22 deal -- it changed a lot. And typically, I did
23 everything the same way that I had always done.

24 Q. Okay. And there was a case that came down from
25 the Supreme Judicial Court called

1 Commonwealth versus Lunn in the summer of 2017
2 that addressed this issue. Do you recall that?
3 Were you given notice of that case?

4 A. I could have been. I don't recall it off the
5 top of my head.

6 Q. And then there was a policy that was issued in
7 November of 2017, it was called the Lunn policy.
8 Were you notified of that policy, specific
9 policy, not the case, the policy, by anybody?

10 A. I don't recall.

11 Q. So if you could look with me at -- in your
12 book.

13 A. Okay.

14 Q. It's Tab B. And there's a document there called
15 the Lunn policy, executive office transmittal,
16 dated November 10th of 2017, is what began.

17 MR. HOOPES: Sorry. I'm going
18 to let Giana...

19 (PAUSE)

20 Q. So looking at that, can you tell us, had you
21 ever seen that policy before today?

22 A. I may have. It doesn't look familiar to me
23 but...

24 Q. Okay. And so if you, if you can -- The first
25 page is APP 005.

1 A. Yes.

2 Q. If you can turn to me -- with me to APP 007.

3 And about two-thirds of the way down, there's --
4 halfway down there's a Section III Roman Numeral
5 III, that says, DHS officials taking custody of
6 individuals at a courthouse. Do you see that?

7 A. Yes.

8 Q. And three paragraphs down there's a capital A.
9 It says, individuals over whom the Trial Court
10 has custody.

11 A. Yes.

12 Q. So if you and I can read that together. I'll
13 read it out loud.

14 A. Okay.

15 Q. Consistent with Chapter 2, Sections XIV and XV,
16 of the Court Officer Manual (current edition),
17 when an individual who was brought into court in
18 custody is subject to release after his or her
19 court proceeding, court security personnel shall
20 process that individual out of lockup in the
21 normal course regardless of whether the
22 individual is subject to a civil immigration
23 detainer or warrant.

24 Next paragraph. If, during the
25 processing of an individual subject to release

1 out of the courthouse, a DHS official is present
2 in the courthouse and seeks admission into the
3 courthouse's holding cell area in order to take
4 custody of the individual pursuant to an
5 immigration detainer or warrant, court officers
6 shall permit the DHS official to enter the
7 holding cell area in order to take custody of
8 the individual once Trial Court security
9 personnel have finished processing that
10 individual out of the court security personnel's
11 custody, if a security department supervisor
12 supervisor determines that the DHS official
13 would otherwise take custody of the individual
14 inside or immediately outside of the courthouse.

15 So let's stop there. The first
16 paragraph, Consistent with Chapter 2, Sections
17 XIV and XV of the Court Officer Manual. So you
18 understand -- You know the manual that you're
19 referring to; right?

20 A. Yes.

21 Q. And that's sort of a general manual for court
22 officers; correct?

23 A. Yes.

24 Q. And there's a specific section that it's
25 referring to there that, in subsections XIV and

1 XV, that give direction as to exactly how
2 releases are supposed to be; correct?

3 A. Yes.

4 Q. So if the Hearing Officer will permit, I'm going
5 to approach you and show you one page from that,
6 which at the bottom of 2-9. And in your
7 experience as a court officer, had you reviewed
8 that Court Officer Manual at some point?

9 A. Yes.

10 Q. And it's pretty clear in XIV.B., Prisoners and
11 detainees will be released only from the lockup
12 or holding room unless ordered by the court.
13 Correct?

14 A. Yes.

15 Q. Court officers in the lockup will determine if
16 there are no holds on the prisoner/detainee and
17 is properly identified before the person is
18 released. And just to be clear, that process of
19 clearing holds, in other words, somebody wants
20 the prisoner, that would typically take place
21 downstairs in the lockup.

22 A. Yes.

23 Q. And in D, if the detainee comes from the
24 sheriff's department to the court, from the
25 sheriff's department, House of Correction, or

1 another correctional facility, the court officer
2 in the lockup must call all the records of the
3 department of the facility to determine if there
4 are any other holds before releasing the
5 detainee. Correct?

6 A. Yes.

7 Q. And then in XV, court officers releasing the
8 prisoner that is posting his or her own bail
9 will do the following: They're going to verify
10 the person who's posting the bail, verify the
11 accurate amount. Number 3, verify that the
12 court officer will escort the prisoner out. Is
13 that correct?

14 A. Yes.

15 Q. Now, so is that what they're referring here in
16 the Lunn policy in that first paragraph, this
17 XIV and XV?

18 A. Yes.

19 MR. HOOPES: I offer this page,
20 if I may. If there's any objection?

21 JUDGE FABRICANT: No objection.

22 HEARING OFFICER. Yes. It's
23 received.

24 MR. HOOPES: B1 -- Number 1.

25

EXHIBIT 1

(DOCUMENT MARKED AS EXHIBIT 1)

Q. So the second paragraph that we read, which says that, if the DHS official is there, right, again, going back to your stipulation, okay, where it says 007, that page, --

A. Yes.

Q. -- where it says, if, during the processing of an individual subject to release out of the courthouse, a DHS official is present in the courthouse... That was happening on April 2nd; correct?

A. Yes.

Q. And if we go to the next paragraph on 008, it says, before being granted entry into the holding cell area, DHS officials must present credentials and a copy of the detainer and civil immigration arrest warrant to court security personnel, sign in to the holding cell area, and surrender their weapons. Correct?

A. Yes.

Q. And that would have been, they would have to present their identification to either to you or one of your staff who was there; correct?

A. Yes.

1 Q. And then, lastly, it says, to the extent
2 possible, court security personnel should
3 require that DHS officials transport any
4 individuals taken into custody through the
5 prisoner transport entrance and avoid taking
6 individuals through the public areas of the
7 courthouse. Correct?

8 A. Yes.

9 Q. So that's different than what you were
10 describing for us, though; correct?

11 A. Yes.

12 Q. So you were aware of the general policy for
13 court officers on April 2nd, 2018, but you don't
14 recall being aware of this Lunn policy.

15 A. Not off the top of my head, I don't. Sure I
16 saw it at some point.

17 Q. And so would it be fair to say that there were
18 communications from above you, supervisors and
19 supervisors' supervisors, at various times --

20 A. Oh, yes.

21 Q. -- as to various policies and various policy
22 changes?

23 A. Yes.

24 Q. And was there ever any particular training done
25 with regard to this new policy, that you can

1 recall?

2 A. No, I don't recall any training.

3 Q. So on that day of April 2nd, you recall seeing
4 the ICE officer who was there; correct?

5 A. Yes.

6 Q. And you said to the ICE officer -- you
7 identified yourself.

8 A. Yes.

9 Q. And you knew he was there for Medina Perez;
10 right?

11 A. Yes.

12 Q. The person down in the lockup at that point;
13 right?

14 A. Yes.

15 Q. And you knew from your employee, Mike Walsh, who
16 was what they call per diem, --

17 A. Yes.

18 Q. -- that there was an expectation he was going to
19 be released; right?

20 A. Yes.

21 Q. And there was an expectation he was going to be
22 released into ICE custody.

23 A. Yes.

24 Q. And it's your testimony that you offered the ICE
25 officer the opportunity to go down to the

1 sallyport; is that correct?

2 A. Yes.

3 Q. And he said, if he's coming out the front door,
4 I'm all set.

5 A. Yes.

6 Q. And sitting here today, do you have any
7 knowledge one way or another whether he had
8 spoken to the ICE officer by Clerk Okstein
9 before you arrived?

10 A. I had heard that since.

11 Q. But at that time, you didn't --

12 A. At that time, I had no knowledge of that.

13 Q. And to your recollection, that's what the ICE
14 officer said, I'm all set, and just stayed where
15 he was; --

16 A. Yes.

17 Q. -- is that correct?

18 Did Michael Walsh, the per diem, say anything to
19 you about the ICE officer actually making a
20 request, being able to go down into the holding
21 cell?

22 A. No.

23 Q. So you, after that conversation, went back
24 downstairs, and then you got a call from
25 Clerk Okstein; --

1 A. Yes.

2 Q. -- right?

3 A. (Witness nods head).

4 Q. And that the ICE agent was looking for
5 assistance because there were a number of
6 people, there were friends of Medina Perez.

7 A. Yes.

8 Q. And you went out to probation, probation said
9 that it wasn't needed to report to probation,
10 and you went upstairs.

11 A. Correct.

12 Q. And spoke to the ICE agent.

13 A. Yes.

14 Q. And then had the conversation with MacGregor
15 over your phone transmission; --

16 A. Yes.

17 Q. -- is that right?

18 So can you tell us about, between that
19 conversation that you had on the phone and the
20 next couple of days, how many conversations did
21 you have with MacGregor one on one about this?

22 A. I would guess that we probably had three. I
23 know we had one that day, I believe we had
24 another one that -- a little while after the
25 initial conversation, and then in the morning we

1 went over it again.

2 Q. And so how long were these conversations, if you
3 just estimate?

4 A. Short conversations. He answered my
5 questions quickly.

6 Q. And so, a minute, two minutes, five minutes?

7 A. Two minutes.

8 Q. Okay.

9 A. Two minutes, maybe.

10 Q. And in any one of these three conversations did
11 he ever mention to you the name David Jellinek?

12 A. No.

13 Q. Did he ever say to you that David Jellinek was
14 the person who caused the release to happen?

15 A. No.

16 Q. Did he ever say to you that David Jellinek was
17 the person who planned the release with him?

18 A. No.

19 Q. So now you know David Jellinek from being around
20 the court.

21 A. Yes.

22 Q. And you had seen him there from time to time in
23 his capacity as a bar advocate.

24 A. Almost daily, I believe.

25 Q. Almost daily.

1 A. Right.

2 Q. And so would you say that you had a business --
3 casual relationship or business friendship with
4 him or just business contact relationship?

5 A. Business contact, I would say.

6 Q. And from the time you walked into the courthouse
7 until the time you called MacGregor on the
8 phone, did David Jellinek ever tell you that he
9 was planning to have MacGregor release
10 Medina Perez out the back?

11 A. No.

12 Q. Did you see David Jellinek there the next day?

13 A. I believe it was the next day I saw him.

14 Q. And did David Jellinek come up to you and say, I
15 helped MacGregor, directed MacGregor to release
16 him out the back?

17 A. No.

18 Q. Did he ever say I had the judge's blessing to
19 release him out the back?

20 A. No, he did not.

21 Q. Did you speak to Judge Mary Beth Heffernan at
22 some point right after that?

23 A. Yes. I don't believe it was that day. I
24 don't think she was in that day.

25 Q. And so the next day you spoke to her?

1 A. Shortly after, whether it was the next day or
2 the day after that.

3 Q. And do you recall what that conversation was,
4 what you said to her, what she said back to you?

5 A. Something to the effect of, what the hell
6 happened.

7 Q. You said that or she said that?

8 A. She said that to me.

9 Q. What did you say back to her?

10 A. I told her what I knew happened and I
11 believe --

12 Q. That's what you just told us.

13 A. Yes. Yes.

14 Q. And so the name David Jellinek never came out of
15 her mouth or your mouth to her.

16 A. I don't believe it did.

17 Q. So this party that was for MacGregor, --

18 A. Yes.

19 Q. -- was that in the spring of 2019?

20 A. I believe so.

21 Q. Maybe April of 2019?

22 A. Could have been six months to a year after
23 the incident.

24 Q. In the courthouse.

25 A. Yes.

1 Q. In the basement?

2 A. In the probation.

3 Q. In the probation department.

4 A. Lower level.

5 Q. Attended by how many people?

6 A. I believe there was five of us there.

7 Q. Four court officers and David Jellinek.

8 A. Yes. Some people may have came in to wish
9 him well throughout, grab a piece of cake at
10 some point. But as far as the main group that
11 was there, the court officers and
12 Attorney Jellinek.

13 Q. Can you estimate today how long David Jellinek
14 was there at the party?

15 A. I don't know. I was only in the party for a
16 few minutes.

17 Q. Okay. And while you were there for a few
18 minutes, did you see David Jellinek go over and
19 shake MacGregor's hand?

20 A. I believe everybody did. I don't have a
21 clear memory of them shaking hands.

22 Q. Now, special counsel asked you some questions
23 about a policy that you created after this.

24 A. Yes.

25 Q. So in other words, this policy was your practice

1 of releasing out the front.

2 A. The procedures that we used that were handed
3 down to me.

4 Q. Were handed down to you.

5 A. Yes.

6 Q. So you followed the policies that had been
7 handed down to you.

8 A. Yes.

9 Q. So this Lunn policy, if that wasn't communicated
10 to you by your supervisor, Mr. McPherson, was
11 that ever communicated or addressed to you by
12 Presiding Justice Mary Beth Heffernan?

13 A. No.

14 Q. It was never discussed.

15 A. Policy to release custodies?

16 Q. Yes.

17 A. No, it was never discussed.

18 Q. Specifically to release ICE custodies.

19 A. No, never discussed.

20 MR. HOOPES: So if I can
21 approach the witness.

22 Q. So I'm going to show you this. I ask you to
23 look at that. Can you identify what that
24 document is?

25 A. Yes.

1 Q. And is that a document that you prepared?

2 A. Yes.

3 MR. HOOPES: So if I can offer
4 this as Exhibit 2.

5 Q. Take a minute to get through it.

6 HEARING OFFICER: Any
7 objection?

8 JUDGE FABRICANT: No objection.

9 HEARING OFFICER: Exhibit 2 is
10 received.

11 EXHIBIT 2

12 (DOCUMENT MARKED AS EXHIBIT 2)

13 Q. So can you explain to us how you prepared this
14 document?

15 A. Yes. We had nothing in writing specific to
16 the Newton courthouse, so I put that in writing
17 so there would be no confusion going forward.

18 Q. And is that a document that you prepared by
19 yourself or was that a document you prepared in
20 consultation with Presiding Justice Heffernan?

21 A. I prepared it myself. I believe I gave her a
22 copy as well as Regional Director McPherson.

23 Q. So reading it out loud. It says, Effective
24 Immediately. All custodies of the Newton Court
25 that are scheduled to be released will be

1 released out the front door of the courthouse
2 only, and in all caps. They will be escorted to
3 the lobby from the courtroom or through the
4 Probation Department. If necessary, property
5 will be given back outside of the front door
6 security station. Chief Noe, April 4th, 2018.
7 Am I reading that correctly?

8 A. Yes.

9 Q. So you issued this two days after April 2.

10 A. Yes.

11 Q. And you'd agree with me that what you have here
12 is not what's provided for in the Lunn policy.

13 A. Yes.

14 Q. Okay. And did you pass this up the chain to --

15 A. Yes.

16 Q. Okay. And to Mr. McPherson?

17 A. Yes.

18 Q. And did he agree with this?

19 A. After we talked, he agreed with it.

20 Q. Okay. And did he accept this or was there a
21 modification later?

22 A. He understood. And we had to have a
23 conversation about it, yes.

24 Q. Once you explained it to him.

25 A. Yes.

1 Q. Okay. So from that point on -- Your testimony
2 is, from that point on, this was the policy for
3 the Newton District Court.

4 A. Until I left, yes.

5 Q. Until you left. Regardless of whatever Lunn
6 said.

7 A. Yes.

8 Q. So you've talked a little bit about the doors,
9 you know, with badges. So are you familiar with
10 reports on use of a, use of a badge during a
11 particular day, a badge history report?

12 A. Yes.

13 Q. You've seen one of those? So if I was to show
14 you a history report for that day of April 2nd,
15 could you tell us whether you can identify that
16 as a history report like you've seen before?

17 A. Yes. Thank you.

18 Q. And is it fair to say, -- take your time -- is
19 that a history report for that day, April 2nd?

20 A. Yes, it is.

21 MR. HOOPES: If I could offer
22 this, please. Number 3.

23 JUDGE FABRICANT: No objection.

24 HEARING OFFICER. Exhibit 3 is
25 received.

EXHIBIT 3

(DOCUMENT MARKED AS EXHIBIT 3)

Q. And so that report would show by and large, with restrictions at the top, does that include all events, does it include all events from all devices? Subject to that caveat, this shows all access, use of card, to go through doors that require the badge that day.

A. Yes.

Q. And so somebody, like Officer MacGregor, would have had an access card; correct?

A. Yes.

Q. And his name would appear on the far right-hand column; correct?

A. Yes.

Q. So if we wanted to check out all of Officer MacGregor's entrances and exits using the badge for that day, we simply need to look on the right side; correct?

A. Yes.

Q. And where it says, in the column to the left of that, it says device, that's a description of the area that is accessed; is that correct?

A. Yes.

Q. And to the left of that, it says event, access

1 granted, and then to the left of that there's a
2 column that says time; is that right?

3 A. Yes.

4 Q. Thank you.

5 So also -- So I'm going to show you, --

6 MR. HOOPES: I'll get you a
7 copy.

8 Q. -- I'm going to show you a detainee
9 accountability login. Is that a document that
10 you actually pulled for the day?

11 A. This is the --

12 Q. April 2nd?

13 A. Yes.

14 Q. And that is a, that's a document that logs in
15 who comes in through the back door, brought in
16 to custody?

17 A. This is the custody lockup, yes.

18 MR. HOOPES: So I'd offer this
19 as the next exhibit.

20 JUDGE FABRICANT: No objection.

21 HEARING OFFICER: Okay.

22 Exhibit 4 is received.

23 EXHIBIT 4

24 (DOCUMENT MARKED AS EXHIBIT 4)

25 Q. So this is a sheet that the court officer who's

1 downstairs in the lockup is supposed to complete
2 regarding prisoners coming in and prisoners
3 leaving; is that correct?

4 A. Yes.

5 Q. And at the top it says, detainee accountability
6 daily login for the Newton District Court. And
7 then officer -- Do you recognize this
8 handwriting? That WM?

9 A. That's Wesley MacGregor.

10 Q. And then it says, to the right it says Monday,
11 April 2, 2018; correct?

12 A. Yes.

13 Q. And the first name in there is a woman by the
14 name of Pamela Hodgdon; correct?

15 A. Yes.

16 Q. Identification that says F for female, and then
17 it says Newton. Is that B-O-P? B-O-P?

18 A. I can't tell what those initials are. Newton
19 PD, is what I believe.

20 Q. Okay. And the next column is property received.
21 There's a checkmark.

22 A. Yes.

23 Q. And then there's a docket and the holds. And
24 then there's at disposition ROR. Released on
25 recognizance?

1 A. Yes.

2 Q. And arrival time is 9:00?

3 A. Yes.

4 Q. And departure time is 3:30?

5 A. Yes.

6 Q. So she actually, according to this sheet, didn't
7 leave downstairs lockup until 3:30; right?

8 A. Correct.

9 Q. And the column next to it says property return,
10 Y. Meaning, yes?

11 A. Yes.

12 Q. And then the next person on there is
13 Medina Perez. But before we get there, the
14 third person is Bruce Demelo, who comes in at
15 9:45 and leaves at about 1:50?

16 A. Yes.

17 Q. So that would be even before you arrived.

18 A. I believe so.

19 Q. And then the last person is Crystal Cosme, who
20 arrived at about 10:10 and she leaves at about
21 3:30; correct?

22 Q. Now, going back to Jose Medina Perez. M for
23 male. Police department, comes in from Newton.
24 Property received, there's a checkmark.
25 Correct?

1 A. Yes.

2 Q. Which should mean that he had property; correct?

3 A. Correct.

4 Q. And then disposition, released, came in at 9:05,
5 departure time, 3:00?

6 A. Yes.

7 Q. And property returned has just got right there
8 with I believe a dash; correct?

9 A. Right.

10 MR. HOOPES: Can I just have a
11 moment, Your Honor?

12 (PAUSE)

13 Thank you very much. Those are
14 all the questions I have.

15 HEARING OFFICER: Any redirect?

16 JUDGE FABRICANT: Just a couple
17 of things, if I may.

18 REDIRECT EXAMINATION

19 BY JUDGE FABRICANT:

20 Q. You just went through with Mr. Hoopes the Lunn
21 policy. And he took you through it, pointed out
22 some ways that it might differ from what you
23 were doing.

24 A. Correct.

25 Q. Does that change your memory of what was normal

1 in Newton?

2 A. No.

3 Q. Did you at some point in your conversation with
4 the ICE officer learn that there was a second
5 ICE officer somewhere?

6 A. No. I assumed that there was. I never -- He
7 never mentioned a fellow officer. I assumed
8 he's outside in the --

9 Q. But you didn't see him. You weren't told.

10 A. No. They've always gone in pairs. So I've
11 never seen one by themselves.

12 Q. And when you spoke with Judge Heffernan the next
13 day or the day after and, as you described it,
14 she said what the hell happened, what
15 information did you give her?

16 A. I discussed what I had learned through, in
17 that day, interviewing different people, before
18 I wrote my report on the incident. I spoke with
19 Officer Walsh, I spoke to, spoke to District
20 Attorney Jurgens, I believe I spoke to Clerk
21 Okstein.

22 Q. Did you have any information about what had
23 occurred either on or off the record between the
24 judge and counsel in the courtroom?

25 A. District Attorney, District Attorney Jurgens

1 recalled their conversation at the side bar.

2 Q. And what did she tell you about it?

3 A. She said that Attorney Jellinek requested
4 that custody be released so he can get an
5 immigration attorney.

6 Q. And did she tell you more about that?

7 A. She said -- The district attorney told me
8 that she stated that I don't know how that's
9 going to happen, ICE is right there waiting for
10 him.

11 Q. After this event, did you ever at any time talk
12 with David Jellinek about this event?

13 A. I believe the next day when -- the next day
14 or the day after, I talked to him, I still
15 don't -- I think I said to him I still don't
16 understand what occurred. He shrugged his
17 shoulders.

18 Q. Did he ever at any time tell you anything about
19 the event?

20 A. No.

21 JUDGE FABRICANT: I have
22 nothing further.

23 MR. HOOPES: Neither do I.
24 Thank you.

25 HEARING OFFICER: Thank you.

1 You're complete for today. Thank you very much,
2 sir.

3 If you could call your next
4 witness.

5 JUDGE FABRICANT: Thank you.
6 May the witness be excused?

7 HEARING OFFICER: Yes. Thank
8 you.

9 JUDGE FABRICANT: And we had
10 asked the next witness to come at 11:00. So I'm
11 not sure whether she's here yet.

12 HEARING OFFICER: We can take
13 our morning break now.

14 JUDGE FABRICANT: I've just
15 been told she'll be here at 10:45. So that
16 would work perfectly.

17 HEARING OFFICER: Okay. So
18 we'll resume at 10:45.

19 JUDGE FABRICANT: Thank you.

20 HEARING OFFICER: Thank you.

21 (Recess taken at 10:31 a.m.

22 Proceedings resumed at

23 11:01 a.m.)

24 JUDGE FABRICANT: Commission
25 calls Judge Mary Elizabeth Heffernan.

1 HEARING OFFICER: Thank you.

2

3 HONORABLE MARY ELIZABETH HEFFERNAN,
4 SWORN

5 JUDGE FABRICANT: Mr. McInerney,
6 I wonder if your microphone is on, because that
7 was very soft.

8 HEARING OFFICER: Now it is.

9 JUDGE FABRICANT: That's
10 better.

11 DIRECT EXAMINATION

12 BY JUDGE FABRICANT:

13 Q. Good morning.

14 A. Good morning to you.

15 Q. Would you tell us your name, please.

16 A. Certainly. Mary Elizabeth Heffernan.

17 Q. Great. And you just did exactly what I was
18 going to suggest, just bringing the microphone
19 close. Works better that way.

20 Would you tell us your
21 position.

22 A. Yes. I'm the First Justice of the
23 Newton District Court and the Regional
24 Administrative Justice for Region 4 of the
25 District Court.

1 Q. And is the Regional Administrative Justice role
2 new?

3 A. Yes. The last two years.

4 Q. Would you just go through your professional
5 background, please.

6 A. Certainly. I worked at -- I clerked in this
7 building at the Appeals Court for one year after
8 law school.

9 Q. That is before the Appeals Court moved over --

10 A. Yes.

11 Q. -- out of --

12 A. I'm that old, yes. And I went to the
13 law firm Palmer & Dodge after that, district
14 attorney's office in Middlesex County, ran the
15 Massachusetts District Attorneys' Association
16 for some years, went over to Care Group
17 Healthcare system, Beth Israel Medical Center in
18 the general counsel's office, and then worked in
19 the cabinet of Governor Patrick before I was
20 appointed to the bench.

21 Q. And when were you appointed to the bench?

22 A. February 6, 2013.

23 Q. And when did you become the First Justice of the
24 Newton District Court?

25 A. I was appointed acting in 2015. I believe

1 2016 is when I was appointed permanently.

2 Q. Can you explain to us the role of the
3 First Justice?

4 A. The First Justice is the titular head of the
5 court. You know, we have different departments,
6 the probation department, the clerk's
7 department, the maintenance department,
8 security. And the First Justice is the person
9 who brings those folks together, sets the tone
10 for the courthouse, and hopefully manages things
11 so that the business of the courthouse can get
12 done.

13 Q. And is there a First Justice for each division
14 of the District Court?

15 A. Yes.

16 Q. And does "division" refer to, generally, most
17 instances, a particular courthouse?

18 A. Yes.

19 Q. Do you know how many courthouses -- how many
20 divisions there are in District Court?

21 A. I thought there were 62, but I don't -- Don't
22 hold me to that, please.

23 Q. And as the First Justice, you said you're the
24 titular head of the court, you have those
25 administrative roles as you've described. Do

1 you have any disciplinary authority over other
2 judges?

3 A. I do not.

4 Q. Do you view your role as First Justice as
5 including passing on information to the
6 Regional Administrative Justice or to the
7 Chief Justice that, in your view, they should
8 have?

9 A. It is.

10 Q. And what has been your practice during your
11 years as a judge, that's now about 12 years,
12 what has been your practice regarding recording
13 of courtroom proceedings?

14 A. Everything is recorded. We've switched
15 from -- We've switched over to the FTR service
16 right now. We had an old service before. But
17 everything -- Every hearing in Newton is
18 included, including the clerk magistrates'
19 hearing.

20 Q. And the old system that you had, was that JAVS?

21 A. It was.

22 Q. And are you aware of a rule regarding recording?

23 A. I believe there is a rule regarding
24 recording. I learned it anecdotally and, also,
25 from being in the courts, I learned that you

1 never turn the tape off.

2 Q. I'm going to ask you to look at the screen. And
3 you have a binder in front of you. This is
4 Appendix K. Look either way. Whatever is
5 easier for you. Look at Page 122 in the binder,
6 you'll see what's on the screen. Is that the
7 rule that you're referring to?

8 A. Yes.

9 Q. And does it have -- Does it in general require
10 recording of courtroom proceedings?

11 A. My understanding is, yes.

12 Q. And are there some exceptions, some kinds of
13 things that are not required to be recorded?

14 A. I believe it says certain cases that are
15 impounded, sealed, juvenile matters.

16 Q. And some clerk functions, perhaps?

17 A. Yes.

18 Q. So the call of the list, perhaps?

19 A. Yes.

20 Q. And if you look at Page 123, and go down just
21 before that the bold that says see text, just
22 before that, does this tell you when that rule
23 took effect?

24 A. It does.

25 Q. And when did it take effect?

1 A. It was adopted on December 31st, 1987, became
2 effective February 1, 1988.

3 Q. In your years as a judge, when you were a new
4 judge, do you recall any training or advice or
5 communication with more experienced judges about
6 recording?

7 A. Yes. It was anecdotally told that you should
8 never go off the record.

9 Q. Was there any formal training about that?

10 A. I don't recall formal training, but it was
11 certainly engrained in new judges.

12 Q. And in the course of your 12 years, have you
13 ever turned off the recording or directed the
14 clerk to do so?

15 A. I have not.

16 Q. And are you aware of any legitimate reason to do
17 so?

18 A. I do not.

19 Q. In the Newton District Court, you said you're
20 the First Justice and you have been effectively
21 since 2015. Do you sit there every day or some
22 days?

23 A. I was sitting there every day, up until I
24 became the Regional Administrative Justice, and
25 I had moved. Our chief likes us to do that. So

1 I go around my region often. But most of my
2 time is in Newton, yes.

3 Q. So putting your mind back to 2018, which I
4 realize is seven years ago. During that time
5 period, were you sitting there every day or most
6 days?

7 A. I was there Monday, Tuesday, Wednesday,
8 Friday, as I presided over the Quincy drug court
9 on Thursdays.

10 Q. So on Thursday you wouldn't be there. But
11 generally, if there was something taking you out
12 for some reason, you would be there four days a
13 week.

14 A. Yes.

15 Q. And when you were there, which courtroom would
16 you sit in?

17 A. First session. Except for Wednesdays, which
18 was the jury day in Newton. So that was the
19 second session upstairs.

20 Q. And would you sit in the second session on those
21 days?

22 A. Yes.

23 Q. If there was another -- Was there usually
24 another judge in the building?

25 A. When I was there, sometimes, yes. Yes,

1 sometimes.

2 Q. If there was another judge there, would you
3 refer to that as a visiting judge?

4 A. Uh-huh.

5 Q. Where would that person usually sit?

6 A. Upstairs in the judge's lobby on the second
7 floor.

8 Q. And if you were doing a jury trial upstairs, and
9 there was another judge, then where --

10 A. I would be in my lobby down on the first
11 floor.

12 Q. Even though you might be doing a jury trial --

13 A. Yes.

14 Q. -- on the second floor. So the two judges might
15 be sitting in opposite lobbies but sitting in
16 different courtrooms?

17 A. Yes.

18 Q. During -- Again, putting your mind back to
19 April of 2018 up to April 2nd of 2018. What was
20 the usual practice in your experience if a
21 person came into the courthouse in custody and
22 was then released without the need to post bail
23 and without any probation conditions?

24 A. They could either leave right from the dock,
25 which you have displayed there, or if they

1 needed -- if they didn't have to sign conditions
2 or maybe they had some property downstairs, they
3 could go downstairs and retrieve that.

4 Q. So those two -- Those were two approaches that
5 might occur?

6 A. Yes.

7 Q. And had you sometimes seen a person get their
8 property without going back downstairs?

9 A. Yes.

10 Q. How would that happen?

11 A. They would come up with it, or the court
12 officer would bring their property, and they
13 would be released right from the court, from the
14 dock, and go out the front door of the
15 courthouse.

16 Q. And you're pointing to what's on the screen,
17 which is, I believe 508. Why don't we take a
18 look at 509 as well. That just gives you a
19 different angle.

20 A. Yes.

21 Q. Can you see the dock in that one as well?

22 A. I can.

23 Q. And does that show you where the judge, the
24 judge's bench is and the clerk's bench and the
25 tables that the lawyers would use?

1 A. It does.

2 Q. Again, back up to April 2nd of 2018. So, again,
3 a long time ago, but I ask you to put your mind
4 back there. Were there occasions when you had
5 seen ICE come to court?

6 A. Yes.

7 Q. And did you have a practice regarding what
8 should happen when ICE came to court?

9 A. My practice was, with any law enforcement, I
10 ask them to, if they did not have some sort of a
11 warrant, to sit outside and wait or check in
12 with the court officers.

13 Q. And when you say "outside" --

14 A. Not outside the courthouse. In the lobby.
15 We have a generalist lobby. And I would ask --
16 It was a practice that was instituted because,
17 in our second session, which I don't think you
18 have a picture of, it's a very narrow courtroom,
19 as well as the first session is a large
20 courtroom, it's disruptive if law enforcement
21 effectuates service in the courtroom while the
22 service was going on. That happened on two
23 occasions. Not with ICE, but with other law
24 enforcement officers.

25 Q. And so you would ask that they be directed to

1 wait outside the courtroom?

2 A. Yes.

3 Q. And where would they generally wait?

4 A. ICE would wait on the first floor lobby.

5 Q. And "lobby" gets used in two ways.

6 A. In the lobby of the courthouse. Not the
7 judge's lobby. They would wait right outside of
8 the courtroom.

9 Q. And sometime after April 2nd of 2018 did you
10 change that practice?

11 A. It was confusing at the time when we were
12 there. I think a lot of us were confused about
13 what to do. And I understand that more guidance
14 came down after that, yes.

15 Q. Okay. After April 2nd, --

16 A. Yes.

17 Q. -- did you have some e-mail communication with
18 Chief Justice Dawley regarding that practice?

19 A. Yes.

20 Q. And did he suggest that you consult with a
21 lawyer in his office?

22 A. Yes.

23 Q. And did you do that?

24 A. I did.

25 Q. And we're going to come back to that e-mail.

1 On April 2nd, a Monday, April 2nd of 2018, were
2 you at the Newton District Courthouse?

3 A. I was not. I was at a funeral.

4 Q. And wouldn't be answering your cell phone?

5 A. I was not answering my cell phone.

6 Q. Because you were at a funeral?

7 A. Yes.

8 Q. The next day, April 3rd, were you at the
9 Newton District Courthouse?

10 A. Yes.

11 Q. Did anyone come to talk to you about something
12 on April 2nd?

13 A. Attorney David Jellinek did.

14 Q. And can you tell us about that? Where, when,
15 how long? Tell us about that.

16 A. I also have a drug court in the
17 Newton District Court. Attorney Jellinek was
18 one of the attorneys that was in the roundtable
19 that we used to have before the session. And we
20 were having our roundtable upstairs in the
21 second session at the witness table. And after
22 the meeting, he told me that something had
23 occurred in the courthouse yesterday.

24 Q. And did you go somewhere to talk about it or did
25 you stay --

1 A. No. We were right there.

2 Q. And did he tell you more than that?

3 A. He told me that he had a client whose
4 identity was in question, that had a fugitive
5 from justice warrant out of Pennsylvania, that
6 he used the services of an interpreter to go
7 downstairs with his client to talk about
8 clearing up the warrant, because it appeared to
9 be cleared up during the session.

10 Q. Did he say anything about going off the record?

11 A. No.

12 Q. And did he say that he requested that the judge
13 allow him to go downstairs with the defendant?

14 A. I believe he mentioned that, yes.

15 Q. And did he say anything about his conversation
16 with the judge?

17 A. He did not.

18 Q. Did he say why he was telling you this?

19 A. He was -- No, he didn't say why, but I think
20 he was letting me know that it was an incident
21 that he brought to my attention.

22 Q. Did you say anything?

23 A. Probably. I don't remember, though.

24 Q. Had you been told anything by anyone else before
25 you talked with him?

1 A. No.

2 Q. And how did the conversation end?

3 A. I said thank you for letting me know and I
4 went downstairs.

5 Q. That day or the next day, did the Chief Court
6 Officer come to see you?

7 A. I think that day he did, yes.

8 Q. And what did he tell you?

9 A. He told me that someone had gone out the back
10 door of the courthouse and ICE was waiting in
11 the front and they were not happy.

12 Q. Did he show you a memo regarding where
13 defendants should be released?

14 A. Yes.

15 Q. And were you called upon to make any sort of
16 decision about that memo?

17 A. We discussed it, and I said you better post
18 it clearly in the first floor lobby for the
19 public to see.

20 Q. And that day or the next day did Clerk Okstein
21 come to see you?

22 A. Yes. That day, also.

23 Q. And tell us about that conversation.

24 A. The clerk had listened to the tape, and he
25 told me that there were several, he thought,

1 minutes that were -- that the judge had gone off
2 the tape, and he -- That's all I recall him
3 telling me.

4 Q. Okay. Did he say anything about the defendant
5 and his attorney going downstairs?

6 A. He did not, that I recall.

7 Q. On Wednesday, the 4th, so we're now -- April 2nd
8 was a Monday. So Wednesday, the 4th, was
9 Judge Joseph sitting in Newton at the end?

10 A. I think so.

11 Q. At this time was she sitting in the second
12 session?

13 A. Uh-huh.

14 Q. Excuse me. Second session upstairs?

15 A. Yes.

16 Q. Did you go to see her in the lobby?

17 A. Yes.

18 Q. And did you have a conversation with her?

19 A. Yes.

20 Q. Tell us about that conversation.

21 A. My recollection is that I asked her what
22 Attorney Jellinek had told me. I said what
23 happened. And as was -- at the time, it was
24 confusing about policies or practices, et
25 cetera, for her, I think, and so I was just

1 asking her what happened, if she remembers what
2 happened, could you please tell me, and that's
3 all I recall from our discussion.

4 Q. Okay.

5 A. Because I had to prepare a memo for my
6 Regional Justice and for the Chief.

7 Q. And we're going to talk about that in a bit.
8 Did she say anything about going off the record?

9 A. No.

10 Q. Did you ask her anything about that?

11 A. I didn't.

12 Q. Why not?

13 A. I would -- I assume everyone knows that you
14 never go off the record.

15 Q. But you said Clerk Okstein had said something
16 about part of it.

17 A. Yes. He came in and was quite alarmed, as
18 was I, when he told me.

19 Q. But you didn't ask Judge Joseph.

20 A. I did not.

21 Q. Did she say that she had authorized Mr. Jellinek
22 and the defendant to go downstairs after his
23 release?

24 A. She mentioned it, yes.

25 Q. And did she say anything about going to

1 probation?

2 A. I believe so, yes.

3 Q. Would a judge's permission be required for a
4 defendant and his attorney to go downstairs
5 after he's ordered release?

6 A. No.

7 Q. Are there other places -- If an attorney wants
8 to have a conference with a client, are there
9 any places in the courtroom that could --

10 A. Oh, yes, there are. Attorneys move all the
11 time. There are many rooms that one could have
12 a conversation, yes.

13 Q. Is there a way to get to probation through a
14 public access route?

15 A. Yes.

16 Q. How would you do that?

17 A. You would come in the front door of the
18 courthouse, you would make a left, you would go
19 down the stairs to the basement, which is where
20 the probation department is.

21 Q. And if you were coming from the first session
22 court, how would you do that?

23 A. If you were coming from the first session
24 courtroom, you would do the same thing.

25 Q. During these conversations with various people,

1 what was in your mind as to where Judge Joseph
2 was sitting?

3 A. That's -- I thought that she was sitting
4 in -- I thought this all occurred in the second
5 session, because that's where the judges usually
6 sit. And I was not in the building that day. I
7 later learned it was in the first session
8 downstairs.

9 Q. Did that misconception affect your imagining of
10 how the movement occurred?

11 A. I would say -- Yes. Because leaving the
12 second floor session, if you're not in custody,
13 you would go out through the hallway, through
14 the public door. If you were in custody, you
15 would go down with the court officers either in
16 the elevator or there's a back staircase, not
17 accessible to the public, but to employees, that
18 you would go down to probation through.

19 Q. So if you're not in custody, but you wanted to
20 go talk to probation for some reason, could you
21 get there through a public stairway?

22 A. Yes. You would. That's the only way you
23 would.

24 Q. Did Judge Joseph tell you anything about any
25 concerns that ICE might arrest the wrong person?

1 A. I don't recall.

2 Q. Did she say anything about being concerned that
3 ICE wouldn't allow an attorney/client
4 conference?

5 A. I don't recall that.

6 Q. And when you say you don't recall, are you
7 saying you don't recall her saying it --

8 A. I don't recall her saying it. It was seven
9 years ago.

10 Q. And during these -- After your conversation with
11 Judge Joseph, did you talk with the Regional
12 Administrative Justice?

13 A. I believe I did before and after, yes.

14 Q. And who was the Regional Administrative Justice?

15 A. Stacey Fortes.

16 Q. And when you talked with her, did she ask you to
17 do something?

18 A. She did.

19 Q. What did she ask you?

20 A. She asked me to reduce in writing a synopsis
21 of what happened.

22 Q. And did she also ask you to get the recording?

23 A. She did.

24 Q. And did you do both of those things?

25 A. I did.

1 Q. Did you have someone get the recording, make a
2 copy, and listen to it?

3 A. Yes.

4 Q. And who did that?

5 A. Clerk Okstein.

6 Q. And did you learn further from Clerk Okstein
7 about the off the record part of the
8 conversation?

9 A. Yes.

10 Q. What did you learn?

11 A. He told me that it was a blank spot of almost
12 a minute or two.

13 Q. Okay. Did you have further discussion with
14 Regional Administrative Justice?

15 A. After I learned that, yes. No. I didn't
16 after I learned that, I think. I can't remember
17 the sequence. I spoke with her. She asked me
18 to do those two things. I then reduced it in
19 writing. I don't recall speaking with her
20 afterwards.

21 Q. We're going to bring up your e-mail that we
22 have. And if you look in the book at
23 Appendix B, you will find it. So look wherever
24 is the easiest for you. Let's just read through
25 your e-mail. So what's the date of this e-mail?

1 A. Friday, April 20, 2018.

2 Q. So let's go -- If you go to Appendix B,
3 Page 540, you get to the beginning of the
4 series. They all have -- We all know, to our
5 frustration, you have to look at the e-mail
6 backwards.

7 So looking at yours, what's the
8 date of that?

9 A. Thursday, April 5, 2018.

10 Q. And on Thursdays, where would you be?

11 A. Quincy.

12 Q. Not in Newton.

13 A. No.

14 Q. So what were you in the middle of while you were
15 writing this e-mail?

16 A. In Quincy, when I was sitting in the drug
17 court, I would have the first session, do my
18 drug court, including meetings, et cetera. So
19 it was a wicked busy day over there. But I
20 needed to reduce this to writing for my Chief.

21 Q. And let me ask you to make sure you have your
22 mouth close to the microphone.

23 A. I'm sorry.

24 Q. So I'm going to read through and I'm going to
25 stop in a couple places. So it says, on Monday,

1 April 2nd, 2018, a defendant, who had been
2 arrested over the weekend, was in court for
3 arraignment on a drug possession charge and a
4 fugitive from justice charge, as he was also
5 allegedly wanted in Pennsylvania. An ICE agent
6 was in the courthouse as well with a detainer
7 for the individual.

8 That much, what was your source
9 of information for that much?

10 A. That was probably a combination of
11 Attorney Jellinek and Judge Joseph.

12 Q. Okay. And then it says, as is usual practice in
13 Newton Court, the agent was asked to wait
14 outside the courthouse as he did not have a
15 warrant but a detainer. So this says
16 courthouse. You said earlier courtroom. Can
17 you explain?

18 A. I misspoke. I did not ask him -- I did not
19 ask them to step outside the courthouse. I
20 cannot do that. I asked them to step outside
21 the courtroom.

22 Q. So when you say you misspoke, you're talking
23 about in the e-mail?

24 A. Yes.

25 Q. What you said here; is that accurate?

1 A. Yes.

2 Q. Then it says, there was a prolonged discussion
3 at some point regarding defendant's identity
4 involving ICE, the Commonwealth, the defense
5 attorneys and the judge, there is also an
6 interpreter involved in this case.

7 That much, what was your source
8 of that?

9 A. I believe that was also from Judge Joseph,
10 Attorney Jellinek, it may have been
11 Clerk Okstein as well.

12 Q. And then it says, after this discussion, the
13 Commonwealth moved to dismiss the fugitive
14 charge, the judge releases the defendant on
15 PR -- Is that personal recognizance?

16 A. Yes.

17 Q. -- on the possession charge, not sure if bail
18 was requested.

19 That much, what was your source
20 of that?

21 A. Again, the judge and/or Attorney Jellinek.

22 Q. And then it says, the defense attorney asked the
23 judge if he could utilize the services of the
24 interpreter in probation with the defendant to
25 the further investigate the Pennsylvania

1 detainer so it did not hinder his client
2 further.

3 What was the source of that?

4 A. A combination of the judge and
5 Attorney Jellinek.

6 Q. Then the judge agreed, the defendant was brought
7 to probation by a court officer, unclear if he
8 was cuffed or not, via the back stairway.

9 What was the source of that?

10 A. That was also Attorney Jellinek and the
11 judge.

12 Q. And what is the back stairway?

13 A. So that's where, when I thought it was all
14 occurring in the second session.

15 Q. So the back stairway --

16 A. Back stairway.

17 Q. -- from the second session, would that be the
18 public stairway, would that be the one that's
19 within the secure area?

20 A. It's not a public. Within the secure area.

21 Q. And then it says, the interpreter and defense
22 counsel accompanied him.

23 Is this also -- What's the
24 source of that?

25 A. That is also the judge and Attorney Jellinek.

1 Q. And then it says, the ICE agent, now back inside
2 the building, inquired the clerk if there was
3 any other exit for the defendant from the
4 courthouse, told that all persons not in custody
5 exit the court from the front exit, the ICE
6 agent went outside again presumably to wait for
7 the defendant.

8 What's the source of this
9 information?

10 A. Clerk Okstein.

11 Q. And then at some point the defendant was allowed
12 to leave through the back door of the
13 courthouse, unclear if it was via the employee
14 entrance or the probation back entrance.

15 What's the source of that?

16 A. That was Chief Court Officer Scott Noe.

17 Q. And then it says, ICE did not affect your
18 officer, and the defendant was presumed to have
19 left the rear parking lot with his friends, who
20 had been waiting for him.

21 What's the source of that?

22 A. Also Chief Noe.

23 Q. If I learn any additional information, I will
24 report it forthwith. The chief court officer
25 has posted this policy reiterating the only exit

1 to be used from the courthouse, except for
2 custodies, employees, and judges, is the front
3 door. Thank you.

4 Is that all of what you said?

5 A. Yes.

6 Q. And you didn't say anything about the judge
7 going off the record in that e-mail; correct?

8 A. I did not.

9 Q. Why not?

10 A. I don't know if I knew it then.

11 Q. Okay. So this was April 5th. You're not sure
12 whether --

13 A. I don't recall when I heard that.

14 Mr. Okstein told me that there was a gap in the
15 tape. I just don't remember the timing of when
16 I was told that.

17 Q. Okay. And then going further in Appendix B. It
18 has some back and forth in front of
19 Chief Dawley. I just want to get that in front
20 of us. So if you look at Page 539, --

21 A. Yes.

22 Q. -- you have an e-mail from Chief Justice Dawley,
23 and he says this just to you, dated April 20th,
24 he says, there are a couple of issues here, what
25 is the authority to tell the ICE officer to stay

1 outside the courtroom, I'm concerned that such a
2 practice treats ICE officers different from
3 other members of law enforcement and the general
4 public. It seems to me that such a practice
5 runs counter to the requirement that courtrooms
6 are open to the public without exception. I
7 recommend that such a practice end. And then he
8 says, who was the judge that presided over the
9 case. And then he says, who was responsible for
10 allowing the defendant to exit the courthouse
11 via a nonpublic entrance. And then he says, in
12 addition to the notice posted by Officer Noe,
13 was the court staff told and do they understand
14 that this should not happen again.

15 Is that what Chief Justice
16 Dawley sent to you?

17 A. Yes.

18 Q. And with a copy to Regional Administrative
19 Justice then Stacey Fortes?

20 A. Yes.

21 Q. And did you respond?

22 A. I did.

23 Q. And if you turn the page over to 538, you see
24 your response. Judge Fortes, in response to the
25 questions, it has been my practice to politely

1 ask ICE, who had been known to the court
2 security staff, if they are present to detain a
3 defendant whom they know to be in our Newton
4 police or sheriff DOC -- DOC meaning
5 Department of Corrections?

6 A. Yes.

7 Q. -- custody and in the building or arriving soon,
8 to wait outside the courtroom for the defendant
9 to be released in order to minimize disruption
10 in other cases, particularly in the close
11 quarters of our second session.

12 Is that because you thought
13 this happened in the second session?

14 A. Yes.

15 Q. And with the limited court security staff we
16 have here. They have always acquiesced. I have
17 never been shown a warrant in Newton, a detainer
18 occasionally. Often there is no paperwork at
19 all. And then you responded to his question as
20 to who the judge was, and you said Judge Joseph.

21 A. Yes.

22 Q. And then you responded about how it happened.
23 The defense attorney asked the judge after the
24 Commonwealth dismissed the fugitive from justice
25 case if he could, with the interpreter, speak to

1 his client downstairs in probation in order to
2 further explore the open warrant in Pennsylvania
3 which triggered the then dismissed fugitive
4 complaint. Judge allowed it. And the judge
5 believes the defendant was brought downstairs in
6 custody to the probation department. And then
7 you said, in addition to the posted written
8 policy of Chief Noe, the clerk's office and
9 probation have been told that the only exit from
10 the courthouse for defendants released from
11 custody will be the front door of the
12 courthouse, those in custody will exit via the
13 sallyport, employees only will use the two back
14 entrances which are accessed only by ID card
15 entrance and egress. Thank you. And please let
16 me know if you need further information.

17 Is that, is that what you
18 wrote?

19 A. Yes.

20 Q. If you go back to Chief Justice Dawley's
21 questions. Look at his Question Number 3, who
22 was responsible for allowing the defendant to
23 exit the courthouse via a nonpublic entrance.
24 Did you respond to that question in your e-mail?

25 A. No.

1 Q. Is there any reason you didn't respond to that
2 question?

3 A. I don't recall why I did not answer that
4 question. I may not have known.

5 Q. And then on April 20th, a little, just a little
6 bit later in the day, Chief Justice Dawley
7 writes back to you. He says, thanks for the
8 response, I don't think this situation, even if
9 raised by ICE is a problem. It sounds like
10 court personnel were just trying to accommodate
11 the attorney/client relationship by use of the
12 interpreter. On the first issue, asking them to
13 step outside the courtroom, obviously it is your
14 call, and you should exercise your own judgment.
15 My only hesitation is the appearance factor,
16 especially as ICE continues their campaign of
17 attacks on us. I don't know the answer to this.
18 But do any other District, -- DC -- Is that
19 District Court?

20 A. Yes.

21 Q. -- any other DC's do this. If you need any
22 guidance from Zach -- Who's Zach?

23 A. Now Judge Hillman.

24 Q. Who was he then?

25 A. He was in the administrative office in the

1 District Court legal department.

2 Q. If you need any guidance from Zach or our
3 lawyers, let me know, thank you for all you do,
4 have a good weekend.

5 Did you receive that from
6 Chief Justice Dawley --

7 A. I did.

8 Q. -- on the afternoon of April 20.
9 And did you consult with Zach Hillman?

10 A. I believe I did.

11 Q. And later that day, the next e-mail, over at the
12 bottom of Page 537, thank you as well, I will
13 reach out to Zach, thank you for your support.

14 So you did. You just told us
15 at some point with Judge Zach have some
16 consultation and then make some change in the
17 policy --

18 A. Yes.

19 Q. -- practice. That practice, was that ever in
20 writing?

21 A. No. It was a result of a disruption I had up
22 in the second session where a trooper was trying
23 to have a witness to a murder brought -- He was
24 a defendant in our courtroom. It just got very
25 confusing. So I was -- I don't want to disrupt

1 the ongoing daily business of the court, so
2 that's why I asked, anyone, would you please
3 check in with the court officers, ICE, could you
4 wait outside, please. Of the courtroom.

5 Q. And then after your consultation with Zach --

6 A. I changed that.

7 Q. And do they now --

8 A. They do. They check in with the court
9 officers. This was all pre Lunn. So yes.

10 Q. And so your recollection is that this was
11 pre Lunn. Let's, let's take a look at
12 Appendix B.

13 Now, when you refer to Lunn,
14 are you referring to the SJC decision or are you
15 referring to a court transmittal?

16 A. Both.

17 Q. So Appendix B. Just give yourself some time to
18 take a look at that.

19 A. The 0005?

20 Q. Yes.

21 (PAUSE)

22 A. Okay.

23 Q. What was the date of this?

24 A. I don't -- Oh. November 10th, 2017.

25 Q. So it actually was --

1 A. Before.

2 Q. -- before. Was it --

3 A. It was -- This policy came out before
4 April 2nd of 2018, yes.

5 Q. And had you yet incorporated into your practice?

6 A. No.

7 JUDGE FABRICANT: All right.
8 That's all I have. Thank you.

9 HEARING OFFICER: Ms. Mulvey.

10 CROSS-EXAMINATION MS. MULVEY:

11 Q. Good morning, Judge Heffernan. We have never
12 met, have we?

13 A. Oh, yes, we have. You've done evidence
14 programs for us many times and I've met you a
15 couple of times. Nice to see you again.

16 Q. I apologize. Nice to see you. I'm horrible
17 with faces.

18 A. Not a problem.

19 Q. All right. I haven't been before you in the
20 Newton District Court; --

21 A. Not that I recall.

22 Q. -- is that fair?

23 All right. And on April 2nd of 2018, we've
24 heard -- Do you recall that was a Monday?

25 A. Yes.

1 Q. And your clerk's mother had passed away and you
2 were going to the funeral?

3 A. Yes.

4 Q. Okay. And understandably, didn't have your cell
5 phone on?

6 A. Correct.

7 Q. All right. And do you know that there was a
8 time during the morning when Judge Joseph, who
9 was sitting in that day, had a couple of
10 questions and tried to reach you by phone?

11 A. I think I recall that, yes. My phone showed
12 calls missed.

13 Q. All right. And do you understand she had some
14 questions related to a different case that you
15 handled and was looking for some guidance?

16 A. I don't know. Yeah. I don't remember.

17 Q. All right. In any event, you did come to the
18 Newton District Court on the next day, Tuesday;
19 is that right?

20 A. Yes.

21 Q. And Judge Joseph wasn't there?

22 A. No.

23 Q. All right. And you said that at some point that
24 day David Jellinek approached you about this
25 incident; --

1 A. Yes.

2 Q. -- is that right?

3 You said it was in connection with a drug court
4 meeting?

5 A. Yes. He stayed after the roundtable was
6 over.

7 Q. And when does the roundtable take place?

8 A. Noontime.

9 Q. Okay. So this would be sometime 2:00-ish?

10 A. Probably 1:00, closer to 1:00.

11 Q. Okay. The meeting was 12:00 to 1:00?

12 A. Uh-huh.

13 Q. You don't do it during lunch? You do it right
14 before lunch?

15 A. Hopefully.

16 Q. And as of that time, 1:00 or so, nobody had told
17 you anything about this incident; is that true?

18 A. True.

19 Q. Okay. Clerk Okstein didn't come in and say, oh,
20 my God, Judge, we had this happen?

21 A. No, I don't remember him doing that.

22 Q. Scott Noe didn't come in and say, I have some
23 bad news for you, Judge?

24 A. Not that morning, no.

25 Q. All right. And so the first person that told

1 you anything about this incident was
2 David Jellinek?

3 A. Yes.

4 Q. What he told you was frankly benign, wasn't it?

5 A. Benign?

6 Q. Well, he told you that he had a client with an
7 identification issue?

8 A. Yes.

9 Q. And a fugitive warrant?

10 A. Yes.

11 Q. And there's nothing particularly out of the
12 ordinary about either of those things, is there?

13 A. No.

14 Q. He told you that he wanted to speak to his
15 client?

16 A. Yes.

17 Q. Who needed an interpreter?

18 A. Yes.

19 Q. Okay. Nothing unusual about that?

20 A. No.

21 Q. All right. He told you that he asked the judge
22 and she allowed him to go downstairs?

23 A. Yes.

24 Q. To speak with his client?

25 A. Correct.

1 Q. Did lawyers sometimes speak with clients in the
2 lockup?

3 A. When they were in custody? Of course, yes.

4 Q. Okay. And that was pretty much what he told
5 you, wasn't it?

6 A. Yes.

7 Q. Okay. You said he referred to it as an
8 incident?

9 A. Yes.

10 Q. What about that set of facts is an incident that
11 would warrant him coming to talk to you about
12 it?

13 A. I don't know.

14 Q. Did it strike you as odd that he was giving you
15 this information?

16 A. No.

17 Q. Why did you think he was telling you all this?

18 A. I think he was telling me about it because of
19 the ICE involvement.

20 Q. Well, but he didn't tell you about ICE, did he?

21 A. He didn't tell me about ICE. Not that I
22 recall. But I don't know. We had a lot of
23 discussion around the courthouse about issues
24 around that at that time.

25 Q. Is it fair to say -- Yeah. At that time, you

1 know, ICE was sort of a hot topic; right?

2 A. It was.

3 Q. And there was a lot of changing policies and
4 things like that?

5 A. Yes.

6 Q. All right. And even among District Courts, the
7 District Courts in Massachusetts weren't all
8 created with the cookie-cutters, were they?

9 A. No.

10 Q. They're very, very different in physical layout?

11 A. Yes.

12 Q. In entrances and exits and courtrooms?

13 A. Correct.

14 Q. And it's really difficult to make
15 one-size-fits-all policies for the
16 District Courts?

17 A. I don't know if it is or not. You'd have to
18 ask my chief that.

19 Q. Well, have you sat in different courthouses?

20 A. Yes.

21 Q. And do different courthouses do things
22 differently?

23 A. Somewhat.

24 Q. All right. There are different doors, different
25 accesses to lockups, there are all kinds of

1 different things happen; right?

2 A. Yup.

3 Q. And even in Newton, access for custodies is very
4 different in the first session than in the
5 upstairs second session, isn't it?

6 A. Uh-huh. Yes.

7 Q. In the first session, they can bring people
8 directly from the lockup into the dock; is that
9 right?

10 A. Right.

11 Q. And the second session, they have to walk them
12 up the backstairs or take the elevator?

13 A. Or take the elevator.

14 Q. And there's no dock alone in there, is there?

15 A. There isn't.

16 Q. For that reason, the call of the daily list
17 generally takes place in the first session; is
18 that right?

19 A. Yes.

20 Q. Why did you think that Judge Joseph was doing
21 the daily list in the second session?

22 A. I just -- Because the visiting judge
23 generally sits in the second session. And for
24 some reason, it didn't compute in my brain.

25 Q. Okay. But --

1 A. There wasn't a -- you know.

2 Q. Yeah. But the daily list didn't generally
3 happen up there, did it?

4 A. It does if there are small claims going on.
5 Like today is small claims days, so they use the
6 first session because there are more people. So
7 we go upstairs and do our daily list.

8 Q. But that -- This day, that wasn't happening, was
9 it?

10 A. No.

11 Q. Now, fair to say there's been a lot of talk
12 about, not just ICE in general, but this
13 incident over the last seven years?

14 A. Yes.

15 Q. And you've heard lots of different things from
16 of lots of different people?

17 A. I have?

18 Q. Yes.

19 A. Yes.

20 Q. And is it difficult to sort out today, in June
21 of 2025, what you heard from who, when?

22 A. It's challenging.

23 Q. Okay. Is it fair to say that what you told the
24 grand jury back in 2019 is probably closer to
25 accurate than your memory today?

1 A. Probably.

2 MS. MULVEY: All right. Could
3 I approach the witness, Your Honor?

4 HEARING OFFICER: Yes.

5 Q. Just to make things easier, can I give you a
6 copy of your testimony?

7 A. Yeah. Thanks.

8 Q. I'd ask you to look at Page 33, transcript
9 Page 33. There are some Bates numbers. But if
10 you look at transcript Page 33.

11 A. Transcript page 33. Yes.

12 Q. And I should have started, this was given on
13 February 28th of 2019 in the Federal courthouse?

14 A. Yes.

15 Q. And if I ask you to look at Page 33, you were
16 asked, understandably, what did David Jellinek
17 tell you?

18 A. Yes.

19 Q. And this was the conversation after the drug
20 court meeting that you were telling us about?

21 A. Yes.

22 Q. And you said, what I recall him telling me, and
23 I don't, because this e-mail is a compilation of
24 a few after I spoke to, after I spoke to him
25 first, he told me that he had represented a

1 fellow who they didn't know if he was wanted in
2 Pennsylvania, ICE was also in the building
3 wishing to effect service on him, and he had
4 been arrested, and I don't -- I remember him
5 saying something about he asked the judge if he
6 could bring his fellow downstairs after he had
7 been released with the interpreter to talk to
8 probation, something about trying to sort out
9 whether the Pennsylvania warrant was still
10 active. That's my recollection of how it first
11 started with me, and then I said, okay, you
12 know, and I went downstairs, I said, well, thank
13 you for telling me or something, and I went
14 downstairs, and when I went in to my lobby, my
15 chief court officer came in, Scott Noe, with a
16 policy saying -- reiterating that people go out
17 the front door, and I said, okay, we need to
18 reiterate this, and he told me that an incident
19 had happened that someone went out the back
20 door, so then it started like something
21 happened, I knew something had happened, and I
22 said, okay, well, tell me a little bit about it,
23 and he said he understood the court officer had
24 let someone out the back door, so I was alarmed
25 at that, and I listened, and then I think the

1 clerk came in and talked to me, too,
2 Larry Okstein, and I was just kind of getting as
3 much information as I could from those parties.

4 Does that sound like it's
5 probably accurate?

6 A. Yes.

7 Q. Okay. And so did David Jellinek tell you
8 anybody had gone out the back door?

9 A. No.

10 Q. Did he tell you that he talked with the court
11 officer and made an arrangement to let his
12 client out the back door?

13 A. No.

14 Q. Did he tell you that he told Judge Joseph he was
15 going to do this and she said, yeah, go ahead?

16 A. He did not.

17 Q. Did he tell you -- I assume at that point you
18 knew Assistant District Attorney
19 Shannon Jurgens?

20 A. Yes.

21 Q. And she was assigned to your court, so she'd be
22 there pretty much every day?

23 A. Yes.

24 Q. Did he tell you she was upset or angry about
25 anything?

1 A. I don't remember that.

2 Q. That probably would have flagged the matter for
3 you, wouldn't it?

4 A. It may have.

5 Q. And I assume, if he said anything like that, you
6 would have said, well, why, why is she upset?

7 A. Possibly. Yup.

8 Q. Don't remember anything about that?

9 A. I don't.

10 Q. Did you ever talk with Assistant District
11 Attorney Jurgens about this?

12 A. I did not.

13 Q. And so the next thing you recall is Scott Noe
14 coming in and saying, --

15 A. Yeah.

16 Q. -- Judge, here's what happened.

17 A. I think his hair was on fire, basically.

18 Q. Okay. This was kind of a bad day for him;
19 right?

20 A. It was a bad day for all of us.

21 Q. Yeah. And so he told you that the court officer
22 had let the defendant out the back door.

23 A. He did.

24 Q. And that was the first you were hearing about
25 it; right?

1 A. Yes, it was.

2 Q. Okay. And understandably, you, too, were
3 concerned about it.

4 A. Very.

5 Q. All right. And at that point you still didn't
6 know anything about off the record; is that
7 right?

8 A. I did not.

9 Q. All right. And that time or within a day or so
10 did Chief Court Officer Noe have a policy that
11 was in writing?

12 A. Yes.

13 Q. And he told that we're going to put that posted
14 in the front?

15 A. Yes.

16 Q. We want to make sure everybody knows this?

17 A. Yes.

18 Q. Because we want everybody going out the front
19 door?

20 A. Yes.

21 Q. Okay. Now, actually, that policy, at least in
22 terms of ICE custodies, is a little different
23 from what the Lunn policy wanted done, isn't it?

24 A. Yes.

25 Q. Okay. And as judge -- I'm sorry --

1 Special Counsel Fabricant showed you, there was
2 actually -- do you call it transmittal letters?

3 A. Yes.

4 Q. They up there send you out all kinds of things?

5 A. They do.

6 Q. And one of them was this, what we've been
7 calling the Lunn policy, which is here's how you
8 want you do deal with ICE?

9 A. Yes.

10 Q. And actually, dealing with ICE in terms of them
11 taking custody, that's not really the judge's
12 issue, is it?

13 A. It is not.

14 Q. That takes place between the court security
15 personnel and the ICE agents?

16 A. It does.

17 Q. And so you don't usually see that happen?

18 A. I do not.

19 Q. Don't know much about how it happens?

20 A. No. But in the -- During my time in Newton,
21 I have seen ICE effectuate their service from
22 the front of the building, yes.

23 Q. Okay. And this transmittal letter that y'all
24 got in November of 2017 actually said that the
25 court wanted that to happen in the lockup,

1 didn't it?

2 A. Yes.

3 Q. And there could be good security reasons for
4 that; right?

5 A. Yes.

6 Q. Okay. Not all defendants are happy about going
7 into ICE custody?

8 A. Yes.

9 Q. They might put up a fuss?

10 A. I don't know.

11 Q. All right. And certainly, if they have some
12 friends, there's at least the potential for an
13 unpleasant or an unsafe confrontation?

14 A. Very much so, in the courtroom, yes.

15 Q. Okay.

16 A. Not in security. But in the courtroom.

17 Q. No. But in any public area.

18 A. Yes.

19 Q. If there's a scuffle in the front lobby, and
20 there are people there, that's just not the kind
21 of situation anybody wants.

22 A. Absolutely not.

23 Q. And so the actual policy was that, for somebody
24 who had come into the court in custody, was
25 released and was going to ICE, that that should

1 happen in the lockup; right?

2 A. Per Lunn. The policy.

3 Q. Yes.

4 A. Yes.

5 Q. And the policy that Chief -- I'm sorry -- Chief
6 Court Officer Noe developed actually is a little
7 different from that; is that right?

8 A. Yes.

9 Q. Okay. And you said, if you think that's right,
10 go ahead and do it?

11 A. Yes.

12 Q. Okay. And that's one of those examples where a
13 particular District Court may do things a little
14 differently?

15 A. Yes.

16 Q. Now --

17 A. And we weren't told that that was wrong
18 either.

19 Q. You were not told it was wrong.

20 A. No.

21 Q. And the next thing that happened after Chief Noe
22 was -- that you talked to Judge Joseph the next
23 time she was in the courtroom?

24 A. Yes.

25 Q. And I think we heard that was the Wednesday, the

1 4th?

2 A. Yes.

3 Q. Right. And you had a conversation with her?

4 A. Yes.

5 Q. All right. And again, you were still trying to
6 gather information and figure out what happened?

7 A. Yes.

8 Q. Okay. And at that point you still didn't know
9 about the off the record; is that correct?

10 A. I did not.

11 Q. All right. And so you didn't ask her.

12 A. I didn't.

13 Q. And she didn't tell you.

14 A. She did not.

15 Q. Okay. And did she answer your questions?

16 A. Yes.

17 Q. All right. Did you feel like she told you what
18 she thought was important, as far as you
19 remember?

20 A. Yes.

21 Q. Okay. You didn't feel like she was holding back
22 anything or --

23 A. Not that I could tell.

24 Q. All right. And in fact, do you remember that
25 you were the one who told her that he had gone

1 out the back door?

2 A. I don't remember that.

3 Q. Okay. Do you remember her -- you saying to her
4 I want to talk to you about this case, the guy
5 went out the back door, and she said how did
6 that happen, and you said that's what I'm trying
7 to figure out?

8 A. I don't remember that.

9 Q. Does it sound like something that could have
10 happened?

11 A. Probably, yeah.

12 Q. Okay. Because you were trying to figure out
13 what happened; right?

14 A. Absolutely. Yes.

15 Q. You weren't up there to reprimand or scold her
16 for anything, were you?

17 A. No. I wished that I had been in the
18 courthouse on April 2nd.

19 Q. Okay. And why is that?

20 A. Because this would not have happened.

21 Q. Why is that?

22 A. Because I would not have -- I don't know why,
23 but it would not have happened. I can tell you
24 that.

25 Q. Well, do you generally accompany defendants down

1 to the lockup?

2 A. I do not, generally.

3 Q. All right. And if a defendant's down there, and
4 the court officer let him out the back door, is
5 there any way you as the judge could stop that
6 if you didn't know about it?

7 A. I would know about it.

8 Q. How would you know?

9 A. Because I would have been told, I'm sure.
10 They just would not have done it if I had been
11 in the building, whoever was involved.

12 Q. And is that because you're sort of a senior and
13 in charge?

14 A. I believe so.

15 Q. So do you think maybe they thought that this was
16 a situation that could be used to advantage?

17 A. Who?

18 Q. Court Officer MacGregor and David Jellinek?

19 A. I have no idea what they thought.

20 Q. Okay. But you don't think they would have
21 pulled it with you there?

22 A. I do not think so.

23 Q. Now, you also, after your conversation with
24 Judge Joseph, had a phone call with her; is that
25 right?

1 A. I don't remember the phone call.

2 Q. But you know from records that it happened?

3 A. Yes.

4 Q. And in fact, she called you late on Thursday
5 afternoon and then again on Friday, and you
6 finally touched base on Friday morning?

7 A. If you say so, yes.

8 Q. Have you seen records that show that?

9 A. I haven't seen records. I understand that
10 that occurred.

11 Q. And that there was a 10-minute phone call, 10 or
12 11 minutes?

13 A. That's what I've seen. I don't recall.

14 Q. And you don't at this point remember that?

15 A. I don't. I give my phone number to many new
16 judges and they call a lot.

17 Q. But given what was going on at this point, your
18 belief is that that phone call was about this
19 incident; is that right?

20 A. I am not sure what it was about.

21 Q. All right. But you know it happened, you just
22 don't remember what; --

23 A. Yes.

24 Q. -- is that right?

25 All right. Now, you also sent some e-mails and

1 received some e-mails about this situation; is
2 that right?

3 A. Some e-mails?

4 Q. Yes. The e-mails that's what Special Counsel
5 Fabricant was talking about?

6 A. Yes. Oh, yes.

7 Q. And the first e-mail, if we look at, I think
8 it's App 540 and 541. On Thursday, April 5th,
9 at 12:26, you sent Judge Fortes an e-mail? I'm
10 sorry.

11 A. Hold on one sec.

12 Q. Let me wait for you to catch up.

13 A. 541. Yeah. 540 and 541, on Thursday,
14 April 5?

15 Q. Right.

16 A. Yup.

17 Q. You were letting Judge Fortes know that this had
18 happened?

19 A. I was.

20 Q. In fact, had you had a phone call with her
21 before that?

22 A. I did.

23 Q. And she said would you just put it down in an
24 e-mail?

25 A. Yes.

1 Q. And you did that, didn't you?

2 A. I did.

3 Q. And this e-mail was sort of a summary or a
4 compilation of the various people that you
5 talked to?

6 A. It was.

7 Q. And as Judge Fabricant pointed out, it doesn't
8 talk about off the record. Does that suggest to
9 you that you hadn't yet spoken to Clerk Okstein
10 about that part of it?

11 A. Yes.

12 Q. All right. Do you recall what it was that
13 caused him or you to end up talking about that
14 part of it?

15 A. Yes. Because, again, hair on fire, a clerk
16 comes in and tells me that there's a large gap
17 in the tape. Yes.

18 Q. Well, it happened on Monday; right?

19 A. Right.

20 Q. And this is Thursday at noontime.

21 A. Uh-huh.

22 Q. And with his hair on fire, he hasn't come in to
23 tell you that?

24 A. I haven't -- I don't recall exactly when he
25 came in to tell me.

1 Q. All right. But certainly, if you had known that
2 when you were writing to Judge Fortes, you would
3 have included that information.

4 A. I would have. It may have been, you know, I
5 think. You know what I mean? I don't know.

6 Q. So with his hair on fire, he still hadn't told
7 you by Thursday?

8 A. I don't recall him telling me by Thursday.

9 Q. And when he told you, did you know he was
10 sitting in the clerk's chair at that point?

11 A. I don't know if I did know that. I think he
12 told me.

13 Q. All right. Did you say to him, well, why would
14 you do it?

15 A. No. Clerks don't question judges when they
16 tell them what to do.

17 Q. Don't clerks help new judges all the time?

18 A. Clerks help new judges, but they do not tell
19 them what to do.

20 Q. Did you ever actually listen to the tape?

21 A. I believe I listened to it a long time ago.

22 Q. And do you know that the person that asked if
23 they could off the record was David Jellinek?

24 A. Well, he asked, are we on the record, my
25 understanding is, and the judge asked the clerk

1 to take us off the record.

2 Q. But could it be maybe the reverse?

3 A. I don't know that it was.

4 Q. All right. And do you know that the actual gap
5 was 52 seconds?

6 A. I learned that, yes.

7 Q. So it wasn't several minutes?

8 A. Okay.

9 Q. All right. And did you ever talk to anybody
10 about what happened during that time?

11 A. No.

12 Q. Now, whenever you learned that, the way that you
13 saw this is that there were essentially two
14 issues; is that right? One, was the court
15 officer letting the defendant out the back, and
16 the other with Judge Joseph going off the
17 record; is that right?

18 A. At least two, yes.

19 Q. Well, those were the two you were aware of; is
20 that right?

21 A. Well, I don't know how the -- it came to be
22 that the court officer let the defendant out the
23 back door.

24 Q. And you never did any investigation on that; is
25 that right?

1 A. No. That's not mine.

2 Q. And when you reported this to Judge Fortes, that
3 was because she was the Regional
4 Administrative --

5 A. Yes.

6 Q. Right. Now, does she have power to discipline
7 judges?

8 A. No.

9 Q. The only person who could do that would be
10 Chief Judge Dawley?

11 A. I'm not even sure he can discipline judges.
12 I mean, there's a range of -- you know,
13 discipline of judges is not what's within the
14 District Court's purview, my understanding.

15 Q. Is there some time that the judge said something
16 wrong, either intentionally or unintentionally,
17 there's a meeting to discuss it to ensure that
18 doesn't happen again?

19 A. Yeah. I don't know if I call that
20 discipline.

21 Q. Okay. Fair enough. There's attempt made to
22 tell the judge how to do it correctly.

23 A. Well, there's an attempt to discuss what
24 happened and perhaps point out other ways to do
25 things.

1 Q. All right. And that kind of thing happens not
2 infrequent; is that right?

3 A. It does not happen infrequently. Correct.

4 Q. Now, when you and Judge Fortes were
5 communicating, did Judge Fortes pass this on up
6 the chain to Judge Dawley, --

7 A. Yes.

8 Q. -- Chief Judge Dawley? And do you recall why
9 she did that?

10 A. I think she was as alarmed as I was.

11 Q. Would you take a look at Page 540.

12 A. Yes.

13 Q. All right. And the top e-mail there was
14 April 20th of 2018?

15 A. Yes.

16 Q. Which is actually two and a half weeks after
17 this happened?

18 A. Yes.

19 Q. And she says, Chief Judge Heffernan called me
20 about this incident a couple of weeks ago, I
21 asked her at that time to follow up with an
22 e-mail outlining the incident below, I also
23 suggested she pull the tape because there was
24 some indication the judge involved may have gone
25 off the record prior to the defendant going down

1 the back stairwell, I'd spoken to the judge
2 involved, can brief you if you need additional
3 info. Okay. And then she says, informing you
4 about it now because Judge Heffernan called to
5 let me know regional director for ICE may bring
6 up at meeting supposedly scheduled with
7 CJ Carey, I didn't want you or CJ Carey
8 blind-sided by any info. Is that what she
9 wrote?

10 A. Yes.

11 Q. Okay. And so the event that prompted her to
12 tell Chief Judge Dawley about this was a meeting
13 with ICE.

14 A. I'm not sure that -- I think that may have
15 been one of the motivations, but I don't know.

16 Q. Do you see any other motivation in this e-mail?

17 A. Oh, I think --

18 Q. She said informing you about it now because
19 Judge Heffernan called to let me know the
20 regional director for ICE may bring up at
21 meeting supposedly scheduled with CJ Carey, I
22 didn't want you or CJ Carey blind-sided by --

23 A. I don't know if Chief Justice Fortes told
24 Chief Justice Dawley on the phone or something.
25 That looks like this is the first writing, yes.

1 Q. Okay. Now, we've also gone through or
2 Special Counsel Fabricant went through some of
3 Chief Justice Dawley's responses and the back
4 and forth; is that right?

5 A. Yes.

6 Q. And one of the things that he said was on the
7 top of 538.

8 A. Yes.

9 Q. He was responding to your e-mail, answering some
10 of his questions?

11 A. Yes.

12 Q. All right. And he said, Mary Beth, thanks for
13 the response, I don't think that this situation,
14 even if raised by ICE, is a problem. Right?

15 A. He did.

16 Q. Okay. So he wasn't concerned about it other
17 than perhaps with consequences with ICE; right?

18 A. I don't know what he was concerned about.

19 Q. That's what he wrote; right?

20 A. He did write that.

21 Q. Okay. And is it fair to say that at this point
22 relationships between the state court and ICE
23 were a bit frosty?

24 A. It was challenging, yes.

25 Q. Strained?

1 A. I believe so. I don't know. I have never
2 talked with ICE about it. I don't know.

3 Q. And then he said, it sounds like the court
4 personnel were just trying to accommodate the
5 attorney/client relationship by use of the
6 interpreter; right?

7 A. Yes.

8 Q. And that certainly would be an appropriate thing
9 to do, wouldn't it?

10 A. What would be an appropriate --

11 Q. Well, to give a defendant a chance confer with
12 his counsel?

13 A. Yes.

14 Q. And to allow the interpreter to do his job if
15 the client needed an interpreter?

16 A. Yes.

17 Q. All right. And in the downstairs courtroom,
18 there isn't any private meeting space for a
19 lawyer and a client within a courtroom; is
20 that --

21 A. No.

22 Q. So if you need to have a private conversation,
23 it's hard for a lawyer and an interpreter to sit
24 in the courtroom and do that; true?

25 A. I think it's hard to do in any courthouse in

1 the state.

2 Q. Okay. ICE was waiting in the front lobby?

3 A. Yes. So I was told.

4 Q. Okay. And --

5 A. I wasn't there.

6 Q. Having had experience with ICE, do you have some
7 expectation of what would happen if a lawyer
8 said, ICE, don't take him yet, I want to talk to
9 my client?

10 A. I don't have any expectation.

11 Q. Do you think it would be reasonable for the
12 lawyer to be concerned that maybe ICE wouldn't
13 honor that request the way a stable judge might?

14 A. I don't know.

15 Q. And the other place that conferences took place,
16 especially for clients in custody, was in the
17 lockup; right?

18 A. Yes.

19 Q. And again, if the client needs the interpreter,
20 the interpreter has to go to lockup for that; is
21 that right?

22 A. Yes.

23 Q. And so this was a pretty complicated situation
24 from both what you heard and what you now know
25 about this defendant situation; right?

1 A. Complicated how?

2 Q. Well, he had state court charges; right?

3 A. Yeah. Which were dismissed.

4 Q. Well, they weren't dismissed that day.

5 A. The possession charges? He was released on
6 personal. The fugitive was dismissed.

7 Q. Right. So he had pending state court charges;
8 right?

9 A. Yes.

10 Q. He had this warrant that might or might not be
11 outstanding from Pennsylvania; right?

12 A. Yes.

13 Q. And he had ICE looking for him.

14 A. Yes.

15 Q. Right. And it would be reasonable for his
16 defense lawyer to want to kind of run through
17 those issues and what would happen next; right?

18 A. Yes.

19 Q. And it would be reasonable to do that in the
20 lockup, wouldn't it?

21 A. Not if he was released from custody.

22 Q. Well, doesn't the Lunn policy say that he's
23 supposed to go downstairs to the lockup to get
24 processed?

25 A. For ICE?

1 Q. Yes.

2 A. Oh, maybe, yes. I don't know.

3 Q. Well, if that's what it says, then that would be
4 a perfectly reasonable thing for the lawyer and
5 the client and the judge to do; right?

6 A. The lawyer, the client, and the judge? I
7 don't know why the judge would be involved in
8 that.

9 Q. Well, in saying to the interpreter you can go
10 down to the lockup?

11 A. Going down to the lock up with the
12 interpreter or probation is fine.

13 Q. Okay. All right.

14 A. I don't get the question. Sorry.

15 Q. So there would be nothing at all wrong with a
16 judge allowing the defense counsel to confer
17 with his client and the interpreter in the
18 lockup.

19 A. Unless -- If the person were out of custody,
20 it would be unusual.

21 Q. All right. But if he's being -- If ICE is there
22 for him, he's supposed to be processed out of
23 custody in the lockup.

24 A. Right.

25 Q. Isn't that the Lunn policy?

1 A. And that did not happen. Right. So...

2 Q. Right. But that's what was supposed to happen.

3 A. Apparently, according to the Lunn policy,
4 yes.

5 Q. Right. He was supposed to go downstairs in
6 custody and get processed out there; is that
7 right?

8 A. That is what Lunn says, yes.

9 MS. MULVEY: May I have moment?

10 (PAUSE)

11 MS. MULVEY: I have nothing
12 else. Thank you, Judge Heffernan.

13 REDIRECT EXAMINATION

14 BY JUDGE FABRICANT:

15 Q. Judge, who was it that came in with his hair on
16 fire?

17 A. A couple of people. Chief Court Officer
18 Scott Noe and Larry Okstein.

19 Q. Each of them separately.

20 A. Correct.

21 Q. Do you know when each of them came in?

22 A. Scott came in first.

23 Q. Okay.

24 A. And then I don't remember when Larry came in.

25 Q. You don't remember when that happened.

1 A. Yes.

2 Q. Okay. You said in answer to one of Ms. Mulvey's
3 questions, or you adopted her phrasing, dealing
4 with ICE is not really the judge's issue.

5 A. No.

6 Q. So you, as the judge, would you, if a lawyer
7 makes an argument to you that ICE is going after
8 him but he's the wrong person, how would you
9 respond to that as a judge?

10 A. How would I respond to that as a judge?
11 Well, if he was represented, I would ask his
12 lawyer to look into it.

13 Q. And if the lawyer had looked into it, and had
14 not succeeded in persuading the ICE officer, and
15 the ICE officer still wanted to take custody --

16 A. Yeah. It has nothing to do with me. I would
17 certainly not get involved.

18 Q. So not the judge's role.

19 A. Absolutely not.

20 Q. And would you be making suggestions regarding
21 how this problem might be solved?

22 A. I would not.

23 Q. Would you be suggesting, well, we could detain
24 him overnight?

25 A. I would not.

1 Q. Would you be suggesting, would you be suggesting
2 anything about how to solve this problem?

3 A. I would not.

4 Q. Would you tell the lawyer, the lawyers, ICE is
5 not my responsibility?

6 A. I'm not sure I would phrase it that way, but
7 I would just say -- I would not get involved.

8 Q. Is that how you would phrase it?

9 A. Yes.

10 Q. The Lunn policy. We've talked about the Lunn
11 policy.

12 A. Yes.

13 Q. As you look at it now, and as you talked about
14 earlier, what the normal practice was in Newton
15 at the time, was Newton doing something
16 different from Lunn policy at the time?

17 A. I think so, but I don't believe it was
18 outside of the Lunn policy.

19 Q. Okay.

20 A. I believe it was allowed.

21 Q. But as you've described, the normal practice in
22 Newton was, if a defendant's released from
23 custody, goes out through the courtroom in the
24 first session.

25 A. Correct.

1 JUDGE FABRICANT: All right.
2 That's all I have. Thank you.

3 MS. MULVEY: I just have
4 another question or two.

5 RECROSS-EXAMINATION

6 BY MS. MULVEY:

7 Q. Are you aware that, during the morning, there
8 were multiple calls on the Medina Perez case?

9 A. I'm not aware of that.

10 Q. All right. And if I told you that his defense
11 lawyer, who at that point was
12 Elizabeth Bostwick, not David Jellinek, was
13 asking for time to investigate his identity, and
14 Judge Joseph acquiesced, is that an appropriate
15 thing for a judge to do?

16 A. Sure. Second call all the time for cases.

17 Q. Or a third call sometimes or --

18 A. Many calls.

19 Q. -- come back in the afternoon.

20 A. Yes.

21 Q. Because it's important to give a defense lawyer
22 time to do his job, isn't it?

23 A. His or her job. Absolutely.

24 Q. All right. I went to school when it was all
25 his. Sorry about that.

1 And if in the afternoon
2 David Jellinek wanted more time to try to
3 persuade ICE that this was the wrong guy, would
4 it be appropriate for a judge to give him that?
5 A. The time that is required by the defense and
6 the assistant DA for any case is liberally given
7 by me.
8 Q. Okay. Because you want to make sure everybody's
9 rights are protected.
10 A. That's my job, to make sure.
11 Q. Right. And to make sure each side has time to
12 do its job.
13 A. Yes.
14 Q. All right. You would never say to a lawyer, I'm
15 not going to let you investigate that; right?
16 A. I don't know that I would never say that.
17 Q. Within reason.
18 A. I'm not sure I would even within reason. I'm
19 not sure. I would have to look at it
20 individually.
21 Q. All right. And certainly, even though ICE isn't
22 your issue, you wouldn't want ICE to take the
23 wrong person, would you?
24 A. Certainly not.

25 MS. MULVEY: Thank you.

REDIRECT EXAMINATION

BY JUDGE FABRICANT:

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Q. Would you detain somebody overnight because of a question about ICE?

A. How could I? There's nolle pros. Unless they bailed on the person. No.

Q. And so there's fugitive from justice warrant -- fugitive from justice charge. It's dismissed.

A. Yes.

Q. What you then have is two misdemeanor drug charges.

A. Correct.

Q. In the normal course of things in April of 2018, on a misdemeanor drug charge, would you be setting a bail that someone can't make?

A. No.

Q. And if somebody has no criminal record?

A. No.

Q. And is there a statutory presumption in the District Court on release on personal recognizance?

A. Yes. There is now. Certainly.

Q. Was there then?

A. At the time there was. But it's more solid now with granting and all those case laws.

1 Q. But there's statutory provisions --

2 A. For sure, yes.

3 Q. -- that establishes a presumption, and that was
4 in effect at the time, --

5 A. Yes.

6 Q. -- of release on personal recognizance.

7 A. Correct.

8 Q. And that applies to the District Court. Doesn't
9 apply to the Superior Court because of the
10 different kinds of cases.

11 A. Oh, yes.

12 Q. Oh, yes, it's different?

13 A. The -- I don't know about the Superior Court.
14 I'm often told about them, but I don't know
15 about them.

16 JUDGE FABRICANT: Thank you.

17 THE WITNESS: You bet.

18 JUDGE FABRICANT: That's all I
19 have. Thank you.

20 MS. MULVEY: I have nothing
21 else. Thank you.

22 HEARING OFFICER: Thank you.
23 The witness is excused. Thank you, Judge.

24 JUDGE FABRICANT: I hope we
25 have our next witness perhaps waiting out in the

1 hallway.

2 (PAUSE)

3 HEARING OFFICER: Good

4 afternoon.

5 HONORABLE STACEY FORTES, SWORN

6 HEARING OFFICER: Please have a

7 seat. Be as close to the microphone as

8 possible. That would be much appreciated.

9 DIRECT EXAMINATION

10 BY JUDGE FABRICANT:

11 Q. Good afternoon.

12 A. Good afternoon.

13 Q. Please state your name.

14 A. My name is Stacey Fortes.

15 Q. And are you now the Chief Justice of the
16 District Court?

17 A. I am.

18 Q. And back in 2018, what was your role?

19 A. I was a Regional Administrative Judge.

20 Q. And would you just go back through your
21 professional background, starting from when you
22 started practicing law, and run through the
23 sequence of your professional history.

24 A. Sure. So out of law school, my first
25 position was as an assistant attorney general, I

1 was an assistant district attorney when
2 Ralph Martin was the District Attorney.

3 Q. So tell us years, if you can remember.

4 A. I think it was 1991 or '92 I started in the
5 AG's office, around 1994 or so, maybe, I went
6 over to the District Attorney's Office. I'm not
7 completely sure on the dates. I was in the
8 District Attorney's Office under Ralph Martin
9 until maybe around '97. And then I went over to
10 the MBTA as a labor attorney in the labor
11 department. Dan Conley called me one day, who
12 was a new Suffolk district attorney, and he
13 asked me to be Chief of the District Court
14 prosecution in Suffolk County. I went back to
15 Suffolk County. I was appointed to the bench in
16 December of 2006, and have been an
17 Associate justice since then, and now
18 Chief Justice of the District Court.

19 Q. And when did you become the Regional
20 Administrative Justice?

21 A. Let's see. I was a Regional Administrator
22 Justice... Maybe in -- I'm not positive of the
23 dates.

24 Q. Sometime before April of 2018?

25 A. Yes.

1 Q. And did you also, sometime around then, become
2 the First Justice of the Lowell District Court?

3 A. Yes.

4 Q. Did you hold those roles simultaneously?

5 A. I did.

6 Q. Describe for us, please, the role of a
7 Regional Administrative Justice.

8 A. Okay. So the District Court is split, given
9 in size, into six regions. The Regional
10 Administrative Judge is appointed by the
11 Chief Justice to help the Chief Justice with the
12 administration of the District Court. So as
13 Regional Administrative Judge, I was responsible
14 for scheduling judges, approving the schedule in
15 my region, dealing with day-to-day issues that
16 came up, try to keep things off the
17 Chief Justice's plate, so dealing with those
18 issues, bringing things to his attention that
19 needed to be brought to his attention, and
20 anything that the Chief Justice designated the
21 Regional Administrative Justice.

22 Q. Does the Regional Administrative Justice have
23 disciplinary authority over other judges?

24 A. No.

25 Q. Does the Chief Justice, now that you're in that

1 role, have disciplinary authority over other
2 judges?

3 A. Unfortunately now, yes.

4 Q. And is there a statutory provision that gives
5 the Chief Justice that authority?

6 A. Yes.

7 Q. Are you aware of a rule regarding recording of
8 proceedings in the District Court?

9 A. Yes. There's a District Court rule,
10 Rule 211, requires all, all courtroom
11 proceedings to be recorded.

12 Q. And you've noticed the monitor, Rule 211 is
13 being displayed on the monitor. Also in front
14 of you on the witness stand is a binder. That
15 binder has hard copies of a whole set of
16 appendices. So everything we're going to
17 display on the monitor is also in that binder.
18 And you can look on the monitor or in the
19 binder, whichever is easier for you.

20 This is Appendix K. And after
21 the cover page, starts at Page 122 of the
22 appendix and goes over to Page 123. What is
23 your understanding of the substance of this
24 rule?

25 A. The rule requires all courtroom proceedings

1 to be recorded.

2 Q. And are there some exceptions?

3 A. Administrative matters. But everything that
4 happens in court needs to be recorded.

5 Q. So call of the list, for example, the clerk is
6 calling the list, the judge isn't sitting on the
7 bench yet.

8 A. Yes.

9 Q. Is that an exception?

10 A. That's an exception.

11 Q. But anything the judge is doing, is that
12 required to be recorded?

13 A. Yes, it is.

14 Q. And if you look on Page 123, go down the page to
15 just before the bold capital letter line, just
16 before that.

17 A. Yes.

18 Q. Does it tell you when this rule was adopted?

19 A. Yes. Adopted December 31st, 1987, effective
20 February 1st, 1988.

21 Q. And in your -- You've been a judge since 2006.
22 So now 18 and a half years, perhaps. You said
23 December of 2006. During the course of your
24 career as a judge, have you ever during that
25 time gone off the record?

1 A. No.

2 Q. In your view, is there any legitimate reason to
3 do that?

4 A. No, there's no legitimate reason to do it.
5 There are times I would say where someone has
6 forgotten to turn the recording machine on, but
7 not to require that it be turned off.

8 Q. So have there been times when it came to your
9 attention that not, at the direction of the
10 judge, but through some inadvertence or error,
11 some proceeding wasn't recorded?

12 A. Yes.

13 Q. And have you had occasion to deal with that in
14 terms of reconstructing the record?

15 A. Yes.

16 Q. If you receive information to indicate that some
17 of the proceeding or some part of some
18 proceeding wasn't recorded, do you -- upon that
19 information, is it automatic in your mind that
20 that means the judge turned it off or is there
21 another possibility?

22 A. There is another possibility.

23 Q. What's the other possibility?

24 A. Well, the possibilities that I just went
25 through. So you could come back from a recess,

1 the clerk could forget to turn it on, it could
2 be malfunctioning. There are other reasons.

3 Q. Are you familiar with the Lunn policy?

4 A. Yes.

5 Q. And recently there's been a new Lunn policy.

6 A. Yes.

7 Q. I want to take you back to April of 2018.

8 A. Yes.

9 Q. So put the recent one out of your mind.

10 A. Okay.

11 Q. And focus on the one that was in effect in
12 April of 2018, and that's behind Tab B in the
13 binder, and what you see in front of you here is
14 the policy on the monitor.

15 Do you have a sort of capsule
16 summary of the central theme of that policy?

17 A. The policy boils down to not to help or
18 hinder ICE officials from performing their
19 duties based on the Lunn holding.

20 Q. So be neutral.

21 A. Yes.

22 Q. How did you first hear about an event in Newton
23 on April 2nd of 2018?

24 A. I got a phone call from the First Justice
25 Mary Beth Heffernan informing me that there had

1 been a situation in Newton when she wasn't there
2 involving the covering judge.

3 Q. And who was the covering judge?

4 A. Judge Joseph.

5 Q. And do you know when you got that phone call?

6 A. I don't recall today, no.

7 Q. You just told us in the short version what the
8 substance of that call was, but was there more
9 to that call?

10 A. Yes, yes.

11 Q. So tell us what you can remember.

12 A. So Judge Heffernan told me that there was an
13 individual before the court being arraigned,
14 that individual had been arraigned on a fugitive
15 from justice charge, I believe a drug charge as
16 well, and that there was also an ICE detainer,
17 civil detainer, for the defendant, that ICE was
18 there in the building to effectuate that
19 detainer, that the fugitive charge had been
20 dismissed, I believe the defendant was released
21 on personal recognizance, and that somehow the
22 defendant had gone out the back door and ICE had
23 not been able to effectuate.

24 Q. And in the course of this conversation, did you
25 say anything about some part of the proceeding

1 having been recorded.

2 A. Yes. Well, yes. Because I said, well, how
3 did that happen. And she said, well, that's the
4 problem, there's a portion of it that was not
5 recorded, she said the judge involved went off
6 the record.

7 Q. And did she tell you how she knew that?

8 A. My memory was she knew it from the clerk, her
9 clerk.

10 Q. And did you ask her to do something?

11 A. I did. I said, Mary Beth, how do you know
12 that, you weren't there, did you listen to the
13 tape, the portion of the tape that you could
14 listen to. And she said, no, should I do that,
15 and I said yes.

16 Q. And did you ask her to do something else as
17 well?

18 A. I also asked her to send an e-mail of what
19 transpired.

20 Q. Summarize it in an e-mail?

21 A. Yes.

22 Q. All right. And let's look at, in your binder,
23 Tab V. You'll see behind Tab V, you'll see on
24 the monitor here we have what appears at
25 Page 540 behind Tab V, and your e-mails of

1 course, as we all know, much to our annoyance,
2 start at the back and work forward.

3 So at Page 540 you see an
4 e-mail from, it says Mary Heffernan. Is she
5 referred to as Mary Beth?

6 A. Yes.

7 Q. You see an e-mail from Mary Heffernan to you,
8 Thursday, April 5th, 2018, 12:26 p.m. And I
9 believe, again, because we read it earlier, what
10 you have in front of you, is this the summary
11 that she sent you in response to your request?

12 A. Yes.

13 Q. And then if you go further up Page 540 is there
14 then an e-mail from you, April 20th, 2018, at
15 12:21 p.m., from you. And it's a little
16 confusing, but do you remember who this was to?

17 A. Chief Justice Dawley.

18 Q. And so you said to Chief Justice Dawley, Chief,
19 Judge Heffernan called me about this incident a
20 couple of weeks ago, and I asked her at the time
21 to follow up with an e-mail outlining the
22 incident below, I also suggest that she pull the
23 tape because there was some indication the judge
24 involved may have gone off the record prior to
25 the defendant going down the back stairway, I've

1 spoken to the judge involved, and can brief you
2 if you need additional info. Informing you
3 about it now because Judge Heffernan called to
4 let me know regional director for ICE, question
5 mark -- So did you have uncertainty about
6 whether that was the right title?

7 A. Yes.

8 Q. We can bring up the meeting supposedly scheduled
9 with CJ Carey. Who is CJ Carey?

10 A. The Chief Justice of the Trial Court,
11 Paula Carey.

12 Q. And I didn't want you or CJ Carey to be
13 blind-sided by any info. The Chief Justice of
14 the Trial Court. So the Trial Court, is it
15 accurate to describe it as, there are seven
16 departments, each department has a chief,
17 appointed by the Chief Justice of the
18 Trial Court, and there's one Chief Justice of
19 the Trial Court that oversees all of those seven
20 departments?

21 A. Yes.

22 Q. Is that accurate?

23 A. Yes, that is.

24 Q. At the time, the Chief Justice of the
25 Trial Court was Paula Carey.

1 A. Yes.

2 Q. Chief of the District Court was Paul Dawley.

3 A. That is correct.

4 Q. You were Regional Administrative Justice.

5 A. Yes.

6 Q. And the First Justice is Mary Beth Heffernan.

7 Mary Beth Heffernan was the First Justice.

8 A. That's correct.

9 Q. So you said you had spoken to the judge
10 involved. So do you know when that happened?

11 A. I'm not sure when that happened. It would
12 have been obviously before I sent this e-mail
13 and after I talked to Judge Heffernan.

14 Q. So sometime between April 5th and earlier that
15 day on April 20.

16 A. That's right.

17 Q. And do you know how it came about -- Where,
18 first of all, was this conversation?

19 A. With Judge Joseph?

20 Q. Yes.

21 A. In the Lowell District Court on Hurd Street.

22 Q. And Lowell was where you were sitting.

23 A. That's correct.

24 Q. Do you know how it came about that she was
25 sitting in the Lowell District Court?

1 A. I think that I said to Judge Heffernan that
2 Judge Joseph was either scheduled to be sitting
3 with me or I would schedule her to sit with me
4 so I could ask her what happened, talk to her
5 about it.

6 Q. And you, as the original administrative justice,
7 had authority over the schedule.

8 A. That's correct.

9 Q. So one way or the other, she was scheduled to
10 sit there on some day between April 5th and
11 April 20.

12 A. Correct.

13 Q. And I want to just go back to this e-mail
14 from -- before we talk about the conversation
15 with Judge Joseph. I want to go back to this
16 e-mail from Judge Heffernan. And you'll see
17 somewhere in here that there's a reference to
18 the defendant and his lawyer going down to
19 probation regarding the Pennsylvania warrant.
20 And we'll find that.

21 So on Page 541, a little above
22 the middle of the page, the defense attorney
23 asked the judge if he could utilize the services
24 of the interpreter in probation so the defendant
25 can further investigate the Pennsylvania

1 detainer so it did not hinder his client
2 further. That make sense to you?

3 A. Not to me, no.

4 Q. And why did it not make sense to you?

5 A. Because there wouldn't have been anything
6 that probation could do about the Pennsylvania
7 matter.

8 Q. So probation would be the keeper of the
9 Triple I.

10 A. Yes.

11 Q. And so if there's a charge pending in
12 Pennsylvania, would that show up on the
13 Triple I?

14 A. Yes.

15 Q. Can probation change the Triple I?

16 A. No.

17 Q. Triple I comes from Federal.

18 A. That's right.

19 Q. All right. Now, on whatever day it was, between
20 April 5th and April 20th, Judge Joseph is
21 sitting in Lowell, you're sitting in Lowell, and
22 you had a conversation.

23 A. Yes.

24 Q. And you said that that conversation was in her
25 lobby or your lobby?

1 A. No. In my lobby. She wouldn't have had a
2 lobby there because she wasn't sitting there on
3 a regular basis.

4 Q. How did that conversation come about?

5 A. I asked to talk to her over the lunch recess.
6 So I think we, you know, sat down, the two of
7 us, had lunch, regular chitchat about how things
8 were going, and then I said, Shelley, Mary Beth
9 called me about a situation in Newton, went
10 through it with her and asked her, and I said
11 there's a portion of it, my understanding is, it
12 wasn't recorded, and asked her what happened, if
13 she recalled it.

14 Q. And what did she say?

15 A. She recalled it. She told me that, again,
16 that the defendant had been before the court for
17 an arraignment. She told me that the defendant
18 was charged with a drug offence, fugitive
19 offense. There was confusion she said about the
20 defendant's identity, and she was concerned
21 about that and concerned about people in the
22 audience hearing whatever confusion was about
23 the identity, and had the parties at side bar,
24 and there were some conversation about how the
25 equipment in Newton worked as opposed to other

1 courts that she had been in. Newton was still
2 on an old recording system. It hadn't moved to
3 the FTR system yet. And so there was some
4 conversation about that with specific details.
5 Beyond that, I don't recall.

6 Q. Did she talk about an incident that occurred in
7 another court that was still on an old recording
8 system?

9 A. She may have. I just don't recall.

10 Q. Did she ever, in the course of this
11 conversation, did she ever directly tell you
12 that she had told the clerk to turn off the
13 recording system?

14 A. No. And I didn't, I didn't ask her directly
15 either, no.

16 Q. But she never directly told you that.

17 A. No.

18 Q. Did she tell you anything that in your view
19 would be an acceptable reason for going off the
20 record?

21 A. No.

22 Q. When she talked about concern about people in
23 the audience hearing a discussion of the
24 defendant's identity, did she explain why that
25 was a concern?

1 A. I don't recall.

2 Q. In your view, is a discussion of a defendant's
3 identity something that should happen off the
4 record?

5 A. Not in my view but...

6 Q. And is it an exception to Rule 211?

7 A. It is, it is not.

8 Q. Did she say anything about being concerned that
9 ICE would take the wrong person?

10 A. No. I don't recall us getting that far into
11 the conversation about ICE and what happened
12 because I still was just trying to figure out
13 why there was a portion that wasn't recorded.

14 Q. And you were trying to figure why there was a
15 portion that wasn't recorded. She never said
16 there was a portion that wasn't recorded because
17 I told the clerk to turn the recording off.

18 A. No. I didn't hear that in the meeting with
19 me.

20 Q. Did she say anything about ICE?

21 A. Not that I can recall. But again, I was
22 focused in the first part of the why there's no
23 recording.

24 Q. So you don't recall her saying anything about
25 ICE.

1 A. No. I mean, obviously, in the beginning of
2 the conversation with her, when we were talking
3 about what happened in Newton, I think there was
4 a preliminary conversation about it, but not
5 into details, because, again, I was focused
6 on...

7 Q. Did she say anything about wanting the attorney
8 to have an opportunity to explain the
9 defendant's rights to him before ICE would take
10 him to custody?

11 A. I don't recall anything like that.

12 Q. Did she say anything about wanting to pause ICE
13 taking the defendant into custody?

14 A. No.

15 Q. How did the meeting end?

16 A. I recall that I had made a copy of Rule 211
17 for her prior to the meeting. I also made a
18 copy of the ICE policy. I gave her a copy.
19 Reviewed 211 with her. Told her, Shelley, you
20 know all courtroom proceedings have to be
21 recorded. She said she knew that. I also
22 believe I gave her a copy of the Trial Court ICE
23 policy, and I think she said that she had it
24 because she called the administrative office.
25 And she said she understood everything, so we

1 went back to work.

2 Q. She told you she knew about Rule 211, that all
3 things need to be recorded.

4 A. I don't think she said specifically I know
5 about Rule 211. But she said I know. All court
6 proceedings need to be recorded. Yes, I know,
7 she said.

8 Q. And was that the end of the conversation?

9 A. Yeah. As I recall it, yes.

10 Q. And after that meeting with Judge Joseph, did
11 you have any further conversation about this
12 with anybody before you sent your e-mail to
13 Chief Justice Dawley?

14 A. I, at some point I talked to Judge Heffernan.
15 I think I called her. And I said I talked to
16 Shelley and she did not tell me she instructed
17 the clerk to turn off the recording, Mary Beth.
18 And Judge Heffernan by that time I think had
19 listened to the recording, because she said,
20 yes, she did, Stacey. And I said, well, I
21 talked to her, and that was it.

22 Q. At that point were you satisfied that it
23 wouldn't happen again, that she wouldn't go off
24 the record again?

25 A. I was satisfied that, with her answer to me,

1 that she knew what the Trial Court policy was.

2 Q. And so you then sent this e-mail to
3 Chief Justice Dawley.

4 A. Yes.

5 Q. What was the next thing you heard about this?

6 A. After the e-mail from Chief Justice Dawley, I
7 think Chief Justice Dawley asked to meet with me
8 and Judge Joseph.

9 Q. Did you get any help from his assistants in
10 setting up the meeting?

11 A. Yes.

12 Q. And did you -- In preparation for that meeting,
13 did you send an e-mail from Joseph Jackson in
14 Chief Justice Dawley's office --

15 A. Yes.

16 Q. -- requesting that he get a copy of the
17 recording for Chief Justice Dawley?

18 A. Yes.

19 Q. And that is at Page 532, starting at the bottom
20 of the page. Hi, Joe, hope is all is well,
21 Chief Justice Dawley asked me to forward this to
22 you for Newton recording, and what you were
23 forwarding was the name of the case,
24 Commonwealth versus Jose Medina Perez,
25 April 2nd, 2018.

1 A. Yes.

2 Q. And you sent that to Joe Jackson. And then you
3 sent a further e-mail. You said, Joe, as you
4 know, there is no FTR in Newton yet. Judge
5 Heffernan's copy of the recording is in the
6 lobby if someone needs to pick it up for the
7 Chief.

8 A. Correct.

9 Q. Was there then a meeting in Chief Justice
10 Dawley's office on May 8th of 2018?

11 A. Off the top of my head, I don't recall the
12 date, but I'm sure there's something referencing
13 the date. There was a meeting in Chief Justice
14 Dawley's office.

15 Q. Do you remember that meeting?

16 A. Yes.

17 Q. And who was there?

18 A. My memory is, Chief Justice Dawley,
19 Judge Joseph, and I.

20 Q. So three people in the room.

21 A. That I recall.

22 Q. What was your role in the meeting?

23 A. As the Regional Administrative Judge, you
24 have to go to a meeting with the Chief usually
25 there as another witness to fill in anything, if

1 you had a prior conversation with the judge,
2 that was my purpose, but it's the Chief's
3 meeting.

4 Q. Was he running the meeting?

5 A. Yes.

6 Q. Tell us please everything you remember about
7 that meeting, what he said, what she said.

8 A. Well, he -- My memory is he had notified both
9 of us what the meeting was about, and he asked
10 her, I think at the beginning of the meeting,
11 did you have an opportunity to listen to the
12 recording, and then he said there was some
13 things that he was concerned about in the
14 recording, I think things like lack of formality
15 in the beginning, professionalism, and then the
16 instruction, did she instruct the clerk to go
17 off the record, and Judge Joseph in that meeting
18 right away said, yes, I did, and I shouldn't
19 have done that.

20 Q. And had you heard her say that at any time
21 before?

22 A. No.

23 Q. This is the first time you heard her directly
24 acknowledge?

25 A. She didn't say it to me. She said it to him,

1 yes.

2 Q. And beyond that conversation about going off the
3 record, what else do you recall of this meeting?

4 A. So I remember, I remember not specifics,
5 because it was his meeting, I remember him going
6 through the incident with her, telling her it
7 was a serious matter, very serious matter,
8 making sure again that she understood the rule
9 with regard to recording, that she understood
10 the ICE policy. But the specifics of who said
11 what -- beyond, you know, beyond that, I don't
12 know.

13 Q. Did she explain in any way why she went off the
14 record?

15 A. I don't recall.

16 Q. Did she say anything about ICE, that you recall?

17 A. Not, not that I can recall, no.

18 Q. So do you recall her saying anything about being
19 concerned that ICE would take the wrong person?

20 A. I don't recall.

21 Q. Do you recall her saying anything about being
22 concerned that ICE would take custody of the
23 defendant before his attorney had a chance to
24 confer with him?

25 A. I don't.

1 Q. Did she say anything about wanting to pause ICE
2 taking him into custody?

3 A. No.

4 Q. Did she say anything about wanting his attorney
5 to have a chance to explain his rights to him
6 before ICE would take him into custody?

7 A. Not that I can recall.

8 Q. How did the meeting end?

9 A. My memory is it ended similar to the meeting
10 with me, her being very apologetic about going
11 off the record, saying she understood the
12 policies, that she was apologetic for taking
13 everyone's time, and that's the way the meeting
14 ended.

15 JUDGE FABRICANT: All right.
16 That's all I have at this point.

17 CROSS-EXAMINATION

18 BY MS. MULVEY:

19 Q. Good afternoon, Chief Justice Fortes.

20 A. Good afternoon.

21 Q. My name is Liz Mulvey. Certainly, I've never
22 appeared before you; is that fair?

23 A. That's fair.

24 Q. Okay. This rule against going off the record or
25 requiring that all proceedings be recorded has

1 been in effect probably longer than you've been
2 practicing?

3 A. I think that's probably fair to say, yeah.

4 Q. Is it also fair to say that over the years it's
5 sometimes been honored in breach?

6 A. Not, not in my experience.

7 Q. I understand that. But would you be surprised
8 if other judges had at various times gone off
9 the record?

10 A. No. I mean, you know, I don't know what
11 other judges do and, you know, do necessarily
12 unless it's brought to my attention.

13 Q. Fair enough. And you don't, even as Chief, go,
14 you know, around surveying people, do you?

15 A. No, no.

16 Q. So if other lawyers, judges, clerks testified
17 that that, you know, happens for one reason or
18 another, that wouldn't surprise you, would it?

19 A. When you say it would surprise me --

20 Q. You would believe that.

21 A. I would, I would not not believe it.

22 Q. Right.

23 A. Yes.

24 Q. Right. You would accept that that happens.

25 A. It would surprise me, but I would accept that

1 it happens, yes.

2 Q. Okay. And that rule, like other rules, for
3 various reasons sometimes may not be honored;
4 right?

5 A. Like any rule, yes.

6 Q. For example, the Lunn policy as issued in
7 November of 2017 actually says that, if for
8 somebody who came in in custody, ICE should take
9 custody in the lockup.

10 A. That's correct.

11 Q. And that's, among other things, a security
12 thing, right, because you don't want a scuffle
13 in the public area of the courthouse?

14 A. No. That's correct.

15 Q. And you know, in Newton, that wasn't the policy;
16 right?

17 A. I learned that after, during this incident,
18 yes.

19 Q. So that's another example of, just because
20 there's a rule, doesn't mean everybody always
21 follows the rule.

22 A. That's right. That's right.

23 Q. And when you had this meeting with Judge Joseph,
24 that was sort of an informal lunchtime meeting;
25 is that right?

1 A. Correct. Correct.

2 Q. And your main purpose was to make sure she
3 understood you really can't go off the record.

4 A. That's right.

5 Q. You weren't suggesting to her that she had
6 something to do with this. You wanted to make
7 sure, don't turn off the tape.

8 A. That's right. And she did say that that in
9 fact happened. I wanted to first find out what
10 happened from her. I was hearing what happened.

11 Q. Okay. And your understanding was, she hadn't
12 had a chance to listen to the recording; right?

13 A. When she met with me.

14 Q. You were just sort of raising it at that point.

15 A. Yes. She didn't know anything about the
16 meeting.

17 Q. And you didn't take any notes because this was a
18 lunchtime --

19 A. Yes.

20 Q. -- conversation, trying to help her understand
21 don't do this.

22 A. That's correct.

23 Q. All right. And as a RAJ and now as a chief,
24 that's part of your role, is to help people do
25 the right thing.

1 A. That's correct.

2 Q. All right. And you started out the meeting by
3 saying, I understand you may have gone off the
4 record.

5 A. Yes.

6 Q. And she didn't say, no, that's not true; right?

7 A. Well, I started off the meeting by saying
8 that Mary Beth called me about this situation in
9 Newton, and part of what she's telling me is
10 that there was a portion of the hearing that
11 wasn't recorded. I didn't say to her did you
12 go -- because I didn't know and Mary Beth didn't
13 know at that time.

14 Q. And you didn't ask her, did you?

15 A. No. I did not say, did you go off the
16 record.

17 Q. All right. And you said I understand some of it
18 was off the record?

19 A. Yes. Do you know what happened.

20 Q. And she didn't say, no, that's not true, did
21 she?

22 A. No, she didn't say, no, that's not true.

23 Q. That was sort of the assumption everybody was
24 working on?

25 A. What was?

1 Q. That part of it is off the record.

2 A. Yes.

3 Q. All right.

4 A. Yes.

5 Q. And if she remembers that you showed her or read
6 her the rule, that would be accurate; right?

7 A. The rule on recording. 211. Yes.

8 Q. All right. And there was some conversation, and
9 you don't recall it directly, about an incident
10 in Waltham? Do you recall her telling you about
11 something like had happened in Waltham?

12 A. I don't recall that.

13 Q. Do you remember in general some conversation
14 about Waltham?

15 A. I don't know, no.

16 Q. So is it possible that you asked her, have you
17 ever gone off the record before, and she started
18 talking about something that had happened in
19 Waltham?

20 A. It's possible.

21 Q. Do you know that now there actually was an
22 incident in Waltham where a side bar was getting
23 broadcast to the gallery?

24 A. I don't know.

25 Q. All right. But at that point was it Waltham and

1 Newton that still had JAVS instead of FDR?

2 A. It was definitely Newton. I don't recall
3 Waltham as well.

4 Q. All right. And she, when you gave her the rule,
5 said, I'm sorry, I won't ever do it again,
6 basically?

7 A. I -- In the meeting with me, she didn't say
8 anything about going off the record. So it
9 wasn't directing that. It wasn't, to me, I'm
10 sorry, I'll never do that again. That was with
11 Chief Justice Dawley. I never heard from her or
12 anything in the meeting with me about
13 confirmation one way or another that there was a
14 portion of the proceeding that wasn't recorded.

15 Q. Well, you had started out by saying, I
16 understand this happened; right?

17 A. Right.

18 Q. And she didn't dispute it; right?

19 A. She didn't dispute it.

20 Q. Okay. And so given that you already knew it,
21 did you understand that she was agreeing with
22 you?

23 A. Again, I didn't already know it. Because I
24 was hearing it, and it hadn't been confirmed
25 from Judge Heffernan yet. So I didn't already

1 know it. I was telling her what I heard, and
2 then at the end of the meeting I was saying to
3 her, you know all courtroom proceedings have to
4 be recorded. She didn't say to me I'm sorry
5 because at that point I don't -- it wasn't clear
6 to me that she was acknowledging anything about
7 the portion of the recording not being recorded,
8 for lack of a better word. So I heard that
9 first with Chief Justice Dawley.

10 Q. Well, if you said to her I understand it was off
11 the record and that didn't happen, wouldn't you
12 have expected her to say, no, that didn't
13 happen?

14 A. No. I didn't say to her -- I said to her, my
15 understanding from Judge Heffernan is there's a
16 portion of the hearing that wasn't recorded. I
17 didn't know whether the machine wasn't working,
18 I didn't know what happened, why there was a
19 portion that was not recorded.

20 Q. Did you ask her?

21 A. No, I didn't say, I didn't say to her, did
22 you turn off the recording, no.

23 Q. Okay. Did you say why, was it off the record?

24 A. Again, it wasn't clear to me, other than what
25 I was hearing from Judge Heffernan, no one had

1 listened to the tape yet that there was a
2 portion that wasn't recorded. I was telling her
3 that when I spoke to her this is what I heard --

4 Q. Okay.

5 A. -- and do you remember this incident --

6 Q. All right.

7 A. -- and was there -- did something happen --

8 Q. All right.

9 A. And letting her talk to me about the
10 incident.

11 Q. And did she say to you, no, I didn't go off the
12 record?

13 A. No.

14 Q. Okay. Did you ask her directly, did you go off
15 the record?

16 A. I did not.

17 Q. Okay. So you gave her the Rule 211?

18 A. I did.

19 Q. And you gave her the Lunn policy?

20 A. Yes.

21 Q. Which actually Newton wasn't follow; right?

22 A. Well, yes. Based on what we just talked
23 about, yes.

24 Q. Okay. And then the focus of this meeting was
25 not ICE and the defendant escaping, it was going

1 off the record, wasn't it?

2 A. The focus of the meeting was trying to figure
3 out what happened. Mary Beth was saying one
4 thing. Mary Beth wasn't there. So I said, let
5 me talk to Shelley and see if I can piece
6 together what happened.

7 Q. All right. And did you try to piece together
8 what had happened with ICE?

9 A. I didn't get that far because, again, I was
10 trying to figure out --

11 Q. The tape.

12 A. -- the tape.

13 Q. You were concerned about the tape; right?

14 A. Exactly.

15 Q. All right. And then there was this meeting with
16 Chief Judge Dawley; right?

17 A. Yes.

18 Q. And again, he's running the show because he's
19 the Chief.

20 A. That's correct.

21 Q. You didn't take any notes again, --

22 A. No.

23 Q. -- did you?

24 A. No.

25 Q. And she said it, yes, I did it, I'm sorry, --

1 A. That's right.

2 Q. -- I'll never do it again.

3 A. Exactly.

4 Q. All right. And there was some conversation
5 about what had happened with the actual
6 proceedings.

7 A. Yes.

8 Q. Okay. But again, the focus was making sure she
9 understood don't go off the record; right?

10 A. In his meeting?

11 Q. Yes.

12 A. The focus for him was making sure she doesn't
13 go off the record and making sure she understood
14 the Trial Court policy, the ICE policy.

15 Q. Okay. Which -- Do you know she actually called
16 and got a copy during the day that day?

17 A. During the day of the --

18 Q. The day of the hearing.

19 A. I believe so. Yeah. Because I think when I
20 handed her a copy, she said she had gotten it
21 from the administrative office.

22 Q. Right. She actually called and had them tell
23 her about the policy; right?

24 A. Based on what she was saying, yes.

25 Q. And do you know there's actually an e-mail

1 showing that they sent it to her?

2 A. I don't dispute that.

3 Q. So that was a perfectly appropriate thing for
4 her to do, try to get help.

5 A. Absolutely.

6 MS. MULVEY: I have nothing
7 else. Thank you, Judge.

8 JUDGE FABRICANT: I have
9 nothing further for this witness. Thank you.

10 HEARING OFFICER: Thank you
11 very much. You're excused.

12 JUDGE FABRICANT: We have our
13 next witness scheduled at 2:00. So if we could
14 take a lunch break now, that would be great.

15 HEARING OFFICER: That's fine.
16 We'll recess until 2:00. Thanks All.

17 (PAUSE)

18 Can I just confirm, do you have
19 another witness after that or is that going to
20 be the last one?

21 JUDGE FABRICANT: The witness
22 after that will be Judge Joseph.

23 HEARING OFFICER: Okay. And
24 that would be for tomorrow?

25 MR. HOOPES: Yes. We talked

1 about that yesterday.

2 HEARING OFFICER: Okay.

3 JUDGE FABRICANT: I think the
4 next witness will not take two hours. If that's
5 how we want to proceed, that's fine.

6 HEARING OFFICER: That's fine.
7 And then if you could give thought over the
8 break so that by the end of the day we can talk
9 a little bit more about plans for after
10 Judge Joseph's testimony, you can let us know
11 what you're thinking is on that.

12 MR. HOOPES: Yes.

13 HEARING OFFICER: All right.
14 Thanks very much.

15 JUDGE FABRICANT: Thank you.
16 (Luncheon recess taken at
17 12:52 p.m.

18 (Proceedings resumed at
19 2:01 p.m.)

20 JUDGE FABRICANT: The
21 Commission calls former Chief Justice
22 Paul Dawley.

23 HEARING OFFICER: Good
24 afternoon.

25

1 former CHIEF JUSTICE
2 PAUL C. DAWLEY, SWORN
3 HEARING OFFICER: Thank you.

4 Please be seated.

5 DIRECT EXAMINATION

6 BY JUDGE FABRICANT:

7 Q. Good afternoon, Chief Justice Dawley.

8 A. Good afternoon.

9 JUDGE FABRICANT: Is that on?

10 THE WITNESS: Not sure.

11 JUDGE FABRICANT: I think it
12 is.

13 HEARING OFFICER: No.

14 (PAUSE)

15 Q. Would you state your name, please.

16 A. My name is Paul Dawley. Last name is spelled
17 D-a-w-l-e-y.

18 Q. Thank you.

19 And what do you do now?

20 A. Presently work as the general counsel to the
21 University of Massachusetts Foundation.

22 Q. Were you -- In your previous role, were you the
23 Chief Justice of the District Court?

24 A. Yes.

25 Q. Would you tell us, please, go back to when you

1 became a lawyer, and just give us a brief
2 overview of your professional background.

3 A. I became an attorney in 1989. I worked for
4 approximately 12 years as an assistant district
5 attorney in Plymouth County. I was the Deputy
6 First Assistant District Attorney. In 2001, I
7 was appointed as an associate justice of the
8 Brockton District Court. I served as the
9 Regional Administrative Justice and the
10 First Justice of the Court. And then in 2013 I
11 was appointed as the Chief Justice of the
12 District Court. In 2018, I was reappointed to
13 additional five-year term. And then, in 2022, I
14 retired from the bench.

15 Q. Can you tell us what the role is of the
16 Chief Justice of the District Court?

17 A. The duties of the Chief Justice are set forth
18 in the statute, Chapter 211B, Section 10. And
19 essentially, it is to oversee the operation of
20 the District Courts. There are 62
21 District Courts across the Commonwealth. And
22 primarily the duties are to implement policies
23 from the Trial Court and the Supreme Judicial
24 Court. There are budget and personnel
25 responsibilities. There's work, working with

1 probation, for example, to implement recidivism
2 reduction program, such as specialty courts,
3 drug courts, mental health courts, implementing
4 training, professional development, not only for
5 judges, but for court personnel, including
6 clerks, implementing information technology
7 enhancements. Case load management is a
8 significant part of it. And there's a public
9 outreach aspect in terms of working with the bar
10 associations. The duties are wide ranging.
11 Those are some of them.

12 Q. And does the statute authorize the Chief Justice
13 to discipline judges of the District Court?

14 A. Yes, it does.

15 Q. Does it give you much guidance about exactly how
16 you would go about that?

17 A. The statute I think is somewhat vague. The
18 practice is, in an instance of judicial
19 misconduct, the Chief Justice will report that
20 to the Chief Justice of the Supreme Judicial
21 Court, Chief Justice of the Trial Court, and
22 then the referral to the Commission on Judicial
23 Conduct would take place.

24 Q. And before you would report it, do you do some
25 investigation?

1 A. Yes.

2 Q. Would you talk with the judge involved?

3 A. Typically, there would be some type of
4 investigation. In some instances, the
5 information is just provided to you. In other
6 instances, it required some investigation on my
7 part, and ultimately, a report to the court.

8 Q. You said that there are 62 divisions of the
9 District Court. And does that -- Does a
10 division refer usually to a particular
11 courthouse?

12 A. Yes. There are 62 separate District Courts
13 in the Commonwealth. Attached to those are
14 158 judges, 26 clerk magistrates, one clerk
15 magistrate appointed by the governor to each
16 court, and then this court sets approximately a
17 thousand employees across those 62 courts.

18 Q. And you said 158 judges?

19 A. Yes.

20 Q. And 62 clerks.

21 A. Yes.

22 Q. And are those -- Are the divisions located
23 everywhere except Boston?

24 A. That's correct.

25 Q. And what serves the equivalent function in

1 Boston?

2 A. The Boston Municipal Court.

3 Q. And what kinds of cases does the District Court
4 hear?

5 A. It hears both criminal and civil cases, would
6 be civil damage thresholds, approximately
7 \$50,000 by rule of the SJC. The criminal
8 matters are generally matters for which a person
9 can be incarcerated for up to two and a half
10 years. In addition, the District Court, the
11 subject matter jurisdiction is very wide ranging
12 because it also includes mental health,
13 involuntary mental health commitments, domestic
14 abuse, 209A orders, landlord/tenant matters, and
15 there's a whole host of administrative appeals
16 that an individual would have a right to appear
17 in court to challenge an administrative finding.

18 Q. And you refer to 209A. Is that a statute
19 relating to restraining orders arising out of
20 domestic abuse situations?

21 A. Yes.

22 Q. Can you talk a little about the process when a
23 new judge is appointed to the District Court?

24 A. The District Court has a formal judicial
25 orientation program. Every newly-appointed

1 judge for the first four weeks is assigned to
2 sit on a daily basis with a different judge, a
3 more senior judge, with a particular focus on a
4 particular subject matter.

5 The curriculum, if you will, is
6 established by the District Court Committee on
7 Education. That's comprised of judges, clerks,
8 and probation officials. And what they do is
9 identify substantive areas of the law that we
10 anticipate are going to require judicial
11 decision-making.

12 So, for example, on the
13 criminal side, a new judge would sit with
14 somebody to review arraignments and bail. Bail
15 revocation, probation violation matters, jury
16 empanelment, sentencing, case disposition on a
17 criminal side. On the civil side, you may sit
18 with somebody to review landlord/tenant cases,
19 debt collection. And then, of course, the
20 involuntary commitments for substance abuse
21 disorder Section 35, domestic violence 209A.

22 So in the first four weeks, a
23 judge is assigned to sit with a specific other
24 judge to review these matters and gain obviously
25 the experience and the perspective of the more

1 experienced judge.

2 Q. Is it a different judge each day for those four
3 weeks?

4 A. For the most part. Occasionally somebody
5 will sit on a pro bono one day with another
6 judge. But it's designed -- There's quite a bit
7 of travel involved, because a new judge is
8 moving around and meeting a lot of different
9 judges.

10 Q. And did you also meet with the new judge when
11 you were the Chief Justice?

12 A. I did. The practice is, once somebody is
13 confirmed by the governor's council, a meeting
14 is set up in the administrative office where a
15 new judge would meet with me as the
16 Chief Justice as well as the administrative
17 office staff, the lawyers and the other staff.

18 Q. And did your office also provide materials for
19 each new judge?

20 A. Yes. Every new judge is provided materials,
21 frankly, a large box of books, as well as
22 electronic materials, and the materials not only
23 come from the administrative office of the
24 District Court, they come, some instances, the
25 Supreme Judicial Court, Flaschner Judicial

1 Institute, the administrative office of the
2 Trial Court. So people would be inundated with
3 materials to receive.

4 Q. Is one of the things that each new judge would
5 be provided with a copy of the Massachusetts
6 Rules of Court, this book that I'm holding up?

7 A. Yes, it is.

8 Q. And every year does Thomson Reuters come out
9 with a new version of this?

10 A. I believe so.

11 Q. Does Flaschner send a copy of the new version to
12 every judge every year?

13 A. I believe so.

14 Q. Did the District Court in your time as
15 Chief Justice also have educational conferences
16 at various times?

17 A. We had at least one annual conference
18 court-wide. But after I became Chief Justice,
19 we instituted orderly regional meetings, they
20 were referred to, where judges would -- first
21 would be the clerks would gather in the morning,
22 and there'd be presentation on development in
23 the law, circuit areas of the law, and then the
24 afternoon we'd do that same program -- or
25 different program but the same type of approach

1 to judges. So every three or four months we
2 were meeting and it was an education program
3 presented.

4 Q. And were there on occasion a special conference
5 on a particular topic, such as race and bias?

6 A. Yes.

7 Q. And all of these various conferences and
8 programs, if a judge couldn't attend for some
9 reason, was there a process to make sure that
10 whatever materials might have been handed out at
11 a conference would be sent to the judge who
12 couldn't attend?

13 A. That's correct.

14 Q. How --

15 A. We would have a process where, for varying
16 reasons, whether they were on trial, whether
17 there was a personal commitment they had, people
18 couldn't make it. So they would identify the
19 administrative staff or identify who was not
20 present and they would send them the materials.

21 Q. Can you tell us what a transmittal is or was
22 when you were Chief Justice?

23 A. It was a communication from me on a variety
24 of subjects, to all judges, all clerk
25 magistrates, all chief probation officers,

1 essentially all court staff. And within the
2 transmittal, it could be about a development in
3 the law, it could be a policy from the
4 Trial Court or the SJC, could be personnel
5 announcements. The announcements, for instance,
6 of new judges or the announcements of
7 retirements. It was a way to communicate with
8 the whole District Court system.

9 Q. Did you keep track of them so each one has a
10 number so --

11 A. I didn't, but somebody did.

12 Q. Somebody on your staff did that?

13 A. Yes.

14 Q. I'm going to ask you to look at Appendix C. And
15 you have in front of you a binder, and we're
16 displaying on the monitor here, so you can look
17 at either way, whether it's in the binder or on
18 the monitor, Appendix C. And in that binder you
19 have all of the appendices. So if you look at
20 the first page of Appendix C, you see the front
21 page of it, which is what's on the monitor.

22 A. Yes.

23 Q. Is that what a transmittal coming from the
24 District Court looks like or did look like at
25 the time?

1 A. Yes.

2 Q. Were there also transmittals that would come
3 from the Trial Court as well?

4 A. Yes.

5 Q. And would they look somewhat similar?

6 A. Yes.

7 Q. But would it indicate that it was coming from
8 the executive office of the Trial Court and the
9 name of the Chief Justice of the Trial Court
10 and/or the court administrator?

11 A. It would. At the top it would be clear that
12 it was from Chief Justice Carey, for example.

13 Q. So looking at this one, and this is numbered
14 transmittal number 1222, do you see it up in the
15 right upper part of the page? Do you see that?

16 A. Yes. Yup.

17 Q. And let me ask you to go over to Page 10 in the,
18 Page 10 in the -- using the pages on the -- I'm
19 sorry -- Page 13, using the page numbers at the
20 upper right corner of the page. Do you see
21 that?

22 A. Yes.

23 Q. Okay. And -- I'm sorry.

24 HEARING OFFICER: Is it 12?

25 Q. I told you the wrong thing.

1 JUDGE FABRICANT: Yes, 12.

2 Thank you.

3 Q. Page 12.

4 A. Yes.

5 Q. If you look at Paragraph 6 on Page 12, do you
6 see that that says updated immigration bench
7 card?

8 A. Yes.

9 Q. And do you see that it says that at the
10 December 13th, 2017, conference? And was there
11 a conference on December 13th, 2017,
12 specifically on the subject of race and bias?

13 A. Yes. It was a court-wide conference on that
14 subject for all District Court judges.

15 Q. And although specifically on that subject, were
16 there some materials handed out on other
17 subjects?

18 A. Yes.

19 Q. And you see it says here at the December 13th,
20 2017, conference, we distributed a revised
21 information and immigration matters bench card
22 dated 12/17 -- Does that mean December of '17?

23 A. Yes.

24 Q. -- to note the Supreme Judicial Court's holding
25 in Lunn versus Commonwealth, that Massachusetts

1 court officers do not have the authority to hold
2 an individual in custody solely on the basis of
3 a Federal civil immigration detainer beyond the
4 time that the individual would otherwise be
5 entitled to a release from state custody. Do
6 you see that?

7 A. Yes.

8 Q. And do you see that it says, consistent with
9 District Court Transmittal 1209? Is that a past
10 transmittal that had been issued earlier?

11 A. Yes.

12 Q. Which was issued after the Lunn decision and
13 rescinded prior District Court transmittals on
14 that subject, this revised bench card replaces
15 the bench card dated 10/16 -- Does that mean
16 October of 2016?

17 A. Yes.

18 Q. -- and should be discarded.
19 So is this telling the recipient that here's a
20 new bench card on immigration matters, anything
21 you have from before this you should discard?

22 A. Yes, it does.

23 Q. And then please contact Jackie Lawson. Is she a
24 person in the administrative office --

25 A. She's an administrative assistant.

1 Q. If you do not receive the updated bench card.
2 And then the electronic version, -- Was this
3 sent electronically by e-mail?

4 A. Yes.

5 Q. -- the electronic version of the new bench card
6 is attached so you can replace Pages 125 to 126
7 in your 90-day guide. What's a 90-day guide?

8 A. 90-day guide is put together by the
9 Education Committee. It's a condensed version
10 of the significant amount of materials a judge
11 receives, and it's designed by the committee to
12 be a quick resource for judges on the things
13 that they're most likely to encounter in their
14 first 90 days on the bench.

15 Q. So is the idea that it would be a good idea for
16 the judges to have that with them --

17 A. We recommend they bring it on the bench with
18 them.

19 Q. And then it says, additional guidance on
20 responding to request from the
21 Department of Homeland Security can be found in
22 the Trial Court's policy and procedure regarding
23 courthouse interactions with the
24 Department Homeland Security issued by executive
25 office transmittal 1713 dated November 10th,

1 2017.

2 So this is advising the
3 recipient that's where you look to get more
4 information on the subject?

5 A. Yes.

6 Q. And we're going to look at that in just a
7 minute. But if you go over to Tab D. We'll
8 pull it up here on the monitor. Is this -- At
9 Pages 15 and 16. Is this the updated bench
10 card?

11 A. Yes, it is.

12 Q. And if you look in the bottom right-hand corner
13 of each page, do you see where it says AODC
14 revised 12/17?

15 A. Yes.

16 Q. Does that tell the reader that this comes from
17 the administrative office of the District Court
18 and that it was revised in December of 2017?

19 A. Yes, it does.

20 Q. So it should replace anything earlier on the
21 subject?

22 A. Yes.

23 Q. And if you look at the last box on the second
24 page, so within the box, and if you look at the
25 bottom paragraph, do you see where it says, for

1 guidance on the manner in which Trial Court
2 employees and in particular court officers shall
3 respond to request from Department of Homeland
4 Security to provide information about and take
5 custody -- And I'm just going to skip a little
6 bit. See Executive Office Transmittal 1713
7 dated November 10th, 2017, which contains the
8 Trial Court's policy and procedure regarding
9 courthouse interactions with the Department of
10 Homeland Security. Do you see that?

11 A. Yes.

12 Q. So what did you expect judges and other court
13 personnel in the District Court to do when they
14 got Transmittal 1222 and the attached electronic
15 bench card?

16 A. The expectation was, this would replace the
17 prior one and would be put in the 90-day guide
18 or available as a resource for the judges.

19 Q. And did you expect them to read it?

20 A. Yes.

21 Q. And see the reference to Trial Court Transmittal
22 1713?

23 A. Correct.

24 Q. And let's take a look at that just so we know
25 what it's referring to. And that is Appendix B

1 in your book. You will see that this is a
2 transmittal issued by the Executive Office of
3 the Trial Court dated November 10, 2017,
4 Executive Office Transmittal 1713.

5 A. Yes.

6 Q. Was this document commonly referred to as the
7 Lunn policy after the Lunn decision?

8 A. Yes, it was.

9 Q. And is that what your transmittal was telling
10 judges they should look to for more information
11 on the subject?

12 A. Yes. This was the document that was referred
13 to in the bench card.

14 Q. And in your time as District Court Chief, were
15 you familiar with District Court Special Rule
16 211?

17 A. Yes.

18 Q. We're going to pull that up. You were familiar
19 with that.

20 A. (Witness nods head).

21 Q. This is Appendix K. And it's in your book
22 behind Tab K and at Pages 122 to 123. What is
23 your understanding of what this rule requires?

24 A. The Rule 211 is entitled Quarterly Court
25 proceedings, and it sets forth the requirement

1 that all courtroom proceedings be recorded
2 electronically.

3 Q. Are there some exceptions?

4 A. There are. They're listed in the first
5 paragraph. They exclude the call of the list
6 and similar matters of an administrative nature,
7 proceedings that are being recorded by a court
8 reporter appointed by the court, and proceedings
9 conducted by a magistrate other than a judge.

10 Q. And if you go over to the second page of it,
11 Page 123 in the appendix, and you look at the
12 line right above near the bottom of the page,
13 right above the part that's in capitals and in
14 bold, do you see that it tells you when this
15 rule was issued and took effect?

16 A. It was issued December 31st, 1987, and
17 effective February 1st, 1988.

18 Q. In your experience as a sitting judge and as
19 Chief Justice, were there any circumstances
20 that, in your view, when it's permissible to go
21 off the record?

22 A. I think there were some circumstances. And I
23 can -- I'll only speak for myself.

24 Q. Please.

25 A. When I was a judge, there were some

1 circumstances that I thought it was appropriate
2 to go off the record.

3 Q. And what were those?

4 A. When somebody clearly wanted to speak to me
5 about a personal matter.

6 Q. Personal to who?

7 A. Personal to the lawyer. Something non-case
8 related. In addition, I can particularly
9 remember an area that was challenging, but when
10 lawyers or members of law enforcement were in
11 the courtroom, and they wished to bring to your
12 attention that the individual who was the
13 subject of the arraignment perhaps or the
14 sentencing was a cooperating witness or an
15 informant, and then it became more difficult to
16 have that information in a public setting.
17 There are obvious dangers attached to that. So
18 those would be instances I can clearly remember
19 when I sat in Brockton District Court dealing
20 with a couple of those and being very cautious
21 not to record those.

22 Q. And was there something that you would observe
23 in the courtroom that would tip you off that
24 that was what somebody wanted to talk about if
25 somebody asked to go off the record?

1 A. Well, it was -- some instances would be, an
2 assistant district attorney, it would sometimes
3 be the defense lawyer, in some instances a
4 member of the law enforcement would be there,
5 and they informed the clerk that they wanted to
6 talk to you.

7 Q. And did the presence of law enforcement give you
8 some indication?

9 A. In some instances.

10 Q. And was there another type of proceeding that
11 you would do, not necessarily off the record,
12 but not on the regular record?

13 A. There could be an in-camera review of certain
14 information. Particularly, I think there was a
15 Martin proceeding which is when an individual
16 wishes to assert constitutional right, that the
17 SJC make sure be done, and not in a courtroom,
18 but an in-camera setting, I also believe that
19 that they suggest that that be recorded and the
20 recording -- I'm not sure if it's impounded, but
21 be kept separate and apart from the case.

22 Q. And you say constitutional right. So a right
23 not to testify, for example.

24 A. Yes.

25 Q. So if someone is subpoenaed to a trial and wants

1 to say I have a right not to testify, and you
2 need to rule about whether the person does in
3 fact have that right. Is that --

4 A. Yes. Because sometimes you're going to
5 inquire as to whether there's a legitimate basis
6 on which the person is asserting the privilege.
7 For instance, self-incrimination. That
8 obviously has potential implications to that
9 individual, so that's the type of proceeding you
10 would do it in.

11 Q. And you call that a Martin proceeding. Is that
12 after the name of a SJC decision?

13 A. Yes.

14 Q. Are you aware that some judges in past years
15 used to do so-called lobby conferences off the
16 record?

17 A. Yes.

18 Q. And what's a lobby conference?

19 A. It's a conference among the parties with the
20 judge in the judge's chambers.

21 Q. And what would such a conference be about?

22 A. Most likely a disposition in the case.

23 Q. So a potential plea.

24 A. Correct.

25 Q. Are you aware of any SJC decisions on that

1 subject?

2 A. I am. The SJC, I'm not sure what year it
3 was, but it was probably early 2000's, they
4 issued a clear directive that unrecorded lobby
5 conferences should not take place.

6 Q. And would that be perhaps the case of
7 Murphy versus the Boston Herald?

8 A. Yes.

9 Q. And what do you view as the lesson of that case?

10 A. Perhaps the importance of ensuring that the
11 proceedings are recorded. It's a complete and
12 accurate record established of what is being
13 said.

14 Q. In 2015, did the SJC take some action to end the
15 practice of lobby conferences off the record? A
16 rule change, for example?

17 A. I believe they may have amended -- I forget
18 what rule it is, but I know that there was an
19 amendment to one of criminal rules in which they
20 emphasize that proceedings should be done in
21 open court on the record.

22 Q. So let's take a look at Appendix L. So you have
23 in front of you Rule 12 of the Rules of Criminal
24 Procedure. Are the Rules of Criminal Procedure
25 established by the SJC?

1 A. Yes.

2 Q. And if you look at Rule 2B, -- do you see it --
3 it says --

4 A. I'm sorry. Did you say 2B?

5 Q. 2. I'm sorry. It's not 2B. It's 12B2. It
6 says, plea discussions, and then it says, the
7 judge may participate in plea discussions at the
8 request of one or both of the parties if the
9 discussions are recorded and made part of the
10 record.

11 A. Yes.

12 Q. Do you see where it says that?

13 A. Yes.

14 Q. And we have the reporter's notes that tell us
15 when that change was made. So I think we'll
16 find that at Page 143 to 144. Do you see at the
17 bottom of Page 143 it says reporter's notes
18 January of 2015?

19 A. Yes.

20 Q. And then it has a whole discussion of the
21 changes made in 2015 and has a big paragraph
22 about 12B2 and it tells us that that's when that
23 change was made in substance. Take your time to
24 look at it if you have any uncertainty about it.

25 A. Yes. And it cites Murphy versus the

1 Boston Herald.

2 Q. In 2018, -- and I know it's nearly seven years
3 ago -- what recording system did the
4 District Court use?

5 A. The District Court was in the middle, I think
6 the Trial Court generally was, too, in the
7 middle of changing to the recording systems.
8 The new version, if you will, of the recording
9 system was something called For the Record, FTR.
10 They, I think in 2018 they were in the process
11 of implementing it across the state. My memory
12 is they picked the largest courts first to
13 implement that system. So there was some courts
14 that had it, some courts did not.

15 Q. And the older system, was there -- The courts
16 that didn't yet have FTR, was there consistency
17 in those courts about what they did have?

18 A. I forget what it's called, but it's
19 essentially a cassette recording. It was some
20 type of recording that played. And when you
21 wanted to listen to it, you would gather the
22 cassette and put it in a system, put on
23 headphones and listen to it.

24 Q. And did some of the courts have what they call
25 JAVS?

1 A. Yes.

2 Q. What did you have to do to get a recording from
3 JAVS?

4 A. I would have to say I don't know. Because if
5 I needed a cassette, I would give it to the
6 administrative staff and they would request it
7 of the court and then I received a cassette.

8 Q. Was it sometimes a CD --

9 A. Yes.

10 Q. -- instead of cassette? And do you know what
11 the Newton District Court was using at the time
12 in April of 2018?

13 A. They were not -- They did not yet have the
14 FTR system. They had the old system.

15 Q. Did Judge Joseph become a judge of the
16 District Court in November of 2017?

17 A. Yes.

18 Q. And at that time had you had any previous
19 acquaintance with her?

20 A. No. The first time I met Judge Joseph was
21 after she was appointed, and she come in to meet
22 me and administrative staff as part of the
23 judicial orientation.

24 Q. And did you follow the usual practice in
25 providing orientation with Judge Joseph as you

1 do with other new judges?

2 A. Yes.

3 Q. Did you have your staff send her or give her the
4 usual materials for a new judge?

5 A. Yes.

6 Q. And did you assign her a mentor?

7 A. I did.

8 Q. Can you talk a little bit about the judicial
9 mentor program, what that is and how it works or
10 did work in 2018?

11 A. So every judge in the Trial Court, every
12 newly-appointed judge receives a mentor for a
13 two-year period. The mentors go through
14 specific training, generally, the more
15 experienced the judges have been on the bench
16 longer. And the program is designed to provide
17 support with guidance to newer judges,
18 essentially a vehicle for their support that
19 they can speak to and review matters with and
20 gain the support.

21 Q. Does the Chief Justice choose the mentors?

22 A. Yes.

23 Q. And do the mentors get some training in being a
24 mentor?

25 A. Yes. I think several times a year they

1 attend sessions and there's mentor training.

2 Q. Is part of the role of a mentor that they're
3 trained to do, that they should be available to
4 their mentee or mentees for phone consultation
5 pretty much at any time?

6 A. Yes. The whole idea is to building a system
7 where there's somebody available to provide a
8 support to the newly-appointed judge.

9 Q. Now, I want to turn your attention to April 20th
10 of 2018. Did you receive an e-mail from
11 Judge Fortes about an incident in Newton?

12 A. Yes.

13 Q. And let's look at Appendix B. And Howard has up
14 on the screen what I think is Page 540. The top
15 of the page I'm showing on the monitor, is this
16 the e-mail that you received from Judge Fortes?

17 A. Yes.

18 Q. And was Judge Fortes at the time the
19 Regional Administer Justice for the region that
20 included Newton?

21 A. Yes, she was.

22 Q. When you got this e-mail from Judge Fortes, was
23 this the first you had heard about the incident
24 that she describes in Newton?

25 A. Yes.

1 Q. And I'm just going to read it. Chief Judge
2 Heffernan called me about this incident a couple
3 of weeks ago. I asked her at that time to
4 follow up with an e-mail outlining the incident
5 below, that is the e-mail from Judge Heffernan.
6 I also suggested she pull the tape because there
7 was some indication the judge involved may have
8 gone off the record prior to defendant going
9 down the back stairwell. I've spoken to the
10 judge involved. I can brief you if you need
11 additional info. Informing you about it now
12 because Judge Heffernan called to let you know
13 regional director for ICE, question mark, may
14 bring it up at meeting supposedly scheduled with
15 CJ Carey. I didn't want you or CJ Carey
16 blind-sided by any information. Judge Heffernan
17 can fill in anything I left out.

18 Did you read that e-mail when
19 you got it?

20 A. Yes, I did. And attached -- Well, not
21 attached, but I think forwarded to that e-mail
22 was Judge Heffernan's e-mail.

23 Q. And did you read Judge Heffernan's e-mail?

24 A. Yes.

25 Q. Did you expect that a Regional Administrative

1 Justice would bring to your attention the
2 matters that needed to come to your attention?

3 A. Yes.

4 Q. Did you also expect that a Regional
5 Administrative Justice or a First Justice or
6 some combination of them would handle matters
7 that they could handle so you didn't have to
8 handle everything?

9 A. That's accurate. Oftentimes the
10 First Justice or the Regional Administrative
11 Justice, they'll deal with things and, you know,
12 attempt to solve problems before they reach a
13 higher level.

14 Q. And was there a meeting scheduled with the
15 regional director for ICE or somebody in some
16 similar role?

17 A. There was. From time to time Chief Justice
18 Carey would meet with different areas of law
19 enforcement. Some of those meetings I would
20 attend with her, whether they were with the
21 Colonel or the state police, the attorney
22 general. It was an attempt to reach out and
23 engage in a discussion about different policies
24 or different issues. So she often would set up
25 meetings that I saw for other Chief Justices

1 would attend.

2 Q. And at around this time, do you recall that
3 there was a meeting scheduled?

4 A. I do -- I'm not sure of the time, but I do
5 remember a meeting scheduled with the, I think
6 it was the director of the Boston office of ICE.

7 Q. And this being April of 2018, was there some
8 tension in the relationship between state
9 authorities and Federal authorities particularly
10 related to ICE?

11 A. I'm not sure I'd describe it as tension,
12 other than I think the point of the Trial Court
13 was we were trying to -- I think we were trying
14 to educate law enforcement about this policy and
15 the decision that the Supreme Judicial Court had
16 made in Lunn and what that meant for everyday
17 activity in the courthouses. I think her intent
18 was to collaborate with them, make them aware of
19 the legal restrictions we faced and inform them
20 what we were going to do about it.

21 Q. When you got this, did you read the attached
22 forwarded e-mail from First Justice Heffernan?

23 A. Yes, I did.

24 Q. Was that -- Had you had any previous awareness
25 of what she refers to as the usual practice in

1 Newton Court, the agent was asked to wait
2 outside the courthouse as he did not have a
3 warrant but a detainer? Was that something you
4 had any previous awareness of?

5 A. No, not before this e-mail.

6 Q. What was your reaction to it?

7 A. Well, I responded to it by asking essentially
8 what authority the court had to exclude an ICE
9 agent from being in the courtroom and expressed
10 a little bit of concern in terms of whether that
11 was permissible.

12 Q. And is that the e-mail that appears at Page 539
13 that you sent on April 20th at 12:31 p.m.?

14 A. Yes.

15 Q. So really just 10 minutes after the e-mail from
16 Stacey Fortes.

17 A. Correct.

18 Q. Did you ask a series of questions?

19 A. I did. I essentially asked four questions.
20 The first related to what was the authority of
21 the court to exclude a Homeland Security agent
22 from being in the courtroom. Secondly, who was
23 the judge who handled this matter. Third was,
24 who was responsible for the defendant being
25 allowed to leave the courthouse through the

1 non-public exit. And fourth is, what steps had
2 we taken so that the staff understands this
3 should never happen again.

4 Q. And did you get a response from --

5 A. Yes.

6 Q. -- First Justice Heffernan?

7 A. She gave me a detailed response to each one
8 of them.

9 Q. Is that what appears starting on Page 538 and
10 going over to Page 539?

11 A. Yes.

12 Q. And did you respond back --

13 A. I did.

14 Q. -- at the top of Page 538?

15 A. I did. I want to point out something.

16 Q. Yes.

17 A. Because, I think, in fairness to
18 Judge Heffernan. As this went on -- Because my
19 original reaction was, this is impermissible,
20 you can't keep people out of the courtroom,
21 there's constitutional implications to an open
22 court. And the more I discussed this with the
23 legal counsel both in my office and the
24 Trial Court, particularly the people who worked
25 on the policy, they felt that a judge had

1 discretion to do so if they thought that the
2 presence could be disruptive. So I'm not sure
3 if it was at the time or shortly thereafter, I
4 backed off somewhat and felt that
5 Judge Heffernan had the discretion to take that
6 action if she felt it was warranted.

7 Q. And going over to your e-mail, the same day,
8 1:17 p.m., did you advise her to confer with
9 Zachary Hillman?

10 A. Yes. Zach Hillman was the general counsel in
11 the District Court administrative office, and I
12 suggested that she connect with him.

13 Q. And is he now a judge?

14 A. Yes, he is.

15 Q. Did you hear later that she had conferred with
16 Zach Hillman and that she had made a change in
17 the practice?

18 A. That's correct.

19 Q. After you received the e-mail from Judge Fortes,
20 did you get the recording from the proceeding in
21 the Newton District Court?

22 A. Yes. I requested a copy of the tape
23 recording of the, of the case in particular.

24 Q. And did you listen to it?

25 A. I did.

1 Q. And when you got the recording, was it in the
2 form that the District Court produces a
3 recording, that is, as opposed to any sort of
4 enhancement?

5 A. No. I do remember this. I do remember
6 listening to it. And what I remember about it
7 is having to ask for a set of headphones so I
8 could attempt to listen more closely, because
9 there was good deal of inaudible statements. I
10 could figure out some of it, but there was a
11 number of inaudibles I couldn't understand.

12 Q. So it was hard to make sense of it.

13 A. Yes.

14 Q. And are you aware that there has ever been an
15 enhanced version that is sent to a vendor who
16 has expertise in enhancing a recording?

17 A. I think at some point somebody told me that.
18 I'm not sure who. But ultimately, I saw a
19 transcript. I'm not sure when it was produced.
20 But it was clear that this was enhanced or
21 somebody had the ability to more closely listen
22 to it than the original tape.

23 Q. At that time, did you have an enhanced version?

24 A. No.

25 Q. And did you have a transcript at that time?

1 A. No.

2 Q. So you were playing the original version of the
3 recording and listening as best you could.

4 A. Correct.

5 Q. All right. We're going to play that recording
6 now, and we're just going to listen to it
7 without the transcript, just so we hear what the
8 original sounds like.

9 (RECORDING PLAYING)

10 Q. After you listen to the recording, do you have
11 any concerns?

12 A. The concern I had was to the tape being shut
13 off.

14 Q. Was that the only concern?

15 A. At that time.

16 Q. And what did you do?

17 A. I, after I listened to it, I requested to
18 meet with Judge Joseph and Judge Fortes.

19 Q. And did your assistant set up a meeting for
20 May 8th?

21 A. That's correct.

22 Q. And did you have a meeting with Judge Joseph and
23 Joseph Fortes?

24 A. Yes, I did.

25 Q. Where was the meeting?

1 A. That was in the administrative office in the
2 District Court in my office.

3 Q. In your office. Was anyone present other than
4 Judge Joseph and Judge Fortes and you?

5 A. No.

6 Q. And going into that meeting, did you have any
7 information about this incident other than the
8 recording and the e-mail from Judge Fortes with
9 the forwarded e-mail from Judge Heffernan?

10 A. No.

11 Q. Tell us about that meeting. Who said what?

12 A. I set the meeting up because our concern that
13 the tape had been shut off and Judge Joseph was
14 a new judge. So when she come in and we met
15 with her, I told her I had listened to the tape
16 and I had a couple of concerns that I wanted to
17 talk to her about. I started by discussing the
18 tape being shut off. Shortly after I discussed
19 that, the fact that it appears the tape was shut
20 off, Judge Joseph said to me, she acknowledged
21 that she had directed the clerk to do that. She
22 apologized. She indicated to me she was not
23 aware that there was a rule that required the
24 tape to be on. And she essentially said it
25 would not happen again. She had been made aware

1 of it, she had thought about it, and wouldn't
2 happen again.

3 Q. Did she tell you anything about why she went off
4 the record?

5 A. Well, we were talking about the importance of
6 the rule. And I asked her, I said why did you
7 shut the tape or direct the clerk to shut the
8 tape off, and she stated something to the effect
9 of the defense lawyer wanted to speak to her off
10 the record because the defense lawyer was
11 concerned that the identity of his client was
12 not the same individual of whom there was an out
13 of state warrant. I think it was Pennsylvania,
14 if I'm not mistaken. There was a warrant. And
15 the lawyer was trying to convey to Judge Joseph
16 it was not the same person.

17 Q. And did she give you any indication of why a
18 discussion about identity with respect to the
19 Pennsylvania warrant should be off the record?

20 A. No. I don't think we discussed that part of
21 it as much as we discussed the rule, the
22 importance of adhering to the rule, and we
23 focused more on the rule and the importance of
24 maintaining a full, complete record. I remember
25 specifically speaking to her about, just by the

1 nature of the position I had, we get a large
2 number of complaints about judges and clerks,
3 and I remember telling her that it was my
4 experience that the most favorable piece of
5 evidence always in terms of these things is the
6 tape itself, because there are people who make
7 accusations about failure to get due process and
8 then you listen to the tape and realize, well,
9 that's not accurate. So we spent a lot of time
10 talking about the rule, the importance of it,
11 and then she acknowledged it, she apologized,
12 and said wouldn't happen again.

13 Q. Did she tell you anything about what was said
14 off the record?

15 A. My memory is that it was, it was the same.
16 It was the issue of the defendant's identity and
17 his warrant that was out of state.

18 Q. Did she say anything about any discussion about
19 ICE?

20 A. No, not that I recall.

21 Q. When you listened to the recording, you could
22 hear some reference to ICE, could you?

23 A. I think you could. But frankly, I'd want to
24 sit once again to really listen word for word.

25 Q. And that, of course, if you could hear it, it

1 was the part that was on the record.

2 A. Right.

3 Q. Not the part that was off the record. Did she
4 say anything about being concerned, her being
5 concerned that ICE would take the wrong person?

6 A. No.

7 Q. Did she say that she thought she had a
8 responsibility to determine the defendant's
9 identity with respect to the ICE detainer?

10 A. No. We never got to that level of
11 discussion, and it was more about the tape being
12 shut off, the importance of the rule.

13 Q. Did she say anything about being concerned that
14 ICE wouldn't allow an attorney/client
15 conference?

16 A. No.

17 Q. Did she say anything about wanting to pause ICE
18 taking the defendant into custody?

19 A. No.

20 Q. Did you ask her directly whether she had
21 anything to do with the defendant going out
22 back?

23 A. Yes. So we addressed the issue of the tape,
24 the recording being shut off first, and then I
25 raised with her the issue of the fact that the

1 defendant was let out this side entrance while
2 ICE was waiting for him. And I asked her if
3 she, first of all, if she was responsible for
4 that, if she was aware of it, if she had any
5 knowledge whatsoever of it, and she strongly
6 denied each and every one of that. The final
7 question, I said, did you have anything at all
8 to do with him leaving the courthouse that way,
9 and she very strongly and adamantly denied that.

10 Q. And did you accept her denial?

11 A. Yes, I did.

12 Q. And did she say that she had inadvertently or
13 unintentionally facilitated it?

14 A. No.

15 Q. How did the meeting end?

16 A. The remainder of the meeting was a discussion
17 about training and the importance -- the issues
18 that new judges deal with, the importance of
19 engagement, particularly with other judges who
20 are more experienced, particularly knowing what
21 you don't know and you can rely on other sources
22 of support to get that knowledge. And so the
23 first part of the meeting, if I could describe
24 it, it was somewhat stern. It was, it was right
25 to the point. And then the rest of the meeting

1 I would describe as more positive because it was
2 a focus on how we -- where are we going to go
3 from here and how do we get on a positive path.

4 Q. And when the meeting ended, what was your view
5 of the matter of that situation at that time?

6 A. I viewed it, the whole meeting I viewed it as
7 really a training issue. I certainly didn't
8 view it based on what I knew at that time as a
9 disciplinary matter. And I can tell you, I
10 conducted disciplinary matters. If I had viewed
11 it that way, I would have had legal counsel with
12 me, we would have been memorializing everything
13 that was said, I probably would have advised at
14 the outset that there may be a need for counsel.
15 None of that was present here because the
16 circumstances that I knew didn't warrant that.

17 Q. Now, speaking of training and going back to the
18 subject of what training was provided for new
19 judges. Was there any training specifically
20 provided about Rule 211 and the requirement of
21 recording?

22 A. I don't think there was. Because after this,
23 I asked the District Court Committee on
24 Education to incorporate it into the training
25 going forward.

1 Q. And why wasn't there training about that
2 requirement?

3 A. Well, first of all, it's somewhat a
4 procedural method. And most of the training was
5 really bearing on substance of law so that you
6 put a judge in a position that they can make
7 judicial decisions based on the substance of
8 law. It was more procedural. And my view is
9 that people knew about it and it was kind of
10 self-evident. It turns out over time that was
11 not the case.

12 Q. Later in, within the month of May, still within
13 the month of May, did you change her mentor
14 assignment so as to provide her with more
15 focused attention?

16 A. Yes.

17 Q. After these events, sometime later on, did you
18 receive information about any practices
19 regarding going off the record?

20 A. To the court generally?

21 Q. Yes.

22 A. It was --

23 Q. In the District Court.

24 A. In the District Court, I think it was
25 sometime in the fall, there was a, there was a

1 news report that essentially wrote about the
2 Federal grand jury investigation of this matter.
3 And in reading that, I spoke with a number of
4 people in the Trial Court, and one of the
5 Trial Court lawyers, somebody I have great
6 respect for, told me, you know, there is a lot
7 of noise out there that this isn't the only time
8 this has happened, this is a practice.

9 So what I did was, I asked the
10 Regional Administrative Justices to survey each
11 and every one of the courts and have a
12 discussion on two issues; one, whether people
13 were aware of the rule and complied with it and,
14 secondly, whether they also understood that
15 unrecorded lobby conferences were prohibited
16 under an SJC decision. So the RAJs did that,
17 and in short order they reported to me that this
18 practice is not happening. And of course, their
19 response was based on what people were reporting
20 to them.

21 Q. Were you satisfied with the response you got?

22 A. You know, I was glad with the response
23 because, again, it's important that full
24 recordings be made.

25 JUDGE FABRICANT: Thank you.

1 That's all I have at this time.

2 HEARING OFFICER: Mr. Hoopes.

3 MR. HOOPES: Thank you,
4 Mr. Hearing Officer. I got to mic up.

5 CROSS-EXAMINATION

6 BY MR. HOOPES:

7 Q. Good afternoon, Chief Dawley. I got to make
8 sure I got your title correct.

9 Judge Dawley, you know that I
10 represent Judge Joseph; correct?

11 A. Yes, I do.

12 Q. And I'd like to go back to an area first that
13 was covered by special counsel, which is the
14 e-mails. So if you look at the e-mails which
15 should be in V.

16 MR. HOOPES: If we could pause
17 for one second.

18 A. Did you say B?

19 Q. V as in Victor.

20 (PAUSE)

21 A. Yes.

22 MR. HOOPES: Give me one sec,
23 so we got to hook up.

24 (PAUSE)

25 Q. So if you could -- It's Page 540. And I believe

1 you read it a little bit, but I'd like to go
2 back to it.

3 A. Yes.

4 Q. This is an e-mail from Stacey Fortes on
5 April 20th at about 12:21 p.m.

6 A. Yes.

7 Q. Correct?

8 A. Yes.

9 Q. Yeah. And it says, to read it again, it says,
10 Chief. Now she's one of your Regional
11 Administrative Justices.

12 A. Yes. Correct. There are six Regional
13 Administrative Justices in the state, and she's
14 one.

15 Q. And so she's one of the people you rely on being
16 in communication with you if there was anything
17 that's important that is happening within her
18 region; right?

19 A. Yes.

20 Q. And you would have expected her to not only
21 manage the judges who were under her to the
22 benefit of the court but also keep you posted on
23 any sort of incident that might cause a problem;
24 correct?

25 A. Yes.

1 Q. Okay. And so here she says on April 20th,
2 Chief Judge Heffernan called me about this
3 incident a couple of weeks ago. I asked her at
4 that time to follow up with an e-mail about the
5 incident. Below. I also suggested she pull the
6 tape because there was some indication that the
7 judge involved may have gone off the record
8 prior to the defendant going down the back
9 stairwell. I've spoken with the judge involved
10 and can brief you if you need additional
11 information. Informing you about it now because
12 Judge Heffernan called to let me know regional
13 director for ICE may bring up this incident at
14 the meeting supposedly scheduled with
15 Chief Justice Carey, and I didn't want you or
16 Chief Justice Carey to be blind-sided by any --
17 Have I read that correctly?

18 A. Yes.

19 Q. And Judge Heffernan can fill in anything I left
20 out.

21 So you learned subsequently
22 just by reading below that the date of the
23 incident was April 2 of 2018; correct?

24 A. Yes.

25 Q. And so you received this e-mail on April 20th;

1 is that right?

2 A. That's correct.

3 Q. And so that's approximately two and a half weeks
4 after the incident; --

5 A. Yes.

6 Q. -- is that right?

7 Now, would it be fair to say that there had been
8 a couple of issues with ICE at the
9 Newton District Court in the year or year and a
10 half prior? Isn't that correct?

11 A. I remember at least one.

12 Q. Yup. And so -- And that would have involved
13 some press on Judge Heffernan; correct?

14 A. Yes.

15 Q. And you did not take the date that you received
16 this as an indication that Judge Fortes was in
17 any way trying to not raise this issue so you'd
18 be alerted to it any sooner.

19 A. No. I read it in terms of a delay as she
20 knew that there was a potential meeting with the
21 ICE officials and probably that prompted her to
22 notify us.

23 Q. And she got that information from
24 Judge Heffernan.

25 A. Looks like Judge Heffernan.

1 Q. Who Judge Heffernan apparently was concerned
2 enough to call Judge Fortes; correct? The
3 suggestion was, we better alert Chief
4 Justice Dawley.

5 A. Yes.

6 Q. So that Chief Justice Dawley or Chief
7 Justice Carey are not blind-sided at the
8 meeting.

9 A. That's correct.

10 Q. So clearly by now, both Judge Heffernan and
11 Judge Fortes are concerned that this might be an
12 issue.

13 A. It certainly seems that way.

14 Q. And might have thought it was an issue prior to
15 that; right?

16 A. It could.

17 Q. Now, you indicated that you had asked four
18 questions on Page 539.

19 A. Yes.

20 Q. And you ran through the questions. And one was,
21 what was the authority. And you told us that's
22 in this e-mail that you got a response and the
23 response was it had been my practice and
24 eventually that practice was changed with --

25 A. Yes. Correct.

1 Q. And the second was, who was the judge that
2 presided over the case. You got an answer to
3 that.

4 A. Correct.

5 Q. The third one, who was responsible for allowing
6 the defendant to exit the courthouse via a
7 non-public entrance. Let's put a pause on that
8 one -- put a pin in that for a second.

9 And fourth, in addition to the
10 notice posted by Officer Noe, was the court
11 staff told, and do they understand that this
12 should not happen again?

13 A. Correct.

14 Q. Yup. And so there was a policy in place to
15 prevent that from happening, right, which was
16 the Lunn policy?

17 A. The Lunn policy.

18 Q. We'll come back to that.

19 Now, as to Number 3, who was responsible for
20 allowing the defendant to exit the courthouse
21 via a non-public entrance. The e-mail's sort of
22 deafening in the silence. Nobody ever responded
23 to Question Number 3 to you; correct?

24 A. Directly, that's correct.

25 Q. Okay. Now, eventually you set up a meeting, and

1 the meeting was with Judge Joseph and
2 Judge Fortes; correct?

3 A. Yes.

4 Q. And it was in your office?

5 A. Correct.

6 Q. And the three of you sat and the three of you
7 talked, as you just described.

8 A. Yes.

9 Q. But there was nobody writing down notes.

10 A. That's correct.

11 Q. And you explained that nobody was writing down
12 notes as part because you viewed it as just
13 educational, informational but educational sort
14 of meeting; is that correct?

15 A. That's correct.

16 Q. Now, it would be fair to say that you took no
17 notes, no one took notes on that day, and there
18 were no notes that were created by you or
19 Judge Fortes regarding the meeting at a later
20 time; is that correct?

21 A. That's correct.

22 Q. So in other words, there's no notes available at
23 this point for you to refresh your recollection.

24 A. That's correct.

25 Q. So your testimony here today and your testimony

1 before in any other proceeding regarding this
2 was unaided by any notes to refresh your memory.

3 A. That's correct.

4 Q. Now, at the end of the meeting -- If you can go
5 to Page 534, please, at the very top of the
6 page.

7 A. Yes.

8 Q. It's two days later, on May 10th. It says from
9 you to Judge Joseph, Shelley, Judge Joseph, I
10 appreciate meeting with you and your
11 consideration of the issues we discussed. As I
12 mentioned, the best part of this job is that
13 every day is a learning experience. I look
14 forward to seeing you at the conference. Thanks
15 and take care, Paul Dawley. That's the first
16 one; correct?

17 A. That was in response to her e-mail to me.

18 Q. Okay.

19 A. Yeah.

20 Q. And below that is her e-mail to you two days
21 before. Shelley Joseph to Judge Dawley, thank
22 you for meeting with me today. I've learned and
23 understand all that we've discussed. I look
24 forward to seeing you at the conference next --
25 That's what that says; right?

1 A. That's correct.

2 Q. And as to the sentence above that, which is, I
3 appreciate your concern, your consideration of
4 the issues we discussed, as mentioned, the best
5 part of this job is that every day is a learning
6 experience. Now, I take it that you thought
7 that your impression was, when she left, that
8 she had been candid with you; correct?

9 A. Yes.

10 Q. Thank you.

11 Now, we can go to -- We talked a little bit
12 about Rule 211, the off the record.

13 A. Yes.

14 Q. And spend a little time. So Judge Fabricant
15 asked you some questions about training
16 materials, books that happened, things that are
17 provided to new judges. And you explained as
18 sort of a predicate to that, that every judge --
19 every new judge is important to you, which is
20 why you give them a mentor for up to two years.

21 A. Yes.

22 Q. And so it would be fair to say that in your mind
23 every judge needed a mentor just to make sure
24 that they had somebody guiding them as they
25 went.

1 A. I think for the most part that's true. I
2 mean, people have different levels of
3 experience, they bring different qualities to
4 the bench, but it's a very different job than,
5 for instance, where I came from being a
6 prosecutor or a defense lawyer. Much different
7 role. So it requires I think support from
8 somebody with more experience to help you
9 navigate some of the issues.

10 Q. And one of the ways you also provided support
11 was providing written materials; is that
12 correct?

13 A. Correct.

14 Q. And so it would be the 90-day guide; is that
15 correct?

16 A. Correct.

17 Q. And that's probably as big as that stipulation
18 book that you got there?

19 A. It's actually very similar to this. It's a
20 live binder.

21 Q. It's just a lot of material, be fair to say?

22 A. It is. They're constantly trying to condense
23 it because we ask people to bring it on the
24 bench with them.

25 Q. And in fact, is that the same as a benchbook or

1 is there a separate book called the benchbook
2 that Judge Rooney --

3 A. Judge Rooney's Benchbook is I think a
4 condensed version of the 90-day guide.

5 Q. And so new judges get two of these books, both
6 about that size.

7 A. Yup.

8 Q. And Judge Fabricant, Special Counsel Fabricant
9 showed you the West Publishing Company book
10 called Rules. You've looked at that in the
11 past.

12 A. Yes, I have.

13 Q. And you know that's about 1,500 pages of small
14 type; right?

15 A. Very voluminous. Correct.

16 Q. And so you've been a new judge before; correct?

17 A. Was.

18 Q. And I assume that it's different being a judge
19 than being a lawyer. You have different things
20 that you have to pay attention to, I assume.

21 A. Yes.

22 Q. And so I assume that you must have felt, when
23 you were a new judge, that it was a little bit
24 like drinking from a fire hose, maybe; yes?

25 A. Correct.

1 Q. And you were trying to grasp the key concepts
2 every day that were going to be in front of you
3 and grow that experience; is that right?

4 A. Yes.

5 Q. So you would -- Would you agree with me that
6 it's not reasonable to expect a new judge that's
7 been in six months to have read every page of --
8 1,500 pages of the West book?

9 A. That's correct.

10 Q. Okay. Now, it would be fair to say that, as to
11 this Rule 211, which was passed and became
12 effective in May 1988, that it was, for a long
13 time it was honored more as a breach than in
14 fact -- by some people; correct?

15 A. Correct.

16 Q. And over time things have slowly morphed a
17 little bit because of the SJC decision. There's
18 a little less of that and less of that and less
19 of that over time.

20 A. I think that that's accurate.

21 Q. So when you were a young assistant district
22 attorney in Plymouth County --

23 A. Yes.

24 Q. -- area, I assume that there were judges going
25 off the record; yes?

1 A. That is correct. Particularly as to most of
2 my time was Superior Court, and it was a
3 frequent occurrence.

4 Q. And in fact, in Superior Court, there was no
5 rule about going off the record until after this
6 incident in 2018; is that correct?

7 A. I couldn't speak to that. But the other
8 difference is Superior Court at that time was
9 stenographers as opposed to a recording system.

10 Q. But it wouldn't be unusual for some judge to
11 motion to the stenographer to talk with the --

12 A. I've seen that occur.

13 Q. Okay. And in fact, sometimes there were lobby
14 conferences with the assistant district
15 attorneys and even with private counsel over
16 cases, for various reasons, plea discussions,
17 what are we going to do next, all kinds of
18 things; correct?

19 A. Yes. That's correct.

20 Q. Now, you told us that, even though the practice
21 has been tightening up, there hadn't been an
22 issue really until this case that caused you to
23 put into effect after 2018 the new training; is
24 that right?

25 A. Can I ask you, what do you mean by "there

1 hadn't been an issue?"

2 Q. Well, let me phrase it another way.

3 A. Yup.

4 Q. You indicated, when special counsel asked you
5 questions, that there was nothing in the 90-day
6 guide and nothing in the benchbook that
7 referenced 211, be on the record all the time,
8 nothing like that; correct?

9 A. Right.

10 Q. And so this was a wake-up call that you wanted
11 to educate all your new judges right up front;
12 is that right?

13 A. Correct.

14 Q. And so now, every judge, every young judge,
15 every new judge who comes on the bench in what
16 used to be your court, and now is Chief Justice
17 Fortes court, is told this right up front.

18 A. I believe it's part of the, --

19 Q. The pack.

20 A. -- the 90-day -- Yup. Yes.

21 Q. Now, this Lunn case -- Before I go there, if I
22 could just ask you one thing, which is -- I'm
23 going to show you one document, and this is an
24 e-mail exchange back in December 2018. One,
25 two, three, four pages. And the bottom of the

1 string, going up to February 19, there's an
2 e-mail exchange with you and Paula Carey. Just
3 look at that. And could you just read to
4 yourself from the bottom there.

5 (PAUSE)

6 A. Yes. I recall this.

7 Q. And Paula Carey was the Chief Judge of all the
8 Trial Court at that point.

9 A. Correct.

10 Q. She was the supervising judge of all seven
11 departments; correct?

12 A. That's correct.

13 Q. And on that last page, Judge Carey actually
14 says, I don't know if there's a rule about going
15 off the record in the District Court. Correct?

16 A. She said I do not recall a rule but my
17 suggestion would be to look at statutes to
18 determine whether there's anything in the law
19 that requires recording everything. We also may
20 want to locate rule, standards, et cetera that
21 indicate that the judge is in charge of her
22 courtroom. And Chief Justice Dawley would be
23 able to tell you if there are any specific
24 District Court standards.

25 Q. Okay. And so the date of this e-mail exchange

1 is February 4th, 2019. There's many other
2 things in there. So --

3 A. Yes.

4 Q. -- it may not be necessary to admit the whole
5 thing. But the content is the Chief Judge of
6 all the courts, in the Trial Courts in
7 Massachusetts was not at that time aware of this
8 rule; correct?

9 A. Correct.

10 Q. Thank you.

11 Now, moving back to the Lunn policy. So if we
12 can set the context here a little bit for the
13 Lunn policy. Some part of it everybody probably
14 knows, which is in 2017, then Chief Justice
15 Gants wrote this decision that was called
16 Commonwealth versus Lunn; correct?

17 A. Lunn versus Commonwealth.

18 Q. Lunn versus -- Thank you.

19 A. Correct.

20 Q. And it was a case that tried to balance the
21 interest of the state and the Federal
22 authorities; correct?

23 A. That's correct.

24 Q. And it was a very cutting edge case in a sense,
25 was it not?

1 A. It was a very significant case.

2 Q. Significant.

3 And as you've described, striking the balance is
4 delicate. And having it on paper is different
5 than executing the decision; correct?

6 A. That's correct.

7 Q. And Chief Justice Carey led the committee that
8 ended up issuing this executive office
9 transmittal that you were shown on
10 November 10th, 2017, probably, four or five
11 months after the decision came down, and it's
12 one, two, three, four pages. I mean, somebody
13 put a lot of thought and work into what the
14 execution was going to look like.

15 A. I think they had a working group, members of
16 each department, Chief Justice Carey, and
17 primarily it's driven by the security
18 department.

19 Q. Thank you.

20 So the working groups would be security, would
21 be the judiciary. Anybody else that you can
22 recall? Maybe the clerk's office?

23 A. I'm sure. I'm sure they were included.

24 Q. And maybe probation?

25 A. I would think so.

1 Q. And so -- And this was the fruit of their labor,
2 the product; correct?

3 A. Yes.

4 Q. And this went out from the executive office to
5 everybody, to judges, clerks, registers -- That
6 would be registers of probate?

7 A. I would think so, registers of probate. They
8 have registers of Land Court. I don't think
9 that would apply.

10 Q. Land Court. Probation, chief probation, and all
11 staff. And it would be fair to say that at this
12 point in time there was a nationwide issue with
13 regard to ICE and immigration; correct?

14 A. Certainly -- Yes.

15 Q. And this was meant to provide guidance that
16 provided the balance so nobody was going to be
17 left guessing in the District Courts as to how
18 they were supposed to handle these issues, this
19 issue, ICE comes, ICE wants to take somebody in
20 custody, what do we do, this is the guidance.
21 Is that correct?

22 A. My sense is that that policy attempted to
23 implement the SJC decision and answer questions
24 that court personnel would deal with frequently,
25 try to give them direction and guidance.

1 Q. Thank you.

2 And so did you have a sense that, besides
3 sending it out by e-mail, zing out it goes, that
4 there was training that accompanied this in any
5 way?

6 A. I'm sure. I would assume it was covered in
7 terms of security. It was a matter that would
8 have --

9 Q. For your court, meaning, you got these judges
10 who are -- have to be intelligent to get on the
11 bench, they can read, they can read the whole
12 thing; right?

13 A. So when the decision issued, my office issued
14 a legal bulletin that outlined this is the
15 decision. In fact, I think we issued it the
16 next day saying this decision was made,
17 significant changes, and this is the holding of
18 the court. Thereafter, it was subject to
19 coverage in some of our trainings over the next
20 several months.

21 Q. Thank you.

22 And you expected, I assume you expected the
23 presiding justice at the very least to read the
24 transmittal; correct?

25 A. Yes.

1 Q. Of each one of the -- How many District Courts?

2 A. 62.

3 Q. Of each one of the 62, which is a lot of courts
4 for you to be controlling, and this was a means
5 to control it; right?

6 A. Well, I'm not sure I'd use the word
7 "control." But it's more to support them in
8 implementing this. And guidance.

9 Q. But it wasn't meant to be, I'm going to follow
10 it if I want to follow it. This came from the
11 top; correct?

12 A. Correct.

13 Q. There was an expectation that the SJC was run of
14 the show here, was through her acting and all
15 the justices were supposed to be --

16 A. I should put, compliance with this is
17 required. It's not an option. Courts are
18 required to implement the SJC decision.

19 Q. Thank you.

20 And can I ask you to go to the third page of
21 this policy, which would be -- and if you look
22 at -- It's Page 7, I'm told.

23 A. Yes.

24 Q. And there's a Roman Numeral III that says,
25 DHS officials taking custody of individuals at a

1 courthouse.

2 A. Yes.

3 Q. And then there's a Paragraph 1, Paragraph 2,
4 Paragraph 3.

5 A. Yes.

6 Q. The first sentence of Paragraph 3 says, the
7 security supervisor or designated officer shall
8 inform the First Justice, or Regional
9 Administrative Justice of the department with
10 the jurisdiction over the person if DHS
11 officials are present in the courthouse with the
12 intent of arresting or taking anyone into
13 custody, i.e a party or other participant in a
14 case before a judge or magistrate or a person
15 intending to business in the courthouse.

16 So we can talk it through. So
17 if Medina Perez, which is the name of the
18 individual later on on April 2nd, in question
19 here, was in the Newton District Court, and ICE
20 was there to take custody of him, then a
21 security supervisor or designated officer was
22 supposed to inform either the First Justice or
23 the Regional Administrative Justice; is that
24 correct?

25 A. Right literally, yes. Now I would say

1 there's a lot of these courts, the First Justice
2 is only there a couple of days a week. So
3 whoever is sitting. I would be First Justice to
4 me. Whatever judge is sitting should be
5 informed.

6 Q. Okay. And in addition to that, you are relying
7 on the, I assume the policy for implementation,
8 relying on security supervisor to have knowledge
9 of this policy.

10 A. Yes.

11 Q. And would you have expected that a presiding
12 justice would have had some discussion with a
13 security supervisor in each individual court so
14 that they were sort of on the same page on this?

15 A. I think that would certainly be a best
16 practice.

17 Q. Okay. As you sit here today, did you know
18 whether or not the Newton District Court
19 actually implemented the Lunn policy on or by
20 April 2nd, 2018?

21 A. I couldn't -- I'd defer to the security
22 officials over there to tell you the answer to
23 that.

24 Q. Okay. And if the presiding justice testified
25 earlier this morning that it was not in effect

1 on April 2nd of 2018, we'd take her word for it;
2 right?

3 A. Yes.

4 Q. And so as you've just said, as I understood it,
5 this is a requirement of the SJC, and failure
6 after having noted that this policy is a
7 violation of the expectation of the SJC;
8 correct?

9 A. Well, I'll reiterate. This was not optional.
10 The SJC made a decision courts are required to
11 implement. One of the holding court, the
12 holding was clear, this policy is pretty clear.
13 It should have been implemented.

14 Q. As you sit here today, do you have any
15 information that anybody has reported
16 Judge Heffernan to the CJC because of this
17 violation?

18 A. No. But I would strongly disagree if
19 somebody made that suggestion. I would very
20 strongly reflect at it.

21 Q. Okay. And why is that?

22 A. Because the court -- These courts, these
23 courts are made up of joint leadership. So when
24 you implement policies like this, it's typically
25 the clerk magistrate, the first justice, the

1 chief probation officer, and the chief court
2 officer that works as a team. And respectfully,
3 to suggest that there's some type of misconduct
4 by not implementing that, and I'm not sure
5 you're suggesting that, if you were, I would
6 strongly disagree with it.

7 Q. If I were to suggest to you that it's very
8 probable that Judge Heffernan was trying to do
9 the best she could, the best way she could?

10 A. No question. That was my experience with her
11 at all times.

12 Q. And it may certainly have been that Judge Joseph
13 was doing the best she could as best she could.

14 A. That may well be true.

15 MR. HOOPES: Thank you. Just
16 have one moment, please?

17 (PAUSE)

18 MR. HOOPES: Nothing further.
19 Thank you.

20 HEARING OFFICER: Special
21 counsel.

22 JUDGE FABRICANT: Very briefly.

23 REDIRECT EXAMINATION

24 BY JUDGE FABRICANT:

25 Q. Chief Justice Dawley, the chief of the

1 Trial Court, is that person appointed by the SJC
2 among one of the judges of the seven Trial Court
3 departments?

4 A. That's correct.

5 Q. And so is that person, while serving as chief of
6 the Trial Court, also not sitting but also a
7 judge of one of the seven Trial Court
8 departments?

9 A. That's correct.

10 Q. Which of those departments was Paula Carey a
11 judge of?

12 A. She was a justice of the Probate Court,
13 Probate and Family Court.

14 Q. Probate and Family Court. Had she ever been a
15 judge of the District Court?

16 A. No.

17 Q. Is Rule 211 a rule of the District Court?

18 A. It's a rule of the District Court and the
19 Boston Municipal Court.

20 Q. Does it apply to Probate and Family Court?

21 A. No.

22 Q. Do you know whether the Probate and Family Court
23 had or has a rule regarding recording?

24 A. I have no idea.

25 Q. The Lunn policy and the Lunn decision,

1 Lunn verse Commonwealth decision of the SJC, are
2 those the same thing or two different things?

3 A. I'm sorry. Could you repeat.

4 Q. The Lunn policy --

5 A. Yes.

6 Q. -- was a document that we referred to, executive
7 office transmittal 1713.

8 A. Correct.

9 Q. And the SJC decision in Commonwealth versus
10 Lunn -- Lunn versus Commonwealth, are those the
11 same thing or two different things?

12 A. Well, they're two distinct things. The
13 decision of the SJC was a court issuance of a
14 decision on the matter and the policy is the
15 Trial Court's implementation of that.

16 Q. The SJC decision. Was the holding of that
17 decision that Trial Courts, court personnel,
18 court officers, cannot hold a person beyond the
19 time that that person would otherwise be held in
20 state custody for purposes related to an ICE
21 detainer?

22 A. Correct. They distinguish a civil detainer.

23 Q. So as opposed to a judicial warrant.

24 A. Yes.

25 Q. So a judicial warrant is a different story.

1 A. Very different.

2 Q. But as to a civil detainer, the holding, if I
3 understand correctly, was that, if you get
4 notice of a detainer, but you're otherwise --
5 the person is otherwise being released on
6 personal recognizance, on bail, whatever,
7 however they're being released, you got to
8 release them.

9 A. Correct.

10 Q. You can't hold them. If ICE calls you up and
11 says I'm going to be there in two hours, you
12 can't hold them for two hours.

13 A. That's correct. The whole Lunn decision was
14 the defendant was held with trial, the trial
15 judge dismissed the case, and the court held
16 him, Lunn, longer, until ICE got there on the
17 civil detainer. His lawyer filed a petition,
18 emergency petition with the SJC saying this is
19 likely to recur. The court heard the matter,
20 and then made it clear, you cannot hold somebody
21 any longer than they would be held on the state
22 charge, for example.

23 Q. And was that a matter of authority in the sense
24 that state law does not give a court authority
25 to hold somebody unless there is state law

1 authority --

2 A. It has been a while since I've read the
3 decision. But I believe the SJC had noted that
4 this is a matter that the legislature could
5 address or may address, but that based on
6 essentially Fourth Amendment precedent, the
7 state constitution, that there was no right to
8 hold somebody based on the civil detainer.

9 Q. Now, the Lunn policy, executive office of
10 Trial Court transmittal 1713, did the SJC issue
11 that?

12 A. No.

13 Q. Was that a policy to tell courts what they're
14 supposed to do given that they can't hold
15 somebody, under the SJC decision, they can't
16 hold somebody beyond the time that the person
17 would otherwise be held on state court charges,
18 was it a policy to tell them, okay, now what are
19 we supposed to do?

20 A. It was, as is stated, it's to provide clear
21 guidance to judges, clerks, probation and
22 security and all court staff on responding to
23 DHS requests and in the presence of DHS officers
24 in the courthouses.

25 Q. And what did you understand -- It may be a while

1 since you've read it, but what did you
2 understand to be the essence of the Lunn policy?
3 It's a number of pages. Was there --

4 A. That's a hard question. There's a lot of
5 different aspects of this. And for instance, it
6 deals with when ICE makes a request for
7 information. It addresses that. It deals with
8 situations in which a person is in custody
9 versus not in custody. So there's a whole
10 series of different scenarios. It also I think
11 imposes requirements on security to record the
12 interactions with ICE when ICE comes to the
13 courthouse and seeks to take someone.

14 Q. Record not in the sense of a recording system --

15 A. Record in the sense as a record, a login I
16 think it references.

17 Q. Was it your understanding that a judge is
18 supposed to be neutral regarding ICE?

19 A. Of course.

20 Q. Not help, not hinder.

21 A. That's correct.

22 Q. Is that a fair summary?

23 A. That is correct.

24 Q. And also, if ICE wants to go to the lockup,
25 supposed to allow them to go to the lockup.

1 A. The guidance clearly is a provision where, I
2 believe that's the preference, if somebody's in
3 custody, then that exchange should take place
4 being in the lockup.

5 Q. Now, if ICE is going to take somebody, if the
6 person that's in the lockup, if that person is
7 still being held on state court charges, they
8 haven't posted bail yet or bail hasn't been set
9 yet or being detained without bail, and so
10 they're go to back in the sheriff's custody, to
11 the House of Corrections, jail, whatever, can
12 ICE take the person?

13 A. No. The person remains in the custody of the
14 state law enforcement where they came.

15 Q. So in order for ICE to take somebody, that has
16 to be a person who is eligible for release.

17 A. Release. Right.

18 Q. But you can't hold somebody longer than somebody
19 would otherwise be held, according to the SJC.

20 A. That's correct.

21 Q. So you got to somehow do this in a matter of
22 seconds; right? They're in the courtroom, the
23 judge says he's released --

24 A. So this Section III, I read this to
25 essentially to try to address that issue and

1 talk about how the hand-off will occur, and
2 that's where it speaks to the lockup provision.

3 Q. And what's your understanding of how the lockup
4 is supposed to occur? Take your time to read
5 whatever you want to read.

6 A. Section 3A, second paragraph, a DHS official
7 is present in the courthouse and seeks admission
8 into the courthouse's holding area in order to
9 take custody of the individual pursuant to an
10 immigration detainer warrant, court officers
11 shall permit the DHS official to enter the
12 holding cell area in order to take custody of
13 the individual once the Trial Court security
14 personnel finish processing an individual out of
15 the court security personnel's custody.

16 Q. So the word is "permit."

17 A. Correct.

18 Q. If they want to go to lockup, you got to let
19 them go to lockup.

20 Now, suppose you have a court where the normal
21 practice -- and maybe this isn't the practice in
22 lot of places. But suppose in a particular
23 courthouse the normal practice is that, if
24 somebody's being released, if the judge says, I
25 order a release on personal recognizance, if the

1 normal practice is, and what happens then is,
2 the court officer takes off the restraints and
3 opens the door to the dock and the person walks
4 out into the courtroom and out the door, if
5 that's the normal practice, what do you
6 understand the implication of that -- this
7 policy to be?

8 A. It would seem to be inconsistent with the
9 policy.

10 Q. That practice.

11 A. Correct.

12 Q. But if that is normal practice, what is supposed
13 to happen in terms of ICE?

14 A. Now let me qualify this. I'm not security
15 expert. A lot of times just left that to the
16 court officers. That's their expertise. When
17 you get involved sometimes, you make it more
18 confusing. But I would think the ultimate goal
19 is that there be a seamless hand-off so that
20 there's not incidents in the public area of the
21 courthouse.

22 Q. So it's a little confusing of how this is
23 supposed to happen under this policy, isn't it?

24 A. Correct.

25 Q. If you go to that paragraph, just above the

1 paragraph we just talked about, there's a line
2 that says, court security personnel shall
3 process that individual out of lockup in the
4 normal course regardless of whether the
5 individual is subject to a civil immigration
6 detainer or warrant.

7 Do you understand that to mean
8 that they're supposed to do whatever is normal
9 there, supposed to do what they normally do with
10 regard to processing the individual --

11 A. I think you can make a strong argument in
12 support of that interpretation.

13 Q. So there's room for interpretation here.

14 A. One thing is, throughout the state, the
15 62 courts, you get very different lockup sizes,
16 you get very different situations in terms of a
17 staffing at some of these courthouses. So
18 there's some unique situations for every court,
19 and you would think that, you know, the
20 leadership of the court, the chief court
21 officer, work those issues out.

22 Q. So you would expect some coordination within the
23 court among security, the first justice, the
24 clerk, whoever else is involved in the
25 leadership of the court.

1 A. No question.

2 Q. And as you read this, you wouldn't be expecting
3 a uniform application of this policy exactly the
4 same in every courthouse.

5 A. You would think there's got to be some
6 flexibility, because not all these courthouses
7 are the same.

8 JUDGE FABRICANT: All right.

9 Thank you.

10 I have nothing further.

11 RECROSS-EXAMINATION

12 BY MR. HOOPES:

13 Q. So it's fair to say, I assume, that out of
14 62 District Courts, --

15 A. Correct.

16 Q. -- that most of them have a lockup.

17 A. There may be one or two out west that don't.
18 They use the local police department.

19 Q. Okay. So that would mean almost 60 probably do;
20 right?

21 A. I think so.

22 Q. And if you read the last page of this policy,
23 labeled Page 8, it's the paragraph above B, it
24 says, to the extent possible, court security
25 personnel should require that DHS officials

1 transport any individuals taken into custody
2 through the prisoner transport entrance and
3 avoid taking the individual through the public
4 areas of the courthouse. To the extent
5 possible.

6 A. Correct.

7 Q. And so you would assume that every presiding
8 justice would make a good faith effort to try to
9 comply with this and only not comply to the
10 extent it wasn't possible; correct?

11 A. Correct.

12 Q. Now, just one other small matter, if I can,
13 which was raised by special counsel.
14 So in Massachusetts practice, the district
15 attorney's office has a particular power, not in
16 the Federal Court, they have the power to file
17 what is called a nolle pros; correct?

18 A. That's correct.

19 Q. So the district attorney's office has the
20 executive branch authority to prosecute or not
21 prosecute regardless of the judge; correct?

22 A. Correct.

23 Q. On the one hand. On the other hand, if the
24 system district attorney or prosecutor says,
25 Your Honor, I'd like to dismiss, the judge has

1 the sole power to dismiss, and it's the DA's
2 responsibility to move for dismissal; correct?

3 A. That's correct.

4 Q. And so with regard to governor's warrants, the
5 governor's warrant is in the form of a
6 complaint, so to speak, in the District Court;
7 correct?

8 A. Yes.

9 Q. And the governor's warrant, the individual can
10 be held without bail, bail can be set, or
11 released in the unlikely circumstance on
12 personal; correct?

13 A. Correct.

14 Q. And so that warrant is live or alive with that
15 authority from the presiding justice until that
16 complaint governor's warrant is actually
17 dismissed; correct?

18 A. Yes.

19 MR. HOOPES: Thank you. No
20 other questions.

21 JUDGE FABRICANT: Just one
22 more.

23 REDIRECT EXAMINATION

24 BY JUDGE FABRICANT:

25 Q. Can an assistant district attorney nolle pros

1 the charge of fugitive from justice?

2 A. I think under -- this is off the top of my
3 head -- I think Rule 17, if I'm correct -- of
4 the Rules of Criminal Procedure, set forth the
5 authority of a nolle pros, and I don't think
6 there are any restrictions on the type of case
7 that a prosecutor can file a nolle pros on. I
8 might be wrong on 17. But I always thought the
9 prosecutor retains the sole and exclusive
10 decision whether or not to charge in the
11 nolle pros authorities exclusively theirs.

12 Q. Rule 16. Entry of a -- And it's a latin term.
13 Nolle prosequi. But it's usually called nolle
14 pros. Correct? A prosecuting attorney may
15 enter a nolle pros pending charges at any time
16 prior to the sentence. A nolle pros shall be
17 accompanied by written statements on nolle pros
18 prosecuting attorney setting forth the reasons
19 for that disposition. In practice, do people
20 tend to use nolle pros or dismissal
21 interchangeably?

22 A. It varies by county. It's an interesting
23 legal issue. The source of some dispute in a
24 number of counties where some judges have
25 declined to act on motions to dismiss so they'll

1 utilize the nolle pros authority. It really
2 varies across the state.

3 Q. And this requirement of a written statement,
4 does that tend to be done in the form of a
5 checkbox form?

6 A. It's usually a form, and a lot of times I've
7 seen in the state in which it happens determine
8 that procedure.

9 JUDGE FABRICANT: All right.
10 Thank you.

11 MR. HOOPES: Thank you.

12 HEARING OFFICER: Okay. Thank
13 you very much, Judge. You're excused.

14 JUDGE FABRICANT: Can the
15 witness be excused?

16 HEARING OFFICER: Yes.

17 JUDGE FABRICANT: Thank you.

18 What remains of the
19 Commission's case is Judge Joseph. And I
20 understand we're going to wait until tomorrow
21 morning.

22 HEARING OFFICER: Yes.

23 MR. HOOPES: You wanted to
24 address --

25 HEARING OFFICER: Yes. And so

1 I was hoping that we can understand what you
2 expected after Judge Joseph's testimony.

3 MR. HOOPES: So I was hoping --
4 Can you hear me or do I need
5 the mic?

6 HEARING OFFICER: I can hear
7 you.

8 MR. HOOPES: So I was
9 expecting, based on our conversation, that after
10 her testimony, we would the begin a case for the
11 respondent on Friday morning. With one
12 exception. But I believe we're probably going
13 to call anywhere up to six witnesses. But just
14 so the court knows, I think it's probably two
15 hours total max. I mean, these witnesses are
16 going to hopefully flow.

17 There is one possible
18 exception. One of the witnesses is a retired
19 judge who's also a mediator. And if she can
20 move her mediation ever so slightly on Friday
21 morning, she'll be here at 9:00. But she may
22 not be able to. We may have to ask your
23 permission to have her come over after
24 Judge Joseph testifies.

25 HEARING OFFICER: Meaning

1 tomorrow.

2 MR. HOOPES: Meaning tomorrow.

3 HEARING OFFICER: That's fine.

4 MR. HOOPES: And my second
5 question would be, if that's our time slot,
6 meaning a couple of hours, would you be looking
7 for us -- when would you be looking for us to
8 have briefs done?

9 HEARING OFFICER: Well, I was
10 thinking about that. And from my perspective,
11 to the extent that both counsel would appreciate
12 the weekend to prepare for that, that's fine
13 with me. We can discuss the issues on Monday.

14 MR. HOOPES: That would be
15 wonderful. And if I can ask, could we do
16 summations at 9:00 a.m.? Mr. Keating has an
17 issue at 11:00.

18 MR. KEATING: I have a doctor's
19 appointment, Judge, if I can possibly keep at
20 11:00 on Monday. I'd like to. I don't want to
21 interrupt the proceedings if that's not
22 possible. But if it's possible --

23 MR. HOOPES: I won't be an
24 hour.

25 HEARING OFFICER: Okay. Is

1 that -- So it sounds like we could do it on
2 Monday, the summations Monday morning.

3 JUDGE FABRICANT: My
4 preference, frankly, would be to do it on
5 Friday, but whatever you prefer is fine.

6 MR. HOOPES: That would be
7 great. I appreciate it.

8 HEARING OFFICER: Yeah. I
9 think giving both sides the weekend to prepare
10 their summations is in everybody's interest,
11 frankly. So I think we can do that. And I
12 think we can certainly be complete by 11:00
13 based on everything.

14 JUDGE FABRICANT: And just to
15 be clear, respondent goes first on closing.

16 HEARING OFFICER: Yes.

17 JUDGE FABRICANT: And so our
18 expectation, then, just so we're clear about
19 timing is, tomorrow we're going to have
20 Judge Joseph and perhaps Judge MacLeod. On
21 Friday, we'll have --

22 MR. HOOPES: Four or five.
23 Quick, quick.

24 JUDGE FABRICANT: And you think
25 that's a total of two hours.

1 MR. HOOPES: Yes.

2 JUDGE FABRICANT: And so we're
3 probably off Friday afternoon, it sounds like.

4 HEARING OFFICER: Yes.

5 JUDGE FABRICANT: Very good.

6 Thank you.

7 HEARING OFFICER: Anything
8 else?

9 JUDGE FABRICANT: That's it.

10 HEARING OFFICER: Thanks All.
11 We'll see you tomorrow.

12 (The proceedings adjourned
13 at 3:47 p.m.)
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C E R T I F I C A T E

I, LISA L. CROMPTON, Registered
Professional Reporter, hereby certify that the
foregoing is a true and accurate transcript of my
stenographic notes of the proceedings in this
matter on the date and time specified in the
caption hereof.

IN THIS WITNESS WHEREOF I have hereunto
set my hand this 27th day of August, 2025.



LISA L. CROMPTON

REGISTERED PROFESSIONAL REPORTER

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CERTIFIED HEARING TRANSCRIPT (DAY 4)

COMMONWEALTH OF MASSACHUSETTS
COMMISSION ON JUDICIAL CONDUCT

COMPLAINT NUMBER 2019-22

VOLUME IV

HEARING

~ BEFORE ~

HEARING OFFICER

DENIS J. McINERNEY, ESQ.

JUNE 12, 2025

9:00 A.M.

Boston, Massachusetts

Lisa L. Crompton, CSR (MA) (RI), RPR

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I N D E X

HONORABLE SHELLEY RICHMOND JOSEPH	PAGE NO.
DIRECT EXAMINATION BY JUDGE FABRICANT	655
CROSS-EXAMINATION BY MS. MULVEY	737
REDIRECT EXAMINATION BY JUDGE FABRICANT	787

E X H I B I T S

EXHIBITS	DESCRIPTION	PAGE NO.
EXHIBIT 5	E-mail chain with attached Executive Office Transmittal 17-13, 5 pages	759

1 HEARING OFFICER: Good morning.
2 We're on the record.

3 So this is the fourth day of
4 the hearing on the Commission on Judicial
5 Conduct's Complaint Number 2019-22.

6 I'd ask that counsel please
7 identify themselves for the record.

8 JUDGE FABRICANT: Judith
9 Fabricant, special counsel for the Commission on
10 Judicial Conduct.

11 MR. NEFF: Howard Neff for
12 Commission on Judicial Conduct.

13 MS. MULVEY: Elizabeth Mulvey
14 for Judge Joseph.

15 MR. HOOPES: Tom Hoopes for
16 Judge Joseph.

17 MR. KEATING: Michael Keating
18 for Judge Joseph.

19 HEARING OFFICER: Thank you.
20 Good morning Everybody.
21 Special Counsel, call your next
22 witness.

23 JUDGE FABRICANT: And I call
24 Judge Joseph.

25

1 HONORABLE SHELLEY RICHMOND JOSEPH,
2 SWORN

3 HEARING OFFICER: Thank you.

4 Take your seat.

5 DIRECT EXAMINATION

6 BY JUDGE FABRICANT:

7 Q. Good morning.

8 A. Good morning.

9 Q. Two years ago, on June 6th of 2023, you and I
10 met in the Commission's office for an interview,
11 I was acting on behalf of the Commission, and
12 your three lawyers were there, and -- the same
13 lawyers who are here now, you were under oath,
14 and there was a court reporter, and the court
15 reporter produced a transcript of that
16 interview; correct?

17 A. Yes.

18 Q. And that transcript is in and stipulated
19 appendices which are all in the book; okay?

20 A. Okay.

21 Q. So we may refer to that the from time to time.

22 You started practicing law in
23 1993; correct?

24 A. Well, I graduated from law school in 1992. I
25 did some work in -- I was sworn into the bar in

1 the end of 1992, and I started working at the
2 end of that year or the beginning of the
3 following year.

4 Q. You were at the attorney general's office,
5 Massachusetts attorney general's office first
6 for some period of time, and then you were with
7 a civil law firm for a period, and then you
8 started a private practice in 2000.

9 A. I did.

10 Q. And your office was in Newton.

11 A. Yes.

12 Q. And your work was mostly criminal defense.

13 A. Mostly.

14 Q. You spent several years as a bar advocate.

15 A. I did.

16 Q. And we've heard some testimony about what bar
17 advocates do, and they serve as attorney for the
18 day, from time to time in different courthouses,
19 and getting entered into whatever's on that day;
20 correct?

21 A. Yes.

22 Q. And that's what you did.

23 A. I did.

24 Q. And you did that for several years, and two of
25 those years were in the Newton District Court;

1 correct?

2 A. I don't recall how long I was a bar advocate
3 in Newton. I think it was longer than that. I
4 was on the bar advocate list for about seven
5 years. And during those seven years, I was a
6 bar advocate both in Middlesex and
7 Suffolk County.

8 Q. So you think your role in Newton as a bar
9 advocate was longer than two years.

10 A. I think it was longer than two years.
11 Although, the bar advocate work that I did, I
12 did more of it as I was beginning my law
13 practice and little by little I --

14 HEARING OFFICER: Could you get
15 just a little closer to --

16 THE WITNESS: Of course.

17 HEARING OFFICER: Thank you.

18 Q. Eventually your private practice picked up and
19 you phased out the bar advocate.

20 A. I did.

21 Q. And that happened -- You're the not the only one
22 who followed that path; right?

23 A. I would expect. Right.

24 Q. During your private practice, sometimes you
25 would be in Newton every day, other times there

1 would be a gap of some months; correct?

2 A. I don't think I was ever in Newton every day.
3 There were times when I had multiple cases in
4 Newton and I would be there every day of the
5 week. There are other times when I had gaps in
6 cases that I was handling and I wouldn't be in
7 Newton for months.

8 Q. So let's take a look at Exhibit N, Page 243,
9 Line 10. So you said, I had a lot of cases in
10 Newton District Court, but they ran slow, some
11 days I was there every week, other days it would
12 be months until I came back. That's what you
13 said.

14 A. Correct.

15 Q. So you had a lot of cases in Newton but it
16 wasn't constant --

17 A. That's right.

18 Q. -- during that period of time.
19 And you were familiar with the courthouse.

20 A. I was.

21 Q. In 2019, the U.S. attorney brought a matter to
22 the Federal grand jury and you were indicted on
23 criminal charges; correct?

24 A. Yes.

25 Q. You were represented by excellent counsel;

1 correct?

2 A. Yes.

3 Q. Two of the same who are here -- All three of the
4 ones who are here are excellent. Two of them
5 represented you in the criminal case; correct?

6 A. That's correct.

7 Q. And the case was dismissed by the Federal Court
8 based on the agreement that you entered into
9 with the United States attorney; correct?

10 A. That's right.

11 Q. The agreement was some four pages long with the
12 signatures on the fourth page; correct? So
13 we're going to bring up the signature page. The
14 agreement is Appendix M. We're going to look at
15 Page 162, which is the signature page. And do
16 you see your signature there?

17 A. I do.

18 Q. And see the signatures of your lawyers there?

19 A. I do.

20 Q. And now we're going to go back a couple of
21 pages, to Page 159, which is the beginning of
22 the agreement, and see the beginning of the
23 agreement. And I'm going to read Paragraph 2,
24 and you have it at Page 115 on your side. I'm
25 just going to read Paragraph 2.

1 Judge Joseph, -- I'm inserting
2 the title, although it was not there --
3 Judge Joseph agreed that within 30 days of the
4 effective date of this agreement she will
5 formally refer herself to the Massachusetts
6 Commission on Judicial Conduct and will
7 thereafter cooperate fully in any investigation
8 or proceeding into her conduct that has been or
9 may be initiated or conducted by the
10 Massachusetts Commission on Judicial Conduct
11 until any such investigation or proceeding is
12 closed or concluded.

13 Such referrals shall include, a
14 stipulation by Judge Joseph to the accuracy of
15 the facts set forth in the attached statement of
16 facts. Parties agree that the attached
17 agreed-upon statement of facts may not represent
18 all relevant facts. Judge Joseph agrees that
19 she will not contest the accuracy of the
20 statement, that she does not object to the
21 consideration or admissibility into evidence of
22 the statement and any investigation or
23 proceeding that has been initiated or conducted
24 by Massachusetts Commission on Judicial Conduct,
25 attest in writing under penalties of perjury to

1 compliance with the conditions of this
2 paragraph, at the time of her submission to the
3 Massachusetts Judicial Conduct. And then there
4 are a couple more sentences about how the
5 Commission reviews the Federal material and
6 there's a sentence that makes it clear that
7 you're entitled to --

8 A. Yeah.

9 Q. So you did refer yourself to the Commission, you
10 did certify that you did so, and we have a
11 statement of facts before us.

12 A. (Witness nods head).

13 Q. So let's -- Is all that correct?

14 A. Yes, it is.

15 Q. Let's look at the statement of facts which was
16 attached to the agreement. And let's look at
17 Paragraph 3. Again, certain title, even though
18 I've -- Judge Joseph knew -- This is Page 163.

19 A. Give me one second. Okay. Thank you.

20 Q. Judge Joseph knew that criminal defendants in
21 Newton District Court custody were kept in the
22 lockup area in the basement of the courthouse
23 and were brought upstairs by a court officer in
24 the courtroom for the court appearances. The
25 normal custom and practice in Newton District

1 Court, subject to certain exceptions, was that a
2 defendant would be released from custody into
3 the courtroom. This courtroom had only one
4 public entry/exit which led to the courthouse
5 lobby.

6 So you are not contesting that
7 the normal custom and practice in
8 Newton District Court, subject to certain
9 exceptions, was that a defendant would be
10 released from custody into the courtroom.

11 A. That's correct.

12 Q. Correct?

13 Now, while you were in practice, you had
14 experience with lobby conferences off the
15 record.

16 A. I did.

17 Q. And in 2015, you were practicing as a criminal
18 defense lawyer.

19 A. Yes.

20 Q. And you became aware in 2015 that lobby
21 conferences were no longer conducted off the
22 record.

23 A. So I wasn't aware that there was a rule
24 change. I am aware of that now. But I did know
25 that practice had changed a little bit, just by

1 experience and being in court where lobby
2 conferences were beginning to be recorded on the
3 record.

4 Q. And you now know that that's because the SJC
5 changed Rule 12 of the Rules of Criminal
6 Procedure to require that lobby conferences be
7 recorded.

8 A. That's correct.

9 Q. Correct? And then you became a judge on
10 November 2nd of 2017.

11 A. I did.

12 Q. And as a new judge, you were provided with a lot
13 of materials.

14 A. Yes.

15 Q. Some of them came from District Court, some of
16 them came from the Trial Court, some of them
17 came from the Flaschner Judicial Institute.
18 There were a lot of materials.

19 A. There were a lot of materials.

20 Q. And among the materials was this binder of the
21 Massachusetts Rules of Court. Correct?

22 A. Yes. It probably was the 2017 or '18
23 version, but it looked something like that.

24 Q. This issue is the 2021 version. But yes, it
25 would have been the version that was current at

1 the time.

2 A. Yes.

3 Q. Your lawyer put it out yesterday, by the way,
4 your lawyer said I think 1,500 pages. Actually,
5 it's about 1,300 pages. But there is a section
6 of District Court rules; right?

7 A. There are.

8 Q. You were familiar with this book even before you
9 became a judge.

10 A. I was.

11 Q. You were familiar with it in practice, maybe
12 even in law school.

13 A. I don't remember it in law school, but
14 certainly in practice.

15 Q. Okay. And so you know that at the back of the
16 book there's a way to find particular sets of
17 rules because there's a list and then there are
18 markings on the edge of the pages that help you
19 find what's listed.

20 A. Yes.

21 Q. So if you wanted to look for District Court
22 rules, you could do that by looking on the list
23 and finding the marking and that would be where
24 that marking is; right?

25 A. Yes. That's correct.

1 Q. And the District Court rules in this book amount
2 to about 30 pages; right?

3 A. I, I don't know.

4 Q. Do you want to look at the book?

5 A. If you tell me it's 30 pages, I believe you.

6 Q. 30 pages you could read or scan in probably an
7 hour; right?

8 A. Rules -- There are times -- I don't know if
9 you can read them in an hour but...

10 Q. But it wouldn't take up 1,300 pages.

11 A. No.

12 Q. The rest of the book has the Rules of Civil
13 Procedure, Rules of Criminal Procedure, Rules of
14 Appellate Procedure, and the SJC court rules,
15 the rules of Superior Court, the rules of the
16 Land Court, the rules, et cetera, et cetera, et
17 cetera, it has all kinds of things; right?

18 A. Yes.

19 Q. So if you wanted to look specifically at the
20 District Court rules, you could do that and
21 you'd get -- you'd find about 30 pages.

22 A. Yes.

23 Q. You never did as a new judge sit down with the
24 rule book and review the District Court rules to
25 make sure you were familiar with the rules of

1 the district --

2 A. I was familiar with the rules from the
3 practice. I did not sit down with the rule book
4 and read the rule from, you know, the
5 District Court rules from beginning to end.

6 Q. Did you read part of it, again, as part of your
7 preparation for becoming a judge?

8 A. As part of my preparation for becoming a
9 judge, there was a training program that the
10 District Court initiated where I sat with judges
11 for the first month or so, and I think over the
12 course of the three and a half weeks I sat with
13 20 different judges and saw what they did on the
14 bench. And I was what they called a baby judge,
15 so I would sit next to a judge on the bench and
16 watch daily with them, whoever they were, and I
17 would go back and review the substantive matters
18 either that I learned that day or that I didn't
19 know that I needed to familiarize myself with.

20 Q. So you've anticipated my next series of
21 questions. But there was never a time when you
22 picked up the rule book, during a break or at
23 night or anytime, picked up the rule book and
24 said maybe I should be familiar with the
25 District Court rules and look through them or

1 skim them or read them.

2 A. Well, I'm sure, if there was an issue that
3 dealt with a rule, I would have referred to the
4 rule book. I don't recall picking it up and
5 just reading it from start to finish.

6 Q. You talked about this court orientation process.
7 You spent about four weeks sitting with other
8 judges so that you could see what each of them
9 does on various substantive matters; correct?

10 A. Yes.

11 Q. And there were about 20 of them, because it's
12 about four weeks, that's about 20 days, usually
13 one judge each day, and so about 20 of them.

14 A. Correct.

15 Q. And you could ask those judges any questions you
16 wanted to ask.

17 A. Absolutely.

18 Q. And during that period of orientation, you have
19 no memory of ever seeing a judge go off the
20 record; right?

21 A. I don't.

22 Q. And you now know that District Court Rule 211
23 requires that all court proceedings be recorded.

24 A. I do.

25 Q. The process for new judges also includes

1 assignment of a mentor; correct?

2 A. Yes.

3 Q. And initially you were assigned
4 Judge Michael Brooks and then that changed
5 later; correct?

6 A. That's correct.

7 Q. And part of the mentor process, as you were
8 told, was that you could call your mentor with
9 questions at any time; correct?

10 A. Yes.

11 Q. And in fact, you could ask questions of any
12 judge at any time.

13 A. Absolutely.

14 Q. And were people welcoming and forthcoming and
15 inviting you to call them at any time?

16 A. Oh, of course. It was such a collegial
17 atmosphere where judges would give you their
18 numbers, their cell phone numbers, call me
19 anytime if you have a question.

20 Q. In the orientation manuals that you got at the
21 beginning, there was a laminated benchcard
22 reporting each matter; correct?

23 A. Yes.

24 Q. And there was a District Court education
25 conference on December 13th, 2017, focused on

1 race and bias that you were not able to attend.

2 A. Yes, I was not able to attend that
3 conference.

4 Q. After that, you're not sure whether you received
5 whatever materials were distributed at that
6 conference; is that correct?

7 A. The only thing I remember receiving was a
8 book by Bryan Stevenson, because he was speaking
9 at that conference. I don't recall receiving
10 any of the other materials. That was given to
11 me earlier because of the family issue,
12 emergency that I had that I was unable to attend
13 the conference.

14 Q. And you didn't contact the administrative law
15 office to say please make sure I get the
16 materials.

17 A. My father had passed away, so I wasn't able
18 to go to the conference. And I had a couple
19 weeks off before I came back to work, and it
20 just wasn't on my mind to call the
21 administrative office and ask them.

22 Q. Okay. But you did get District Court
23 transmittal 12-22; correct?

24 A. What -- Sorry. I don't recall what
25 transmittal that was.

1 Q. That is in the binder at -- So it's Appendix C
2 in the binder. You'll see that it's dated
3 January 16, 2018.

4 A. Yes, I did receive that.

5 Q. And you'll see that it's addressed to all
6 judges, magistrates, et cetera, and it goes out
7 by e-mail, and you saw the practice of
8 transmittals coming by e-mail.

9 A. I did. I don't have any independent memory
10 of receiving this, but it did go to all judges.
11 I did have a computer at that time, so I would
12 imagine I received it, but I don't have an
13 independent memory of receiving this.

14 Q. You were reading your e-mails.

15 A. I was.

16 Q. And if an e-mail came --

17 A. Yes, I was.

18 Q. And the transmittal makes reference to, in
19 Paragraph 6, it makes reference to an updated
20 immigration benchcard that was distributed at
21 that conference that you weren't able to attend;
22 correct?

23 A. Yes.

24 Q. Paragraph 6 on Page 12.

25 A. Yes.

1 Q. Is that correct?

2 And it tells you that, if you don't have it, if
3 you didn't get it, you can contact Jackie Lawson
4 to get it.

5 A. It does.

6 Q. And it also says that an electronic version,
7 laminated version.

8 A. Correct.

9 Q. But an electronic version was attached to the
10 transmittal; correct?

11 A. Yes.

12 Q. And that's on Tab D. So it's at Page 15 and 16
13 in the binder. The transmittal, -- going back
14 for a minute -- it tells you that the new
15 updated benchcard supersedes any previous
16 benchcard.

17 A. Yes.

18 Q. And the benchcard itself tells you when it was
19 issued. Right at the bottom it says
20 District Court AODC revised December 2017;
21 correct?

22 A. I see that now. I don't think I ever noticed
23 that before. But yes, it does say that.

24 Q. It tells you, if you look at the very last
25 paragraph within the box, it tells you, for

1 guidance about immigration matters, for guidance
2 about requests for the DHS to take custody, you
3 can refer to what we're calling the Lunn policy,
4 that is Transmittal 17-13 issued by the
5 administrative law, the executive office of
6 Trial Court on November 10th, 2017; correct?

7 A. Yes.

8 Q. And when you got the transmittal and the
9 attached benchcard, did you check to make sure
10 you had the Lunn policy?

11 A. I, I don't know.

12 Q. Okay.

13 A. It's eight years ago almost, so I just, I
14 just don't remember.

15 Q. So you don't know whether you found it, pulled
16 it out, and read it to make sure you were
17 familiar with it?

18 A. I have no memory of doing that.

19 Q. And you did later on become familiar with that
20 policy.

21 A. I did.

22 Q. And you now know that it goes on for several
23 pages, it has some complexity, but the essence
24 of what it says is that all court personnel are
25 supposed to allow ICE to do their job, not help

1 or hinder, allow them to go to the lockup to
2 take custody if that's what they asked to do.

3 A. Right. I think the essence of the Lunn
4 policy is you can't help or hinder and that the
5 preferable place to take somebody in custody is
6 from the lockup.

7 Q. And you now know that the Lunn decision issued
8 by the SJC, Lunn versus Commonwealth, says that
9 a court cannot hold a defendant in custody any
10 longer than the person would otherwise be held
11 for purposes of an ICE detainer.

12 A. Correct.

13 Q. On April 2nd of 2018, you were sitting in
14 Newton District Court.

15 A. I was.

16 Q. And the First Justice was not there that day.

17 A. Correct.

18 Q. You were sitting in the first floor courtroom,
19 the first session.

20 A. I was.

21 Q. And you had a list of cases to hear.

22 A. I did.

23 Q. You had sat in the Newton District Court about
24 six times before.

25 A. I did. Although I'm not sure if I ever sat

1 with the docket before. I was often there on a
2 Thursday when there was no docket.

3 Judge Heffernan was in Quincy that day. They
4 would assign a judge when emergencies that came
5 in, last minute arrests or restraining orders,
6 something of that nature.

7 Q. So, again, you've anticipated some of my next
8 questions, but that's fine.

9 So on that day you did have a
10 list. And I want to call your attention to the
11 full day docket -- the full day transcript --

12 A. Okay.

13 Q. -- of that day, which is Appendix H. But let's
14 look at Page 47. It is Page 5 of the docket.
15 And it is the second page -- Page 5 of the
16 transcript. It's the second case called. It's
17 a case of someone called -- Take your time to
18 find it.

19 A. I'm sorry. Page --

20 Q. It's Page 47 of the appendix.

21 A. Okay.

22 Q. Within the transcript, if that's easier, --

23 A. Sure.

24 Q. -- Page 5.

25 A. Okay. Thank you.

1 Q. And it's a case of a person by the name of
2 Pineda -- if I'm pronouncing that correctly.
3 What you can see here is that the clerk says,
4 the clerk says that there is private counsel
5 that came in on Friday and requested an
6 11:00 a.m. call because he just filed an
7 appearance Friday and had to be in another
8 court. That's what the clerk says.

9 A. Yes, it is.

10 Q. And so you said second call.

11 A. Yes.

12 Q. And the Commonwealth asked the clerk, do you
13 have the appearance. The clerk said, I don't
14 have that. The defendant's counsel, did you
15 understand that to mean the counsel who had been
16 appointed and was being replaced by private
17 counsel who had entered an appearance?

18 A. Let me just read.

19 (PAUSE)

20 A. I don't know. I don't know that refers to
21 that he doesn't have the appearance or he
22 doesn't have the continuance. I don't know.

23 Q. If you go to where it says defendant's counsel,
24 defendant's counsel said, -- and they're not
25 named -- defendant's counsel said, I have

1 originally been appointed to represent
2 Mr. Pineda and I understand there's been a
3 notice of appearance, may I withdraw. See that?

4 A. Yes.

5 Q. And you said you may.

6 A. Yes.

7 Q. So this was an example of a situation, and it
8 was the second case on the list that day, a
9 situation where retained counsel comes in and
10 replaces appointed counsel.

11 A. Yes. I mean, it looks from the transcript
12 that an attorney had filed an appearance a few
13 days prior to replace appointed counsel.

14 Q. And that's something that you see happen.

15 A. Sure.

16 Q. Not unusual.

17 A. This situation is not unusual, no.

18 Q. And maybe it's because of stereotypes up there
19 in the world about appointed counsel or for
20 whatever other reason, but it happens.

21 A. I mean, I don't feel I can comment as to the
22 reasons it happens. It happens for a whole host
23 of reasons, you know, including sometimes
24 counsel got appointed for bail purposes only
25 because they're not indigent and they're not

1 entitled to private counsel. I can't speculate
2 as to what happened here.

3 Q. Okay. But it happens.

4 A. It does.

5 Q. Now, not long after, the case of
6 Mr. Medina Perez was called.

7 A. Correct.

8 Q. And the case was on the docket that day for
9 arraignment.

10 A. It was.

11 Q. The charges were fugitive from justice based on
12 a Pennsylvania warrant and two drug
13 misdemeanors.

14 A. Yes.

15 Q. And you appointed the bar advocate of the day
16 Ms. Bostwick.

17 A. I did.

18 Q. The assistant district attorney's position in
19 the morning was that she would ask him to detain
20 Mr. Medina Perez on the fugitive from justice
21 charge; correct?

22 A. That's correct.

23 Q. But she would not be seeking bail on the drug
24 charges.

25 A. Well, I think what she said is that she

1 wouldn't be seeking bail on the drug charges if
2 he was held on the fugitive from justice matter.

3 Q. Let's take a look at the transcript, which is
4 Appendix G. Page 39. Appendix G. So it's
5 toward the bottom of Page 39. And you say,
6 Commonwealth with respect to the new charges --
7 I take that was a reference to the drug charges,
8 not that the old Pennsylvania charge -- is there
9 going to be a request. Does "request" mean
10 bail, request for bail?

11 A. A bail request, yes.

12 Q. And she says, no, Your Honor. And then you
13 said, okay. And then she said, well, not the
14 drug possession. And you said, the drug
15 possession that. And she said, if they're
16 treated separately, I'm asking that he be held
17 without. And you said, right on the fugitive.
18 And she said, but if he's not, I would have a
19 bail request.

20 A. Yes.

21 Q. So did you understand that to mean she was not
22 asking for bail on the drug charges, she was
23 going to ask for a detention on the fugitive
24 from justice charge, and if you did not detain
25 on the fugitive charge -- which you didn't have

1 to.

2 A. Correct.

3 Q. But if you do, she would ask for bail.

4 A. Right. Exactly.

5 Q. Do you understand that?

6 A. Yes.

7 Q. So if she were to press that position, which she
8 ultimately didn't do, but if she were to press
9 that position, you would have to make a decision
10 about whether to detain him on the fugitive from
11 justice charge; correct?

12 A. I don't know if I'm understanding your
13 question.

14 Q. If her position didn't change on the fugitive --

15 A. Yes. I would have to make a decision whether
16 to hold him on the fugitive from justice charge
17 or not or release him on bail or just release
18 him.

19 Q. And in making that decision, you would have to
20 determine whether there was sufficient evidence
21 that he was the person wanted in Pennsylvania;
22 correct?

23 A. Well, I think there's a lot of factors that
24 go into that decision, so I don't think it's
25 fair to what you're suggesting.

1 Q. That's one of the factors, --

2 HEARING OFFICER: Sorry. If
3 you could be a little closer to the mic. Thank
4 you.

5 Q. -- that's one of the factors that would go into
6 it.

7 A. It's one of the factors.

8 Q. If you weren't satisfied that there was enough
9 evidence to connect him to the Pennsylvania
10 warrant, you wouldn't have a basis to hold him,
11 would you?

12 A. Well, again, I don't think you can look at
13 the factors individually. You really need to
14 look at the factors as a whole. And that's one
15 of the factors to consider, but there is a lot
16 of factors to consider.

17 Q. That's one of the factors --

18 A. Yes.

19 Q. -- you would have had to consider if that
20 decision were presented to you.

21 A. Of course.

22 Q. And Attorney Bostwick questioned whether he was
23 the person --

24 A. She did. When you have a matter that's
25 before us on the fugitive, one of the first

1 questions that we're trained to ask is whether
2 or not there's a question of identification,
3 because that really sets forth the procedure
4 that we would follow to handle the matter for
5 the day. So that is one of the questions that I
6 asked at some point in the morning, and
7 Attorney Bostwick indicated that there was a
8 question about identification with respect to
9 her client and the fugitive from justice matter.

10 Q. And she asked for time to investigate that, --

11 A. Yes.

12 Q. -- that issue. And you gave her time.

13 A. Of course.

14 Q. As the case was called multiple times over the
15 course of the morning and she was still working
16 on that.

17 A. She was. I think we called it four times. I
18 could be wrong about that. I think it was about
19 four times. And each time she asked for
20 additional time to continue her investigation as
21 to the identification of her client.

22 Q. And when the court was ready to recess for
23 lunch, she was still working on it.

24 A. She was.

25 Q. And she said she had a doctor's appointment

1 during lunch break and asked you to not call it
2 before 2:15 --

3 A. Yeah. She said she was waiting for a fax, as
4 I recall, and she had a doctor's appointment and
5 wouldn't be able to be back until 2:15, so she
6 asked if we could move the session at 2:15 or at
7 least hold this matter until 2:15.

8 Q. And sometime during the course of the day, maybe
9 during the morning, maybe during the lunch
10 break, the clerk informed you that there was an
11 ICE officer present with a detainer for
12 Mr. Medina Perez.

13 A. Yes. It was at the end of the lunch break.
14 The first assistant clerk, who was also my
15 session clerk that day, came in to inform me
16 that there is an ICE detainer for Mr. Medina
17 Perez.

18 Q. And the clerk informed you that it was
19 Judge Heffernan's practice to have the ICE
20 officer remain outside the court.

21 A. He did. And he said that there was a
22 practice in the Newton District Court that
23 prevented ICE from coming into the courtroom
24 proceedings and he asked if I would follow it.

25 Q. And you were concerned about that.

1 A. I was. I had never heard of a policy like
2 that before.

3 Q. And you were concerned about it because you
4 understood that the public has a right of access
5 to court proceedings; correct?

6 A. Correct.

7 Q. You understood that the public has a right to
8 see and hear what's happening in court; correct?

9 A. That's right.

10 Q. And you knew, as you told me in our interview,
11 these are public hearings open to the public.

12 A. That's right.

13 Q. And you remembered that there was a policy
14 somewhere about ICE but you couldn't put your
15 hands on it.

16 A. Correct.

17 Q. So you called the administrative office of the
18 District Court and you spoke with a lawyer
19 there.

20 A. I did.

21 Q. And the lawyer there read the Lunn policy to
22 you.

23 A. Yeah. It took them a while, a short while to
24 call -- to find it, and they had to call me
25 back, and they read me the policy.

1 Q. And you concluded that you could follow
2 Judge Heffernan's policy.

3 A. Yes. We talked about the policy. It was a
4 fairly long policy. They read it to me. And I
5 told them the concern I had and the information
6 that I was given about this policy. And my
7 question was two-fold. One, do I have to -- you
8 know, is the policy consistent with the
9 Trial Court -- is the Newton policy consistent
10 with the Trial Court policy; and two, is it a
11 policy, Newton policy that has to be followed,
12 and I was given advice on that.

13 Q. And after that conversation, you told the clerk
14 to make that request to the ICE officer, to step
15 outside the court.

16 A. Well, I did. I told him I would follow the
17 Newton District Court policy. And I was a new
18 judge, a visiting judge. I was only there for
19 the day covering for Judge Heffernan, who was
20 not there for the day, and I didn't feel that it
21 was my place to not follow any policies that the
22 court had so long as they were proper policies
23 according to the administrative office.

24 Q. And so the clerk told you that he would do that.

25 A. Yes.

1 Q. And in the afternoon, after the lunch break.

2 A. Yes.

3 Q. The Medina Perez case was called at
4 2:48:13 p.m., and Mr. Jellinek appeared,
5 David Jellinek appeared on behalf of the
6 defendant; correct?

7 A. He did.

8 Q. And the transcript now, again, is on Tab G.
9 We're going to look at Page 40. And you have
10 stipulated to the accuracy of this transcript;
11 correct?

12 A. I have.

13 Q. So I'm going to read from the transcript and
14 then I'm going to stop at various times and ask
15 you some questions about it.

16 So at 2:48:13 Clerk Okstein
17 says, court officer, can you bring out the next,
18 Mr. Perez. And Court Officer MacGregor says all
19 right. Clerk Okstein says, Judge, the next case
20 will be Commonwealth versus Jose Medina Perez,
21 Attorney David Jellinek has filed an appearance
22 on behalf of Mr. Perez. And you say, good
23 afternoon.

24 A. I did.

25 Q. Attorney Jellinek says, good afternoon,

1 Attorney Jellinek on behalf of Mr. Perez, may we
2 approach briefly. You say, yes, please. And
3 Attorney Jellinek said, thank you. Clerk
4 Okstein said, do you want to wait for your
5 client. Attorney Jellinek said, no, side bar.
6 And you said, we're just going to side bar.
7 A. That's correct.

8 Q. So at that point the defendant had not been
9 brought into the court.

10 A. He was in the process of being brought up.
11 And the question was whether to wait for him to
12 actually get into the courtroom or to begin the
13 side bar without him since he wasn't going to be
14 part of the side bar conversation, but since you
15 could hear the steps coming, he was coming
16 upstairs, I said that we could go to side bar
17 before he was physically let into the courtroom.

18 Q. And an attorney certainly can waive his client's
19 presence.

20 A. He could. That's not what happened here.

21 Q. But he said not to wait for him.

22 A. Right. But it was going to be a side bar
23 anyway without his client present.

24 Q. When Mr. Jellinek asked to go to side bar, you
25 granted that request.

1 A. I did.

2 Q. And you knew that that meant the public could
3 see what was going on but couldn't hear what was
4 being said.

5 A. Correct.

6 Q. You also knew that, as long as you were on the
7 record, if anyone wanted to know what had been
8 said, they could get a recording.

9 A. I hadn't thought of that at the time. But
10 that is true, that if it's on the record, the
11 public can get a recording of it.

12 Q. So there's still public access, although it's
13 not so immediate.

14 A. Correct.

15 Q. Now, let's go back to the transcript. So you go
16 to side bar. And you said -- It starts with
17 something inaudible. Then you said, is
18 dismissed. Is that a reference to the fugitive
19 from justice charge?

20 A. I don't know what that is. That doesn't make
21 a lot of sense looking at the transcript, so I'm
22 not sure if that -- I'm not sure what that is.

23 Q. What is it that was dismissed?

24 A. Nothing at that point in time had been
25 dismissed, so I'm not sure.

1 Q. Ultimately, the course of the day, what was it
2 that was dismissed?

3 A. Ultimately, the Commonwealth moved to dismiss
4 the fugitive from justice but --

5 Q. Did she move to dismiss or did she nolle pros?

6 A. She moved to dismiss. There was no nolle
7 pros filed in that matter.

8 Q. So after you said it was being dismissed, you
9 said, so it's my understanding that ICE is here.

10 A. Yes.

11 Q. And that was the first in this call of this
12 case, that was the first mention of ICE;
13 correct?

14 A. I believe so.

15 Q. And then Attorney Jellinek says, so there's the
16 fugitive. And Judge Joseph says, if there's no
17 warrant. And the assistant district attorney
18 says, yes. And Attorney Jellinek says, there is
19 no something inaudible that we can tie this to
20 him. And the assistant district attorney says,
21 I don't think it's him. Is that, as you
22 understood it, in reference to the Pennsylvania
23 charge?

24 A. I believe so.

25 Q. And then you said, okay. Then Mr. Jellinek

1 says, ICE is convinced that this guy -- went
2 over to ICE, they say they have a biometric
3 match, I went through it and did the research,
4 there's 13 FBI numbers connected to this Social,
5 so something's bad with the inaudible, my client
6 denies that it's him, ICE is going to pick him
7 up if he walks out the front door, but I think
8 the best thing for us to do is to clear the
9 fugitive issue, release him on a personal, and
10 hope that he can avoid ICE. Is that what was
11 said?

12 A. That's what it says, yes.

13 Q. So you understood that what Mr. Jellinek wanted
14 to do, what his goal was, was to have his client
15 avoid ICE.

16 A. Oh, what I -- how I interpreted that is that
17 he had concerns that his client was not the same
18 person that ICE thought he was, just like he
19 wasn't the same person he was arguing that
20 Pennsylvania thought he was, and I interpreted
21 that as him wanting more time to do the
22 investigation to see how that pertained to both
23 agencies.

24 Q. Is that what he said?

25 A. Well, he said, avoid ICE. And my response

1 was, if you need more time, we can hold him
2 until tomorrow.

3 Q. And then did he accept that suggestion?

4 A. He didn't ultimately.

5 Q. So he wasn't asking for his client to be held
6 longer so that he could work on the issue, was
7 he?

8 A. Well, at that point in time I didn't know
9 what he was asking for. I can only tell you how
10 I interpreted it, which, as you can see from my
11 response, is that I offered to have him held
12 until the following day.

13 Q. So the assistant district attorney says, I don't
14 think arguing ICE is really my. And
15 Attorney Jellinek says, right. Then she says --
16 she's continuing but she was interrupted. She
17 says my, my. And then you said, the other
18 alternative is, if you need more time to figure
19 this out, hold him until tomorrow.

20 A. Right.

21 Q. And David Jellinek says something inaudible.
22 And then you said, then it's a different. Do
23 you know what you were referring to?

24 A. I don't.

25 Q. Then the assistant district attorney says,

1 there's a detainer attached to my paperwork, but
2 I feel like that's separate and apart from what
3 my role is. And then Attorney Jellinek says,
4 there is an ICE detainer, so if he's bailed out
5 from Billerica, and then something inaudible,
6 ICE will pick him up. Then you said, ICE is
7 going to get him. Attorney Jellinek says
8 something inaudible. And then you said, what if
9 we detain him.

10 A. Correct.

11 Q. Attorney Jellinek said, are we on the record.
12 And you said, Larry, can we go off the record
13 for a moment. And Larry refers to first
14 assistant clerk who was serving as session clerk
15 that day.

16 A. Correct.

17 Q. And the clerk said, what's that. And you had to
18 get his attention.

19 A. Right. He was -- Yeah. He wasn't paying
20 attention, so he -- I think his reference,
21 what's that, I interpreted that as what's that,
22 I didn't hear that.

23 Q. And then you said, are we off the record. And
24 Clerk Okstein says, we're on the record.
25 David Jellinek says, can we go off the record

1 for a minute.

2 A. Correct.

3 Q. And when you said -- When he asked to go off the
4 record, he didn't give any reason and you didn't
5 ask for any reason; correct?

6 A. That's right.

7 Q. And you granted the request by asking the clerk
8 to go off the record.

9 A. I did.

10 Q. And you told me in our interview that there
11 didn't seem to be any reason not to allow it.

12 A. Correct.

13 Q. You said there wasn't a lot of contemplation.

14 A. That's correct.

15 Q. And you said you didn't give it much thought.

16 A. I didn't.

17 Q. And you said there really wasn't a reason.

18 A. No. At that point in time, I didn't know
19 that there was a rule preventing it. And so he
20 asked, and I allowed it.

21 Q. And you said, when we interviewed, that you
22 thought he might tell you something about why
23 Attorney Bostwick hadn't come back after lunch.

24 A. She said she had a medical appointment. I
25 wasn't sure. I figured in the past, when off

1 the record conversations were conducted, because
2 this was something sensitive to discuss. That
3 could have been one of the options.

4 Q. The medical thing.

5 A. Sure.

6 Q. But in fact, she had come back. She was sitting
7 in the audience.

8 A. I didn't realize that at the time.

9 Q. And you knew that, if you're off the record,
10 there's no record.

11 A. Correct.

12 Q. So there's no public access.

13 A. Right.

14 Q. But this was an arraignment, not a lobby
15 conference, not a conference regarding a
16 disposition; correct?

17 A. Correct.

18 Q. And you have no specific memory of ever seeing a
19 judge go off the record.

20 A. I have no specific memory one way or the
21 other. I didn't keep track of when people were
22 on or off the record. Certainly, it could have
23 happened. I just can't recall a specific matter
24 or what was discussed.

25 Q. So no specific memory.

1 A. No, not one way or the other.

2 Q. And you then had a conversation off the record
3 for some 52 seconds.

4 A. Correct.

5 Q. And the conversation was about the Medina Perez
6 case.

7 A. It was.

8 Q. Not about anything else.

9 A. No. It was about the Medina Perez case.

10 Q. And you have stipulated -- Getting back to the
11 statement of facts that you agreed to.

12 A. Sure.

13 Q. -- with the U.S. attorney that, during that
14 off the record conversation, Mr. Jellinek asked
15 that the defendant be allowed to go back
16 downstairs after he was released; correct?

17 A. After -- That he be allowed to interview his
18 client with the assistance of the interpreter in
19 the lockup, I would say prior to his release.
20 After I had released him on his own recognizance
21 but before the court officers had physically
22 released him in the lockup.

23 Q. So let's take a look at Appendix M, Page 164,
24 Paragraph 10. So after the recorder was turned
25 off, there was a 52-second off the record side

1 bar conference with Judge Joseph with defense
2 attorney, with prosecutor present. In the
3 course of this conference, the defense attorney
4 asked Judge Joseph to allow -- and this refers
5 to him as AS. I think it was intended to mean
6 alien subject, but we'll call him Medina Perez.
7 -- to allow Mr. Medina Perez be escorted up to
8 the courtroom by a court officer to go back
9 downstairs.

10 A. Correct.

11 Q. And your position is that nothing was said off
12 the record that hadn't been said on the record;
13 correct?

14 A. No, that's not correct. There was one thing
15 that was different off the record than on the
16 record, and I put that on the record as soon as
17 we went back on the record.

18 Q. So maybe my question is confusing. Your
19 position is that nothing was said off the record
20 that wasn't then put on the record.

21 A. Afterwards. So there was one thing that was
22 said off the record that was not said on the
23 record, and that was his request to speak with
24 his client in the lockup area with the
25 interpreter prior to his release.

1 Q. And you put that on the record.

2 A. And I put that on the record.

3 Q. And other than that, your position is nothing
4 was said off the record that wasn't said either
5 before or after, wasn't said at some point on
6 the record.

7 A. So the off the record conversation was really
8 a continuation of the on the record
9 conversation. The words were different, so I
10 don't -- but there was nothing of substance that
11 was any different than him asking to speak with
12 his client downstairs with the assistance of the
13 interpreter.

14 Q. So there was no purpose for being off the
15 record.

16 A. At the time, I didn't know what the purpose
17 was.

18 Q. Looking at it in retrospect, there was no
19 purpose for being off the record according to --

20 A. Again, at the time, on April 2nd, I didn't
21 know what the purpose was. I -- He asked to go
22 off the record, and I allowed that request.

23 Q. And shortly before you allowed that request,
24 Mr. Jellinek had told you that he didn't think
25 his client was the right person for ICE and had

1 said that he thought the best thing to do was to
2 clear the fugitive issue, release him on
3 personal, and hope that he can avoid ICE.

4 A. Yes. That's what his response was or that's
5 what his statement was, which is when I
6 suggested to hold him without bail overnight.

7 Q. And your suggestion was to hold the defendant
8 without bail to prevent ICE from arresting him
9 while the attorney would investigate.

10 A. No. My purpose for holding him overnight was
11 to give the attorney enough time to continue his
12 investigation. It was already 3:00 in the
13 afternoon. And I had afforded his morning
14 attorney plenty of time to do her investigation,
15 and I felt that it was only fair now that there
16 was a new attorney, who came in after the lunch
17 break, to give him the same courtesy that I gave
18 her in the morning. And, --

19 Q. I'm sorry.

20 A. -- and in order to make sure that everybody
21 would be back the next day, the only way I saw
22 at the time to do that would be to detain him,
23 hold him without bail for the night, and have
24 everybody come back the next morning.

25 Q. And what she had been investigating was the

1 Pennsylvania warrant, whether he was the right
2 person for the Pennsylvania warrant.

3 A. Yes. She was investigating his
4 identification as it pertained to the
5 Pennsylvania warrant.

6 Q. And what you thought that Mr. Jellinek would be
7 looking to investigate was whether he was the
8 right person for ICE; correct?

9 A. Well, they were working off the same
10 biometric information and identification
11 information. So I'm not sure that you can
12 really separate them like that. The fugitive
13 from justice matter hadn't been dismissed yet,
14 and his identification was important. I mean,
15 we need to know who's coming in and out of the
16 courthouse.

17 Q. But the assistant district attorney had already
18 said she had concluded he was not the right
19 person for the Pennsylvania warrant and she was
20 seeking to dismiss that.

21 A. I'm not sure whether or not -- Let me take a
22 look at the transcript. Give me one moment.

23 Q. You might look at the top of Page 41.

24 A. Right. That's all part of the same
25 conversation, yes.

1 Q. She said, I don't think it's him.

2 A. I don't think it's him, yes.

3 Q. Meaning, the Pennsylvania --

4 A. Correct.

5 Q. She wasn't saying anything about ICE.

6 A. Correct. But she hadn't moved to dismiss it
7 at that point in time.

8 Q. But you understood that she was going to.

9 A. Not at that -- She said I don't think it's
10 him, then we started talking about the, as I'm
11 looking at the transcript, the identification as
12 it pertained to ICE as well. So kind of talking
13 about it all at the same time.

14 Q. And she said, at least once, perhaps more than
15 once, ICE is not my role.

16 A. Correct.

17 Q. So she wasn't talking about identification for
18 ICE. She was talking about identification for
19 Pennsylvania and she was telling you she had
20 concluded that she didn't think it was him.

21 A. Well, I'm not sure -- I think she was saying
22 that the ICE detainer was not her issue, you
23 know, she was concerned about the two complaints
24 that -- the Massachusetts complaints. I think
25 the conversation that we were having was whether

1 he was the same individual that Pennsylvania
2 thought, that ICE thought he was, and all I was
3 doing was trying to give the attorney more time
4 to do his investigation.

5 Q. And you thought the suggestion to hold the
6 defendant overnight without bail, you thought
7 that was a good suggestion for Mr. Jellinek's
8 client; correct?

9 A. I did.

10 Q. That's what you said in your response to the
11 Commission --

12 A. I did.

13 Q. And Mr. Jellinek didn't like that suggestion;
14 correct?

15 A. He did not.

16 Q. You were concerned that ICE might take the wrong
17 person.

18 A. Yeah. I wasn't really concerned that ICE was
19 going to take the wrong person. ICE was not my
20 concern. I was concerned about giving the
21 attorney enough time to do the investigation
22 regarding his client's identification that I
23 thought he wanted to do. And if he could get
24 that information and convince ICE that it wasn't
25 who they thought he was, that would be his job.

1 That's not my role. I wasn't concerned about
2 ICE.

3 Q. So let's look at your response to the
4 Commission's charges at Paragraph 23, which I'll
5 read from here, but try --

6 A. Is it in the book so I can read it as well?

7 Q. So we don't have it in our copy in hand.

8 A. Okay.

9 Q. So maybe make it bigger.
10 Judge Joseph disagrees either that her
11 statements as quoted in Paragraph 23 --

12 HEARING OFFICER: I'm sorry.
13 Please speak up. Speak into the microphone.

14 Q. Judge Joseph disagrees that her statements as
15 quoted in Paragraph 23 conveyed an intention to
16 assist defense counsel to identify and avoid ICE
17 or that she subjectively had any intention. As
18 she had tried to do throughout the day,
19 Judge Joseph did intend to permit both of
20 Medina Perez's counsel sufficient time to
21 represent the client properly because she did
22 not want ICE to take custody of Medina Perez if
23 it was determined that he was not the person
24 subject to the detainer. Given the preceding
25 events, Judge Joseph's intention was to make

1 sure that Medina Perez's counsel, who had
2 repeatedly insisted that the ICE detainer did
3 not pertain to his client, had a reasonable
4 opportunity to investigate his belief that his
5 client was not the subject of the detainer and
6 to present ICE with any further information he
7 was able to obtain to establish that ICE was
8 mistaken by his client's identity. Her
9 suggestion was intended to explore a course of
10 action that would the cause the defendant to be
11 held without bail in state custody until morning
12 to permit defense counsel a reasonable
13 opportunity to make that inquiry. And then it
14 goes on.

15 So you wanted to make sure that
16 ICE wasn't going to take the wrong person;
17 correct?

18 A. Again, my concern was, allowing the defense
19 attorney enough time to investigate and do
20 whatever job he felt that he could do with
21 whatever information that he got. I was just
22 trying to hit pause, just like I had four times
23 during the morning.

24 Q. And your proposal was to do that by detaining
25 him overnight.

1 A. That's correct. That was the only safe,
2 secure, practical way to do it to make sure that
3 everybody would be back the next day.

4 Q. And if he were -- If the fugitive from justice
5 charge was dismissed, you couldn't detain him
6 overnight on that if it was dismissed.

7 A. That's true. But it hadn't been dismissed
8 yet.

9 Q. So did you think that you would deny the motion
10 to dismiss that charge so as to keep him
11 overnight even though the DA was saying she
12 didn't think it was him?

13 A. See, now we're speculating as to things that
14 didn't happen. But what I was suggesting at
15 that point in time was pause, everything stops
16 right here, and we are going to do all of this
17 tomorrow, we'd handle the fugitive from justice
18 matter tomorrow, we'll handle the arraignment on
19 the Newton charge tomorrow, he's going to get
20 held one more day so you can do your
21 investigation however you want to do it and get
22 any information that you think might be helpful,
23 if there's any helpful information, we'll all
24 come back tomorrow.

25 Q. Did you consider the question of what the legal

1 authority would be to detain him overnight?

2 A. At that point in time, I don't think I got to
3 analyze it in those terms. I was really just
4 trying to hit pause and bring everybody back
5 tomorrow to give him the time that I thought he
6 was requesting to do the investigation that he
7 wanted, and I really wanted to extend him the
8 same courtesy that I had given prior counsel
9 over the morning to do exactly what she had
10 done.

11 Q. So the question of what legal authority there
12 would be to keep a person at the jail overnight,
13 you didn't think about that.

14 A. Well, it would have been, it was by
15 agreement, we would have just continued the
16 matter until the following day. And I guess,
17 technically, if the fugitive of justice matter
18 hadn't been dismissed, which it wasn't at that
19 point in time, that could have been a legal way
20 to do it as well. But I don't think I really
21 contemplated that at the time. I think it was
22 just really more continue all of this until
23 tomorrow, we'll do all of this tomorrow.

24 Q. And didn't think through the question of
25 authority to detain him.

1 A. No. You can hear in the transcript that
2 we've played, it all happened very quickly, and
3 I was responding to the statements that I was
4 hearing and the questions I was being given,
5 really, I was just trying to hit pause and say,
6 sure, happy to give you more time.

7 Q. And you said it happened very quickly. You were
8 the judge; right?

9 A. Sure.

10 Q. You were in charge.

11 A. I was.

12 Q. You could slow it down if you thought that
13 appropriate, couldn't you?

14 A. Well, that's what I tried to do, by saying
15 I'm going to give you your time, let's come back
16 and do this tomorrow.

17 Q. So you could slow down the proceeding in the
18 courtroom if you thought that appropriate,
19 couldn't you?

20 A. I suppose.

21 Q. You could take a recess and go into your lobby
22 and pause some more, couldn't you? Call your
23 mentor.

24 A. Hypothetically.

25 Q. Call another judge.

1 A. Well, that already happened. I spent a good
2 portion of the lunch break and then 45 minutes
3 afterwards doing that. So we didn't get back on
4 the bench until 2:48, which we typically get
5 back at 2:00. I knew this case was being called
6 at 2:15. So there was a significant delay in
7 starting the session so that I did have an
8 opportunity to call down to the administrative
9 office and seek guidance.

10 Q. But as to this question of detaining him
11 overnight when the assistant DA is saying it's
12 not him for the fugitive from justice warrant,
13 and you're -- the question of whether you could
14 detain him overnight, whether there was legal
15 authority to detain him overnight, you didn't
16 think to look into that, ask someone's advice
17 about that?

18 A. I wasn't analyzing it that way. I was just
19 trying to find the solution to the problem I
20 thought he was asking me, which was can I please
21 have some more time to do my investigation.

22 Q. And that wasn't -- He rejected that suggestion;
23 right?

24 A. He rejected that, which is why he got
25 released on his own recognizance.

1 Q. And you told me in an interview that you were
2 very concerned about who is this guy, you really
3 wanted to determine who he was.

4 A. Yes.

5 Q. And you told me that you felt that you had a
6 responsibility to everybody involved, the
7 defendant, the attorneys, the district
8 attorney's office, ICE, everybody needed to know
9 who he was.

10 A. Correct.

11 Q. And you felt that it would be an injustice to --
12 for ICE to take him if he was the wrong person.

13 A. I don't know if I -- whether or not I used
14 the word "injustice." I was very concerned
15 about knowing who the individual was that was
16 being arraigned in my courtroom that day given
17 all of the identification issues that we had
18 been facing that day.

19 Q. And you didn't want an injustice to happen in
20 the courthouse; correct?

21 A. You never want injustice to happen. You want
22 fairness to happen.

23 Q. Even if he was the right person, you were not
24 confident that the ICE agents would either delay
25 their seizure of the defendant to permit an

1 attorney/client conference or an attorney
2 conference to take place once they had taken him
3 custody; correct?

4 A. Can you repeat that? I don't understand your
5 question.

6 Q. This is your response to Commission's charges at
7 Paragraph 24. You said that you were not
8 confident that the ICE agents would either delay
9 their seizure of the defendant to permit an
10 attorney/client conference or permit an
11 attorney/client conversation to take place once
12 they had taken him into custody. Right?

13 A. Right. That's why I suggest -- That's why
14 the attorney asked if he could just speak with
15 his client in the lockup area prior to his
16 release to ICE custody, and I allowed that to
17 happen.

18 Q. And you wanted to pause the ICE arrest. That's
19 what you told me in our interview.

20 A. Not necessarily. I just wanted his attorney
21 to be able to speak with him.

22 Q. Well, let's look at your interview, Page 216.
23 So this is Appendix M, Page 216 of the appendix.
24 Let's look at Line 5. And you said, it would
25 just pausing everything. Right?

1 A. I'm just reading the paragraph.

2 Q. Sure. Read as much as you feel you need to to
3 understand the context.

4 (PAUSE)

5 A. So as I say a few lines before that, the
6 question of why didn't you feel like you needed
7 to put that on the record, meaning that he could
8 speak with his client in the lockup needing the
9 assistance of the interpreter. And my answer
10 was -- He asked me to. I didn't feel as if I
11 needed to. But he asked. And I was under the
12 impression he was going to go directly into ICE
13 custody. And it seemed as if it was important
14 for him to be able to speak to his client before
15 that, as I paused so that he would have the
16 assistance of the interpreter in order to do
17 that.

18 Q. And then you say, it was just pausing
19 everything. Correct?

20 A. It was pausing everything because they were
21 going to be taking him into ICE custody. Yeah.
22 It was a place he could have a quick
23 conversation before that happened.

24 Q. And then you went back on the record. And we'll
25 go back to the transcript, Exhibit G, and we'll

1 go back to Page 40 -- Page 41. So when you went
2 back on the record, there was no more discussion
3 about whether the defendant was the right person
4 for ICE; correct?

5 A. So where, -- I'm sorry -- where are we
6 talking?

7 Q. Exhibit G.

8 A. Talking about 2:50:57?

9 Q. Yes.

10 A. Yes. Correct.

11 Q. So back on the record. There's no more mention
12 of the question of whether the defendant is the
13 right person for ICE.

14 A. Correct.

15 Q. Correct? And I'm just going to read the
16 transcript at this point.

17 A. Okay.

18 Q. So Clerk Okstein says, Judge, we're back on the
19 record on Mr. Jose Medina Perez,
20 Attorney Jellinek on behalf of Medina Perez.
21 And you say, good afternoon, Mr. Jellinek.
22 Attorney Jellinek says, good afternoon.
23 Attorney Jellinek then says, after some
24 extensive research into the various FBI numbers
25 and then something inaudible Social Security

1 numbers, as well as obtaining a photo from
2 Pennsylvania, we don't believe that this
3 gentleman is the same gentleman on the fugitive
4 from justice warrant. Did it strike you as odd
5 that it's the defense attorney who's saying
6 that -- saying it first?

7 A. It did. But ultimately, it didn't matter.

8 Q. And then the assistant district attorney
9 confirms it. She says, Your Honor, with the
10 information that I have, I don't think that
11 there is enough tying him to the Pennsylvania
12 warrant, a great deal of other out of state
13 records, I do believe that some of them belong
14 to this individual, but that is not what's at
15 issue.

16 A. Correct.

17 Q. And you said, okay. And the assistant district
18 attorney said, so at this point I would dismiss
19 the. And you said, the fugitive. She says,
20 count one. And you said, okay. And then she
21 says, there's not a bail request for counts two
22 and three. Those are the drug counts.

23 A. Yes.

24 Q. But I would ask that for a pretrial conference
25 date on those. And you said, okay. And then

1 Attorney Jellinek said, absolutely. You said,
2 that's fine. Attorney Jellinek said, I would
3 ask that, I believe he has some property
4 downstairs, I'd like to speak with him
5 downstairs with the interpreter if I may. And
6 you said, that's fine, of course. And then he
7 said, thank you. And the clerk said -- I'm
8 sorry. You said, Commonwealth no request on
9 counts. District attorney said, yes. The clerk
10 said, so do you want me to arraign him. And you
11 said, yes, please. And then -- This is the
12 district attorney said, yes, please. And you
13 said, yes. Defense counsel said, yes. And then
14 Clerk Okstein goes through the arraignment
15 process. And defense attorney says, could we
16 have May 29th for a pretrial. The clerk says,
17 May 29th. Defense attorney says, please. And
18 then you said, sir, I'm going to enter a plea of
19 not guilty on your behalf, Attorney Jellinek has
20 filed his appearance to represent you in this
21 matter, are you privately retained. Jellinek
22 says, yes. And then you said, okay, sir, you
23 are entitled to request an examination to
24 determine whether you're a drug-dependent person
25 who would benefit from treatment, if you choose

1 to exercise this right, you must do so in
2 writing within five days, and your attorney can
3 further explain that to you. Mr. Jellinek says,
4 thank you. Clerk says, all right, Judge.
5 Attorney Jellinek says, thank you. Clerk says
6 something inaudible. Attorney Jellinek says,
7 all set, Mr. Clerk. And you said, wait just a
8 second.

9 And then turning over to the
10 next page. You see the clerk speaking to you.
11 Now, the clerk is right in front of you;
12 correct?

13 A. Correct.

14 Q. So he can turn around and speak to you in a soft
15 voice, but it's still on the record.

16 A. Yes.

17 Q. And he said -- When we listen to the tape -- And
18 you've heard the tape recording now multiple
19 times --

20 A. Yeah.

21 Q. -- in this proceeding. So you can hear that
22 it's a softer voice. He says, there was a
23 representative from ICE here in the court to
24 visit the lockup. Correct?

25 A. Correct.

1 Q. And you said, that's fine, I'm not going to
2 allow them to come in here, but he's been
3 released on this.

4 Now, you had already told the
5 clerk that ICE couldn't come into the courtroom,
6 correct, in accordance with Judge Heffernan's
7 practice?

8 A. Correct.

9 Q. And -- So you said it again at this point.

10 A. Right. I felt bound by the Newton District
11 Court policy that we were following.

12 Q. So then probation officer asked, are we still
13 doing the \$150 attorney fees. No, he's
14 privately retained. And then you reiterated
15 what date, May 29. And then the clerk gives him
16 the standard warning. And then Court Officer
17 MacGregor asks, he's released, Mr. Clerk? Clerk
18 says, what's that? Court Officer MacGregor,
19 he's released? Clerk says, he is. Attorney
20 Jellinek says, yup. And then you said, he is,
21 Mr. Jellinek asked if the interpreter can
22 accompany him downstairs to further interview
23 him. And Attorney Jellinek says, yes, please.
24 And you said, and I've allowed that to happen.
25 And then Attorney Jellinek says, thank you.

1 According to this, Attorney Jellinek says again,
2 thank you, Your Honor. And you said, you're
3 welcome. Clerk says, thank you, Judge, that's
4 all we have. That's all -- we're all done for
5 now. So that ended the proceeding.

6 A. Yes.

7 Q. And during the course of that proceeding, of
8 that on the record portion back in open court,
9 the interpreter is interpreting for the
10 defendant; correct?

11 A. Yes, he is.

12 Q. And in the recording, you can hear that voice in
13 the background; correct?

14 A. Correct.

15 Q. And you knew throughout that on the record in
16 open court, in part, you knew that the ICE
17 officer was not in the courtroom.

18 A. Correct.

19 Q. So when you said that the defendant was
20 released, you knew that the ICE officer was not
21 in the courtroom.

22 A. Correct.

23 Q. And you knew that, when you said he was going
24 downstairs with his lawyer, the ICE officer is
25 not in the courtroom.

1 A. I didn't hear --

2 Q. That the ICE officer was not in the courtroom.

3 A. That's correct.

4 Q. And you knew that the ICE officer was out in the
5 main lobby outside the courtroom; correct?

6 A. I don't know where the ICE officers were.

7 Q. Well, let's go back to -- First of all, let's go
8 back to the transcript where Mr. Jellinek
9 says -- We're back to the top of Page 41.
10 There's a big paragraph with Mr. Jellinek
11 talking.

12 A. Where are we again? Sorry.

13 Q. Page 41. Mr. Jellinek is talking. And he says,
14 ICE is going to pick him up if he walks out the
15 front door. Did that give you a clue about
16 where the ICE officer was?

17 A. You know, I didn't know. I assume that -- I
18 didn't know how many officers there were. I was
19 under the impression there would be one officer.

20 Q. But where did you think they were?

21 A. I thought one, at least one was in the lobby.
22 I expected that one would be in the lobby as
23 well.

24 Q. But nobody told you that; right?

25 A. No.

1 Q. And when I interviewed you, -- let's look at
2 Appendix N, Page 218, Line 8 and 9 -- I had
3 asked you -- We had a conversation about how the
4 ICE officers could get to the lobby.

5 A. Right.

6 Q. And then I asked you, they can't get there from
7 here -- or you said, they can't get there from
8 here, but they can certainly get there any other
9 way they want.

10 A. Right.

11 Q. And then you said, why is that, you know,
12 relevant, there were ICE agents waiting in the
13 lobby. So that's where you thought they were.

14 A. Right. But if you actually look a couple
15 lines down from there, I said that I assume that
16 there was an ICE van in the back.

17 Q. So you said, I only know that, referring to ICE
18 agents waiting in the lobby, I only know that
19 because the chief court officer was standing in
20 front of the doors in first session. Going to
21 say blocking the door. Right? I'm not sure,
22 you know, what the intention was. And then at
23 some point later on you said you thought they
24 might have a van in the back. Correct?

25 A. Just the next couple of lines. After I say,

1 I'm not sure that was their intention or not,
2 you asked standing in the front of the doors
3 inside the courtroom or outside the courtroom.
4 I said, inside the courtroom and I assume that
5 there was an ICE van in the back.

6 Q. But nobody told you that.

7 A. No.

8 Q. Now, let's turn to the time period after
9 April 2nd.

10 A. Okay.

11 Q. You were not in Newton on April 3rd.

12 A. I was not.

13 Q. On April 4th, you were in Newton again.

14 A. (Witness nods head).

15 Q. And you were in second session because
16 Judge Heffernan was there in the first session.

17 A. Correct.

18 Q. And Judge Heffernan came up to your lobby to see
19 you.

20 A. She did.

21 Q. And she told you that a defendant who was wanted
22 by ICE had escaped through the sallyport;
23 correct?

24 A. Yes.

25 Q. And your position is that that's the first you'd

1 heard about it.

2 A. It is.

3 Q. You did not say anything in that conversation
4 with Judge Heffernan about going off the record.

5 A. I didn't. I asked her how that happened, and
6 she said that she was trying to figure that out.

7 Q. And she didn't ask you about going off the
8 record; correct?

9 A. No.

10 Q. And you told me, when we interviewed, that the
11 issue of going off the record just didn't come
12 to mind.

13 A. Correct. At that point in time, I didn't
14 know that there was a policy preventing it.

15 Q. So just didn't come to your mind.

16 A. It just -- No.

17 Q. And you did not tell her that you were concerned
18 that ICE would take the wrong person; correct?

19 A. It was a very brief conversation. I don't
20 recall the specifics of what we talked about.
21 We talked about generally what happened, and
22 that was it.

23 Q. And you didn't tell her that your intention was
24 to pause ICE taking the defendant into custody;
25 correct?

1 A. I'm not sure that we got that far into what
2 happened, other than her trying to determine on
3 a security basis how somebody could have been
4 released out the sallyport and not have been
5 apprehended by ICE.

6 Q. But you didn't tell her that.

7 A. Again, I don't recall seven years later the
8 full substance of the conversation. I know we
9 talked very frankly for a couple minutes and
10 then that was it.

11 Q. And then sometime in the next couple of weeks
12 you were sitting in the Lowell District Court.

13 A. Yes. Close to about three weeks later.

14 Q. I'm sorry?

15 A. Close to about three weeks later.

16 HEARING OFFICER: Get close to
17 the mic.

18 Q. Sometime been April 5th and April 20; correct?

19 A. Yes.

20 Q. And Stacey Fortes was then the
21 Regional Administrative Justice for that region
22 and she was the First Justice for the Lowell
23 District Court.

24 A. She was.

25 Q. She's now the Chief Justice.

1 A. She is now the Chief Justice.

2 Q. And the Regional Administrative Justice has the
3 power, has the authority to schedule judges --

4 A. Correct.

5 Q. She asked you to come to her lobby during the
6 lunch break.

7 A. Right.

8 Q. She didn't tell you why.

9 A. No.

10 Q. She didn't tell the topic of the conversation.
11 But she asked you to come to the lobby.

12 A. Yeah. She said why don't you grab your lunch
13 and come on into the lobby.

14 Q. And you sat there and ate lunch and had a
15 conversation.

16 A. Yeah.

17 Q. And she said to you that it was her
18 understanding that part of -- She brought your
19 attention to the Newton event.

20 A. She did.

21 Q. And she said it was part of her understanding --
22 it was her understanding that part of the
23 proceeding was not recorded, and she asked what
24 happened. Right? She didn't accuse you. She
25 said it was her understanding that part of the

1 proceeding was not recorded, and she asked what
2 happened. Right?

3 A. Correct.

4 Q. And you told me, when I asked you about that
5 conversation with Judge Heffernan, that you
6 acknowledged it immediately; correct?

7 A. I did.

8 Q. You did or you told me that?

9 A. Well, I told you that and I did.

10 Q. Is it your position in response to the
11 Commission's charges that you acknowledged it
12 immediately? Let's look at --

13 A. I would have if she said that it was in --
14 And I recall that she showed me the rule, and
15 that was the first that I had heard that there
16 was a rule preventing unrecorded conversations
17 in the courtroom.

18 Q. But let's look at Paragraph 37 of your response
19 to the Commission's charges. So let's go to
20 the -- read the part of what the Commission
21 charges is accurate. And you said the RAJ
22 invited Judge Joseph to her chambers during the
23 lunch recess, and they spoke while having lunch,
24 and Judge Joseph learned from the RAJ of the
25 evidence, of the existence of Special Rule 211,

1 which prohibited off the record recordings,
2 Judge Joseph told the RAJ that she was unaware
3 of the rule prohibiting off the record
4 proceedings and expressed her understanding of
5 the rule and promised that she would observe the
6 rule in all future proceedings. Is that
7 correct?

8 A. Correct.

9 Q. And then Judge Joseph denies that she was less
10 than fully candid as she believes that the RAJ
11 understood that Judge Joseph had directed that
12 the conference take place off the record and
13 that it was that understanding that prompted the
14 meeting and the discussion about Special Rule
15 211 and its purpose. Right? That's what you
16 said.

17 A. Yes. That's what I said.

18 Q. But you didn't say that you acknowledged it;
19 correct?

20 A. I don't understand your question.

21 Q. Well, there's a difference between assuming or
22 believing that she knew it and acknowledging it
23 directly; correct?

24 A. Again, I'm not really understanding what
25 you're saying. It made sense that I denied that

1 I was less than fully candid, and I believe that
2 at the time Chief -- well, at the time,
3 First Justice Fortes understood that I had
4 directed the conference to take place off the
5 record and that -- I'm just having a hard time
6 regarding -- and it was that understanding that
7 prompted the meeting, the discussion about the
8 rule.

9 Q. So you believed that she understood that you had
10 directed the clerk to go off the record.

11 A. Yes. I mean, she said it when we started the
12 meeting that she understood that part of
13 record -- part of the conversation was off the
14 record.

15 Q. She didn't say, I understand you told the clerk
16 to go off the record; correct?

17 A. No. I don't remember the specific words.
18 But it was clear that we were talking about the
19 same thing. That's why she opened the book,
20 read me the book, and she even printed a copy of
21 the rule for me.

22 Q. But you never said to her directly, I told the
23 clerk to go off the record.

24 A. Again, I don't remember. But it was clear
25 that we were off the record. And I was the

1 judge, so whether the words came out or it was
2 inferred, I can't speak as to what the exact
3 words that was said seven years ago.

4 Q. You talked to her about the recording equipment
5 in Newton; right?

6 A. I did.

7 Q. And you talked about an incident in another
8 court; right?

9 A. In Waltham, yes.

10 Q. In Waltham. And that was an incident in which
11 the recording system or the amplification system
12 malfunctioned; correct?

13 A. The amplification system was -- We were
14 having a side bar conference on a rather
15 sensitive matter, concerning somebody's mental
16 health, and I was notified by attorneys that
17 were sitting in the audience that it was
18 amplifying in the audience as opposed to just
19 being at side bar.

20 Q. And that's not the way --

21 A. No.

22 HEARING OFFICER: Speaking of
23 amplifying. Thank you.

24 Q. And so on that occasion, you turned off the
25 record so that that wouldn't happen; correct?

1 A. I did. Actually, what I did, I just
2 disconnected the microphone that was at the side
3 bar. So the record was going on in the
4 courtroom, but I just disconnected the
5 microphone when the side bar conversation was
6 occurring.

7 Q. And you talked about that with Judge Fortes --

8 A. I did.

9 Q. -- when she asked you about this.

10 A. Yes.

11 Q. In Newton, on April 2nd or at any other time,
12 there was no malfunction of the recording
13 system; correct?

14 A. No.

15 Q. It was a decision you made to direct the clerk
16 to turn off the record; correct?

17 A. Right.

18 Q. You did not tell Judge Fortes in that
19 conversation that you were concerned that ICE
20 might take the wrong person.

21 A. Again, I don't remember the full extent of
22 the conversation. We spoke about the case. She
23 was worried about having gone off the record and
24 was really there to guide me. I was a new judge
25 in her region. And it was a very friendly

1 conversation. You know, I don't -- I would have
2 shared with her everything that was relevant as
3 I remember it.

4 Q. But you didn't tell her that you were concerned
5 that ICE would take the wrong person; right?

6 A. Again, I don't remember the specifics of the
7 conversation that we had.

8 Q. So you don't remember telling her that ICE
9 wouldn't allow an attorney/client conference.

10 A. Again, I can't recall sitting here today
11 exactly the conversation that we had. You know,
12 I just -- I'm sorry. I just can't say for sure.

13 Q. So then you don't remember telling her that you
14 were just pausing the arrest.

15 A. I wasn't pausing anything. I was trying to
16 afford the attorney the time to speak to his
17 client before he was taken into ICE custody,
18 which is where I presumed he was going.

19 Her concern was the fact that I
20 had gone off the record, she gave me the rule,
21 she gave me a copy of the Lunn policy, which I
22 had had because I received it on that day, and
23 that was really the concern and some of the
24 conversation. It wasn't a very long
25 conversation. We finished our lunch and went

1 back to session. I just don't recall the, you
2 know, the complete dialogue of what we talked
3 about, but we had a very open back and forth
4 dialogue about exactly what happened that day.

5 Q. And the next thing you heard about this event
6 was, I believe it was May 2nd, you got an e-mail
7 from Chief Justice Dawley's administrative
8 assistant inviting you to come to a meeting with
9 Chief Justice Dawley on May 8th.

10 A. Correct.

11 Q. And you got the recording from the clerk.

12 A. After I received that notification -- His
13 e-mail had indicated what he wanted to talk
14 about, that he wanted to talk about that matter.
15 So I actually was sitting in Newton. And while
16 I was there, I requested a copy of the -- They
17 were on the old system. We talked about the
18 JAVS system. So I requested a copy of the CD so
19 that I could listen to the hearing prior to
20 meeting with Chief Justice Dawley.

21 Q. And you did listen to it.

22 A. I did.

23 Q. And so when you went into the meeting with
24 Chief Justice Dawley, you had listened to the
25 recording.

1 A. I had.

2 Q. And you knew that the recording showed that you
3 had told the clerk to turn off the record.

4 A. Right.

5 Q. So when you went into that meeting, and
6 Chief Justice Dawley asked you about going off
7 the record, you acknowledged --

8 A. Of course.

9 Q. -- to the Chief Justice that you had gone off
10 the record. Correct?

11 A. Of course I did.

12 Q. And you apologized for it.

13 A. I did.

14 Q. And you told him that the off the record
15 discussion was about the defendant's identity
16 with respect to the Pennsylvania warrant;
17 correct?

18 A. And it was, yes.

19 Q. And -- It was? You're saying that the off the
20 record discussion was about the issue of
21 identity regarding the Pennsylvania warrant?

22 A. No. The off the record conversation was
23 about the defendant's identity, period, and also
24 the defendant's request to -- the defense
25 attorney's request to speak to his client

1 downstairs with the assistance of the
2 interpreter prior to his release.

3 Q. Before the off the record discussion, the
4 assistant district attorney had told you that
5 she didn't believe he was the person wanted in
6 Pennsylvania; correct?

7 A. Correct.

8 Q. So the off the record discussion, that issue was
9 done; correct?

10 A. Again, it was the off the record
11 conversation, as best as I remember, it was
12 really a continuation of the conversation that
13 started on the record. The only difference is
14 that the defense attorney asked that the client
15 to speak with his attorney in the lockup prior
16 to his release from state custody, which I
17 allowed. But I don't know that you can separate
18 the identification issues. They're all part of
19 and parcel of the same thing.

20 Q. But you weren't talking about Pennsylvania in
21 that off the record discussion.

22 A. Again, it was a continuation of the
23 conversation that happened on the record.

24 Q. The Chief Justice asked you if you had anything
25 to do with the defendant being released out the

1 back; correct?

2 A. He did.

3 Q. And you denied it.

4 A. I did.

5 Q. And you did not say that you were concerned that
6 ICE would take the wrong person.

7 A. Again, I don't recall the specific things
8 that we talked about other than what happened
9 during that matter.

10 Q. You did not say that you thought you should
11 determine if defendant was the right person for
12 the ICE detainer.

13 A. I don't believe so. I just -- I don't -- I
14 don't know that I understand your question.

15 Q. Well, should we go back to your interview with
16 me in Appendix M, Page 229, when you said,
17 starting at Line 8, you said, I certainly felt
18 that I had a responsibility as a judge to
19 everybody involved, the defendant, the
20 attorneys, whoever they may be, the district
21 attorney's office, ICE, everybody, we needed to
22 know who he was, didn't matter to me whether
23 this was on or off the record, ascertaining his
24 identity was a huge importance to me, and I felt
25 there was responsibility to know who he was.

A. Well, looking at it, that I wanted to know who the defendant was, period.

Q. But you didn't tell Chief Justice Dawley that you thought you had a responsibility to determine if he was the right person for the ICE detainer; correct?

A. I'm just going back to look at the transcript.

Q. Yup. Take your time.

A. So if you go back to the page before, you have the whole conversation. You know, we were just talking about the identity of defendant and as it pertained to everybody. And again, I was just trying to be fair to everybody and give everybody enough time to do whatever job they felt that they needed to do for the person that's before me.

Q. But you thought you had a responsibility to determine who he was and that included for ICE; correct?

A. No. I was affording his attorney enough time

1 to investigate his identity as he saw it fit.

2 Q. So go back to that big paragraph where you're
3 answering on Page 229. We've got a list of
4 people who you thought you had a responsibility
5 as to ascertaining his identity. The list
6 includes ICE; correct?

7 A. It does. But I don't think that what was
8 meant by that was that I had the responsibility
9 to determine his identification for ICE
10 purposes. I wasn't concerned about ICE. I was
11 concerned about the attorney having enough time
12 to do whatever investigation he felt necessary
13 to help his client. The fact that he -- ICE was
14 there, it really didn't make a difference, other
15 than the fact that the issue of identification
16 was raised. And that's why I hit pause, which
17 is the word I use here, let's come back
18 tomorrow, let's do this tomorrow.

19 Q. So when you refer to ICE here in this paragraph
20 long answer, that's what you meant, was to give
21 the attorney an opportunity to figure out? It
22 wasn't that you were supposed to make a
23 determination.

24 A. No. I didn't need to make a determination.

25 Q. Well, certainly, you didn't need to make a

1 determination. But your answer here was not
2 that you -- You're telling me now, you're
3 telling the hearing officer now, that your
4 answer did not indicate that you thought you had
5 a responsibility to everybody, district
6 attorney's office, ICE, everybody, we needed to
7 know who he was.

8 A. Again, I felt that I needed to be fair to
9 everybody that was before me, and I wanted to
10 everybody to be able to do their jobs as they
11 wanted to do their jobs.

12 Q. All right.

13 A. And that includes ICE.

14 Q. And in that -- So that includes ICE, that you
15 wanted ICE to be able to do the job as they
16 should, and part of that issue is whether it's
17 the right person; correct?

18 A. Yes. But that's not my determination.
19 That's, you know, that was for the attorney to
20 figure out if he could --

21 Q. Certainly not your determination.

22 A. No.

23 Q. You know that now.

24 So in this conversation with Chief Justice
25 Dawley, you did not say that you intended to

1 pause the ICE arrest; correct?

2 A. Again, I don't recall the specific words that
3 we said, and there was no discussion about
4 pausing any arrest.

5 Q. But that was part of what you told me at our
6 interview, right, that you were just pausing?
7 Correct?

8 A. Right. I was pausing to continue the matter
9 until tomorrow so that everybody could come back
10 and do the jobs that they needed to do.

11 Q. And you did not say to Chief Justice Dawley, as
12 you have said in your response to the
13 Commission's charges, that you had the
14 unintended effect of assisting in what happened.
15 Right? This is Paragraph 32 of the response.

16 So Judge Joseph agrees that the
17 unintended effect of her assent to allow defense
18 counsel and the interpreter to accompany
19 Medina Perez to the lockup was to assist defense
20 counsel's plan, but denies that she had any
21 knowledge of the plan. And then it goes on. Or
22 that she intended to assist the plan or that she
23 intended to permit anything other than the
24 retrieval of the defendant's property. And it
25 goes on.

1 So in response to Commission's
2 charges, you said you agreed that you had the
3 unintended effect of assisting defense counsel's
4 plan. You didn't tell Chief Justice Dawley
5 that, did you?

6 A. Again, I wouldn't have -- I mean, I had no
7 intent to help the defense attorney with his
8 plan. So that's what I would have told
9 Chief Justice Dawley, and that's exactly what I
10 did tell Chief Justice Dawley.

11 Q. But you didn't tell him you had an unintended
12 effect of assisting; correct?

13 A. I don't know. Again, I don't remember the
14 words that we used, but I can't imagine that I
15 would have included that.

16 Q. And what you told Chief Justice Dawley was that
17 you denied completely that you had anything to
18 do --

19 A. I didn't have anything to do with it.

20 Q. But we're talking about the conversation with
21 Chief Justice Dawley. You denied completely
22 that you had anything to do with it.

23 A. Of course.

24 Q. And in your interview with me, I asked you,
25 similar question, I asked you if you had done

1 anything to facilitate, and at that time you did
2 say that you wanted to pause the ICE arrest, but
3 you did not say that you had the unintended
4 effect of assisting or intentionally assisting;
5 correct?

6 A. Right.

7 Q. And you deny completely that you had anything to
8 do with it.

9 A. Right. I didn't.

10 JUDGE FABRICANT: That's all I
11 have. Thank you.

12 HEARING OFFICER: Ms. Mulvey.

13 MS. MULVEY: Thank you.

14 CROSS-EXAMINATION

15 BY MS. MULVEY:

16 Q. Good morning, Judge Joseph.

17 A. Good morning.

18 Q. Okay. I just want to sort of fill in some of
19 the gaps without repeating everything that
20 you've already said. Fair enough?

21 A. Sure.

22 Q. Okay. Now, you've talked a little bit about
23 your background as a defense lawyer, both as a
24 bar advocate and private counsel.

25 A. I did.

1 Q. Did you also spend some years on the law
2 enforcement side?

3 A. As a prosecutor, yes.

4 Q. Tell us about that, please.

5 A. So when I finished law school, I actually
6 worked at the State House as legal counsel for a
7 state senator for about six months, and then I
8 was hired by the attorney general's office where
9 I spent the next -- close to seven years of my
10 career. While at the attorney general's office,
11 I spent some time in family bureau, family
12 community crimes bureau, where I worked with
13 victims of violent crimes who would at that time
14 sue the state for financial recovery as a result
15 of being victims of violent crimes, and it was
16 my determination whether or not to award
17 out-of-pocket expenses or not. I then went to
18 the criminal bureau where I spent five years as
19 a special assistant district attorney, working
20 as a baby at the Suffolk County attorney's
21 office, and in between those five years I was
22 there for a year in District Court, and then --
23 well, which was then District Court, now we call
24 it the Boston Municipal Court, and then I spent
25 three months back at the attorney general's

1 office in the insurance fraud bureau where I
2 prosecuted insurance fraud cases, before coming
3 back to the district attorney's office as a
4 special assistant, where I spent the last four
5 years in Superior Court, again, back in the gang
6 unit.

7 Q. And as a result of working both as a prosecutor
8 and criminal defense lawyer, how did you see
9 your role as the judge?

10 A. I saw my role as kind of an intermediary
11 before -- between both. Having been on both
12 sides, my role was to be fair to everybody who
13 appeared before me. I had been a prosecutor and
14 I had appeared before many judges. I had been a
15 defense attorney, tried many cases, was in court
16 very often. And I wanted to make sure that
17 everybody who came before me and what felt fair,
18 felt that they had an opportunity to be heard,
19 and that I handled their matters, you know, so
20 that they felt that, you know, that they were
21 able to be heard.

22 Q. Did that include ICE?

23 A. It did.

24 Q. And if Attorney Jellinek had said, yes, let's
25 just come back in the morning, let me see what I

1 can do, was it your assumption ICE would come
2 back?

3 A. Absolutely.

4 Q. And depending on how successful David Jellinek
5 had been, what did you think ICE would do?

6 A. If they were convinced that they didn't have
7 the proper paperwork that -- or identification
8 of the defendant, that they would have released
9 the detainer and then not be able to serve the
10 detainer.

11 Q. Did you think that continuing the proceeding for
12 one day and having ICE come back to give
13 David Jellinek time, if that's what he wanted,
14 did you think that that was obstructing or
15 impeding or hindering ICE?

16 A. Not at all. I thought it was giving the
17 attorney time that he needed. It was already
18 3:00, a little bit later in the afternoon. You
19 know, the court closes down at 4:30. I was just
20 trying to give him as much time as he needed to
21 do whatever investigation he wanted to do.

22 Q. Let me back up a little. We've heard that this
23 was a Monday in the Newton District Court?

24 A. It was.

25 Q. And you said you think it was the first time you

1 had a docket. Can you tell us what that means?

2 A. Yes. So there's a docket of cases that are
3 scheduled to be in court every day. As I had
4 indicated a little bit earlier, Newton is a
5 little unusual in that it's a small court. It
6 only represents one town, the town -- or the
7 city, the City of Newton. And on Thursdays, the
8 First Justice doesn't sit in Newton, she sits
9 over in Quincy to handle their recovery court.
10 And so a visiting judge sometimes, not all the
11 time, comes to Newton to sit in case of any
12 emergencies. On all other days there is a judge
13 that's assigned to Newton District Court and
14 handles whatever cases are on the list for that
15 day. So this being a Monday, I had all the
16 weekend arrests plus anything that had been
17 scheduled to be heard that day.

18 Q. So by Newton standards, was this a busy day?

19 A. It actually was a busy day, particularly for
20 Newton standard. Not a lot happens in Newton.
21 I think we had about 20 cases on the list, which
22 is very busy for Newton.

23 Q. And as we've heard, First Justice Heffernan was
24 not there that day?

25 A. Correct.

1 Q. As a visiting judge, how did you see your
2 relationship or responsibility with the
3 First Justice or the Presiding Judge?

4 A. So I always like to -- The First Justices
5 are, you know, the leader of the court, and I
6 always like to follow how they like to do things
7 in their court.

8 Q. Was that part of sort of trying to be fair or
9 trying to respect everybody?

10 A. Absolutely. We're taught that we're judges,
11 we're independent, we can make our own
12 decisions. Particularly as a new judge who's
13 learning and meeting my colleagues for the
14 first, second, third time, I certainly want to
15 be respectful to judges, particularly senior
16 judges who have practices and policies that are
17 specific to their courts, because every court is
18 different.

19 Q. At this point, by April of 2018, can you give us
20 some idea of how many different District Courts
21 you've sat in over five months?

22 A. I believe at that time there were eight
23 District Courts in the region where I was
24 assigned to. So, certainly, sometimes we would
25 sit out of region if we needed to cover for

1 somebody else. So it was a possibility that I
2 sat in more than eight, but I at least sat in
3 eight courts.

4 Q. And if you sat down and you thought about it and
5 made a list, would you be able to come up with
6 something unique or perhaps even odd about every
7 single one of them?

8 A. Oh, absolutely.

9 Q. Just the way it works.

10 A. It's just the way it works. Every
11 District Court -- They're all built at different
12 times. They're not cookie-cutter courts.
13 They're all different.

14 Q. Now, during the morning, one of cases that came
15 before you was Jose Medina Perez; is that right?

16 A. Correct.

17 Q. And this was a misdemeanor drug arrest --

18 A. Yes.

19 Q. -- over the weekend.

20 A. Yes.

21 Q. Were there, as we've heard, two additional
22 nuances or facets or complications?

23 A. There were.

24 Q. One was the Pennsylvania warrant and one was the
25 ICE detainer?

1 A. Correct.

2 Q. Now, you I think said to
3 Special Counsel Fabricant on your direct exam
4 something about the Pennsylvania warrant and the
5 ICE detainer using the same biometric
6 information?

7 A. Yes.

8 Q. Could you tell us what you meant by that?

9 A. So I was under the assumption that -- So when
10 somebody's arrested on a criminal offense,
11 there's a bail determination made. There was --
12 This individual was held without bail over the
13 weekend between his arrest and the time of his
14 arraignment. And it was then that they
15 determined that -- it was during that time that
16 they determined that he was also alleged to have
17 been a fugitive from justice out of
18 Pennsylvania. And it all goes into the same
19 central computer system so all law enforcement
20 agencies get their information off that same
21 central system.

22 Q. Okay. And so when you say the same biometric
23 information, do you, as either a prosecutor or
24 defense lawyer, have some understanding what the
25 police department actually does to figure out

1 there's a fugitive warrant and an ICE detainer?

2 A. I believe that they've just got to type into
3 it the system and then up pops the information.

4 Q. And do they do that by name or height or eye
5 color or fingerprint? What do they use?

6 A. So it's my understanding they use their name
7 and the date of birth, and that alerts all other
8 law enforcement agencies that an inquiry has
9 been made.

10 Q. And biometric, does that mean fingerprinting?

11 A. I believe it means fingerprints and maybe any
12 other information that they may have about the
13 person.

14 Q. And knowing that basically Pennsylvania and ICE
15 would be relying on the same sources, did that
16 enter into your thinking?

17 A. It did.

18 Q. How?

19 A. Well, if one agency got it wrong, there's
20 certainly a possibility that the other agency
21 was wrong, too.

22 Q. And was that what the lawyers were telling you?

23 A. Exactly.

24 Q. Did you think it was fair to give them a chance
25 to prove that to whoever?

1 A. I did. I mean, I had two lawyers who were
2 questioning their client's, same client's
3 identification based on the same, I'm going to
4 say biographical, biometric information.

5 Q. And in fact, as the day evolved, did somebody,
6 -- and maybe we'll talk about who in a minute --
7 did somebody convince the Commonwealth that
8 Pennsylvania had the wrong guy?

9 A. They did. And what was odd about it is that
10 in the morning the assistant district attorney
11 was adamant that that's who Pennsylvania thought
12 he was, and she had made a call, I believe to
13 the department, and they said, yes, we're going
14 to come and get him. And there was also a
15 photograph that had been shown to me that was
16 inconclusive to me as to whether they were the
17 same person or not. I think the photograph was
18 from the Pennsylvania arrest eight years prior.
19 And I couldn't tell whether it was the same
20 person or not. So -- And then after the lunch
21 break, it appeared where she didn't believe it
22 was the same person that she was -- she received
23 some information convinced her of that.

24 Q. The prosecutor.

25 A. The prosecutor, yes.

1 Q. Let's go back to the morning. We heard that
2 there were three or four calls of Mr. Medina
3 Perez's case?

4 A. Yes.

5 Q. Is that common in the District Court, that
6 they'll do a second or a third call?

7 A. There is. Typically, when there's an
8 interpreter involved.

9 Q. Why is that?

10 A. Because you want to give the attorney time to
11 speak with their client. Oftentimes -- I don't
12 know whether this was the case on this day or
13 not -- the interpreter has multiple people that
14 they have to the interpret for. And so
15 oftentimes that takes some time to do that. In
16 a case such as this and any case of this matter,
17 you need to afford the attorney time to speak
18 with their client so that they can determine if
19 there are any issues, questions of
20 identification. Again, that's the first issue,
21 the question that we ask as judges on a fugitive
22 matter. And then to get whatever information
23 they need from their client.

24 Q. Who was representing Mr. Medina Perez in the
25 morning?

1 A. So in the morning, I appointed
2 Attorney Bostwick to represent him.

3 Q. And she's referred to as bar advocate?

4 A. She was the bar advocate. She was our duty
5 attorney for the day. And Newton typically only
6 has one duty attorney, because typically the
7 list isn't very long, so they just assign one
8 attorney to handle the case, indigent clients
9 that appear for arraignment.

10 Q. And so had somebody determined that
11 Mr. Medina Perez was indigent?

12 A. Yes. I was actually told he was marginally
13 indigent. He was afforded an opportunity to
14 have a court-appointed attorney, but the fee for
15 that would be little bit more. I also want to
16 say that, if somebody does come in and doesn't
17 have an attorney, and if there is a question of
18 detention as opposed to release that day, a bar
19 advocate would be appointed for bail purposes
20 only, just to make sure that person has an
21 advocate for arraignment.

22 Q. But in this case, it was because
23 Mr. Medina Perez was marginally indigent --

24 A. Correct.

25 Q. And we've seen some mention of \$150. Is that

1 what he'd pay?

2 A. Yes. That's a statutory fee for
3 court-appointed counsel.

4 Q. Now, at some point in the morning did you
5 attempt to reach First Justice Heffernan?

6 A. I did.

7 Q. Tell us about that.

8 A. So there was -- And I don't remember all of
9 the detail, but there was another matter on the
10 list where I believe I was told that it was a
11 file she had in her office as opposed to in the
12 clerk's office. So somehow it didn't make its
13 way into the courtroom. And we couldn't find
14 it. And so I called her in the morning just to
15 find out if she knew where that file was, since
16 the clerk's office couldn't find it and it was
17 on the list.

18 Q. And how did you try to reach her?

19 A. I called her on her cell phone. I didn't
20 know she was at a funeral. I just knew she
21 wasn't at court. So I wouldn't have called.
22 But I called her on her phone and left a
23 message.

24 Q. Did you get any response?

25 A. I didn't.

1 Q. Now, did Attorney Bostwick continue to represent
2 Mr. Medina Perez throughout the morning?

3 A. She did.

4 Q. And in fact, right up until the time court
5 recessed for the luncheon break, --

6 A. That's correct.

7 Q. -- was she representing Mr. Medina Perez?

8 A. She was.

9 Q. And based on what you knew, did she intend to
10 continue to represent him after the lunch break?

11 A. She did. In fact, she asked if she could
12 come back a little bit late after the lunch
13 break because she had a medical appointment
14 which -- and she was waiting for a fax. So it
15 was pretty clear to me that she intended to come
16 back after the lunch break to continue to
17 represent Mr. Medina Perez.

18 Q. Up until the point of the luncheon recess when
19 Attorney Bostwick was saying can we start at
20 2:15 instead of 2:00, had you seen
21 David Jellinek that morning?

22 A. I hadn't.

23 Q. Did he appear on any other matters that morning?

24 A. He did not.

25 Q. Did you see him sitting around in the back of

1 the courtroom?

2 A. I did not.

3 Q. Did he say anything on the record?

4 A. In the morning session?

5 Q. Yes.

6 A. No. He wasn't there.

7 Q. Now, so we saw around 12:40, 12:45 there was the
8 luncheon recess?

9 A. Yes.

10 Q. And you know in Massachusetts we eat lunch from
11 1:00 to 2:00; is that right?

12 A. Correct.

13 Q. All right. Up until the time of luncheon
14 recess, were you aware that there was an ICE
15 officer --

16 A. No.

17 Q. -- in the courthouse?

18 A. I was not.

19 Q. How did you become aware of that?

20 A. So towards the end of the lunch break, when I
21 was sitting in the lobby, assistant clerk
22 magistrate -- First Assistant Clerk
23 Magistrate Okstein came into my lobby and
24 informed me of that.

25 Q. Do you recall what he said?

1 A. He said, Judge, just want to let you know
2 that the Medina Perez matter that is coming in
3 at the end of the afternoon, that there's an ICE
4 agent here with a detainer, and that
5 Newton District Court has a policy that does not
6 permit ICE agents to sit in the courtroom during
7 matters, would you like me to follow that
8 policy.

9 Q. And had you ever heard of a policy like that
10 before?

11 A. I had not.

12 Q. What did you think?

13 A. Well, I asked him -- Particularly new judges
14 rely on our clerks. And having practiced in
15 Newton, I knew Clerk Okstein a little bit. I'm
16 like, you know, do we -- do you have a copy of
17 that policy. And he informed that it was state
18 court protocol, it was a proper practice. I'm
19 not sure what word he used. So there wasn't --
20 And I said, do other judges do that, do you have
21 to do that. Like, you're the judge. And I
22 stated, do we have any policies around about how
23 to handle ICE matters in the courthouse. I
24 figured there's a policy for everything, there
25 has to be a policy. And he didn't -- he says,

1 yes, I know there's a policy, you know, let me
2 see if I can find it. I started looking for a
3 policy. I was looking in my training materials.
4 I looked. I couldn't find it in my materials.
5 I started looking in Judge Heffernan's office to
6 see if I could find anything for any guidance.
7 When I realized I wasn't easily putting my hands
8 on anything, I called down to the administrative
9 office for some guidance from the legal counsel
10 who were there for us when you have questions.

11 Q. Why did you spend so much time? Why didn't you
12 just say, well, if that's Judge Heffernan's
13 policy, we'll do it?

14 A. Because it seemed odd to me to have a rule to
15 exclude anybody from the courtroom. And it
16 just, it just made me pause and say I just want
17 to make sure I can do this. It just didn't seem
18 right to me.

19 Q. Well, why didn't you just say to Clerk Okstein,
20 I don't care what Judge Heffernan does, I'm not
21 doing that?

22 A. Because I was a four-month-old judge and
23 sitting in somebody else's court and I wanted to
24 be respectful to Judge Heffernan and her
25 policies, also, and if it is part of the policy

1 that was proper or allowed, I certainly wanted
2 to follow it.

3 Q. Did you call Downtown to the District Court
4 office?

5 A. I did.

6 Q. Did you speak to somebody there?

7 A. I did.

8 Q. Do you recall who it was that you spoke to?

9 A. I believe I spoke with Ellen Shapiro and I
10 may have also spoke with Zach Hillman. I don't
11 remember whether I spoke with him or not. I
12 remember speaking with Ellen Shapiro.

13 Q. Were there actually a couple of calls?

14 A. There were a couple of calls. I called -- It
15 was during a lunch break. And I left a couple
16 of voicemail messages for various people. I
17 think I left one for Ellen, I left one for Zach.
18 After getting both their voicemails, I actually
19 called the administrative assistant to the
20 administrative office. Her name is
21 Sarah Adamson. And I said, Sarah, I really need
22 some help, are there any of the legal counsels
23 available. There is at the time. I said I
24 don't care who you talk to, but I have this
25 issue here in Newton and I would really like to

1 get some guidance. And she said, let me get
2 back to you. And then within a few minutes, I
3 believe Ellen Shapiro called me.

4 Q. Did you have a conversation with her about this
5 situation with ICE?

6 A. I did.

7 Q. And tell us about that.

8 A. So I recall saying to her, I have a situation
9 here in Newton where I've been asked to exclude
10 ICE from the courtroom. I said, can we do that,
11 is there any guidance that you can offer as to
12 whether that protocol is proper, and if so, do I
13 have to follow it, because I just have some
14 concerns about excluding people from a
15 courtroom. And she said, let me get back to
16 you. And there is a policy.

17 HEARING OFFICER: Trying to be
18 respectful.

19 Is there any way we can do
20 something about the noise here?

21 MS. MULVEY: Would it make
22 sense, Your Honor, just to take -- I'm almost
23 moving topics. Would it make a sense to take a
24 break and let them do what --

25 HEARING OFFICER: Sure. I

1 didn't mean to interrupt.

2 MS. MULVEY: It doesn't matter.

3 HEARING OFFICER: Are you okay
4 with that?

5 Why don't we take our 10-minute
6 break now.

7

8

9 (Recess taken at 10:52 a.m.

10 Proceedings resumed at

11 11:11 a.m.)

12 HEARING OFFICER: Thank you,
13 Court Officer, for taking care of that.

14 I hope it doesn't get too warm
15 back there. And if it does, we'll put that back
16 into operation.

17 Thank you. You may continue.

18 MS. MULVEY: Thank you.

19 Q. Judge Joseph, we were talking about your calls
20 with the administrative office of the
21 District Court; is that right?

22 A. Yes, yes.

23 Q. And when they called you back, what happened?

24 A. So when they called me back, they read me the
25 Lunn policy and --

1 Q. The whole thing?

2 A. A lot of it. I think it was the whole thing.
3 Certainly, the relevant parts to it. And then I
4 asked, again, you know, is the Newton policy --
5 can I do this, and I was given the advice and I
6 remember this story, that the Newton policy is
7 not inconsistent with our policy.

8 Q. I'm sorry. Not?

9 A. Not inconsistent. Correct.

10 Q. All right.

11 A. So you can make the decision you want to
12 make. So I'm the new judge, it's on me, what
13 should I do. She says, you're the judge. But
14 I'm a new judge. And if I have discretion, I
15 wouldn't have normally done that. She says,
16 you're the judge, you make the decision that you
17 want. And I said, you know what, I'm a visiting
18 judge, I'm a new judge, I'm not doing anything
19 that the First Justice in this court wouldn't
20 want me to do so long as it's proper under our
21 policies.

22 MS. MULVEY: Okay. May I
23 approach the witness?

24 HEARING OFFICER: Yes.

25 Q. Let me show you an e-mail with a document. Do

1 you recognize that?

2 A. I do.

3 Q. What is it?

4 A. So that's an e-mail that was sent to me by
5 Ellen Shapiro with a copy of what we refer to as
6 the Lunn policy, the November 10th of 2017
7 policy.

8 Q. What time was that e-mail sent?

9 A. So the e-mail was sent to me at 3:19 --

10 Q. All right.

11 A. -- in the afternoon. But it was --

12 Q. I was going to say, is she forwarding to you an
13 earlier e-mail?

14 A. Yes. So it was scanned in to me at 1:54 in
15 the afternoon that day.

16 Q. And is that about the time you were having these
17 conversations and getting the policy read to
18 you?

19 A. Yes. That was still within that lunch period
20 and prior to -- like I said, I delayed coming
21 back on the bench because I was trying to
22 understand this policy and that was during that
23 time period.

24 HEARING OFFICER: I'm sorry.

25 Can you just clarify for me, when you say that

1 it was scanned in to you, what does that mean?

2 A. So it looks like Ms. Shapiro scanned, it
3 looks like she scanned the policy at 1:54 in the
4 afternoon, which is around the time that I had
5 called for some advice. I had called earlier,
6 and she got the policy and scanned it in. It
7 looks like it was e-mailed to me at 3:19 in the
8 afternoon. So I received the physical copy of
9 the policy after the hearing, but she read me
10 the policy around 1:54 prior to the hearing.

11 HEARING OFFICER: Got it.

12 Q. Actually, if we look at it, does it look like
13 some serial number for a scanner sent it to
14 Ellen Shapiro at 1:54?

15 A. Yes.

16 MS. MULVEY: I'd offer this as
17 the next exhibit. I think it's 4, maybe.

18 HEARING OFFICER: 5. Exhibit 5
19 is received.

20 EXHIBIT 5

21 (DOCUMENT MARKED AS EXHIBIT 5)

22 Q. Now, attached to this is four pages of what
23 we've been calling the Lunn policy; is that
24 right?

25 A. That's correct. I don't have a copy here

1 anymore but...

2 Q. Oh, I apologize.

3 A. Yes. I saw that that was attached.

4 Thank you.

5 Q. And do you remember Ellen Shapiro reading to you
6 the part about people who were in custody and
7 being released?

8 A. I do.

9 Q. Is that in Section A on the bottom of Page 3?

10 A. Yes.

11 Q. And it says, Individuals over whom the
12 Trial Court has custody.

13 A. Correct.

14 Q. And then it talks about an individual who was
15 brought in to court in custody is subject to
16 release after his or her court proceeding.

17 A. Yes.

18 Q. Right? Now, at the point this was being read to
19 you, the prosecutor had not yet told you she'd
20 changed her mind on the Pennsylvania warrant; is
21 that true?

22 A. That's correct.

23 Q. So at the time this was being read to you, did
24 you know what was going to happen?

25 A. I didn't.

1 Q. All right. And did she read the part about how
2 people -- Well, strike it. If he wasn't
3 released, was ICE going to get him?

4 A. No.

5 Q. All right. So if you were, for example, were
6 to hold him for Pennsylvania, --

7 A. Correct.

8 Q. -- what would happen?

9 A. I believe that in the hierarchy of what would
10 happen, because we had him on state charges in
11 Newton, which included the fugitive of justice
12 matter, if I held him without bail on the
13 fugitive of justice matter or the Newton matter,
14 you know, wasn't issue at that time, then we
15 would have kept custody of him until
16 Pennsylvania made the determination whether or
17 not to come in and take him, so to speak. So
18 Massachusetts on behalf of Pennsylvania would
19 have had control of the body, for lack of a
20 better word.

21 Q. Okay. And does that mean that ICE would or
22 would not take custody of him?

23 A. ICE would not have been able to take custody
24 of him.

25 Q. All right. And so ICE would be an issue if for

1 some reason the Pennsylvania warrant wasn't an
2 issue?

3 A. Correct.

4 Q. And during the lunch hour, did you have an
5 understanding that that was sort of a live
6 issue, what's the story on Pennsylvania?

7 A. Yes. And that's when we continued matter
8 until the end of the lunch break, a little
9 further than the lunch break, so that the
10 attorney could continue to do her investigation
11 on whether he was the same person that was
12 subject to the Pennsylvania warrant.

13 Q. All right. Now, I assume, since your issue was
14 ICE in the courtroom, you and Ms. Shapiro were
15 sort of looking very carefully at what it said
16 about where ICE could and couldn't go?

17 A. Exactly.

18 Q. All right. And if we -- I guess we don't need
19 to read the whole thing. But did you read
20 through or did you have it read for you -- to
21 you Section A to see if it said anything about
22 ICE in the courtroom?

23 A. Yes, we did. And I know that -- We actually
24 read the sections a couple different times,
25 because I didn't physically have a copy, and we

1 were going back and forth, and she was having to
2 repeat reading it to me. Both together trying
3 to make whatever determination we needed to
4 make.

5 Q. All right. And after that process was done, did
6 the two of you decide it didn't say you couldn't
7 keep ICE out of the courtroom?

8 A. Yes. And again, her word was it's not
9 inconsistent.

10 Q. And did she read to you parts about where ICE
11 was permitted to go?

12 A. Yes.

13 Q. And what was your understanding about that after
14 she read the policy to you?

15 A. So after she read the policy and indicated
16 that having ICE remain outside the courtroom
17 during the proceeding was not inconsistent, she
18 also told me that they are permitted to go to
19 the lockup and that that's a preferred place to
20 take custody of somebody because it's the most
21 secure and safest place to do that.

22 Q. Did that make sense to you?

23 A. Made complete sense.

24 Q. All right. Had you ever, either as a judge or a
25 defense lawyer, been in a lockup at the

1 Newton District Court?

2 A. Only as a defense lawyer.

3 Q. How did you come to be in the lockup as a
4 defense lawyer?

5 A. If I had clients who were in the lockup area.
6 If I was the bar advocate, and I needed to
7 interview a client, I would interview a client
8 in lockup, you know, for arraignment purposes or
9 whatever needed to happen. And if I had a
10 client in the lockup that was being transported
11 elsewhere after a case, then I would go to the
12 lockup to interview my client or talk to my
13 clients, is probably a better word, before being
14 released to wherever they were going next. So,
15 yeah, to interview clients.

16 Q. And did you know how custodies got in and out of
17 the lockup?

18 A. So from my experience, if you came in
19 custody, you came in through the sallyport. If
20 you left in custody, you left through the
21 sallyport.

22 Q. And the sallyport is that secure door leading
23 into the fenced area that we --

24 A. Yeah. It's secure. That black fence area we
25 saw at the view.

1 Q. And so somebody, a sheriff or ICE or whoever,
2 could pull up a vehicle and it would be a very
3 short distance?

4 A. Yes.

5 Q. To transport the prisoner?

6 A. So the vans would pull right in, they'd come
7 out the doorway, and go in. I never witnessed
8 that, but that's what we knew happened.

9 Q. After your last conversation with Ellen Shapiro,
10 did you speak with Clerk Okstein again?

11 A. I did.

12 Q. What did you tell him?

13 A. I told Clerk Okstein that I had tracked down
14 the policy and that I would follow
15 Chief Justice -- chief Justice -- First
16 Justice Heffernan's policy.

17 Q. Did you ever actually talk to any of the ICE
18 agents yourself?

19 A. No. I never saw any of the ICE agents that
20 day.

21 Q. Never laid eyes on them?

22 A. No.

23 Q. Did you know how many were there?

24 A. I did not.

25 Q. Now, after your conversation with

1 Attorney Shapiro, did the session start up
2 again?

3 A. At some point, yes. I don't recall how much
4 after that, but yes.

5 Q. And who showed up for Mr. Medina Perez?

6 A. Mr. Jellinek.

7 Q. How did you learn that that was happening?

8 A. The case was called, and then there he was.
9 And I was told by the clerk, as we saw in the
10 transcript, that Mr. Jellinek had filed an
11 appearance of counsel.

12 Q. Was that the first time you saw David Jellinek
13 that day?

14 A. It was.

15 Q. Was he somebody you knew from court business?

16 A. He was. I didn't know him well. But I knew
17 him because he was a defense attorney, and we
18 would oftentimes -- often -- a handful of times
19 were in the same court at the same time, so I
20 knew his face and I knew enough to say hello to
21 him.

22 Q. Now, if we look at the transcript --

23 A. I'm sorry. He also appeared before me when I
24 was a judge. I sat in the Waltham court, also,
25 and he used to take bar advocate cases in

1 Waltham, and I do recall he appeared before me
2 once when I was on the bench as well.

3 Q. Now, do you have the transcript there?

4 A. I do. Can you just tell me what section it
5 is, please?

6 Q. It's Section G. And I think we're somewhere
7 around App 40.

8 A. Okay.

9 Q. And I'm looking at the part that starts at
10 2:48:48. Do you see that?

11 A. I see 2:48. Yes, I do.

12 Q. Okay. And is this when you first got to side
13 bar or they first got to side bar?

14 A. Yes. Yes.

15 Q. Okay.

16 A. I was looking above, the paragraph above that
17 says 2:48:13, but that's just when the case was
18 called. So the side bar began at 2:48:48.

19 Q. And we've heard you were sort of rolling your
20 chair over to the side where the lawyers were?

21 A. Yes.

22 Q. And was David Jellinek there?

23 A. He was.

24 Q. Was Assistant District Attorney Jurgens there?

25 A. Yes.

1 Q. Standing side by side?

2 A. Standing side by side.

3 Q. And if we go to the next page.

4 Attorney Jellinek had been pressing his point
5 that this wasn't the fellow that ICE was looking
6 for?

7 A. Right.

8 Q. Was he consistent about that?

9 A. He was.

10 Q. All right. And he said, I think the best thing
11 to do is to clear the fugitive issue, release
12 him on a personal, and hope that he can avoid
13 ICE. Did you think that that meant he was going
14 out the back door?

15 A. Oh, God, no.

16 Q. Did you think that by "avoid ICE" he meant in
17 any improper way?

18 A. No.

19 Q. Is there any way you would have been a party to
20 that?

21 A. No. Absolutely not.

22 Q. If we look down at the next thing you said, does
23 that help you figure out how you interpreted
24 what he was saying?

25 A. Well, it does. Because as soon as he said

1 that, my response is, if you need more time to
2 figure this out, we could -- I said hold until
3 tomorrow. I think hold him until tomorrow is
4 probably what I said, but it just probably
5 didn't get picked up in the transcript. Same
6 sentiment.

7 Q. And when you said, if you need more time to
8 figure this out, what was in your mind?

9 A. That if he wanted time to investigate his
10 client's identity and time to convince ICE that
11 it wasn't who they thought he was, if he wasn't
12 who they thought he was either, that I'd be
13 happy to give him time to do that.

14 Q. We've heard this is almost 3:00 in the
15 afternoon?

16 A. It was.

17 Q. All right. Why didn't you say, I'll give you
18 another hour?

19 A. It was getting to be late in the day. I'm
20 very sensitive to custodies and -- as a judge,
21 as a lawyer. I just know the court officers
22 always like to get the custodies out as soon as
23 possible. I didn't know that he'd be able to
24 get that information in an hour or so, so I
25 thought the best thing to do was to give him as

1 much time as he needed, I had given the attorney
2 hours in the morning, I'd give him the same
3 courtesy, done with court by then, so everybody
4 just come back tomorrow.

5 Q. Now, I think you said on direct that ultimately
6 Attorney Jellinek said, no, that's not what I
7 want; right?

8 A. Correct.

9 Q. Was that on the record?

10 A. I don't remember.

11 Q. Well, if we read through, do you see any place
12 on the record where Attorney Jellinek says, no,
13 I don't want more time, I don't want to come
14 back tomorrow?

15 A. I don't.

16 Q. Did he ultimately tell you, no, that's not what
17 I want?

18 A. He did.

19 Q. Is it fair to assume, then, that that must have
20 been part of the continuation off the record?

21 A. That must have been -- Yes, that must have
22 been off the record.

23 Q. Do you actually remember that?

24 A. I don't.

25 Q. But do you remember he didn't want more time?

1 A. Yes.

2 Q. Once he told you, no, I don't want to come back
3 tomorrow, did you drop the issue of holding him?

4 A. I did.

5 Q. When you were talking about holding him
6 tomorrow, did you see that as any different from
7 holding him from first call to second call or
8 holding him over the lunch break?

9 A. I didn't.

10 Q. Why not?

11 A. Because I had given the attorney in the
12 morning enough time to do her investigation. I
13 wanted to give him the same amount of time to do
14 his investigation. And given the time of the
15 day, I just thought holding him until the
16 following day would be the best way to give him
17 enough time to do that. Plus, I wasn't coming
18 back the next day and thought maybe another
19 judge would handle it.

20 Q. All right. Would it have broken your heart?

21 A. It would not have broken my heart.

22 Q. Okay. When you said, hold him until tomorrow,
23 did you think that would allow him to escape ICE
24 if he was the right guy?

25 A. No, no. To hold him, meaning detain him,

1 keep him in custody for the evening with no
2 opportunity to post a bail. No. He was coming
3 back to Newton District Court the following day.
4 And the attorney would come back, the assistant
5 district attorney would be there, ICE would
6 certainly be, everybody would just come right
7 back the following day. The only question would
8 be whether or not I would be there. I may come
9 back to handle the matter or who -- they may
10 have swapped us or maybe I would have been off
11 to wherever I was going the next day.

12 Q. And certainly, if his lawyer said, yes, that's
13 what I want, I want to come back tomorrow, did
14 you think it would be all right for you to do
15 that?

16 A. Of course.

17 Q. And over his lawyer's objection, did you make
18 any attempt to hold him?

19 A. No.

20 Q. You also said that the thing you do remember
21 that was different was that he asked to speak to
22 his client downstairs with the interpreter.

23 A. Yes.

24 Q. Did that strike you as crazy or an unusual
25 request?

1 A. Not at all.

2 Q. Why not?

3 A. I thought it was a completely appropriate
4 request. I was under the impression that he was
5 going to go back downstairs, pick up his
6 property, and go right into ICE custody through
7 the sallyport, and in order for him to have an
8 opportunity to speak with his lawyer, that would
9 be the -- I mean, his client, that would be the
10 only place to securely do that.

11 Q. Did you have any role in how ICE would actually
12 get him, where they would actually get him?

13 A. No, no.

14 Q. And so were you actually thinking, well, okay,
15 he can go downstairs or he could go to the
16 sallyport or go out the front, was that, as a
17 judge, was that your responsibility?

18 A. No. That's a security issue. And I was
19 familiar with the Lunn policy where, as far as I
20 knew, it was all going to happen in the lockup.

21 Q. And in fact, once you went back on the record,
22 you arraigned Mr. Medina Perez.

23 A. I did.

24 Q. And you gave him some required statutory drug
25 warnings?

1 A. I did.

2 Q. And just as things were winding down, you had
3 ordered him released; is that right?

4 A. I did.

5 Q. And that was released from state custody?

6 A. Released from state custody. I did not set a
7 bail on the state charges. And the fugitive
8 matter at that point I dismissed.

9 Q. Once you had ordered him released, did you
10 think you had any further say or responsibility
11 in what would happen to him?

12 A. No.

13 Q. Did Clerk Okstein then tell you to just wait a
14 second?

15 A. He did.

16 Q. And he said there was a representative from ICE
17 here in the court inaudible to, to visit the
18 lockup?

19 A. Yes.

20 Q. And you said, that's fine, I'm not going to
21 allow them to come in here, but he's been
22 released on this.

23 A. Yes.

24 Q. What did you mean by that?

25 A. What I meant is that that's fine, they can go

1 to the lockup, but in compliance with
2 Newton District Court policy, they can't come
3 into the courtroom to access the lockup, but
4 they can use any of the other entrances and
5 opportunities to get to the lockup that they're
6 able to.

7 Q. Did you think that the ICE agents had walked or
8 taken the T to the Newton District Court?

9 A. No. I assume they drove.

10 Q. All right. And would you assume that they would
11 be placing Mr. Medina Perez into a vehicle?

12 A. Yes.

13 Q. Is there a place at the courthouse where that
14 happens?

15 A. Typically in the sallyport.

16 Q. Did you actually think about that or concern
17 yourself with the logistics?

18 A. I didn't. That's really a security issue.
19 But you know, I just had the policy read to me,
20 and it makes complete sense to take custody of
21 somebody in the lockup where they're already
22 there anyway and it's the most secure place. I
23 mean, I wouldn't want -- It's just the most
24 secure place to do it.

25 Q. Now, the court recessed as Mr. Jellinek and the

1 interpreter and Mr. Medina Perez were going
2 downstairs; is that right?

3 A. Yes, yes.

4 Q. And having seen the transcript, did you actually
5 handle two more short matters afterwards?

6 A. I did.

7 Q. Do you recall what time you left the courthouse
8 that day?

9 A. Sometime around 4:30.

10 Q. As of that time, had anybody told you what had
11 happened with Mr. Medina Perez?

12 A. No.

13 Q. What did you think happened?

14 A. I figured he went into ICE custody and that
15 was the end of it.

16 Q. The next day, did you sit in the Newton District
17 Court?

18 A. I didn't.

19 Q. When were you next there?

20 A. I was in Newton two days later. So on the
21 4th, on that Wednesday.

22 Q. On the 3rd, on Tuesday, did anybody call you up
23 and say let me tell you about Mr. Medina Perez?

24 A. No.

25 Q. Did anybody call you up and say, what happened,

1 what did you do?

2 A. No.

3 Q. What happened on Wednesday, April 4th?

4 A. So on Wednesday, April 4th, I got to the
5 courthouse, I went in and checked in with
6 Judge Heffernan, and she gave me my assignment
7 for the day. She asked if I would handle the
8 jury session upstairs. So I went up to the
9 second floor lobby. I handled the matters that
10 were on that day. Some were jury matters, some
11 were not jury matters. There was some overflows
12 from the first session. And then when the
13 session was down on a break, either I went down
14 to her lobby or she came up to my lobby, I can't
15 remember, and we talked about the Medina Perez
16 case. That's when she notified me that he had
17 been released out the back and had not been
18 apprehended by ICE.

19 Q. Was that the first you were hearing it?

20 A. That was the first I heard of it.

21 Q. What did you say to her?

22 A. I said, how did that happen.

23 Q. What did she say?

24 A. She said, that's what I'm trying to find out.

25 Q. Do you recall exactly what she said and what you

1 said?

2 A. I don't recall everything that she said. She
3 did tell me she had talked to Attorney Jellinek
4 by then and that either she was going to or she
5 had, I don't recall, talked to the chief court
6 officer and other court officers who were there,
7 and she wanted to find out from me what
8 happened, so we briefly discussed what happened.

9 Q. Did you tell her that you had gone off the
10 record?

11 A. No.

12 Q. Did she ask you?

13 A. No.

14 Q. At that point did you know that it was against
15 the rule?

16 A. I didn't. I didn't know until Judge Fortes
17 told me a couple of weeks later.

18 Q. If you had known it was against the rule, would
19 you have done it?

20 A. Oh, God, no.

21 Q. Have you done it since?

22 A. No.

23 Q. Did you also talk about another case with
24 First Judge Heffernan during that conversation?

25 A. We did. And that's actually how the

1 conversation started. Up in the second session,
2 there was a matter that had some public
3 attention, and there were cameras in the
4 courtroom, and the clerk had asked me whether
5 that would be okay or not. When there's cameras
6 in the courtroom, you need permission in order
7 to record. And I said, I'm fine. And so she
8 had said, you know, I just want you to know, I'm
9 the First Justice, and I like to know when
10 there's cameras in a courtroom. So I apologized
11 and said, I'm so sorry, I would have thought the
12 clerk told you that, when the question came to
13 me, I assume you know, and thanks for letting me
14 know, and then she said, let me ask you about a
15 case on Monday. So that's how it came up. Yup.

16 Q. After that conversation on Wednesday, did you
17 have a different -- a second conversation with
18 First Judge Heffernan about the Medina Perez
19 case?

20 Q. I did. During our conversation on Wednesday,
21 she was very concerned about the identity of
22 Mr. Medina Perez, saying that now we don't know
23 where -- who he is or where he is and, you know,
24 we don't know what warrants he may have or what
25 can we do. You know, so we talked with that.

1 And that really upset me, so I called her on
2 Thursday, sometime late in the day, I left her a
3 voicemail message. She called me back on Friday
4 morning, and we talked about it a little bit,
5 really just on the public safety concern. I had
6 asked if he had been arrested on the warrant
7 yet. She said, no. And I said, I'm really
8 concerned that we don't know who he is, I don't
9 want him to be -- So she said, don't worry about
10 it, you know, it happens and, you know,
11 that's -- We just talked about it for a few
12 minutes.

13 Q. Is that the last time you talked about
14 Mr. Medina Perez with first Justice Heffernan?

15 A. I believe so.

16 Q. Let's move then to RAJ Fortes. Did there come a
17 time when you were sitting the Lowell District
18 Court?

19 A. Yes. I believe I was scheduled -- We get our
20 schedules a month in advance. I believe I was
21 scheduled to sit there. If not, I was switched
22 to sit there, which oftentimes happens, also.
23 But regardless, I was sitting there on a day
24 when she was sitting as well.

25 Q. Is that a bigger, busier court than Newton?

1 A. A much busier court.

2 Q. And is there usually more than one judge there?

3 A. There's usually about five judges there.

4 Q. What happened at lunchtime?

5 A. At lunchtime, she came into the lobby. And I
6 was a visiting judge lobby, where I was sitting.
7 And said, why don't you grab your lunch and come
8 in and talk to me.

9 Q. Did you do that?

10 A. Of course.

11 Q. What happened?

12 A. So I went into her office, we sat at a round
13 table, we talked about our kids. We've known
14 each other for a little bit of time. We weren't
15 friends outside of work, but I've known her for
16 a number of years. She was asking how things
17 were going. I was a new judge in her region, so
18 she just wanted to get a check in to see how
19 things were going since I was sitting there.
20 And then she said she wanted to talk to me about
21 a matter I had handled in Newton a few weeks
22 prior.

23 Q. Did you know that was on the agenda?

24 A. I did not.

25 Q. What did she say?

1 A. Again, I don't recall how she identified that
2 case. I hadn't thought about it in a few weeks.
3 But she said something that made me understand
4 that that was the case that she wanted to talk
5 about.

6 Q. And what can you recall about that conversation?

7 A. I don't recall the specifics of the
8 conversation, other than at some point she
9 either asked or I told her or she said that she
10 knew, but we started talking about how did that
11 conversation part of the hearing being off the
12 record.

13 Q. As you understood it, was the reason she was
14 raising it because she knew you'd been off the
15 record?

16 A. At that point, yes.

17 Q. Did you try to hide it or deflect or anything?

18 A. No, no.

19 Q. Did you say, no, I didn't do that?

20 A. Not at all.

21 Q. What happened?

22 A. She says there's a rule that prevents that.
23 She had a copy of the rule. I think she opened
24 up the book and took a xerox copy that she had
25 made of the rule and handed it to me, and we

1 talked about that, and that was it. And she was
2 wicked nice. She's like, listen, you're not in
3 trouble, I just want you to know that I'm here
4 to help you, like I just want to make sure that
5 you're doing all that you need to be doing, and
6 I thanked her for the rule, and that was it.

7 Q. Do you remember her also giving you a copy of
8 the Lunn policy?

9 A. I do. I remember she said, and I have a copy
10 of the Lunn policy. As you all know, I got a
11 copy e-mailed to me that day when I requested
12 it.

13 Q. When you got that Lunn policy in Newton, what
14 did you do with it?

15 A. I read it again and then I put it in my
16 binder.

17 Q. Did you give it to anybody else?

18 A. I did. I made a copy of it for the clerk's
19 office. Actually, I made two copies. I gave
20 one to the clerk magistrate and one to
21 Assistant Clerk Okstein, because they couldn't
22 put their hands on it either, and I left one
23 actually on Judge Heffernan's desk, also.

24 Q. When you spoke with Judge Heffernan, did you
25 attempt to answer her questions and be honest

1 and candid?

2 A. Of course.

3 Q. And when you spoke to RAJ Fortes, did you
4 attempt to answer her questions and be honest
5 and candid?

6 A. Yes.

7 Q. Did each of them have slightly different
8 focuses?

9 A. They did. So Judge Heffernan was concerned
10 with the security issue, for lack of a better
11 word, you know, how did he get out the back door
12 without ICE having apprehended him. That really
13 seemed to be the focus of her concern.

14 Judge Fortes was, the focus of her concern was
15 part of the matter had been conducted off the
16 record, and that was really her focus.

17 Q. Now, we've also heard that you were asked to
18 meet with Chief Justice Dawley; is that right?

19 A. I was.

20 Q. Do you remember that meeting?

21 A. I do.

22 Q. What do you remember about that?

23 A. So I remember, you know, going to his office
24 and he -- And I knew, as I said earlier, that
25 that's the case that he wanted to talk about, so

1 the next time I sat in Newton, I got a copy of
2 the CD. At that point, I knew that part of the
3 record -- part of the hearing had been conducted
4 off the record, and so I assumed that that's
5 what he wanted to talk about. So I wanted to
6 hear it before I got there. So I listened to
7 the recording. I went to his office. It was
8 Judge Fortes, Judge Dawley, myself in his
9 office. He said, do you understand why you're
10 here, and I said, yes, to talk about the case.
11 I don't think I remembered the name of it at
12 that point, but the case in Newton where the
13 defendant had been released out the back door
14 and avoided ICE. He said, well, that's the case
15 I want to talk to you about, what I want to talk
16 to you about is having gone off the record. And
17 that's what we spent a lot of time talking about
18 again.

19 Q. And what did he tell you about that?

20 A. He told me a number of things, you know, the
21 record is your friend, this isn't old times when
22 it happened a lot. He said you should always --
23 The record is your best protector, it's your
24 friend, and there's a rule, and you now know
25 about the rule, so don't do it again, and use

1 this as a learning experience, go to the judges.

2 Q. How did the meeting end?

3 A. It ended on a very positive note. He thanked
4 me for coming in, and I thanked him for the
5 opportunity to come in, and that was it.

6 Q. And did you send him an e-mail afterward?

7 A. I did. I followed up with an e-mail either
8 that day or the next day thanking him and
9 reassuring him that I heard, I listened, and it
10 won't happen again.

11 Q. Did you get a response from him?

12 A. I did.

13 Q. What was that?

14 A. Essentially, thanks for meeting with me and,
15 you know, looking forward to seeing me at the
16 upcoming judicial conference that we have every
17 year.

18 Q. At the time you left Chief Justice Dawley's
19 office, did you think that that would be the end
20 and it should be moving forward?

21 A. I did. Each time I have a conversation about
22 this case, I think it's over and then it comes
23 back.

24 Q. Okay. Chief Justice Dawley told you that the
25 record is your friend?

1 A. He did.

2 Q. Do you believe that?

3 A. I absolutely believe that.

4 Q. Do you wish you had a record of what happened --

5 A. I do.

6 Q. -- during those 52 seconds?

7 A. No question.

8 MS. MULVEY: May I have a
9 moment?

10 (PAUSE)

11 MS. MULVEY: I have nothing
12 else. Thank you.

13 JUDGE FABRICANT: Very briefly.

14 THE WITNESS: Sure.

15 REDIRECT EXAMINATION

16 BY JUDGE FABRICANT:

17 Q. When you proposed -- Well, let me put this a
18 little differently. I think I just heard you
19 say in response to Ms. Mulvey's question that
20 you viewed detaining the defendant overnight,
21 sending him back to the jail, that he would stay
22 overnight, and come back to the courthouse, you
23 viewed that as essentially the equivalent of
24 putting it on for further call. Is that right?

25 A. I mean, at the time I'm not sure that I

1 really analyzed it in that way. But yes. I was
2 just trying to give him more time, and that
3 seemed to be the proper way to do it or a way to
4 do it.

5 Q. And the way that you had in mind that you would
6 do that was you would use the fugitive from
7 justice charge, which authorizes detention
8 without bail if the underlying offense is
9 violent, you would use that charge even though
10 the assistant DA said, I don't think it's him,
11 you would use that charge to send him back to
12 the jail and have him detained overnight.

13 A. No, no, no. So what I was thinking is that
14 there would be agreement to do this, and the
15 attorney would agree, everybody would be on the
16 same page, he would be detained overnight and
17 come back the next day.

18 Q. So with agreement of his attorney, your idea
19 was, you send him back to jail and he'd be
20 detained overnight, even though the law says you
21 can do that only if it's a violent offense
22 underlying and even though the assistant DA says
23 I don't think it's the same person.

24 A. Well, that's if you analyze it under the
25 fugitive of justice matter. I mean, I guess, if

1 you want to get technical, you could do the
2 arraignment. Pause it there. I haven't
3 arraigned him yet. All come back tomorrow, do
4 this tomorrow. That's all I was trying to do.

5 Q. Send him back to the jail to do it.

6 A. Yes. With the agreement of his attorney.

7 Q. Okay. And you thought, if the attorney agrees
8 with that, then you can do it even though there
9 wasn't a legal basis for it.

10 A. No. I thought, under the circumstances, that
11 is the solution that I was offering his attorney
12 to give him more time to do what I thought he
13 was asking me to do.

14 Q. And you said, if I heard you correctly, that you
15 thought he would go right into ICE custody;
16 correct?

17 A. Well, I figured he would go down to the
18 lockup and that ICE would take custody of him in
19 the lockup.

20 Q. And Mr. Jellinek had argued quite vociferously
21 that he was the wrong person, and he had said I
22 think the best thing for us to do is clear the
23 fugitive issue, release him on the personal, and
24 hope he can avoid ICE. And what you thought
25 was, he was abandoning that argument; right?

1 A. No, no. I thought that he didn't want his
2 client held overnight and he would deal with the
3 identification issues in the -- in another
4 forum.

5 Q. So you thought that he was acquiescing in the
6 idea that his client was going to go down to
7 lockup, ICE was going to go to lockup, he was
8 going to be handed over from the lockup to ICE,
9 even though Mr. Jellinek was arguing quite
10 vociferously that he was the wrong guy.

11 A. No. What I thought is what happened, is that
12 I offered a solution, if you want more time to
13 investigate his identification, I'm going to
14 give you more time. And the best way, in my
15 opinion then, to do that would have been to hold
16 his client overnight without any possibility of
17 bail so that everybody that had any involvement
18 in the case would come back the next day,
19 period.

20 Q. But he didn't accept that.

21 A. He didn't accept it. That's why I released
22 him on his own recognizance. Done.

23 Q. And your expectation, releasing him on his own
24 recognizance, was that his lawyer was basically
25 acquiescing that ICE was going to take him.

1 A. I didn't make any judgment about what his
2 lawyer was thinking.

3 JUDGE FABRICANT: All right.
4 That's all I have. Thank you.

5 MS. MULVEY: Nothing else.
6 Thank you.

7 HEARING OFFICER: Thank you
8 very much.

9 JUDGE FABRICANT: And that
10 completes the Commission's case at this time.

11 HEARING OFFICER: Okay. So do
12 you have a witness?

13 MR. HOOPES: Our witness moved
14 her schedule, so she'll be here tomorrow morning
15 at 9:00.

16 HEARING OFFICER: Okay.

17 MR. HOOPES: And we'll be --
18 Within the two hours, we'll have our witnesses.
19 We'll be done.

20 HEARING OFFICER: Tomorrow
21 morning.

22 MR. HOOPES: Yes.

23 HEARING OFFICER: So with that,
24 I think we're recessed for the day.
25

(The proceedings adjourned
at 11:48 a.m.)

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C E R T I F I C A T E

I, LISA L. CROMPTON, Registered
Professional Reporter, hereby certify that the
foregoing is a true and accurate transcript of my
stenographic notes of the proceedings in this
matter on the date and time specified in the
caption hereof.

IN THIS WITNESS WHEREOF I have hereunto
set my hand this 27th day of August, 2025.



LISA L. CROMPTON

REGISTERED PROFESSIONAL REPORTER

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CERTIFIED HEARING TRANSCRIPT (DAY 5)

COMMONWEALTH OF MASSACHUSETTS
COMMISSION ON JUDICIAL CONDUCT

COMPLAINT NUMBER 2019-22

VOLUME V

HEARING

~ BEFORE ~

HEARING OFFICER

DENIS J. McINERNEY, ESQ.

JUNE 13, 2025

9:00 A.M.

Boston, Massachusetts

Lisa L. Crompton, CSR (MA) (RI), RPR

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1 HEARING OFFICER: Good morning.
2 This is the continuation on the hearing of the
3 Commission on Judicial Conduct's Complaint
4 Number 2019-22.

5 Counsel, would you please
6 identify yourselves for the record.

7 JUDGE FABRICANT: Judith
8 Fabricant, Special Counsel for the Commission on
9 Judicial Conduct.

10 MR. NEFF: Howard Neff,
11 Commission on Judicial Conduct.

12 MS. MULVEY: Elizabeth Mulvey
13 for Judge Joseph.

14 MR. HOOPES: Tom Hoopes for
15 Judge Joseph.

16 MR. HOOPES: Michael Keating
17 for Judge Joseph.

18 HEARING OFFICER: Thank you.

19 MR. SULLIVAN: And excuse me.
20 My name is Daniel Sullivan. I'm the general
21 counsel for the Trial Court.

22 And we have two trial court
23 officials testifying this morning. I'm just
24 here in the instance if there's any question you
25 ask as well.

1 Thank you.

2 HEARING OFFICER: Great. Thank
3 you very much.

4 Ms. Mulvey.

5 MS. MULVEY: Judge Joseph calls
6 upon Bonnie MacLeod.

7 HEARING OFFICER: Good morning.

8 HONORABLE BONNIE H. MACLEOD,

9 SWORN

10 HEARING OFFICER: Thank you.

11 Please be seated.

12 DIRECT EXAMINATION

13 BY MS. MULVEY:

14 Q. Good morning. Would you tell us your name,
15 please.

16 A. Good morning. My name is Bonnie Hilly
17 MacLeod.

18 Q. Are you a retired judge?

19 A. I am.

20 Q. How long have you been retired?

21 A. I retired from this building in June of 2016.

22 Q. What courts did you sit on?

23 A. All told, this is the court I left.

24 Q. The whole thing.

25 A. The whole thing. I was appointed to the

1 District Court in 1989. I sat in a variety of
2 District Courts, usually long stints, until I
3 was appointed to the Superior Court in November
4 of 2002.

5 Q. So you spent about 13 or 14 years on each of
6 them?

7 A. Right. Exactly. 13 years in Hingham on the
8 District Court, and then I stayed later than
9 that just so that I could stay with -- my
10 longer, my longer presence was on the
11 Superior Court.

12 Q. Can I take you back? Can you tell us about your
13 professional background before you were
14 appointed to District Court?

15 A. Certainly. I was admitted to the bar in
16 1972. For those of you who can't count, it's
17 52 plus years now, which amazes me. My first
18 legal job -- I left -- I was -- While I was in
19 law school and for about six months thereafter,
20 I was the head law librarian at a law firm
21 called Hill and Barlow. I left Hill and Barlow
22 when I was appointed as assistant district
23 attorney in Middlesex County, and that would
24 have been in September of 2023.

25 Q. 2023?

1 A. Sorry. 1973. And I was in the
2 appellate division of the district attorney's
3 office and I tried felony cases, and then
4 eventually I was appointed chief of the
5 appeals division in the district attorney's
6 office, and my very first case that I've argued
7 was in this very courtroom before the full bench
8 of the Supreme Judicial Court.

9 Q. All right.

10 A. Thereafter, I left the district attorney's
11 office in September of 1976. I had been asked
12 by one of the justices of this court, of the
13 Supreme Judicial Court to consider moving to an
14 office called the Office of Bar Counsel, about
15 which I knew nothing whatsoever. But apparently
16 they were looking for trial lawyers. And so I
17 ended up becoming the first assistant bar
18 counsel in the bar counsel's office. I was
19 elevated to first assistant bar counsel
20 thereafter. And I was chief of the litigation
21 division, which is, basically, I was the person
22 litigating bar discipline cases and presenting
23 the evidence. And I stayed there until I was
24 appointed to the District Court in May of 1989.

25 Q. When you were on the District Court, did you sit

1 in a number of different District Courts?

2 A. I did. I sat -- Oh, I'm sorry. With my,
3 with my career. I also taught for 42 years at
4 four of the Boston law schools, professional
5 ethics.

6 Q. All right.

7 A. I stopped that in 2018.

8 Q. Okay.

9 A. Because I got too busy at JAMS.

10 Yes. When I sat in -- I was named to the
11 Cambridge District Court, but I never sat there,
12 not one day in 13 and a half years. For some
13 reason they wanted to put me in the so-called
14 higher crime courts. So I ended up in Lynn, and
15 I spent five years with Salem and Lynn,
16 situation where I was in Lynn three days and
17 Salem two days and back and forth, and I did
18 that until July of 1994. And then after that, I
19 went to Chelsea District Court, which for those
20 of you who don't remember where Chelsea was in
21 those days, it was in Cambridge. And it was in
22 Cambridge for seven years, I believe. I kind of
23 ended up in Cambridge. Just across the room --
24 across the yard from where I was supposed to be
25 sitting. I was there for substantial period of

1 time. I think 1994 to at least 1999. And then
2 I went back to Salem and Lynn for a little bit.
3 And then my son was playing football for
4 Whitman High School, and I asked if I could go
5 to Malden. So I sat in Malden District Court
6 until I was appointed to the Superior Court in
7 2002.

8 Q. And in the course of your time in the
9 District Court, did you run into different
10 practices and customs in the various courts?

11 A. The District Court is like -- well, in my
12 view, each court has its own culture. And every
13 time you went to a new District Court, you had
14 to figure out kind of who rules the roost, is it
15 probation, is it the clerk's office.

16 I can remember, one day, people
17 came to the District Court because nobody could
18 figure out whose job it was to carry the
19 restraining order into the courtroom. Because
20 they had to be vetted by probation first, and
21 probation said it wasn't their job to bring --
22 And this was the culture of the court. It was
23 always this kind of testimony.

24 So you really had to meet with
25 the chief court officer for that court, the

1 clerk, and the district attorney and whomever to
2 figure out what's the culture of this court.
3 And, you know, basically, I hate to say it, but
4 who do you want me to be, I mean, what control
5 do I have over the gathering. And each court is
6 really like sui generis.

7 Q. Did you also run into lots of different judges
8 in the various courts?

9 A. Certainly, I did.

10 Q. Now, we've heard that, in November of 1989,
11 Special Rule 211 was implemented in the
12 District Court.

13 A. Yes.

14 Q. Is that right?

15 A. I do. I'd been on the bench maybe about five
16 months when it was enacted. Not so much
17 fanfare --

18 Q. I was just going to ask you, would you tell us
19 about the fanfare and the training that
20 accompanied that rule.

21 A. In terms of training, I really don't remember
22 any. We were told that you had to ensure that
23 the tape was on and that things were being
24 recorded, that proceedings were being recorded.

25 And then, of course, I remember

1 sitting in Williamstown with a bunch of my
2 colleagues from different courts and we're
3 arguing about what's a proceeding and what's
4 administrative, what does this mean, and that we
5 kind of all concluded, it meant that it was kind
6 of what we decided it would be. I mean, in
7 other words, given the heft of whatever was
8 going on. Obviously, a hearing was a
9 proceeding, an arraignment was a proceeding.
10 But things that might have pertained to that may
11 not be part of a proceeding.

12 So again, that likewise I think
13 was somewhat sui generis in the type that it was
14 being decided by an individual judge at an
15 individual time as to what was on the record and
16 what was not. And I know I'm going back a
17 little bit historically, maybe, and things
18 certainly felt likely to have changed since I
19 left the court in 2002, but it was really kind
20 of up to --

21 Oftentimes, we didn't have
22 anybody even to run the machine. And when I
23 would stay after 6:00 to 8:00 doing matters,
24 because we didn't have a Juvenile Court and
25 they're doing juvenile, I was it. I was taking

1 the record with my -- I was writing, filling out
2 the docket sheet, I was running the recorder, I
3 was -- I mean, it was all there in front of me.
4 I mean, again, it was -- necessity is the mother
5 of invention.

6 Please remember, in my courts,
7 we did over 100 cases a day, and that's why,
8 when I came to the Superior Court for a while, I
9 thought it was naptime.

10 Q. Vacation?

11 A. Yeah.

12 Q. Both in District Court and in Superior Court,
13 did you as a judge go off the record on
14 occasion?

15 A. I did.

16 Q. Did your colleagues do likewise?

17 A. Oh, yes.

18 Q. If you consider the entirety of your career from
19 1989 to 2016, did the frequency of
20 off the record proceedings or discussions
21 decrease over the years?

22 A. I think it did, only because of the nature of
23 the Superior Court. But the reasons -- I still
24 obviously did them. And I think I had the
25 instincts and the judgment to decide when to do

1 them and when they made sense. I know, I know
2 in this very courthouse -- thank God the statute
3 of limitations -- I know I probably did it at
4 least once a week.

5 Q. And can you just give us a couple of examples of
6 when a judge might go off the record?

7 A. Well, I tried in my mind to categorize them
8 when I understood, you know, the subject matter
9 about which I'd be speaking, like when did I do
10 it, for what reasons. And I think sometimes --
11 I mean, the obvious one I think to a lot of
12 people has to do with safety, the safety of
13 either a litigant or a party or whatever. So
14 something some concern. For example, it was not
15 uncommon in any court I ever was, all of the
16 District Courts and here in the Superior Court,
17 for a district attorney, an assistant DA, and
18 defense counsel ask if they could come up and go
19 off the record, and it was always something
20 like, well, judge we're not asking, you can see
21 we're not asking for very high bail and it's
22 because defense counsel's client is a
23 cooperating witness and is going to lead us to
24 X, Y, and Z, and so we don't want you to think
25 we're crackers by not asking for higher bail,

1 there's good reasons and obviously reasons we do
2 not want to put on the record but would just --
3 that's what we're going to do. So that would be
4 one. And that was, that was pretty routine --
5 not routine, but would happen. That would be
6 the number one I remember, both in the -- all of
7 the District Courts I sat in and certainly a
8 couple of times in the Superior Court.

9 Q. Okay.

10 A. And another would be privacy issues, where
11 somebody -- the lawyers would ask to approach
12 the bench. I remember one of my court officers
13 here came to me one day and said, Judge, the
14 juror upstairs, she is just overwrought, she's
15 crying and she won't tell me why, but she's
16 telling me she can't sit, you know. And I
17 remember the jury selection and, ironically, she
18 was one of the people I was kind of thinking
19 about for the eventual foreperson on the jury.
20 Oh, what's that about. And I said why don't you
21 bring her down. And she was overwrought and she
22 was crying. And the lawyers came up to the side
23 bar with me, and I said off the record, and I
24 asked her what was going on. She had just
25 learned the day before that her husband had been

1 diagnosed with a terminal illness and that she
2 couldn't get it out of her head. Now I don't
3 believe that is something that needs to be on
4 the record. I then went on the record and said
5 this juror is excused for good cause shown. And
6 to me, that's enough. I don't need to make a
7 record that she had to make that private
8 disclosure.

9 That happened lots of little
10 times, people making private disclosures about
11 things that they would rather not see the light
12 of day. And again, it's a matter of judgment as
13 to whether or not you make a record of that kind
14 of thing.

15 Q. When lawyers asked -- Were there occasions when
16 lawyers asked you to get off the record?

17 A. Oh, yes. Most of -- Yeah. A lot of the time
18 I would do that is, you know, when the lawyers
19 would ask.

20 Q. Would you necessarily know what it was they
21 wanted to say?

22 A. No.

23 Q. You just said a minute ago that you could put it
24 on the record after the fact or something like
25 that?

1 A. It was something that was a matter of --
2 again, it would not be probably intimate
3 details. It would just be, no, thank you,
4 everyone, this juror has done whatever. And in
5 some cases it would be something I would never
6 put on the record. I would just tell the
7 lawyers thank you and back off, particularly
8 when you have a cooperating witness, a
9 confidential informant, somebody who didn't want
10 their address known because whatever, those
11 types of things I would necessarily go back on
12 the record in any way.

13 Q. And if something untoward happened at an off the
14 record conversation, did you as the judge have a
15 way to kind of fix that?

16 A. Oh, yes. In fact, if somebody came up -- I
17 think if the lawyers came up and they started
18 talking about something that -- I would say this
19 isn't an off the record conversation, or if it
20 came out, then go back and I would say counsel
21 has explained to me that there are good and
22 whatever reasons, blah, blah, blah, and I would
23 put that on the record. But sometimes -- I
24 don't think I ever got snookered, for want of a
25 better word. I trust lawyers. I think lawyers

1 trusted me. So I was really careful, you know,
2 as I said, not to get snookered. And I don't
3 remember it ever happening. And I know they
4 trusted me.

5 One of the other instances, for
6 example, when I would do something with the
7 lawyers is, I mentioned to you all Chelsea was
8 actually in Cambridge. And for someone like me,
9 who doesn't drive, it was really interesting in
10 the morning to take the commuter rail to the
11 Green Line, walk to -- you know, and get off at
12 Lechmere and then trying to find out where the
13 Chelsea District Court was.

14 But imagine, if you will, how
15 it would be for someone who is arrested
16 overnight in Chelsea, went in a van the next
17 morning and brought to Cambridge where they had
18 never been in their entire lives, and then the
19 Commonwealth doesn't ask for bail, so it's time
20 for them to go home, how do they get home from
21 Cambridge.

22 So the first thing, I would ask
23 the lawyers to come up and say off the record,
24 and I would say to the DA -- I would say to the
25 defense attorney, does your client have a way to

1 get home, does he know how to get home, well, is
2 there anyone here for him today to bring him
3 home. And if he would -- if he said no, then
4 what do you do. I said, well, so we'll just
5 have to give him directions. And then I had
6 this drawer in my bench, and it was full of \$10
7 bills that I had put there, and I would give a
8 \$10 bill to the court officer, and the court
9 officer would then take the guy out, give him
10 directions, how to get to the Green Line, and
11 tell him to get off at Haymarket, then take the
12 bus to Bellingham Square. I mean, this happened
13 every day. And the people were being dumped
14 into Cambridge and never given any thought about
15 what might happen on the other hand.

16 And so we had -- It became a
17 matter of where DA was sneaking money into my
18 drawer, the court officers in my drawer, I went
19 in the drawer one day and it's full of \$10
20 bills, I mean, because everybody was now
21 contributing to the transportation for the --
22 That's the District Court.

23 Q. In terms of cases and litigants and just the
24 management of a day, is there a difference
25 between the District and the Superior Court?

1 A. Oh, for sure.

2 Q. Tell us about that.

3 A. Well, the management was such that -- Again,
4 in the District Court, you never really know --
5 I never sat in Newton. Oh, I did. I sat one
6 day in Newton. But that, too, was in Cambridge
7 at the time, for a very short period of time.

8 Again, you've got a sense of
9 the culture. Some courts are much busier than
10 the others. I tend to, fortunately or
11 unfortunately, end up in the busier ones. So
12 you never knew on a given day how to manage.
13 And I will say, this is probably not the great
14 way to do things, but if you heard there were
15 some 20 changes of plea, they would round up all
16 the people who are going to plead guilty in the
17 back and you would then tell them all their
18 rights and then you do it individually and say
19 did you hear everything I said to all those 12
20 other people. That's how you did, again, if you
21 had 50 or 19 cases day as a District Court
22 judge, you do not -- you know, you try not to
23 rush that over what's required. But you
24 certainly try to do what Jim Dolan used to say,
25 gets the donuts made, and the donuts is getting

1 those hundred people's cases done on that given
2 day.

3 So the culture would depend on
4 the court. I really -- And there was a very
5 strong symbiosis between the court officer, the
6 judge, the probation -- the head of probation or
7 whoever was there, the assistant district
8 attorney, you kind of all had -- you worked the
9 same session, you knew what was, you know, what
10 was going on and what needed to be done on a
11 given day.

12 Q. And when you would come into a District Court,
13 would you rely on those people to sort of show
14 you the ropes in that court?

15 A. Totally.

16 Q. Do you think your experience was different from
17 that of your colleagues?

18 A. I do not.

19 Q. Do you know Judge Shelley Joseph?

20 A. I do not. I know of her. I know I've seen
21 her in passing. I want -- I haven't -- I kind
22 of avoided her since you and Attorney Hoopes and
23 I spoke the first time, because I just forgot
24 that we actually were in the Montgomery Summit
25 together. I didn't even say hello to her. My

1 companion, my friend Andrea Kramer, who was with
2 me, said, oh, I see Judge Joseph, let's go see
3 her. I said, you know what, why don't you go
4 say hi and give her our best. I just didn't
5 want to -- And likewise, we're on the same Inn
6 of Court and it turned out that she's on my
7 team. And when I learned she was on my team, I
8 haven't been to a meeting since I learned it.
9 Because, again, I didn't want it to appear --
10 because you know how rumors and stuff fly, that
11 the two of us were having a, you know, glass of
12 Pinot Grigio together, and God knows I can be
13 had for a glass of Pinot Grigio.

14 MS. MULVEY: Thank you,
15 Judge MacLeod. I have nothing else.

16 CROSS-EXAMINATION

17 BY JUDGE FABRICANT:

18 Q. Good morning, Judge MacLeod.

19 A. Good morning, Judge Fabricant.

20 Q. For this purpose, I'm special counsel.

21 A. Sorry, Counsel.

22 Q. We have an adjudicator on the bench, and that's
23 not me.

24 Judge MacLeod, you said that,
25 when you were sitting as a judge, you would go

1 off the record at times and you knew when to do
2 it and when not to do it.

3 A. Yes.

4 Q. And when not to do it was when you were dealing
5 with something that was a matter of particular
6 public attention or controversy that the public
7 was particularly going to want access to, that
8 was the, no, I'm not going to do it; right?

9 A. I don't necessarily agree with that. I can't
10 say that. Because the public can be a very nosy
11 group of people. And I remember a case where
12 there was a family feud and there was a
13 19-year-old married to an 18-year-old. It was a
14 mixed race couple. The parties were fighting.
15 And the couple wanted to tell me privately what
16 they wanted to do. And believe me, there was
17 this many people in the courtroom to see what
18 was going to happen with that case. And I let
19 them come over to the side bar and I went off
20 the record.

21 Q. There is a right of public access to the courts;
22 right?

23 A. There is. I wish I trusted the public as
24 much as other people.

25 Q. We may debate how much any of us trust the

1 public and we may debate how much any of us
2 trust the media and how fair the media can be.

3 A. True.

4 Q. But the constitution, --

5 A. Yes.

6 Q. -- the Federal constitution, the state
7 constitution, case law provides a right of
8 public access to the court.

9 A. Absolutely.

10 Q. And you know that if you go off the record in a
11 case that involves a kind of subject matter that
12 is getting particular public attention, the fact
13 that you go off the record there is going to
14 catch public attention; right? You know that.

15 A. I guess. I think that's well said. But,
16 again, the public always has an itch to know,
17 but that doesn't mean that at a particular time
18 they're entitled to know.

19 Q. The SJC has said, --

20 A. Yes.

21 Q. -- the U.S. Supreme Court has said the public is
22 entitled to know what goes on in the courts.

23 A. Right. But even the District Court rule
24 talks about the fact that matters might be
25 administrative, and if, as a judge, I deem

1 something to be an administrative matter, as to,
2 you know, whether they -- for example, the
3 things I used to do in Malden was I would say to
4 the court officer, I would say it was before
5 lunch, the person was about to be let go, and I
6 said, you know, this person probably hasn't
7 eaten since he was arrested at 6:00 yesterday
8 morning, could you, you know, maybe bring him
9 back -- when you bring him back downstairs to
10 get his stuff, would you make sure he gets a
11 sandwich before you put him out the sallyport.

12 Q. And that would be a good example of the kinds of
13 things that would be administrative. Doesn't
14 have to do with the substance of the case,
15 doesn't have to do with whether somebody's going
16 to be released or not released, doesn't have to
17 do with whether somebody's going to be detained
18 or not detained. It's a side issue that doesn't
19 involve the substance of the case.

20 A. I would say yes to that.

21 Q. Okay. When you started practicing law in 1972,
22 the District Court had no recording at all;
23 correct?

24 A. I believe that's correct.

25 Q. It was referred to, as some courts around the

1 country have referred to as, not a court of
2 record; right?

3 A. (Witness nods head).

4 Q. And anything that was adjudicated in the
5 District Court in that period of time was
6 subject to trial de novo in Superior Court.

7 A. Correct.

8 Q. There were no jury trials in District Court.

9 A. Correct.

10 Q. Anybody didn't like what happened in
11 District Court, they could go to the
12 Superior Court.

13 A. Yes.

14 Q. They could have a jury trial or they could have
15 another bench proceeding and do it all over
16 again, and maybe that was one of the
17 justifications for not having a record; right?

18 A. (Witness nods head).

19 Q. And that changed over the years. District Court
20 came to have jury trials, the trial de novo
21 system in a gradual way was eliminated
22 eventually --

23 A. Correct.

24 Q. Now, you were last in the District Court in
25 2002; correct?

1 A. Correct.

2 Q. And then you moved to Superior Court.

3 A. Yes.

4 Q. And over the years, both when you were in the
5 District Court and when you were in the
6 Superior Court, you did lobby conferences off
7 the record.

8 A. Yes.

9 Q. Some judges did and some judges didn't. And in
10 the Superior Court at least, it was a topic of
11 some controversy --

12 A. It was.

13 Q. -- among the judges.
14 You were the sort of judge who read the
15 decisions coming out of the SJC.

16 A. I sure was.

17 Q. And you know that over those years there were a
18 series of comments in SJC decisions about the
19 practice of lobby conferences off the record.

20 A. Correct.

21 Q. You know that in 1992, when you were on the
22 District Court, the SJC issued Commonwealth
23 versus Fanelli, that's F-a-n-e-l-l-y, and they
24 said, note that if lobby conference is held, the
25 better practice is to record it. Do you

1 remember that?

2 A. I do. And that's why I did not do --
3 actually, I did not do lobby conferences. I
4 would go off the record while I was on the
5 bench, but I was -- I didn't do -- I don't
6 remember anything about any lobby conferences on
7 the Superior Court.

8 Q. On the Superior Court.

9 A. On Superior Court.

10 Q. So from 2002 --

11 A. Right.

12 Q. -- forward, --

13 A. Yes.

14 Q. -- you did not do any conferences off the
15 record -- I want to make sure we're clear about
16 what -- about the use of the term "lobby
17 conference."

18 A. Right. Because I don't -- I mean, bringing
19 people into my lobby and doing conferences, I
20 did not do.

21 Q. But you also didn't go off the record in any
22 conference with the lawyers in Superior Court
23 when you were talking about the substance of the
24 case.

25 A. I did. But I did it when the lawyers would

1 ask to approach. I can give you a quick
2 example. And that is this: I had a civil case
3 where two of the -- two very well-known lawyers,
4 very fine trial lawyers came in front of me
5 involving the death of an individual who had
6 been hit by a car. And the contention was, by
7 the defendant, that the individual who hit the
8 person in the crosswalk was not in the course of
9 his employment. And so I said, well, I guess,
10 looking at the docket, we ought to make some
11 room for a motion for summary judgment, and the
12 two lawyers looked at each other and said can we
13 do a side -- said can we go off the record,
14 Judge. They came over and they explained to me
15 that they were trying to work out a settlement
16 and that -- which they would prefer if the
17 adjuster, who was sitting in the back of the
18 courtroom, was not aware of.

19 Q. That was a civil case.

20 HEARING OFFICER: And that
21 was --

22 A. That was an off the record conference about
23 the case. And it's certainly substantive in
24 nature.

25 Q. That was a civil case.

1 A. That was a civil case.

2 Q. And in the Superior Court in those days, a lot
3 of stuff happened off the record in civil cases;
4 right?

5 A. (Witness nod head).

6 Q. Civil cases were very different from criminal
7 cases.

8 A. Right. But this was probably in 2014 this
9 happened. But yes. Still the same.

10 Q. So in 2014, in the Superior Court, --

11 A. Right.

12 Q. -- there were court reporters.

13 A. Right.

14 Q. It was maybe the beginning of the time --

15 A. You could kind of do this. (Demonstrating).

16 Q. Well, if the -- More than that --

17 HEARING OFFICER: If I can, can
18 the record reflect what the witness just did, --

19 THE WITNESS: I'm sorry.

20 HEARING OFFICER: -- when she
21 said you could kind of do this, you put your
22 right hand to the side.

23 THE WITNESS: Right.

24 HEARING OFFICER: I just want
25 to make sure the record's clear.

1 A. That would be -- Yeah. Just gestured to the
2 court reporter that it wasn't on the record.

3 Q. But more than that, in a civil case in the
4 Superior Court in the days when the court had
5 court reporters and not electronic recording,
6 what would often happen in Superior Court was
7 that you'd have a court reporter in the
8 courtroom in the morning when you were doing
9 trials, and then in the afternoon when you were
10 doing non-evidentiary proceeding, such as the
11 kind of case conference that you're referring
12 to, the court reporter would be back in her
13 office making a transcript, and unless there was
14 a pro se, you would do it off the record.

15 A. That's correct.

16 Q. But that was in civil cases; right? You
17 couldn't do that --

18 A. Absolutely.

19 Q. -- in criminal cases. Criminal cases were a
20 whole different story.

21 A. Exactly.

22 Q. When you were on the Superior Court, having in
23 mind what the SJC had said, when you had a
24 conference about the substance of a case, you
25 would not go off the record.

1 A. That is correct.

2 Q. And the SJC reiterated, in 2002, in
3 Commonwealth versus Serino, S-e-r-i-n-o, we
4 again recommend that unrecorded lobby
5 conferences be avoided. Do you remember that?

6 A. I do.

7 Q. Then, in 2007, they got more emphatic. Do you
8 remember this? Murphy versus the Boston Herald.

9 A. Yes.

10 Q. Do you remember the Murphy case?

11 A. I remember it well.

12 Q. He was a colleague on the Superior Court.

13 A. Yes, I do remember.

14 Q. And he had done a lobby conference off the
15 record in a case involving an allegation of rape
16 of a teenager.

17 A. Yes.

18 Q. Do you remember that?

19 And the Boston Herald ran -- and then of course
20 it took off on other media. But it started with
21 the Boston Herald. They ran a series of
22 articles in which they attributed to Judge
23 Murphy some language in an off the record lobby
24 conference that a judge would not want to have
25 attributed to him.

1 A. Exactly.

2 Q. Correct? And he sued the Boston Herald for
3 defamation. Do you remember that?

4 A. I do.

5 Q. Much to the amazement of judges in general, he
6 won. Do you remember that? He won a judgment.
7 And it went to the SJC, and the SJC affirms the
8 judgment, and they dropped a footnote. The
9 footnote said, if you remember, if there ever
10 was a case that demonstrates the need for lobby
11 conferences where cases or other court matters
12 are discussed to be recorded, this is the case.
13 This litigation, with all its unfortunate
14 consequences for those involved, might not have
15 occurred if the critical lobby conference had
16 been transcribed. We trust that the lesson
17 learned here will be applied by trial judges to
18 prevent unnecessary problems that often arise
19 from unrecorded lobby conferences. Do you
20 remember that?

21 A. I do.

22 Q. And that got a lot of attention across the
23 courts -- do you remember that -- and across the
24 bar?

25 A. It did.

1 Q. And then, going back a little bit --
2 District Court Rule 11 doesn't apply to
3 Superior Court.

4 A. Correct.

5 Q. Or didn't at the time that you were on the
6 Superior Court. And in the time that you were
7 on Superior Court at least, there was no rule
8 about recording, there was a practice.

9 A. (Witness nods head).

10 Q. And as we talked about, over the years there
11 were many discussions amongst Superior Court
12 judges, some of them still did it, until 2015
13 when the SJC prohibited lobby conferences off
14 the record in the revision of Rule of Criminal
15 Procedure 12(b). Do you remember that?

16 A. I do.

17 JUDGE FABRICANT: That's all I
18 have. Thank you.

19 REDIRECT EXAMINATION

20 BY MS. MULVEY:

21 Q. I just want to be clear, Judge MacLeod. We
22 heard a lot of talk about a lobby conference.

23 A. Right.

24 Q. Is that different than a minute or two at the
25 side bar?

1 A. Totally. It's not the same thing.

2 Q. Why not?

3 A. Well, usually a lobby conferences, as I
4 remember it when I was an assistant DA, I was in
5 the lobby with the defense attorney and the
6 judge, and we would be kind of hashing around
7 what the recommendation was versus what was and
8 what the Commonwealth wanted to do, and we
9 would, we would have that whole substantive
10 conversation in the lobby with the judge, and
11 then we would go out on the record and do
12 whatever it was as the judge would say
13 something, well, I don't need to hear from the
14 victim. All of that would get hashed out in the
15 lobby conference, which usually was not on the
16 record back in those days, and we'd go out and
17 do whatever we were going to.

18 But it's very different as
19 opposed to, again, District Court, in
20 District Court, you know, I used to say to
21 people, you know, this is McJustice. We are
22 McDonald's of the justice world, because we do
23 not have the time or the capability to
24 necessarily engage in a perfect courtroom
25 atmosphere, but we do what we do to get the work

1 done every single day.

2 Q. And do people in the District Court do the best
3 they can to be fair to everybody?

4 A. No question in my mind.

5 MS. MULVEY: Thank you.

6 JUDGE FABRICANT: Very brief
7 follow up, if I may.

8 RECROSS-EXAMINATION

9 BY JUDGE FABRICANT:

10 Q. Judge MacLeod, the difference between what you
11 describe as a lobby conference and something off
12 the record at side bar very brief is that it's
13 brief.

14 A. Right.

15 Q. And that may or may not be the only difference
16 depending on what it's about; correct?

17 A. It may.

18 Q. That series of SJC decisions in which they
19 commented about lobby conference, the message,
20 as you understand it and as it was broadly
21 understood, was going off the record is a big
22 risk; correct?

23 A. That's correct. But they never say don't do
24 it.

25 Q. Until 2015, when they said it's --

1 A. Exactly.

2 Q. -- part of the plea conference -- They did say
3 in 2007, --

4 A. Should be avoided, yes.

5 Q. -- this wouldn't have happened, --

6 A. Yes.

7 Q. -- and we wouldn't be here, all of the
8 unfortunate consequences of this case would not
9 have happened if we had a record so that we knew
10 exactly what was said off the record.

11 A. No question. That's exactly what it says.

12 JUDGE FABRICANT: Thank you.

13 THE WITNESS: Good?

14 MS. MULVEY: I have nothing
15 else. Thank you.

16 HEARING OFFICER: Thank you.

17 MS. MULVEY: Judge Joseph calls
18 Elizabeth Bostwick.

19 ELIZABETH BOSTWICK, SWORN

20 HEARING OFFICER: Thank you.

21 DIRECT EXAMINATION

22 BY MS. MULVEY:

23 Q. Good morning, Attorney Bostwick.

24 Would you just tell us your name for the record,
25 please.

1 A. Good morning. My name is Elizabeth Bostwick.

2 Q. And we've heard, in 2018, you were a bar
3 advocate in, among others, the Newton
4 District Court?

5 A. Yes.

6 Q. Can you tell us a little bit about your
7 professional background up until 2018?

8 A. So I became a lawyer in January of 2000. I'm
9 a graduate of Northeastern Law School. I worked
10 for a small firm for a while, and then I went to
11 corporation counsel's office, City of Boston,
12 and then I did private practice for a period of
13 time, and went back to corporation counsel's
14 office for a short while, and then I returned to
15 private practice again, solo practitioner.

16 Q. And at the time we're here about, were you
17 involved in representing criminal defendants?

18 A. I was. I was a member of the Middlesex
19 Defense Attorneys, which is the agency or
20 non-profit that handles bar advocates who work
21 for Middlesex County.

22 Q. We've heard that term "bar advocate." When
23 you're a bar advocate, what do you do?

24 A. You represent people who are determined
25 indigent by the probation department. It's

1 typical that you work in a couple different
2 courts and you make quote-unquote a duty day
3 where you're the attorney helping the court
4 handle any matters that, you know, you have
5 indigent defendants or a variety of things,
6 Section 35 or whatever, helping the court
7 representing those folks.

8 Q. You said you might have a duty day. What would
9 you do on a duty day?

10 A. I mean, it really depended on the court's
11 needs. Right? So you were basically making the
12 commitment to being the lawyer of the day and
13 stay, you know, for whatever the court needed,
14 so you could represent a variety of people on a
15 variety of issues.

16 Q. So would you essentially spend your day at that
17 court in case somebody needed a court-appointed
18 lawyer?

19 A. You would, yes.

20 Q. Were you the bar advocate or the duty attorney
21 on April 2nd, 2018, in Newton?

22 A. I believe that's accurate. I have no memory
23 of the specific day, but yes.

24 Q. That sounds like something you probably would
25 have been doing at that time?

1 A. In 2018, yes.

2 Q. Were you assigned on April 2nd, 2018, to
3 represent a defendant named Jose Medina Perez?

4 A. Yes.

5 Q. Do you have some memory of the case and the
6 proceedings?

7 A. I have some memory, but it was a while. I
8 also was undergoing cancer treatment at the
9 time; so...

10 Q. A time to forget.

11 A. No. But it was just -- I mean, I was
12 physically undergoing cancer treatment; so...

13 Q. Was that the only day you had any involvement
14 with Mr. Medina Perez?

15 A. Yes.

16 Q. Do you remember that it was a Monday morning?

17 A. No.

18 Q. Do you recall that he had been arrested and was
19 being detained when he showed up for his
20 arraignment?

21 A. I recall that he was detained.

22 Q. Do you recall what the charges were?

23 A. I recall that, I recall that what was at
24 issue was the fugitive of justice warrant.

25 Right? From Pennsylvania. That's what I

1 recall.

2 Q. Do you recall that he had been arrested on state
3 misdemeanor drug charges?

4 A. I believe so. I don't have specific memory
5 of that but..

6 Q. You do remember something about a fugitive
7 warrant?

8 A. I do.

9 Q. And had you dealt with those before?

10 A. Yes.

11 Q. Can you tell us from the perspective of a
12 defense lawyer what you needed to do if they had
13 someone with a fugitive warrant?

14 A. Ideally, I mean, ideally, you can -- you try
15 to figure out if that is the person. And, you
16 know, there's a lot of ways to try to do that.
17 Obviously, as a lawyer on duty, you know, I
18 have, I have somewhat limited access. I don't
19 have a computer, you know. I may have a phone
20 on me. Certainly, the phones are much different
21 now than they used to be. So I have a little --
22 somewhat of a computer. But you try to
23 determine if that is in fact the person.

24 Q. When you say "that is in fact the person," can
25 you just explain what you mean by that?

1 A. Sure. You try to determine whether the
2 individual that is being held on the fugitive
3 from justice warrant is in fact the person on
4 the warrant from the other state.

5 Q. How does the fugitive of justice warrant get
6 hooked up with the person in the first place
7 when they're arrested?

8 A. I think they match them, I think they match
9 them on name and perhaps date of birth.

10 Q. And are there sometimes questions about whether
11 this is truly the person who's the subject of
12 the warrant?

13 A. Yes.

14 Q. Was that true for Mr. Medina Perez?

15 A. I don't have a specific memory of that. I
16 mean, I do recall, I do recall being struck by
17 the photo. Right? So they had a photo of him
18 in the booking process and then there was a
19 photo that came with a warrant, I believe.

20 Q. And when you looked at those, did you have some
21 impression about whether this was the right guy?

22 A. My recollection was it was a different
23 looking individual, different looking man.

24 Q. Do you have a general recollection that there
25 was an issue about his identity while you

1 represented him?

2 A. I believe that I was trying to convey that I
3 did not think it was him.

4 Q. To whom were you trying to convey that?

5 A. To the court and the Commonwealth.

6 Q. Who was representing the Commonwealth?

7 A. Shannon Jurgens.

8 Q. Was she somebody that you knew?

9 A. I knew her from the court.

10 Q. And what was your impression of her?

11 A. I mean, I also had some good experiences with
12 Shannon.

13 Q. As a reasonable, fair prosecutor?

14 A. I thought that she was a very fair and just
15 prosecutor.

16 Q. Back in 2018, did you know an attorney named
17 David Jellinek?

18 A. I did.

19 Q. How did you know him?

20 A. I knew him -- He was actually employed in
21 City of Boston for a while as well.

22 Q. When you worked or overlapping?

23 A. I think, yeah, I think it was somewhat of an
24 overlap. I mean, he worked in the police
25 department. I worked in corporation counsel's

1 office.

2 Q. Did you also know him from the criminal defense
3 work or bar advocate work?

4 A. Yes.

5 Q. Do you remember seeing David Jellinek that
6 morning in the Newton District Court?

7 A. I have no memory of that.

8 Q. In the course of representing Mr. Medina Perez,
9 did you ask for second and third call?

10 A. I believe I did, yes.

11 Q. Is that a common practice in District Court?

12 A. Yeah. I mean, I could be doing multiple
13 things, you know, getting pulled in different
14 directions, you know. I don't think that was my
15 only case that day. I mean, Newton wasn't a
16 terribly busy court, but I don't think it was
17 the only thing that happened that day.

18 Q. And what was the purpose of asking for a second
19 or a third or more calls?

20 A. I think I was trying to gather additional
21 information. I think I was probably dealing
22 with another issue as well, another client.

23 Q. Was it common to, in District Court to ask a
24 judge for a little more time to do something?

25 A. Sure.

1 Q. And was that generally granted?

2 A. Sure. Absolutely.

3 Q. Do you recall who the judge was that day?

4 A. I do.

5 Q. Who was that?

6 A. Judge Joseph.

7 Q. Had you had experience with Judge Joseph before?

8 A. No.

9 Q. She was a relatively new judge?

10 A. I don't know that. I don't think I appeared
11 before her before.

12 Q. In the course of the morning, do you recall an
13 ICE agent being in the Newton District Court?

14 A. Yes.

15 Q. What do you recall about that?

16 A. I just recall that he was in the courtroom
17 all morning. I did speak with him. I think,
18 you know, he was there for Mr. Pena.

19 Q. Mr.?

20 A. Perez.

21 Q. Right. Okay. So in addition to the fugitive
22 warrant, did you know there was an ICE issue as
23 well?

24 A. I knew there was a detainer.

25 Q. And were you representing him with respect to

1 that ICE issue as well?

2 A. I was representing him in terms of the
3 criminal charges in the District Court, and
4 certainly, to the extent, you know, that I could
5 be helpful on the detainer issue, I would be
6 helpful.

7 Q. Did you spend time that morning at intervals
8 investigating Mr. Medina Perez's case?

9 A. I remember -- Yes, yes.

10 Q. Do you remember whether he spoke English?

11 A. He did not speak English.

12 Q. How would you communicate with him?

13 A. There was an interpreter.

14 Q. Were you able to even have a basic conversation
15 with him in English?

16 A. I don't remember that. I do know Spanish,
17 but I don't remember that.

18 Q. Was there anybody there connected with
19 Mr. Medina Perez?

20 A. He had, I remember he had some friends there
21 for a while.

22 Q. Do you remember how many friends?

23 A. I don't.

24 Q. Do you remember speaking with them at all?

25 A. I did speak with them.

1 Q. And was that in -- don't tell us about it, but
2 in connection with this situation?

3 A. Yes.

4 Q. Did you continue to represent Mr. Medina Perez
5 through the lunch hour?

6 A. My understanding was I did.

7 Q. And do you have a big book of tabbed exhibits in
8 front of you?

9 A. I do.

10 Q. Can I ask you, if you would, to take a look at
11 Exhibit H, please? H, like Harry.

12 A. Yes.

13 Q. And if you would, would you turn to Page 147.
14 And I'm talking about transcript pages, not
15 physical pages.

16 A. I believe I'm there.

17 Q. Do you have that?

18 A. Yes.

19 Q. All right. And up at the top the clerk is
20 saying, so, ma'am, Ms. Bostwick has been
21 appointed to represent you. Was that what you
22 meant, there were other clients besides
23 Mr. Medina Perez you were being appointed for?

24 A. That's what the transcript says.

25 Q. Okay. And if we scoot down to Line 16, the

1 clerk says, Judge, that leaves us with
2 Mr. Perez, and Attorney Bostwick, are we
3 still -- and you said I just sent a fax.

4 A. That's what it says.

5 Q. Do you have a recollection of sending a fax?

6 A. I think, I think I did send a fax to his
7 employer.

8 Q. Okay. Was that part of your investigation about
9 his identity?

10 A. Yes.

11 Q. Okay. And then the clerk says, so that just
12 leaves, and there's a conversation with
13 Judge Joseph and another lawyer named
14 Mr. Harrington?

15 A. Yes. That's what the transcript shows.

16 Q. And then if we go over to Page 149, at Line 18,
17 are you speaking again?

18 A. That's what the transcript indicates, yes.

19 Q. And you said, I think, Your Honor, I have an
20 appointment this afternoon, and I wanted to ask
21 if we could have a -- and I understand that the
22 interpreter has to be somewhere as well, if
23 maybe we could have Mr. Medina's case called at
24 2:15 or so, so that would just give me time and
25 then we're not just waiting. Do you remember

1 needing a little time for a medical appointment?

2 A. I do.

3 Q. And did Judge Joseph give you that time?

4 A. Yes.

5 Q. Again, is that something most judges would do if
6 you said can I come back at 2:15?

7 A. Yes.

8 Q. Did you leave the courthouse anticipating that
9 you would come back and continue to represent
10 Mr. Medina Perez?

11 A. That was my understanding.

12 Q. Up until that point, had Attorney Jellinek
13 approached you and told you he had been
14 retained?

15 A. Nobody contacted me telling me that he had
16 secured private counsel.

17 Q. Do you remember seeing Mr. Jellinek before you
18 left for lunch?

19 A. I don't remember that.

20 Q. Do you remember giving him any documents?

21 A. I don't remember that.

22 Q. Okay. You went off to lunch and your medical
23 appointment?

24 A. Yes.

25 Q. While you were away from the courthouse, did

1 anybody contact you to tell you that you would
2 no longer be representing Mr. Medina Perez?

3 A. No.

4 Q. Did you show up thinking you still represented
5 him?

6 A. I did.

7 Q. What do you remember about coming back in the
8 afternoon?

9 A. I remember I came back probably pretty close
10 to 2:00, 2:15. I remember that I ran into
11 Attorney Jellinek. He indicated to me that he
12 had been retained.

13 Q. Was that the first you were hearing of it?

14 A. Yes.

15 Q. Did you have a conference with him about
16 Mr. Medina Perez's case?

17 A. I'm sure I must have said something,
18 something to him. I don't remember what
19 specifically.

20 Q. Do you remember giving him any documents or any
21 of your file?

22 A. I don't.

23 Q. What did you do after that?

24 A. I stayed in the courtroom, you know. I
25 didn't know if, you know, I was going to be

1 relieved for the afternoon, so I stayed.

2 Q. As part of being the duty attorney, would you
3 normally stay until the court proceedings
4 conclude for the day?

5 A. I mean, it would be common -- Sometimes.
6 Right? If the clerk called me and said we don't
7 need you to come back and -- you know, I would
8 probably have gone home.

9 Q. Okay. But you were back first to represent
10 Mr. Medina Perez and then you continued to stay
11 in case anybody needed you?

12 A. I -- My memory is I continued to stay because
13 I came back for Mr. Medina. I didn't know if --
14 That's what I remember.

15 Q. Where did you sit?

16 A. My memory is that I sat to the right side --
17 if you're facing the bench, I sat to the right
18 side.

19 Q. Okay. Is that the side where side bars would be
20 held?

21 A. Yes.

22 Q. Did you see a side bar take place in
23 Mr. Medina Perez's case?

24 A. Yes.

25 Q. Were you sitting in the gallery looking at it?

1 A. I wasn't sitting in the gallery. I was
2 sitting behind the bar.

3 Q. So, actually, within the bar enclosure?

4 A. Yes.

5 Q. And were you able to hear the side bar?

6 A. No.

7 Q. Was there white noise that went on?

8 A. I'm sure there was. I don't know.

9 Q. But even from within the bar you weren't able to
10 hear what they were saying?

11 A. No.

12 Q. Do you know whether parts of it were on or off
13 the record?

14 A. I mean, my memory is that I did know that we
15 went off the record at some point, but I
16 couldn't tell you when that was.

17 Q. And could you hear anything at all from either
18 the on or off the record part?

19 A. No.

20 Q. Did you see Judge Joseph speaking with
21 David Jellinek and Shannon Jurgens?

22 A. Yes.

23 Q. Did anything appear unusual or out of the
24 ordinary to you as you watched it happen?

25 A. I have no memory of anything unusual.

1 Q. Just sort of another day, another side bar?

2 A. I just know that they were at side bar
3 addressing the court.

4 Q. After that finished, do you recall that
5 Mr. Medina Perez was arraigned?

6 A. I don't remember when that occurred. I think
7 he would have been arraigned earlier.

8 Q. In any event, there was some sort of continued
9 proceeding and he was then released? Do you
10 recall that?

11 A. Yes.

12 Q. Do you recall some discussion in open court
13 about Attorney Jellinek going downstairs to
14 speak with Mr. Medina Perez?

15 A. Yes.

16 Q. And the lockup would be downstairs?

17 A. Yes.

18 Q. Had you had experience in the Newton District
19 Court speaking with clients in the lockup?

20 A. Yes.

21 Q. Was that unusual?

22 A. No.

23 Q. If you -- or if the client needed an
24 interpreter, would the interpreter go to the
25 lockup?

1 A. Sure.

2 Q. Was that again pretty routine?

3 A. No. I mean, it wasn't unusual. No, it was
4 not unusual.

5 Q. If you needed it, it happened.

6 A. Of course. I'm sorry.

7 Q. Once they went downstairs, do you remember what
8 you did next?

9 A. I don't.

10 Q. Do you remember seeing either Attorney Jurgens
11 or Attorney Jellinek later that day?

12 A. Yes.

13 Q. What do you recall about that?

14 A. I remember leaving the courthouse. I believe
15 I ran into them on the outside area of the
16 courthouse.

17 Q. Physically outside the building?

18 A. Yes.

19 Q. What do you recall about that?

20 A. I recall being there and Attorney Jurgens is
21 there and I think David Jellinek came out.

22 Q. Do you recall either having or overhearing any
23 conversation about Mr. Medina Perez?

24 A. I don't recall specific conversation, no.

25 Q. Do you remember saying to Attorney Jellinek, I

1 know what you did and you obstructed justice?

2 A. I don't have a memory of that.

3 Q. Did you at that point know that Mr. Medina Perez
4 had gone out the back door?

5 A. He didn't come upstairs with
6 Attorney Jellinek.

7 Q. Did you expect that that's what would be
8 happening?

9 A. That's what I thought would have happened,
10 yes.

11 Q. And did you have an understanding at that point
12 about why that didn't happen?

13 A. I didn't know.

14 Q. Did you understand what had happened with the
15 Pennsylvania warrant?

16 A. In terms of --

17 Q. Of why he wasn't being held on the warrant?

18 A. My understanding, I think that the DA agreed
19 that it wasn't him.

20 Q. Did that surprise you?

21 A. I had tried to make that argument earlier. I
22 thought it wasn't him, and so I think she
23 agreed.

24 Q. Okay. But not while you were representing him.

25 A. No.

1 Q. Do you recall anything else about your
2 interaction with either Attorney Jurgens or
3 David Jellinek?

4 A. No.

5 Q. Did you ever get contacted or interviewed by the
6 Federal U.S. attorney or anybody investigating
7 this case?

8 A. No.

9 Q. Were we the first ones who came looking for you?

10 A. Yes.

11 Q. And was that probably December of this year --
12 last year, 2024?

13 A. I believe that's correct, yes.

14 MS. MULVEY: I have nothing
15 else. Thank you, Attorney Bostwick.

16 JUDGE FABRICANT: I'll be very
17 brief.

18 CROSS-EXAMINATION

19 BY JUDGE FABRICANT:

20 Q. Good morning, Attorney Bostwick.

21 A. Good morning.

22 Q. You were appointed to represent
23 Mr. Medina Perez, and you worked hard for him;
24 right?

25 A. Certainly.

1 Q. And you worked right up until the lunch break,
2 and then court recessed, and you thought you
3 were going to come back and continue to
4 represent him.

5 A. Absolutely.

6 Q. And then Mr. Jellinek came in and took over.

7 A. Yes. I think -- Yes.

8 Q. And that happens sometimes; right?

9 A. Of course.

10 Q. It's not an unusual event.

11 A. No.

12 Q. And we can all speculate about why it happens.

13 Maybe there are some unfair stereotypes out
14 there in the world about appointed counsel. But
15 in any event, it happens; right?

16 A. Sure.

17 Q. And when you came back and you sat in the
18 courtroom, you said you sat inside the bar. So
19 from the perspective of the bench, you'd be
20 visible, wouldn't you?

21 A. Yes.

22 Q. You were not at side bar.

23 A. No.

24 Q. And you couldn't hear what was said at side bar.

25 A. No.

1 JUDGE FABRICANT: I have
2 nothing further. Thank you.

3 MS. MULVEY: I have nothing
4 else. Thank you.

5 HEARING OFFICER: Thank you
6 very much.

7 MR. HOOPES: Judge Joseph would
8 call judge, retired Judge Carol Ball.

9 HEARING OFFICER: Good morning.
10 former HONORABLE CAROL S. BALL,
11 SWORN

12 DIRECT EXAMINATION

13 BY MR. HOOPES:

14 Q. Good morning.

15 A. Good morning.

16 Q. Again, would you state your name and spell your
17 name for the record.

18 A. Yes. My name is Carol Ball. C-a-r-o-l,
19 middle initial S, and last name B-a-l-l.

20 Q. And I'm stopping but I'm going to call you
21 Judge Ball or Attorney Ball.

22 A. Yeah.

23 Q. Whatever you want.

24 A. Yeah. When you and I worked at the DA's
25 office only like 80 years ago; so...

1 Q. 45. So you were a judge, --

2 A. Yes.

3 Q. -- and now you're retired; is that correct?

4 A. Yes.

5 Q. Could you share with the hearing officer your
6 education, training, experience both as a lawyer
7 and as a judge.

8 A. Okay. I went to Northeastern Law School --
9 we have a reunion of Northeastern Law group
10 here -- in Boston. I clerked for the
11 Superior Court in this building. And then I was
12 an assistant DA in Middlesex County across the
13 river for eight years. Tried a lot of cases.
14 We were all very lucky because the -- there had
15 been -- the full-time bill was passed right
16 before we started. Up until that point, lawyers
17 from the Commonwealth of Massachusetts who were
18 DA's would try cases in the morning, criminal
19 cases in the morning, and then they all had
20 civil practices in the afternoon.

21 So I can't remember the year
22 was, but as of right after we got out of law
23 school, that law was passed that DA's would be
24 full-time. And therefore, there were a whole
25 bunch of senior DA's who were making their

1 living off their practice in the afternoon. So
2 they had quit and run off and run their
3 practice. And young people like me, Tom, got a
4 chance -- I tried my first murder a year into
5 the job. So anyway. Eight years, trying
6 murder, rape, the usual felony stuff. Quite
7 fun.

8 Q. Then after you left, did you enter private
9 practice?

10 A. Yes. After that, I wanted to learn to try
11 civil cases. I went to an insurance defense
12 firm and was there for four or five years, and
13 then for the next five or six years I was
14 variously on my own or working in sharing
15 expenses in conjunction with another lawyer or
16 two. I had a trial practice, trying civil cases
17 and also defense. And I did a lot of
18 criminal -- not a lot, but a fair amount of
19 criminal defense work.

20 Q. And was that criminal defense work in both the
21 District Court and Superior Court?

22 A. It was. And Federal. Little bit in
23 Federal Court.

24 Q. And at some point were you appointed to the
25 bench?

1 A. Yes. 1996. Lightning struck and I was
2 appointed to the Superior Court.

3 Q. And you were in the Superior Court for how long?

4 A. 19 and a half years. I retired on May 31st,
5 2015.

6 Q. Thank you.

7 Now, during the course of your practice, private
8 practice, did you have occasion to experience
9 judges going off the record?

10 A. Left, right, and center. I mean, I -- Yes.

11 Q. In both the District Court and in the
12 Superior Court.

13 A. Yes.

14 Q. Could you explain that in more detail.

15 A. Yes. Back -- The whole on and off the record
16 thing was a progression. And back when I was a
17 law clerk and assistant DA, we spent hours in
18 judges' lobbies with the lawyers in the lobby.
19 Mostly -- I was in Superior Court mostly, as a
20 law clerk entirely. Lobby was the
21 traditional -- you heard it described here, with
22 both sides going, the judge saying what would
23 you like me to do, so defense counsel would take
24 it down to their client. So lobby conferences.

25 In addition, there was a fair

1 amount of side bar stuff when you were in
2 assignment sessions, like the first session
3 here. People actually refer -- I'm not going to
4 beat a dead horse about that. People would go
5 on and off the record for various reasons. It
6 became, it became -- Popular sounds correct, but
7 I don't mean that. People became aware that
8 this balance of lobby conferencing and doing
9 stuff in the public was a problem for reasons
10 we've all discussed. And the courts pushed us
11 towards going, towards going on the record and
12 definitely not doing stuff in the lobby because
13 it looked like there were accusations -- You
14 didn't want people to think when we're at the
15 lobby laughing and joking and cutting a deal.
16 You know, that was not -- They want people to
17 see we're doing serious business. And so there
18 was definitely -- The move was to go to side bar
19 and do it in full sight of the public even if
20 not in the hearing of the public.

21 There was, there was some
22 resistance all along the way of this
23 progression. Because it was a very popular
24 practice with lawyers on both sides, with
25 judges, because everybody felt people were, and

1 they were, it's human nature, were much more --
2 you'd get the real scoop if you're off the
3 record, that people are much more willing to
4 give a judge the full information for any, you
5 know, any number of reasons, privacy reasons,
6 office politics reasons, witness problems, and
7 so we all felt that we were --

8 I mean, the goal here was to do justice in the
9 individual case, you know. And to do that, you,
10 as a judge, you want as much information as you
11 possibly can.

12 And there is just -- To this
13 day, I -- you know, I notice I retired in 2015.
14 I would have been in tears about the fact that
15 this rule was not probably -- finally passed --
16 She's laughing. She's right. -- to go on the
17 record, you know, to be all on the record all
18 the time. Because I really meant that it
19 allowed us to do justice to have the opportunity
20 to get the real poop on some things, if you
21 will. And that is -- I understood that that's
22 what it was.

23 Q. So when you were on the bench as a
24 Superior Court judge, did you go off the record?

25 A. Yup.

1 Q. And could you describe that progression and how
2 you conducted those when you were on the
3 Superior Court?

4 A. Well, when you're saying off the record, you
5 mean in lobby conferences and in addition to all
6 the other stuff.

7 Q. Well, if we could separate the two.

8 A. Yeah.

9 Q. First describe the actual lobby conference and
10 then what you would do when you're out on the
11 bench.

12 A. Right. Well, the lobby conference
13 increasingly became not in the lobby anymore but
14 out on the record. We're out at side bar, as
15 you've all discussed, and the conversation would
16 be off the record initially when the transition
17 was made out into the courtroom. And then
18 increasingly it became on the record. For lobby
19 conferences. And it was the same -- basically,
20 I have to say, I found it less intrusive than I
21 thought it would be, would still be able to --
22 in open court you would still be able to, even
23 though side bar off the record even, there still
24 was clearly the appearance to the public that we
25 were doing our job, that it was, you know, a

1 real, a real -- like you see justice work
2 without having to know how the sausage was
3 actually made, which one judge says, public
4 doesn't need to know how the sausage is made.
5 That's literally an old thought. Words not to
6 live by anymore. But anyway.

7 Oh, sorry. Other stuff.

8 And the other was, both the
9 same. I sat in -- As the years go by in the
10 Superior Court, you get seniority, you get a lot
11 more choice of our courts you sit in and what
12 sessions you sit in. And I became, I became
13 someone who sat in this building on the sixth or
14 seventh -- seven, I think, seventh floor. And I
15 did a lot of -- It wasn't just lobbies. It was
16 also -- It was case management session, so
17 you're going out to trial, what motions do need
18 to be filed here, have they been filed,
19 discovery, you know, years of stuff, discovery
20 turned over.

21 And there were lots of side bar
22 on that. And mostly counsel saying, Judge, can
23 we approach and someone saying can we go off the
24 record. And it would often be things like,
25 listen, I got a doctor's appointment at lunch,

1 can I come back at 2:15, look, my guy wants to
2 go pro se and it's really not in his interest,
3 Judge, can you give me a second call so I can
4 try to talk with him, his wife, you know. Lord
5 knows judges don't want lawyers -- defendants to
6 go pro se. So you know, there would be that
7 kind of stuff. So there was all kinds of just
8 getting business done. And I didn't -- Well,
9 anyway.

10 Q. Did you require counsel to provide the reason
11 before they came up to --

12 A. No. You know, I really like lawyers. And I
13 trusted lawyers. I really felt that -- I always
14 trusted that lawyers were doing the right job,
15 were helping counsel and doing the right job for
16 their clients. So I err -- We all have
17 different attitudes about it. But I err on the
18 side assume that counsel's asking to go off the
19 record or approach or go off the record, they
20 were doing it for reasons that were consistent
21 with their representing their client
22 effectively. And if there was a problem, then
23 you deal with it at the time.

24 Q. Were you aware of other judges in the
25 Superior Court --

1 A. Oh, yes.

2 Q. And when you were in the District Court, private
3 practice, were you aware that it was not just
4 one judge, that it was multiple judges --

5 A. Yes.

6 Q. -- going off the record?

7 Did Judge Joseph ever appear before you in
8 Superior Court?

9 A. She did.

10 Q. And would that have been occasions when you
11 would have gone off the record?

12 A. Absolutely. She was in the AG's office
13 across the street. They bring all their cases
14 in Suffolk, so she was in front of me all the
15 time at first.

16 Q. Now, you were present yesterday when there was a
17 question about pausing the proceeding; correct?

18 A. Uh-huh. Yes.

19 Q. And can you share with us any custom and
20 practice that you had with pausing the
21 proceeding without requiring an analysis
22 mentally about all the justifications and
23 reasons for doing that?

24 A. Well, I'm assuming that we're talking -- What
25 I heard yesterday was the conversation about

1 Judge Joseph's proposal to hold the defendant
2 overnight on the out of state warrant and put it
3 over until people have had a chance to figure
4 out all the identity of Mr. -- blanking on...

5 Q. Medina Perez.

6 A. -- Medina Perez. And that -- Yes, I'm aware
7 of hearing that. It is -- It was interesting --
8 Well, anyway. It is true that instead of a bar
9 analysis, bar exam kind of analysis of that,
10 where spot the ethical problem, you could see
11 that since -- I mean, in effect, the
12 Pennsylvania warrant at that point was sort a
13 nullity, whether it was a de jure nullity or
14 what, but it was de facto a nullity, it's kind
15 of like -- But the defense attorney here -- I
16 mean, you would never do that without the
17 defense attorney running along and you're
18 assuming that the defense attorney, by him
19 saying that's a great idea, let's do it, has his
20 client's authority to basically in effect waive
21 his right to a bail hearing that day. So that
22 it didn't -- to be honest, it didn't occur to me
23 that if that's what counsel wanted, I'm trying
24 to get justice on an individual case, for
25 everybody involved, and it just wouldn't occur

1 to me -- I mean, I would have to worry about the
2 paper to hold him on, you know, what do we hold
3 him on here. But just wouldn't occur to me that
4 that's not properly done. Probably a good thing
5 I'm not a judge anymore.

6 Q. And have you done that in the past --

7 A. Oh, yeah. In the first case.

8 Q. Are you aware of other judges in this
9 courtroom -- in this courthouse who have done
10 that in the past?

11 A. I think, yeah. Yes, some. You know, as my
12 former chief said, there was lots talking about
13 at lobby conference. There was definitely a
14 group of us that thought strongly that going off
15 the recorded assisted in the job and the group
16 that said, hey, the SJC's not happy with this,
17 it's not a good idea anyway. There were
18 definitely people that did it and people that
19 didn't do it.

20 Q. Lastly, in your experience both as a prosecutor
21 and as a private counsel and as a judge, has it
22 been a custom and practice of almost every judge
23 to be concerned at the end of the day about
24 pushing custodies out and getting it done so
25 that the court officers and the court staff

1 don't have to remain?

2 A. Oh, yeah. There were a few vans here in this
3 court, there's a van that comes by at noon, they
4 drop them all off. Vans from Middlesex, from
5 Essex, from Norfolk. They're all in here
6 dropping the bodies off. They would bring -- We
7 all referred to them as the bodies in the
8 lockup. And drop the defendants off. And then
9 they make circuit at lunchtime. So there's a
10 huge push to get the defendants who are
11 custodies out the door by lunch so that they can
12 go. Because once the vans start coming back in
13 the afternoon, they stop at a particular time.
14 And if you have custodies that aren't ready to
15 go, that van's got to come back, but it's got to
16 come back after stopping in Brockton, Dedham,
17 and you're going to have court officers, like
18 our friend Vance here, sitting on the eighth
19 floor at 7:30 or 8:00 at night before the
20 defendant is picked up and go back. And the
21 defendants don't like it either because they
22 miss dinner. You know what I mean? So the idea
23 is to get the custodies out the door, get the
24 business done properly, but get the custodies
25 out the door as soon as you can. It's only fair

1 to courthouse staff.

2 MR. HOOPES: Thank you very
3 much.

4 CROSS-EXAMINATION

5 BY JUDGE FABRICANT:

6 Q. Good morning, Judge Ball.

7 A. Good morning, Judge Fabricant.

8 Q. Very nice to see you.

9 A. You, too.

10 Q. You talked about needing some paper to hold
11 somebody on.

12 A. Yup.

13 Q. Right? It's called a mittimus.

14 A. Yeah.

15 Q. And the mittimus goes with the person who is in
16 custody from the court security or from the
17 court to whoever's going to be the custodian,
18 the jails or whoever else; right?

19 A. Yup.

20 Q. And it needs to say what he's being held on.

21 A. Yes.

22 Q. Right? So you need to come up with something
23 that he's being held on; right?

24 A. Yup.

25 Q. Did you ever -- You never sat on the

1 District Court; correct?

2 A. No.

3 Q. You became a Superior Court judge in 1996.

4 A. Correct.

5 Q. You retired you said 2015; is that right?

6 A. Yup.

7 Q. Somehow I was under the impression it was '16.

8 But it was '15.

9 A. It was '15.

10 Q. You spent a lot of time in your years on the

11 Superior Court in this building.

12 A. Yup.

13 Q. This building is really, really busy; right?

14 A. Oh, yes.

15 Q. It's the busiest. The Superior Court.

16 A. It's great. It's a great place to sit. It's
17 moving.

18 Q. And the other place where you've spent a lot of
19 time was Brockton Superior Court.

20 A. Correct.

21 Q. And that is also a very busy court.

22 A. Yup, yup.

23 Q. So the process you described with the vans
24 coming and going, and if it's not ready, they
25 have to come back later and court officers

1 having to stay late, and missed their dinner,
2 that happens in this building; right?

3 A. Oh, yeah.

4 Q. And it probably happens in Brockton, too.

5 A. Oh, yes.

6 Q. Newton District Court, do you think it happens
7 there?

8 A. Well, I think they probably don't stop by as
9 often. But it does matter if there's a body --
10 Sorry. That sounds horrible. -- if there's a
11 defendant there to pick up. It does. They have
12 to come back. But you're absolutely right, it's
13 not as busy.

14 Q. A much less busy court, --

15 A. Yes.

16 Q. -- as far as you know.

17 A. Yes.

18 Q. When you started practicing law in 1977, you
19 were assistant district attorney, and you said
20 you were very lucky.

21 A. Yeah.

22 Q. The way the district attorney's office is
23 usually started, you start at the
24 District Court.

25 A. Yes.

1 Q. And then if you do a good job, you move to
2 Superior Court.

3 A. Yes.

4 Q. And in your case, it happened quickly.

5 A. Yeah.

6 Q. Because there was a lot of transition.
7 When you started practicing at the
8 District Court in 1977, recording was a new
9 thing; right? It probably wasn't in all the
10 District Courts.

11 A. Sure. Absolutely.

12 Q. Just being installed. District Court judges
13 weren't used to it. District Court
14 practitioners weren't used to it.

15 A. Yeah. Nobody particularly liked it.

16 Q. Nobody liked it. And many of the judges who
17 were on the District Court in 1977 were still
18 there in 10 or 12 or 15, 20 years later;
19 correct?

20 A. Yes. Until they hit 70 and they had to...

21 Q. In Massachusetts, just to be clear, --

22 A. Yeah.

23 Q. -- judges have mandatory retirement at age 70;
24 correct?

25 A. Yes.

1 Q. By constitutional amendment enacted in 1974,
2 maybe?

3 A. Good.

4 Q. Some judges like that and some don't. Some
5 chiefs like it and some don't.

6 A. Exactly.

7 Q. You were appointed to the Superior Court in
8 1996.

9 A. Correct.

10 Q. It was actually February of 1996 --

11 A. Yes.

12 Q. -- that you joined the Superior Court.

13 A. Valentine's Day.

14 Q. So the last time you would have appeared at the
15 District Court -- Let me just step back a
16 minute. You were doing -- You were trying
17 serious cases; correct?

18 A. Yes.

19 Q. As a lawyer.

20 A. Yes.

21 Q. But you still might from time to time appear in
22 District Court.

23 A. Bread and butter. OUIs.

24 Q. OUIs?

25 A. Definitely bread and butter in private

1 practice.

2 Q. Because that actually -- that sort of high
3 volume practice works better for earning a
4 living --

5 A. Yes.

6 Q. -- than the more serious cases than in
7 Superior Court.

8 A. Yes.

9 Q. Now, the last time you would have appeared in
10 the District Court would have been late 1995.

11 A. Yes.

12 JUDGE FABRICANT: Okay. That's
13 all I have. Thank you very much.

14 THE WITNESS: Don't you want me
15 to walk me through --

16 MR. HOOPES: Thank you very
17 much.

18 HEARING OFFICER: Thank you,
19 Judge.

20 MR. HOOPES: Judge Joseph calls
21 Allison Koury. I believe she's right outside.

22 HEARING OFFICER: Good morning.

23

24

25

1 ALLISON KOURY, ESQ., SWORN

2 DIRECT EXAMINATION

3 BY MR. HOOPES:

4 Q. Ms. Koury, could you just say your name again
5 and spell it, please, for the --

6 A. Sure. Allison, A-l-l-i-s-o-n, K-o-u-r-y.

7 HEARING OFFICER: Could I ask
8 if you could stay as close to the microphone as
9 possible.

10 THE WITNESS: Sure.

11 HEARING OFFICER: You can move
12 it closer to you if that would be better.

13 THE WITNESS: Very good.

14 HEARING OFFICER: Thank you.

15 Q. And you're an attorney.

16 A. I am.

17 Q. And could you share with the hearing officer
18 your education, training, and experience.

19 A. I received my bachelor's from
20 Providence College, my JD from Suffolk, and my
21 LLM from BU.

22 Q. And you graduated and got your JD. What did you
23 do next?

24 A. I started working as a tax lawyer, and did
25 that for couple of years, maybe three years,

1 while I got my LLM. And then I realized that is
 2 not what I wanted to do, and I was very unhappy
 3 at the time. At the time I was young and had
 4 nobody to worry about but myself, so I knew I
 5 should change fields before I got too used to
 6 making a lot of money, so to speak, so I became
 7 a bar advocate.

8 Q. And what year would that have been? When would
 9 that have been?

10 A. That would have been the early 1990's.

11 Q. And how long were you a bar advocate before you
 12 went to something else?

13 A. So I was a bar advocate until 2001 when I got
 14 married, had a baby, and switched to appeals, so
 15 that I could stay home and have a more flexible
 16 schedule, and I stayed in appeals until my baby
 17 got his license, and then I went back to
 18 Trial Court.

19 Q. And what year would that have been?

20 A. 2017.

21 Q. And during your first stint as a bar advocate,
 22 what courts were you bar advocate?

23 A. Just Lowell District Court.

24 Q. And so, again, that would have been
 25 Lowell District Court in what years, from when

1 to when roughly?

2 A. Roughly in the 1990's.

3 Q. And so when you became a bar advocate again in
4 2017, which courts did you act as bar advocate
5 for?

6 A. I was assigned to Waltham and Newton and
7 eventually Superior.

8 Q. And so can you tell the hearing officer, how
9 many days a week do you think you were in
10 Newton?

11 A. I was in court four times a week, and it
12 could be Newton, it could be Waltham. It
13 just -- Whenever I had cases. But it was many
14 times a week.

15 Q. So if we look at the transcript, you were
16 actually in court in the Newton District Court
17 on a case on April 2nd of 2018. Do you have a
18 memory of that?

19 A. I do not. I have been told I was there.

20 Q. Aside from that, did you have experience with
21 regard to custodies coming in, custody
22 defendants or defendants in custody, coming into
23 the Newton District Court and then being taken
24 out of the Newton District Court?

25 A. Yes.

1 Q. And did you also have experience with people who
2 came in in custody and then being released from
3 custody?

4 A. Yes.

5 Q. And based on your observations and your
6 experience with regard to the Newton District
7 Court, when an individual was being released
8 from custody in the Newton District Court, where
9 were they released to?

10 A. They would go back downstairs. If they had
11 come up in shackles, they would be brought back
12 downstairs to remove the shackles. Even if they
13 weren't in cuffs or shackles, they would go back
14 downstairs to retrieve their property.

15 Q. Now, if you had a client who was released, would
16 you see it as being unusual at all to be going
17 downstairs to speak to him before he left?

18 A. Not at all. There are a number of reasons
19 why I might go downstairs. Like --

20 Q. What would they be?

21 A. If something maybe confusing had taken place,
22 I would want to go downstairs and make sure I
23 was able to talk to the defendant before they
24 actually left the building, or I might have a
25 question for them, and especially when there was

1 an interpreter involved, and either of those
2 things, I wanted to answer the defendant's
3 questions or ask a question, I would want to
4 make sure that I did that right away before --
5 while I still had both people in the building.

6 Q. Going back to your time in Lowell. That was in
7 the mid to late '90's, if I understood it
8 correctly?

9 A. Uh-huh. Yes.

10 Q. Did you observe the practice up there with
11 judges going off the record?

12 A. Yes.

13 Q. I'm sorry. Go ahead.

14 A. It was a different era back then.

15 Q. Okay. And one particular judge up there went
16 off the record.

17 A. Yes.

18 MR. HOOPES: Thank you. That's
19 all I have. Thank you.

20 JUDGE FABRICANT: Very brief.

21 CROSS-EXAMINATION

22 BY JUDGE FABRICANT:

23 Q. Good morning, Ms. Koury.

24 A. Good morning.

25 Q. On April 2nd of 2018, you were in the

1 Newton District Court because you had been
2 appointed to represent a person by the name of
3 Pineda, if I'm pronouncing that correctly.

4 A. That doesn't ring a bell.

5 Q. So let me show you the docket. Let me see if
6 that refreshes your memory.

7 JUDGE FABRICANT: If I may
8 approach.

9 HEARING OFFICER: Yes.

10 Q. Take your time to read as much of it as you need
11 to.

12 (PAUSE)

13 A. Okay. Yes.

14 Q. And take a look at -- Look at behind Tab H in
15 that binder you have in front of you. You have
16 a binder in front of you.

17 A. Oh, yes.

18 Q. Turn to -- Looking at the numbers up in the
19 upper right-hand corner, turn to APP 047,
20 please. And this is a minuscrypt, so look at
21 Page 5 in the transcript. Do you have that in
22 front of you?

23 A. I see that, yes.

24 Q. And you can see that the clerk says, going down
25 about -- to Line 10, the clerk says, calling the

1 matter of Commonwealth versus Pineda, and then
2 the Commonwealth, the assistant district
3 attorney who's not named here, says there is a
4 private counsel that came in on Friday and
5 requested an 11:00 a.m. call because he just
6 filed an appearance Friday and had to be in
7 another court, I believe I do have the request.
8 And then the judge, again, not named here, says
9 second call. And then the assistant district
10 attorney says, okay, you have that. And then
11 the clerk says, I have that. And then
12 defendant's counsel -- So that would be you at
13 that point; right?

14 A. Yes.

15 Q. It says, I had originally been appointed to
16 represent Mr. Pineda, and I understand there's
17 been a notice of appearance, may I withdraw.

18 A. I see that, yes.

19 Q. And the judge -- the court says, okay, you may.

20 A. (Witness nods head).

21 Q. So that was a situation where you had been
22 appointed, and then the defendant or somebody on
23 his behalf retained counsel, and retained
24 counsel came in and replaced you.

25 A. Yes.

1 Q. And that just happens sometimes.

2 A. Yes.

3 Q. It probably still happens sometimes. And there
4 are lots of reasons why it might happen. But it
5 happens. It's not a surprising thing when it
6 does happen; correct?

7 A. It can still be surprising for me. But yes,
8 I see what you're saying.

9 Q. But it's not a rarity; correct?

10 A. No.

11 JUDGE FABRICANT: All right.
12 Thank you. That's all I have.

13 MR. HOOPES: Thank you. Thank
14 you very much.

15 HEARING OFFICER: Thank you
16 very much.

17 Judge Joseph calls retired
18 Judge Sevelin Singleton.

19 former HONORABLE
20 SEVELIN B. SINGLETON, III,
21 SWORN

22 HEARING OFFICER: Thank you.
23 Please be seated.

24

25

DIRECT EXAMINATION

BY MR. HOOPES:

A. Mr. Hoopes.

Q. Good morning, sir.

A. Good morning.

Q. Judge, would you state your name again for the record and spell it.

A. Sevelin B. Singleton, III. Sevelin is spelled S-e-v-e-l-i-n.

Q. Thank you.

So you were a lawyer, then a judge; correct?

A. Correct.

Q. Would you please share your education, training, and experience to the hearing officer.

A. Undergraduate degree, Bachelor of Science, business administration, Northeastern University Law School, JD. And from there, Mass Commission Against Discrimination. I think I stayed there one year. Then I left there and went to the Middlesex district attorney's office. I believe I was there for two years. I had taken a leave of absence from that office to run for city council in the City of Cambridge. I did not win. Thank goodness. From there, I became legal counsel for the City of Cambridge and

1 opened my own private practice.

2 Q. And for how long a period of time were you in
3 private practice?

4 A. Again, maybe two to three years.

5 Q. In what year did you get appointed to the bench?

6 A. 1989.

7 Q. And to which court were you appointed?

8 A. The court I grew up in, Cambridge District
9 Court. The neighborhood.

10 Q. And how long a period of time were you at the
11 Cambridge District Court?

12 A. Actually sitting?

13 Q. When did you retire?

14 A. 2014.

15 Q. And during the course of time that you were
16 sitting on the bench as a judge of the
17 Cambridge District Court, did you engage -- have
18 experience with the custom of going off the
19 record?

20 A. Yes.

21 Q. Could you explain that to the court, please.

22 A. Even though I frowned upon it when asked for
23 a lobby conference or to go off the record, I
24 would press the attorney, usually the defense
25 attorney, as to its reason, and often, of

1 course, they did not want to put that reason on
2 the record, I said at least give me a hint. If
3 the hint was a good hint which required
4 something off the record, a brief off the record
5 moment, then I would grant that request if there
6 was no objection from the district attorney.

7 Q. And did you continue that practice up until the
8 time you retired?

9 A. I did.

10 MR. HOOPES: No other
11 questions. Thank you.

12 JUDGE FABRICANT: If I may have
13 just a minute.

14 (PAUSE)

15 JUDGE FABRICANT: I have no
16 questions for this witness. Thank you.

17 HEARING OFFICER: Thank you.

18 THE WITNESS: At least a good
19 morning to you.

20 JUDGE FABRICANT: Good morning,
21 Judge Singleton.

22 MR. HOOPES: Judge Joseph calls
23 Mr. Gerrity.

24 MARK GERRITY, SWORN

25 HEARING OFFICER: Please be

1 seated.

2 DIRECT EXAMINATION

3 BY MR. HOOPES:

4 Q. Good morning, sir.

5 A. Good morning.

6 Q. Could you state your name again for the record
7 and spell it for the court reporter.

8 A. Absolutely. It's Mark Gerrity, spelled
9 M-a-r-k G-e-r-r-i-t-y.

10 Q. And sir, can you tell the hearing officer where
11 you're employed, by whom?

12 A. I'm employed by the Massachusetts Trial Court
13 as a deputy chief information officer in charge
14 of security infrastructure.

15 JUDGE FABRICANT: I'm sorry. I
16 couldn't hear all of that answer.

17 A. I'm sorry. Yeah. Deputy chief information
18 officer with the Massachusetts Trial Court and
19 I'm responsible for the security infrastructure
20 in the court.

21 JUDGE FABRICANT: Security
22 infrastructure?

23 A. Correct. Infrastructure.

24 HEARING OFFICER: And if you
25 could just move the microphone as close to you

1 as possible, that would be very helpful.

2 THE WITNESS: Yup.

3 HEARING OFFICER: Thank you.

4 Q. Now, could you just briefly describe what your
5 title means. What do you do?

6 A. So what my title is, I manage a team within
7 the Trial Court that is responsible for the
8 installation, the maintenance, service, and
9 repair of all the electronic security systems
10 within the Trial Court, and that includes CCTV,
11 access control system, meaning card swipes,
12 x-ray machines that you see out the entry into
13 the courts, walk-through metal detectors, and
14 also the two-way radio communications.

15 Q. And so those are all the courts. That would
16 include the Newton District Court.

17 A. That is correct. Yup.

18 Q. And so if I were to show you what's been
19 entitled a history report that's in as
20 Exhibit 3, you're familiar with the concept of
21 the exhibit history?

22 A. Absolutely. Yup.

23 Q. Okay. So if I could show you at this time that
24 exhibit but with several lines in it.

25 MR. HOOPES: And I'd ask to

1 admit this version because it's got a couple of
2 lines to make it a little easier for you to
3 follow. And I don't know how you'd like to mark
4 it. I was going to suggest as 3-A.

5 HEARING OFFICER: 3-A sounds
6 fine.

7 Any objection?

8 JUDGE FABRICANT: No objection.

9 HEARING OFFICER: 3-A is
10 received.

11 EXHIBIT 3-A
12 (DOCUMENT MARKED AS
13 EXHIBIT 3-A)

14 Q. Looking at that, can you identify that as an
15 electronic access document for the
16 Newton District Court for April 2nd of 2018?

17 A. Yes, I can.

18 Q. And at my request, did you go back out to the
19 Newton District Court and make observations to
20 confirm that everything seemed to be in order
21 and was in order on this day?

22 A. That is correct, yes.

23 Q. And so if you could -- I'm going to point you to
24 Page 3 of 5. And on the third line, there are
25 categories going across the top. There's a

1 location, group, Trial Court, but there's a
2 start and date time, start time, and other
3 information, but there's also a time event,
4 device name, and code; correct?

5 A. That is correct. Yup.

6 Q. And so looking at entry labeled 110 on the
7 left-hand side, that -- if you go under the
8 device, indicates that it was utilized by one
9 Wesley MacGregor, and it indicates that it's 5
10 and then 228 and then B, capital B, and then
11 lockup, and then arrow sallyport area.

12 A. That's correct.

13 Q. So does that mean that the access was from the
14 lockup area to the sallyport in the back?

15 A. That is correct. So the individual would be
16 standing inside of the lockup with a card
17 reader, presented a card at the reader, and
18 would open the door and allow you access into
19 the sallyport.

20 Q. Go down two levels to 113. It's the same entry,
21 again by Wesley MacGregor. That's going out,
22 correct, from the lockup into the sallyport
23 area?

24 A. That is correct.

25 Q. And going to the next page. Beginning at the

1 top, there are entries for 167 at 12:54, and
2 that indicates, again, lockup arrow sallyport
3 area Wesley MacGregor, then that's Mr. MacGregor
4 going out; correct?

5 A. That is correct.

6 Q. And below that in 168. That's B sallyport area
7 going into the lockup.

8 A. Correct. Correct. So that would be from the
9 exterior of the building sallyport into the
10 lockup.

11 Q. And so the next area entry below that is B
12 lockup arrow sallyport area at 12:56. So he'd
13 be going back out at that point.

14 A. That's correct. Yup.

15 Q. So we've got him going out at 12:54, in at
16 12:55, and out again at 12:56; is that correct?

17 A. Yes.

18 Q. And then the next time we see Mr. MacGregor is
19 in 177, we see lockup exit to staff; correct?

20 A. That's correct.

21 Q. And then the next entry we see is 186, which is
22 1:51, which is lockup out to the sallyport area;
23 correct?

24 A. That's correct. Yup.

25 Q. And that's, again, Mr. MacGregor.

1 A. That is correct.

2 Q. And then at 188 at 1:53 we see sallyport area
3 lockup. So he's coming back into the
4 courthouse; is that correct?

5 A. Yes.

6 Q. And then the next entry regarding the lockup
7 with Mr. MacGregor, because there's other
8 entries with regard to him, but with regard to
9 the lockup, is 211, it's an exit at 3:01.03, or
10 seconds, B lockup area, out to the sallyport
11 area, by Mr. MacGregor.

12 A. That's correct.

13 Q. So again, that entry with him at 3:01 in the
14 afternoon is him opening that back door;
15 correct?

16 A. 3:01 denotes that is from the lockup out to
17 the sallyport area.

18 Q. Thank you.

19 Now, when you were out at the Newton District
20 Court, did you observe whether or not there were
21 keycard access from the dock down to the lockup?

22 A. So there is a door in the lockup on the same
23 level as the lockup that goes -- leads to a set
24 of stairs that goes to the dock in the
25 courtroom.

1 Q. And so if we don't see any keycard access
2 regarding that, which goes down the stairs to
3 the lockup area, being used, what would be the
4 explanation?

5 A. The general explanation would normally mean
6 that the door's potentially propped.

7 MR. HOOPES: Okay. Thank you.
8 That's all I have.

9 CROSS-EXAMINATION

10 BY JUDGE FABRICANT:

11 Q. In 2018, were the doors that went from the
12 dock -- or do you know whether the doors that
13 went from the dock into the courtroom and the
14 other door inside the dock from the stairway to
15 the dock or from the dock to the stairway, do
16 you know whether those used electronic key cards
17 or whether they used physical keys?

18 A. So the door I've been referring to is
19 actually on the ground, the basement level,
20 inside the lockup area into a set of stairs.
21 That system has been in place for I would say
22 quite some time. It was before my tenure with
23 the Trial Court. So I would say, yes, to the
24 best of my knowledge.

25 JUDGE FABRICANT: So let's

1 bring up that photograph so we can show the door
2 of the lockup.

3 Q. I want to preface, the question I'm asking about
4 has to do with the door of the dock. If I said
5 lockup, I misspoke. So the door that goes from
6 the stairway into the dock or from the dock
7 back to the stairway, and the door that goes
8 from the dock out to the courtroom or from the
9 courtroom back to the dock. Those are the doors
10 I'm asking about.

11 A. So I can preface that by, court was in
12 session, and I wasn't able to get up the
13 stairwell into that area.

14 Q. So when you went out to look --

15 A. I could not access that area.

16 Q. And you went out to look recently; correct?

17 A. That's correct.

18 Q. Not in 2018.

19 A. No.

20 Q. Were you in this role in 2018?

21 A. I was the security systems administrator in
22 2018.

23 Q. So here's a picture of the dock. We actually
24 have another picture that shows the door a
25 little bit ajar. Let's see if we can find it.

1 Yeah. Well... Okay. So we're now looking at
2 Page 513, I think, Page 513. The door that is
3 in the foreground there, --

4 A. Yup.

5 Q. -- does that have an electronic card reader as
6 far as you can tell?

7 A. I do not see one.

8 Q. What do you see there?

9 A. I see the key lock on the door. Yup.

10 Q. Okay. And then the other door that's inside the
11 dock, can you tell --

12 A. From what I can see sitting here, it is the
13 same setup as the door in the foreground. It's
14 a key lock, it appears to be.

15 Q. And in that door at the bottom of the stairs, --

16 A. Correct.

17 Q. -- that one would have to go through to get
18 from --

19 JUDGE FABRICANT: Thank you.

20 Q. So we're now looking at Photograph Number 316, I
21 think.

22 MR. NEFF: 515.

23 Q. 516. I'm sorry. So that door that you can see
24 there that you have to go through to get from
25 the lockup into the stairway or from the

1 stairway into the lockup, is that the door you
2 referred to earlier?

3 A. That is correct, yes.

4 Q. And that does happen --

5 A. It does. And you can actually see it
6 actually sticking off the door slightly.

7 Q. And you said that, if there isn't an entry on
8 this document, that might mean that the door was
9 propped.

10 A. That's correct. Yes.

11 Q. And that sometimes happens; correct?

12 A. It does.

13 Q. Shouldn't happen, but it sometimes does.

14 A. Too much.

15 JUDGE FABRICANT: All right.

16 Thank you.

17 Oh, one more question, if I
18 may. I'm sorry.

19 Q. As we look through this list, as we look under
20 the column that says Device, --

21 A. Yup.

22 Q. -- in some places you see a name as opposed to a
23 location description; correct?

24 A. That is correct.

25 Q. So, for example, near the bottom on the first

1 page, at the second line from the bottom, you
2 see Judge Klein's office. Do you know that as
3 of -- Do you know who Judge Klein was?

4 A. I do not.

5 Q. Do you understand that to refer to the office or
6 lobby being used by the First Justice?

7 A. I wouldn't -- Yes, I would guess without
8 actually knowing. It would be a guess.

9 Q. Okay. We don't want you to guess.

10 A. Yeah.

11 Q. But from your experience in dealing with these
12 kinds of documents --

13 A. So I can -- If I could. A lot of times space
14 allocations change within a courthouse, and we
15 never know about it. It might just be a local
16 thing within the courthouse. There -- Before my
17 tenure, there was a lot of locations that refer
18 to a location based on maybe the First Justice
19 and they use their names. We, as we get into
20 doing upgrades in buildings, we correct that.
21 So the person may have retired many years ago,
22 and the staff knows the location, but we are not
23 familiar.

24 Q. So if you look at the rest of that line, it says
25 that the person who used the key card to access

1 wasn't Judge Klein, it was Judge Joseph;
2 correct?

3 A. Yes.

4 Q. So would you take that to mean that that office
5 that this document refers to as Judge Klein's
6 was being used at least that day by
7 Judge Joseph?

8 A. Yes.

9 JUDGE FABRICANT: All right.
10 Thank you.

11 MR. HOOPES: Thank you.

12 HEARING OFFICER: Thank you
13 very much.

14 MR. HOOPES: So in the evidence
15 at this point are two memorandum by ICE
16 officers. We'd ask permission to have those
17 read for the record. I know they're part of the
18 record, but there's a public nature of this. If
19 that's acceptable, we will call a witness to do
20 the reading.

21 HEARING OFFICER: That's
22 acceptable.

23 JUDGE FABRICANT: This witness
24 shouldn't be sworn; right? Or should he be
25 sworn --

1 MR. HOOPES: I think he should
2 be sworn the same --

3 HEARING OFFICER: I'll take a
4 stab at this.

5 Do you solemnly swear that the
6 reading you will be providing us today shall be
7 fully accurate?

8 THE WITNESS: I do.

9
10 DOUGLAS BROOKS, ESQ., SWORN
11 DIRECT EXAMINATION

12 BY MR. HOOPES:

13 Q. Sir, would you state your name again for the
14 record, please.

15 A. Douglas Brooks.

16 Q. And can you spell it, please?

17 A. D-o-u-g-l-a-s, last name B-r-o-o-k-s.

18 Q. And you're an attorney?

19 A. I am.

20 Q. And I have here with us in the record as a
21 report a memorandum that was written by an ICE
22 officer that's entitled Appendix O
23 DHS ICE memorandum investigation,
24 Officer Richard Simmons, dated April 18th, 2018.

25 I'm going to show you this,

1 sir, and I'm going to ask you if you would
2 kindly read it, beginning with the first line,
3 which is April 2nd of 2018.

4 A. (Reading) On April 2nd, 2018, I, Deportation
5 Officer, DO, Richard Simmons, responded to a
6 Secure Communities, SC, hit based on arrest by
7 Newton police. The subject, A079677654,
8 Oscar Pegeuro, March 2nd, 1979, a/k/a
9 Jose Medina Perez, August 15th, 1981, of the
10 Dominican Republic, was arrested by Newton
11 police and charged with possession of Class B
12 cocaine. Subject has no other known criminal
13 history. I arrived at the District, Newton
14 District Courthouse at approximately 09:30
15 hours. At security, I identified myself and
16 asked for the chief court officer. The security
17 officer stated he was not around but the other
18 court officers on duty were in the courtroom. I
19 entered the courtroom and sat in the designated
20 area of police directly next to a court officer
21 and a Newton police officer. A Newton police
22 officer -- I believe his first name is Jason --
23 greeted me by asking if I was here for his guy,
24 Perez. I said, yes, I have a detainer and
25 warrant. He said that he had the paperwork

1 already.

2 As I observed the court
3 proceedings throughout the morning, during a
4 brief recess I introduced myself to a court
5 officer situated near me. I asked him if I
6 would be able to take custody of the subject in
7 lockup at the conclusion of his arraignment. He
8 said that I could and that it would be better
9 for him and the other court officer in the
10 court, as they were the only two court officers
11 around. I said that would be great, as I was
12 alone currently, and for officer safety reasons,
13 it would be best.

14 The subject's arraignment took
15 some time and was not called until after
16 lunchtime. Throughout the day, as circumstances
17 permitted, the court officers, the assistant
18 district attorney, ADA, the clerk magistrate,
19 and the defense attorney were all made aware of
20 my presence and intent to arrest for Peguero
21 upon his release from state custody. In
22 addition, I could see that both the ADA and
23 defense attorney were in physical possession of
24 the immigration detainer.

25 Just before the lunch break,

1 approximately 1230 hours, the female defense
2 attorney approached me and asked if I was with
3 ICE. I stated yes, how can I help you. She was
4 explaining to me her reservations about her
5 client being a wanted person out of Pennsylvania
6 and the subject that I was in court for based on
7 the information in the detainer. I assured her
8 that her client was subject of an ICE detainer,
9 confirmed through biometrics. Ultimately, at
10 approximately 1310 hours, the case was held over
11 to the afternoon session.

12 I re-entered the courtroom at
13 approximately 1400 hours. As I sat in the
14 courtroom waiting for the session to begin, a
15 male attorney, not present in the courtroom
16 earlier in the day, introduced himself as the
17 subject's defense counsel and asked if I was
18 with ICE. I stated yes, how can I help you. He
19 went on to say that he believed there was --
20 there to be a case of mistaken identity with his
21 client. I told him that I knew his client's
22 identity. He proceeded to read and to point out
23 differences in his client's height and weight
24 compared to the subject cited in the detainer.
25 I told him that I was not concerned with those

1 discrepancies. I further told him that I was
2 only concerned with this client's biometric
3 match. I explained that his client had been
4 previously removed from the U.S. and that his
5 presence is evidence of his illegal entrance
6 into the U.S.

7 After the conversation with the
8 defense attorney, I spoke with the ADA in
9 greater detail about the subject's immigration
10 history. I explained his previous deportations
11 and that he would be presented for prosecution
12 to the U.S. attorney's office for re-entry after
13 deportation when he comes into ICE custody.

14 At approximately 1410 hours,
15 the clerk had entered the courtroom and asked if
16 I was with ICE. I stated yes. He asked if I
17 had a warrant, and I, again, stated yes, I have
18 it right here. I asked if he wanted it or
19 wanted to see it, and he said no. The clerk
20 went on to say that the judge wants me to tell
21 you to leave the courtroom. I said, leave the
22 courtroom? The clerk said yes. I said, why am
23 I being told to leave the courtroom? He stated
24 that the judge didn't want her courtroom being
25 intimidated by the presence of ICE. It should

1 be noted that I was in plain clothes, with all
2 my branding and gear covered by a shirt and
3 jacket. I asked again if he was telling me to
4 leave the courtroom, and he said the judge
5 doesn't want anyone being intimidated by ICE.

6 I left the courtroom, and the
7 clerk followed me out to the front
8 lobby/security area. He explained to me that he
9 would let me know as soon as a decision on the
10 case had been rendered. The clerk returned to
11 the courtroom, and shortly thereafter the clerk
12 returned to speak to me again and stated that if
13 the subject is released, he will be released
14 either through the courtroom or brought back
15 down to the lockup and released into the
16 courthouse. I asked, so he will come up the
17 stairs over there and into the lobby to use the
18 main exit? He stated yes.

19 At that time I expressed to him
20 the serious matter of officer safety. I pointed
21 out that I was currently alone and there are
22 three males that have waited all day for the
23 subject. The subject's defense attorney has
24 been meeting with them off and on throughout the
25 afternoon. I asked the clerk if it was at all

1 possible if it would be better for officer
2 safety reasons for me to take the subject into
3 custody in lockup. He said, no, I'm sorry, and
4 returned to the courtroom.

5 It should be noted that it is
6 Massachusetts Trial Court policy to allow ICE
7 officers into the lockup to take aliens into
8 custody. However, I was refused this
9 opportunity.

10 At this time, I waited outside
11 the courtroom for a decision at approximately
12 1421 hours and contacted my team to see if there
13 was anyone available for backup. Deportation
14 Officer, DO, Domenico Federico responded and
15 arrived at the court approximately 30 minutes
16 later. I never left the front lobby. The clerk
17 came out of the court at approximately a 1450
18 and said the subject was being released. The
19 clerk went on to say that subject would be
20 brought back down to lockup and then escorted by
21 a court officer to the lobby/security area where
22 I was waiting.

23 The ADA came out sometime
24 later, I would estimate no more than 10 minutes,
25 and stated to me that she had a bad feeling that

1 the subject was released out of the back of the
2 building. She based her feeling on a, quote,
3 look that she got from the subject's defense
4 attorney. We told her that we were just waiting
5 for the court officer to bring the subject
6 upstairs, and she commented on why it was taking
7 so long. The clerk met us in the lobby and
8 stated that the subject should be coming up any
9 minute and went back to the courtroom. The ADA
10 asked the victim witness advocate, VWA, to
11 inquire about the subject, then went downstairs.
12 Within a few minutes, the VWA returned and
13 informed that he did not see the subject in
14 lockup and that the only other way to leave the
15 building is from lockup, but he doubted that the
16 court officers would have allowed that to
17 happen. The ADA also made a similar statement
18 that she couldn't believe that would happen.

19 We increasingly became
20 suspicious that the suspect was not in lockup,
21 and Deportation Officer Federico stated he would
22 go to the sallyport at lockup. He exited the
23 front entrance and went around to the back of
24 the courthouse on foot. Deportation Officer
25 Federico reported that he noticed a court

1 officer outside talking to correctional officers
2 that were inside the transport van. DO Federico
3 explained to the court officer that we were
4 waiting for our subject to be brought upstairs
5 in the lobby so we could take him into custody.
6 The officers stated the name of the subject
7 before DO Federico and very sarcastically said
8 that he released him out the back door. DO
9 Federico asked why did he do so, knowing that we
10 were in the building with a detainer and warrant
11 of arrest. The officer responded to DO Federico
12 in an arrogant tone, that he just let him go
13 from the back.

14 Ultimately, late in the
15 afternoon, the chief cour officer was suddenly
16 available. He advised that the subject was
17 released out the back of the building but
18 couldn't explain why. It was explained to us by
19 multiple court personnel that it required the
20 assistance of someone with a security pass,
21 court personnel.

22 Q. Thank you.

23 I'm going to show you next what's been marked as
24 Appendix P, (DHS ICE Memorandum of
25 Investigation, Officer Domenico Federico, dated

1 April 18th, 2018, and ask you to read that as
2 well.

3 A. (Reading) On April 2nd, 2018, at about
4 2:15 p.m., I, Deportation Officer Domenico
5 Federico, received a phone call from
6 Supervisory Detention and Deportation Officer,
7 SDDO, Stephen Wells, requesting that I would
8 assist Deportation Officer, DO, Richard Simmons
9 at the Newton District Court located at
10 1309 Washington Street, West Newton,
11 Massachusetts. I grabbed my duty gear and
12 proceeded to that address in order to assist DO
13 Simmons.

14 I arrived at about 2:51 p.m.
15 and parked my government issued vehicle in the
16 front of the building. I contacted my colleague
17 via cell phone about his location in the
18 building and then entered the main entrance. I
19 was greeted by a court security officer at the
20 checkpoint and identified myself as deportation
21 officer and showed my credentials. I explained
22 to the officer that I was there on official
23 business and looking for DO Simmons.

24 Once passed through the
25 security, I noticed DO Simmons was just outside

1 the courtroom. DO Simmons stated that the clerk
2 had informed him just a few minutes ago that the
3 subject was going to be released. The clerk
4 also stated that the subject was going to be
5 brought back down to lockup and escorted by a
6 court officer to the lobby where we were.

7 Within a few minutes, a female
8 Assistant District Attorney, ADA, greeted us and
9 seemed to be aware about the subject's case. We
10 told her that we were just waiting for the court
11 officer to bring the subject upstairs, and she
12 commented on why it was taking so long. The
13 clerk met us in the lobby and stated that the
14 subject should be coming up any minute and went
15 back to the courtroom. The ADA asked the victim
16 witness advocate, VWA, to inquire about the
17 subjects, and he went downstairs. Within a few
18 minutes, the VWA returned and informed that he
19 did not see the subject in lockup, and that the
20 only way to leave the building is from lockup,
21 but he doubted that the court officers would
22 have allowed for that to happen. The ADA also
23 made a similar statement that she couldn't
24 believe that would happen.

25 I became increasingly

1 suspicious that the subject was not in lockup,
2 and I informed DO Simmons that I would go to the
3 sallyport near the lockup and exited the
4 courthouse through the front entrance. I walked
5 to the rear of the building and noticed a court
6 officer outside talking to correctional officers
7 that were inside their transport van. I
8 identified myself as a deportation officer to
9 the court officer and showed him my credentials.
10 I explained to the court officer that we were
11 waiting for our subject to be brought upstairs
12 in the lobby so that we could take him into
13 custody. The officer stated the name of the
14 subject before I did, Peguero, and very
15 sarcastically said that he released him from the
16 back door. I asked him why has did so, knowing
17 that we were in the building with a detainer and
18 a warrant of arrest. The officer responded with
19 an arrogant tone, that he just let him go from
20 the back. I informed DO Simmons and returned to
21 our office.

22 MR. HOOPES: Thank you very
23 much. That's all I have. You can step down.

24 (PAUSE)

25 MR. HOOPES: Judge Joseph would

1 call Michael McPherson. He may be outside.

2 There he is. Thank you.

3 HEARING OFFICER: Good morning.

4 MICHAEL MCPHERSON, SWORN

5 DIRECT EXAMINATION

6 BY MR. HOOPES:

7 Q. Good morning, sir.

8 A. Good morning.

9 Q. I'm going to ask you to keep your voice up and
10 tell the hearing officer and court reporter your
11 name again. Spell your name.

12 A. Michael McPherson, M-c-P-h-e-r-s-o-n.

13 Q. Sir, are you employed today?

14 A. Yes.

15 Q. And by whom?

16 A. The Trial Court, Massachusetts Trial Court.

17 Q. And what's your position?

18 A. Director of security.

19 Q. And director of security for the entire
20 Trial Court?

21 A. Yes, sir.

22 Q. And so we've addressed this a little bit prior
23 to your testimony, but can you again describe
24 what the Trial Court is made up of, how many
25 departments?

1 A. Trial Court is made up of seven departments,
2 the -- Do you want me to list all seven?

3 Q. Sure.

4 A. Housing, juvenile, land, appeals, probate,
5 and Supreme. Not Supreme. I'm missing one.

6 Q. That's okay. BMC?

7 A. The BMC.

8 Q. Yeah. Thank you.

9 So there are courthouse facilities within each
10 one of those departments, I take it?

11 A. There is. There's 94 courthouses within the
12 state.

13 Q. And do you have -- At this point under your
14 command you have roughly how many court
15 officers?

16 A. 1,035.

17 Q. I'm sorry?

18 A. 1,035.

19 Q. Now, back on April 2 of 2018, did you have a
20 position within the Trial Court?

21 A. I was the regional director of security.
22 With 1,035, approximately 955 are court
23 officers, the rest are administrative.

24 Q. Thank you.

25 And so back on April 2, 2018, you were in a

1 supervisory capacity?

2 A. I was the regional director of Middlesex and
3 Essex County.

4 Q. And so would that region include the
5 Newton District Court?

6 A. Yes.

7 Q. And did you become aware of the incident that
8 brings us here today --

9 A. Yes.

10 Q. -- on that day of April 2nd, 2018?

11 A. Yes, I believe so.

12 Q. And did that cause you to conduct an
13 investigation yourself?

14 A. Yes.

15 Q. And did you come to learn that there was a
16 practice in the Newton District Court of
17 releasing individuals out the front of the first
18 session courtroom?

19 A. I was made aware of it through the
20 investigation, yes.

21 Q. And did you have an opinion as to whether that
22 was proper or not?

23 A. It was not proper. Our policy is to release
24 people from the lockup.

25 Q. And is that based on the Court Officer Manual?

1 A. Correct.

2 Q. And was that based at the time on the Lunn
3 policy as well?

4 A. Yes.

5 Q. And when the Lunn policy came out in November of
6 2017, as the supervisor, did you take any action
7 to disseminate that to your staff?

8 A. Yes. I believe through e-mails and also I
9 have chiefs meetings. So when I have the chiefs
10 meetings, it's brought up at chiefs meetings and
11 again through e-mails and maybe a possible memo.

12 Q. And in evidence is a, is a -- Exhibit 2 is a
13 revised policy for the Newton District Court
14 issued on April 4th, 2018. I'll show you the
15 policy. And have you seen that policy before?

16 A. I have.

17 Q. When did you first see that policy?

18 A. I believe maybe on 4/5. Somewhere around the
19 time it was written by Chief Noe.

20 Q. And did you find that policy acceptable?

21 A. Absolutely not. I told him that policy, take
22 it down, and that's not the policy we'd be
23 following.

24 Q. And what policy did you put in place?

25 A. The policy that's in the Court Officer's

1 Manual.

2 Q. Which is all custodies come in, all custodies go
3 back out the back door?

4 A. Everyone's released out the back door.

5 Q. And ICE individuals -- Would individuals be
6 swept by ICE with a detainer would be taken from
7 the lockup?

8 A. We allow the ICE to come to the lockup
9 themselves in custody for safety precautions for
10 everybody involved.

11 MR. HOOPES: Thank you. I have
12 no other questions.

13 CROSS-EXAMINATION

14 BY JUDGE FABRICANT:

15 Q Good morning, Director McPherson.

16 A. Good morning.

17 Q. The last time we spoke you were regional
18 director; correct?

19 A. Yes, I believe so.

20 Q. Congratulations on your promotion.

21 A. Thank you.

22 Q. You learned on April 2nd of 2018 that the
23 practice in the Newton District Court was that
24 people were released through the courtroom and
25 out the front; correct?

1 A. Correct.

2 Q. And that was not proper in your view.

3 A. Absolutely not.

4 Q. But that was the practice that you learned.

5 A. I learned that, yes.

6 Q. And there are 94 courthouses and 62
7 District Courts, and as much as you try to make
8 things uniform, it doesn't always work.

9 A. It doesn't.

10 Q. And after this happened, Chief Noe issued this
11 policy -- Oh, it is dated -- dated April 4th
12 under Chief Noe's signature. And you said, no,
13 that's not proper; correct?

14 A. Correct.

15 Q. And then you had some back and forth with
16 Chief Noe about that; correct?

17 A. Correct.

18 Q. He said, well, if we release people out the
19 back, that's the -- that's where the police
20 officers park and that's a problem; right?

21 A. Correct.

22 Q. So his view was, it wasn't a good idea to
23 release people out the back; correct?

24 A. Correct.

25 Q. And did you end up with some middle ground?

1 A. There was no middle ground. The policy is
2 the policy. And unfortunately, for the
3 Newton police officers' vehicles. The safest
4 way to release someone is through the sallyport.

5 Q. So your view is, whatever, whatever the local
6 chief might say or do, your view was the policy
7 is the policy.

8 A. Correct.

9 JUDGE FABRICANT: Okay. Thank
10 you.

11 MR. HOOPES: Just one.

12 REDIRECT EXAMINATION

13 BY MR. HOOPES:

14 Q. So you were aware of what the policy was in
15 Newton. Did that have same application when the
16 individual prisoner had property? In other
17 words, would they go downstairs or would they go
18 out the front?

19 A. We release them through the sallyport because
20 we have to do a check on every individual, see
21 if they have any warrant, see if there's any
22 hold on them, we call the sheriff's department
23 and check with probation and, yeah, to return
24 over their property and sign for their property,
25 and then we release them.

1 Q. So your understanding at the time of April 2nd,
2 2018, was that, if no property, they went out
3 the front, if they had property, they went
4 downstairs; correct?

5 A. I'm confused. They shouldn't be going out
6 the front.

7 Q. But they were.

8 A. Yes.

9 Q. Which you weren't happy about.

10 A. Yes.

11 Q. But at the same time, if they had property, they
12 went back downstairs.

13 A. Correct.

14 MR. HOOPES: Thank you.

15 JUDGE FABRICANT: Just one
16 more.

17 RECROSS-EXAMINATION

18 BY JUDGE FABRICANT:

19 Q. In that process of discussion about what was
20 actually happening, which made it different than
21 what should have been happening, did you learn
22 that court officers bring the property up to the
23 courtroom with the person or run down and get it
24 for the person?

25 A. I'm not sure if I understood that. I just

1 know that the policies weren't being followed.

2 Q. So you don't know either way whether that was
3 something that would happen.

4 A. At that court, I do not know that.

5 JUDGE FABRICANT: Thank you.

6 MR. HOOPES: Thank you.

7 HEARING OFFICER: Thank you
8 very much.

9 MR. HOOPES: I was going to say
10 Your Honor. Mr. Hearing Officer, there's one
11 photo that we referenced earlier on. It's of
12 the left side -- of the right side -- It's of
13 the left side. I don't believe it was... Yeah.
14 We didn't -- I promised that I'd bring it. I'm
15 bringing it. I'm going to offer this as the
16 next and last exhibit.

17 HEARING OFFICER: And what --

18 MR. HOOPES: This is a
19 photograph of the left side of the gallery.

20 HEARING OFFICER: And what
21 number is this?

22 MR. HOOPES: This would be
23 Number 6, I believe.

24 JUDGE FABRICANT: Just to be
25 clear, this is what we have here in the blowup;

1 correct?

2 MR. HOOPES: Yeah. We blew it
3 up. This is for the record.

4 HEARING OFFICER: Great.

5 I assume no objection.

6 JUDGE FABRICANT: No objection.

7 HEARING OFFICER: Exhibit 6 is
8 received.

9 EXHIBIT 6

10 (DOCUMENT MARKED AS EXHIBIT 6)

11 MR. HOOPES: That's the case
12 for Judge Joseph.

13 HEARING OFFICER: Thank you
14 very much. Anything further from you, Special
15 Counsel?

16 JUDGE FABRICANT: Nothing
17 further. Thank you.

18 HEARING OFFICER: Terrific.

19 So with that, the evidence is
20 closed at this point. And what remains is the
21 summations on Monday morning and then the post
22 hearing briefing.

23 So I just want to note a couple
24 of matters that I'm hoping counsel will address
25 either in your summations or your post hearing

1 briefing or both. I expect you're planning --
2 I'm not sure my mic is working anymore, so I
3 apologize. Just let me know if you can't hear
4 me. I've got it turned on.

5 JUDGE FABRICANT: Just a
6 little -- It may be the batteries.

7 HEARING OFFICER: Yeah. So
8 it's -- I believe it's on. I'll just speak up.

9 I expect you're planning to do
10 this in any event, but I just wanted to make
11 sure I flag this for you now so that we're all
12 on the same page in this regard.

13 The CJC charges that
14 Judge Joseph engaged in misconduct in violation
15 of Massachusetts General Law Chapter 211C,
16 Section 2(5), and a number of rules of the Code
17 of Judicial Conduct.

18 Special Counsel, if you could
19 please make clear what specific conduct you
20 allege violates each particular rule or
21 statutory provision, what specific subsections
22 of Massachusetts General Law Chapter 211C,
23 Section 2(5), you allege Judge Joseph violated,
24 and what conduct you allege was willful.

25 And counsel for Judge Joseph,

1 I'd like you to note if there are any -- if
2 there's any specific rule or statutory provision
3 that you agree was violated as well as your
4 arguments for why the specific rule and
5 statutory provisions cited in the CJC formal
6 charges were not violated.

7 I would also ask that you both
8 include in your summation and/or your post
9 hearing briefing what you believe are the
10 relevant mitigating or aggregating factors that
11 you think I should take into consideration.

12 And finally, I would also like
13 to make sure that you address what sanctions, if
14 any, are appropriate given the evidence
15 presented during this hearing.

16 JUDGE FABRICANT: May I just
17 ask, do you want us to do that in closing
18 argument or do you want us to do that --

19 HEARING OFFICER: I leave that
20 to you. I leave that to you. I just wanted to
21 make sure that, before we complete everything,
22 the summations and the post hearing briefing,
23 that I've heard from both sides on all of those
24 issues.

25 MS. MULVEY: Our issue is, it

1 sounds like you're looking for a degree of
2 specificity from the CJC that isn't in the
3 petition. Could we have -- I understand we had
4 initially contemplated simultaneous filings.
5 But given that there's going to be that we say
6 these acts violated these rules or sections,
7 could we have even just a couple of days extra
8 to respond to that since right now we don't
9 really know exactly the answers to those
10 questions?

11 HEARING OFFICER: Well, my
12 perspective was, but I'm willing to be persuaded
13 otherwise, that both sides exchange their
14 briefs, and I would like to confirm what we're
15 all agreeing makes sense in terms of the
16 schedule, but I was hoping that -- We're going
17 to get the final transcripts from this
18 proceeding by Thursday of next week, June 19th,
19 so it would be two weeks after that that I would
20 get from each side their initial post hearing
21 briefing, and then one week after that I would
22 get your responses to the other side's filing.

23 MS. MULVEY: That's fine. As
24 long as we get a chance to respond to the
25 specifics.

1 HEARING OFFICER: Yes. You
2 will absolutely get that chance through the
3 response.

4 MS. MULVEY: That's fine.

5 HEARING OFFICER: And that's
6 why I thought having simultaneous exchange
7 through the first initial period, two weeks
8 after we get the transcripts, and then one week
9 after that I'll get your responses to each
10 other's briefing. And then with that, the
11 hearing will be officially closed, and then that
12 will start my 30-day clock in terms of my
13 issuing my report and my recommendation.

14 JUDGE FABRICANT: If I may,
15 what I have in mind, although I can certainly
16 change it, is that, in closing, I would spell
17 out very specifically exactly what conduct
18 violates exactly what rule and what provision of
19 the statute. I have not contemplated at this
20 stage, the closing stage making recommendations
21 about sanctions, but I have contemplated putting
22 that in the post hearing briefing, but I'll do
23 it as you prefer.

24 HEARING OFFICER: I'm fine with
25 you doing it that way, whatever you would prefer

1 in that regard. I just want to know your
2 position on that before the hearing is
3 officially closed and then I start working on my
4 report and recommendation.

5 JUDGE FABRICANT: Thank you.

6 MR. HOOPES: Thank you.

7 HEARING OFFICER: Anything
8 further?

9 MR. HOOPES: Not from
10 respondent.

11 HEARING OFFICER: Okay. With
12 that, we are recessed for today. Thank you very
13 much. 9:00 a.m. on Monday for summations.

14 (The proceeding adjourned
15 at 11:14 a.m.)
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C E R T I F I C A T E

I, LISA L. CROMPTON, Registered
Professional Reporter, hereby certify that the
foregoing is a true and accurate transcript of my
stenographic notes of the proceedings in this
matter on the date and time specified in the
caption hereof.

IN THIS WITNESS WHEREOF I have hereunto
set my hand this 27th day of August, 2025.



LISA L. CROMPTON

REGISTERED PROFESSIONAL REPORTER

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CERTIFIED HEARING TRANSCRIPT (DAY 6)

COMMONWEALTH OF MASSACHUSETTS
COMMISSION ON JUDICIAL CONDUCT

COMPLAINT NUMBER 2019-22

VOLUME VI

HEARING

~ BEFORE ~

HEARING OFFICER

DENIS J. MCINERNEY, ESQ.

JUNE 16, 2025

9:00 A.M.

Boston, Massachusetts

Lisa L. Crompton, CSR (MA) (RI), RPR

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1 HEARING OFFICER: Good morning.

2 This is obviously the sixth day
3 of our hearing on the Commission on Judicial
4 Conduct's Complaint Number 2019--22. And this
5 morning we're going to have closing statements
6 by both parties, and we will be starting this
7 morning with Mr. Hoopes, on behalf of
8 judge Joseph.

9 MR. HOOPES: Good morning.
10 It's been a long seven years, a long seven
11 years. And when you know someone, and when you
12 know that they're not capable of what's
13 described in the indictment, and when you know
14 that they're not capable of the conduct that's
15 charged here, then you can defend on the burden
16 of proof or you can do it differently. You can
17 simply search for the truth. And in this case,
18 that's what we've done, for seven years, until
19 we arrived here with you which, frankly, has
20 been as eye-opening as anything preceding it.

21 Now, the truth, though, was
22 shredded beneath the clouds that in the front of
23 the grand jury for a long time, and then the
24 truth was hidden for a long time behind the
25 Jencks Act, and then initially it was still

1 hidden when it came to the CJC. But
2 Special Counsel joined with us, with that then
3 administration, and we finally got many of the
4 documents we were hoping for and looking for
5 and, frankly, thrilled to see.

6 But what we got for documents
7 wasn't nearly enough. It was just the
8 beginning. There were things to do, people to
9 see, people to talk to, interviews, but the one
10 simple thing that we learned at the end of that
11 was this: David Jellinek is a liar.

12 Now, David Jellinek is just not
13 any liar. David Jellinek is a criminal who, for
14 some reason, is still practicing his trade, not
15 just as a lawyer, though, but as a liar. Now,
16 lawyers go to school to get a JD, to learn how
17 to argue inferences. David Jellinek went to
18 school to get a JD, but he may also have
19 attended some school somewhere for liars. But
20 David Jellinek must have cut some classes, not
21 read the material, gotten kicked out of school,
22 because he is a very bad lawyer and a very, very
23 bad liar.

24 So if you look simply and
25 carefully enough the lies are obvious. He is

1 not the mastermind that he thinks he is and in a
2 sense he's not the mastermind of this case,
3 because what he did here was sort of mindless,
4 beyond the pale, committing his crimes in plain
5 sight, so to speak, in many ways, in front of
6 people that he knew, who would instantly wonder
7 what happened. But David Jellinek has a PhD in
8 manipulation. He could teach the school, run
9 the academy, and hire the faculty. He has
10 out-manipulated court officers and clerks,
11 lawyers and prosecutors, and many judges along
12 the road of this case, in the Newton District
13 Court, in the Federal Court, and here before
14 you, and before that, the CJC.

15 Now, like most bad liars,
16 though, the manipulation takes an added light
17 from the lies, and his bad lies in the clear
18 light here tell it all. Now, he seemed to like
19 to lie first in the morning chronologically,
20 which is what he did here. He said what? He
21 said he was at the Newton District Court on the
22 morning of April 2nd of 2018. He got there mid
23 morning, is what he claimed. But he said that
24 he arrived, and he told you why he was hired, he
25 told you what he supposedly heard from ICE, to

1 be out in the courtroom, kicked out of the
2 courtroom into the hallway, he talked about when
3 he spoke to ICE, he claimed that he saw his
4 client, he claimed that he thought about a fee
5 agreement, he talked about a conversation with
6 Ms. Bostwick, he said he received documents from
7 Ms. Bostwick, all in the morning. Well... And
8 he talked a little bit about check and cash, and
9 we'll talk about that a little bit later.

10 What is the simple proof of the
11 lies? ICE, the transcript, the interpreter,
12 Ms. Bostwick, Judge Joseph. He said he was
13 there in the morning. The ICE agent, Simmons,
14 who you heard from through his own report, said
15 one thing; he didn't see him that morning.
16 Ms. Bostwick said she didn't see him that
17 morning, she didn't talk to him that morning,
18 she didn't give him any documents that morning.
19 Judge Joseph said that she didn't see him that
20 morning, which is why she said hello in the
21 afternoon session on the tape. The interpreter,
22 Mendoza, thought he was the prosecutor because
23 of all the talking he did in the afternoon. How
24 could he have interpreted for him in the morning
25 if he thought he was the district attorney?

1 So if you go back through his
2 lies, he could not have arrived in the morning,
3 he could not have been hired as he said because
4 they saw him and they liked his performance.
5 There was no performance. There's not a word in
6 the transcript that says David Jellinek,
7 appearing, Your Honor, for anything in the
8 morning, let alone putting on a masterful
9 performance.

10 Supposedly he said that he
11 heard ICE asked out of the courtroom. If you
12 look at the transcript, there's not one word
13 about any of that happening on the record, and
14 it couldn't have, because it happened in the
15 afternoon, and it was never on the record.

16 Seeing his client? He couldn't
17 have seen his client. If he had seen his
18 client, Mendoza could talk about it, tell about
19 it, explain about it, not what was said, but
20 that there was actual contact. He didn't
21 remember any.

22 Now, that's about 10 lies. And
23 if you remember, when I was asking him
24 questions, who's telling the truth, you or the
25 ICE agent, and if it was the ICE agent, then we

1 have half a dozen lies. I underestimated.
2 We're already at 10, and we haven't even gotten
3 to the afternoon. He exceeded expectations in
4 lying. But his manipulations are countless,
5 without being able to be numbered, innumerable.

6 So as court goes, there are
7 different forms of manipulating and lying.
8 There are untruths, there are half truths, and
9 there are expectations that you would be
10 truthful in a particular situation you are not,
11 all arising to the level of false statements or
12 perjury, depending on the circumstances.

13 He manipulated the assistant
14 district attorney before the case was called, he
15 never said a word about his plan. He
16 manipulated the ICE agent before the case was
17 called, never said anything about his
18 conversation with MacGregor. He manipulated the
19 clerk, never said a word, the other court
20 officers besides MacGregor. That's just before
21 the case was called. While the case was called,
22 never raised his hand and said, oh, Judge, I've
23 talked to Mr. MacGregor and this is what we've
24 agreed to do, never said that so that the DA
25 could hear it, never said that so that the clerk

1 could hear it. After the case was done, the
2 same manipulations.

3 Now, manipulations come easy to
4 him. It's almost unfathomable to imagine, if
5 you are a practicing lawyer with any sense of
6 ethics, that the next morning you would knock on
7 the door of the presiding justice of the
8 Newton District Court, have an ex parte
9 conversation to tell her about a little incident
10 about somebody going out the back and only tell
11 a thumbnail of the story and not tell the fist
12 of what was really important, which was that he
13 had a conversation with MacGregor and out
14 Medina Perez went because of that conversation.
15 From that morning on, she didn't know for days
16 and months any such thing happened. Didn't say
17 anything to the clerk, didn't say anything to
18 the chief court officer Noe. Didn't come over
19 to the ADA the next day and say, you were right,
20 this is what I did.

21 So if you counted all of these
22 lies, out and out, half truths, failures to
23 disclose, David Jellinek must have been setting
24 a one-man record for liars, by a lawyer, lies by
25 a lawyer, or a lawyer's lies, not only in the

1 Newton District Court, but for any court in the
2 Commonwealth of Massachusetts ever.

3 Now, he's not done, though, in
4 some ways. Because from April 3rd on, he said
5 nothing. He was hiding in plain sight every
6 day, going to work, nobody saying anything.
7 Bizarre. But at the same time, he was keeping
8 track of what was happening. He knew about the
9 subpoena to MacGregor and that MacGregor was
10 going to the grand jury.

11 So he claimed that he didn't
12 talk to him between April 3rd and that date when
13 he found out about the subpoena. Can we believe
14 that? Do you believe that? His co-conspirator?
15 Now, the co-conspirator was doing one huge
16 favor, the biggest favor that a co-conspirator
17 could do for David Jellinek. When I asked Noe,
18 and Noe was asked, Officer Noe, Court Officer
19 Noe, when you interviewed MacGregor, did he say
20 anything about David Jellinek, the answer was
21 no.

22 Now, for whatever reason, and
23 we'll get to that, MacGregor was keeping his
24 mouth shut. Jellinek was keeping track of
25 MacGregor, because if MacGregor was keeping his

1 mouth shut, Jellinek still had options. And he
2 sat on it and sat on through May, through June,
3 through July, through August, through September,
4 through October, until he got a call from
5 Clerk Okstein's lawyer, oh, the grand jury's in
6 action and they're coming for you, you are a
7 target. Now, he called the lawyer. And when he
8 heard that word "t-a-r-g-e-t," he must have
9 known bad things can happen.

10 Now, he claimed he wasn't
11 afraid of going to jail. I know no one who is
12 not afraid of going to jail. 20 years, five
13 years, 36 months. If most people, who are made
14 as human beings, get sweaty palms when they see
15 the blue light behind them and wonder if it's
16 for him, for you, for somebody you're with, then
17 he clearly had sweaty palms at the very least.
18 But he said to you, oh, he was just worried
19 about his livelihood and providing a family and
20 professional career. That is not the case. He
21 was worried about everything.

22 Now, he went in to see the
23 U.S attorney's office, after his lawyer had made
24 contact, and we can presume he did the usual
25 thing, which is, he called, said I'm going to

1 talk to you, give you the attorney proffer, and
2 I'm going to bring him in, and in he went, and
3 he cooperated for a number of months.

4 And the reason we know that he
5 was keeping track of MacGregor to see what his
6 options were is because MacGregor had a
7 retirement party in the spring, after Jellinek
8 had been in to see the U.S. attorney's office no
9 less than five times, and who showed up at the
10 party for MacGregor, four court officers and one
11 other person, Jellinek. And while Jellinek had
12 been throwing MacGregor under the bus and
13 causing him to be indicted and him alone, along
14 with Judge Joseph, he walked over to shake his
15 hand.

16 Now, what kind of a person
17 would do something like that? A master
18 manipulator, who has probably did a fellowship
19 in manipulation. So he knew what his cards
20 looked like exactly.

21 And when I asked him, I said,
22 so it was a trade. What did he say? It was a
23 trade. I said it was a trade for what you were
24 going to be able to tell him about the 52
25 seconds. And he said, yeah, it was. He said,

1 he said that was the core of it. I said they
2 had everything in front of it, everything in
3 back of it, it was what was said in those
4 52 seconds off the record, and he agreed. He
5 knew that's what it was about, and they knew
6 that was what it was about. And so he got
7 immunity.

8 Now, you know better than
9 anyone in this courtroom that giving complete
10 immunity to the mastermind of a plot with no
11 corroboration is beyond unusual, and it's
12 tantamount to prosecutorial suicide, because you
13 always, always, always, as a prosecutor,
14 particularly in white collar cases, either need
15 more corroboration or you need a piece out of
16 them, because if you don't take a piece out of
17 them, no jury will believe them, because they
18 know what anybody on the street knows, you can
19 make anything up. And these people made that
20 deal. And that either means that they didn't
21 care about a conviction, they cared about just
22 an indictment, whatever happened after that, or
23 they were fools, and they are not fools. You
24 know and I know and they know one thing: Ties
25 lie. People with ties lie. In the white collar

1 world of prosecution, people who wear ties are
2 the bread and butter of making cases. So you
3 have to do the other things, the actual work.

4 Now, Jellinek gave them two
5 things that they were looking for in the
6 52 seconds, one, what he said to her, and of
7 course, there's variations on that, got
8 infinitely longer, if you could put his nose
9 next to the timeline, you would watch Pinocchio
10 grow. On November 8th, he said, I requested
11 that the judge release Medina Perez through the
12 lockup area. That's all he said. By the time
13 he got to the grand jury, he added, oh, he said
14 that he thought Medina Perez could be released
15 out the back door. That's -- Sounds like two
16 words. Small thing. That's the case. He said
17 one other thing. What was in her mind, he was
18 asked, February of 2019. What did he say? He
19 said he didn't know what was in her mind. He
20 wasn't a mindreader. So that was 2019, 2020,
21 '21, '22, '23, '24, he came and spoke, sat down
22 or did the Zoom, as we understand it, with the
23 special prosecutor in December 2024. She asked
24 him the same question. You said you didn't
25 know. He said not true. She said she

1 understood his plan and, yeah, that's what we'll
2 do. That's the core of the case. That's the
3 core that they traded for. That's the core that
4 they didn't care about. Once he made the trade,
5 he just made it better.

6 Now, it's useful to look at the
7 things that I would suggest that the Federal
8 authorities did not do, because it had
9 spill-over effect into this proceeding. If you
10 look at the document that they produced, they
11 ignored the Lunn policy as the governing factor,
12 they ignored the Lunn policy and the court
13 officer manual, governing factor for where the
14 exit would be, they focused on this mirage that
15 some people are calling the common practice of
16 the point of release in Newton, but they papered
17 their way through that. They ignored the
18 statements that they had in the front of their
19 nose, the interpreter statement that we've
20 discussed. They ignored the ICE statement that
21 they had. They had. We didn't see it for
22 months and years. They had it before they
23 pulled the trigger on this case. They didn't do
24 any of the work that would have seemed to them
25 the collection of small lies all gathered up

1 into one whopper, for the morning, and we've
2 been over it, they would have known he wasn't
3 there in the morning. They didn't accurately
4 state a time he arrived, because he never
5 arrived, why he was hired, all the litany that
6 we talked about earlier.

7 More telling than that, there
8 was an attorney general in Massachusetts named
9 Frank Bellotti, he used to say, if you're going
10 to indict in a case like this, you better be
11 careful, because sloppiness takes you nowhere
12 and it hurts everyone. And in here, they never
13 ordered the transcript of the day. We did that.
14 He had an iPad. They never asked to get the
15 iPad, to go through it, to see what the schedule
16 was, the things that were missing for
17 Special Counsel. They never saw it. They never
18 followed up on his calendar.

19 But the most telling thing, the
20 eagerness to just pull the trigger to ruin
21 somebody was the fact that they never spoke to
22 Ms. Bostwick. You heard her here. We asked
23 her, Ms. Mulvey asked her, the vital question,
24 did the Federal authorities, the FBI, the
25 assistant U.S. attorney ever speak to you. The

1 answer was no. Really? In a case of this
2 magnitude, the woman who was there in the
3 morning, who could tell you whether he was lying
4 or not, you never knocked on her door, you never
5 made a call, you never interviewed her? There's
6 only one explanation for that. And it's not
7 that they're sloppy. Because I assure you, --
8 I've been in cases with these people -- they are
9 not stupid. The only possible explanation is,
10 they didn't want to hear, it might get in the
11 way of their project.

12 Now, probably the most
13 mysterious thing is this whole notion that check
14 versus cash. Now, Mr. Jellinek told the
15 prosecutors and told the grand jury, do you
16 solemnly swear to tell the truth, the whole
17 truth and nothing, but the truth so help you
18 God. I do. And how were you paid. I was paid
19 by check. You were in a proffer session. You
20 know you have an obligation to tell the truth.
21 If you don't, it's a thousand and one violation.
22 You know that. Yes, I do. How were you paid.
23 I was paid by check. Did they ever ask for the
24 check? No. If they had, we'd have it. Did
25 they ever look for the bank account? No. If

1 they had, we'd have it. Did they ask for his
2 tax record? No. We would have it. Did they
3 ever ask for his accounting records? No.

4 Now, if you were supervising
5 these people, and they did something like that,
6 they would be demoted to going forfeiture cases.
7 There's no explanation for this other than they
8 didn't want to do it. Because they are not
9 sloppy. They know what they're doing. And then
10 he walks in six years later to the office of
11 Special Counsel by Zoom and confessed. It was
12 cash. Now, nobody forgets whether it was check
13 or cash. And he didn't.

14 And Special Counsel is much
15 quicker about these things, trying to pay
16 attention to the truth, than her predecessors,
17 and she followed up and asked, where are the
18 bank accounts, let's go back and check, that's
19 what you said, you said check, now you're saying
20 cash. Which is it? And he said, oh, I'll go
21 look for it. You heard him. I asked him. You
22 said you'll go look for it. And we don't have
23 it today. If we don't have it today, that means
24 Special Counsel didn't get it today. Really?

25 Why is that important? It's

1 not just important, it's critical. Because the
2 important question before you is, why the lies,
3 why all the morning lies, why this 10, not six,
4 10 lies that have a destructive weight of a
5 piece of cement as their case. Why? Well, if
6 you weren't there in the morning, why are you
7 lying about it? So talking it through with you,
8 it could have only been because somehow he got
9 there at a time when was different than the
10 morning. And why is that important? Because it
11 goes to how he got to these people. How did
12 they find him, if they didn't see him perform,
13 if he didn't smile at them as he went by, how
14 did he get introduced to them.

15 Well, it seems like the only
16 natural candidate for that would be
17 Wesley MacGregor, who was the court officer at
18 that point. We don't know for sure, but there's
19 nobody else really around. And if
20 Wesley MacGregor made the introduction, and
21 there's no check and they're supposedly only a
22 thousand dollars in cash, could have been more,
23 could have been much more, we don't know, into
24 whose pocket did that cash go. All one? Split?
25 Who knows?

1 But going to back to not asking
2 the questions, I would suggest, I would suggest
3 and I know you know what I'm talking about, what
4 person would ever risk immunity in a case like
5 this to lie? Because as soon as you lie, you
6 get caught and you have no immunity. You're
7 dead. You're going to jail. And so why would
8 he lie about something like check versus cash?
9 If you front that at the very beginning, they'll
10 give you a pass. You know that. I know that.
11 They'll give you a pass, as long as you front
12 it. The only possible explanation, we can't say
13 for sure, but we don't have to, is that
14 something untoward happened between those two,
15 and MacGregor was smart enough to not name
16 Jellinek. Because he can explain, oh, I let him
17 out the back door. You can't explain as a court
18 officer beyond the tape. If you're Jellinek,
19 you can't explain handing cash to a court
20 officer in return for a referral. Maybe there's
21 another explanation. That's as good as I can
22 do. But I would suggest to you something at a
23 crisis level, more important in their minds than
24 letting somebody out the back, is driving this
25 host of lies about the morning. It's too wild a

1 whopper to take a risk otherwise.

2 Now, without trying to be
3 critical of anybody here, because the CJC has
4 its process, CJC filed these charges, then they
5 talked to Jellinek, then they talked to the
6 interpreter, then they talked to the ADA. They
7 never talked to Bostwick. They never looked
8 into any of the things in the transcript. But,
9 by then, it was too late. We were on this path.
10 And in the end, thank God we were. But we were
11 on this path, a path that David Jellinek excused
12 because he said, oh, I was just, what, I was
13 just advocating for my client.

14 Now, there's a preliminary
15 section to the Massachusetts bar rules that says
16 that in a section, Preamble 5 that says that an
17 attorney's conduct is -- has to conform with the
18 requirements of the law. And he knew this
19 didn't conform to the requirements of the law,
20 and Federal authorities knew it didn't conform
21 to the requirements of the law, because they
22 named him in there as the mastermind and
23 co-conspirator.

24 Now, even the Bible, in the
25 Torah and the revelation says that you need two

1 witnesses. What did Federal authorities have?
2 What does Special Counsel have? They have a
3 liar. So maybe we can update, if that's humanly
4 possible, the Torah and the new testament and
5 say you need two credible witnesses. That means
6 for thousands of years, for thousands of years
7 things that were important to human kind where
8 you were going to have a penalty of any kind
9 needed corroboration. They understood that.
10 Somehow that's gotten lost here. Is there any
11 good reason for it? I would suggest not.

12 And if Special Counsel suggests
13 that Mr. Mendoza is that credible second person,
14 he shot himself in the foot. Because whatever
15 his impressions were, he was clear that it had
16 been seven years, clear that he had memory
17 issues, couldn't remember the correct locations
18 of things as simple as where the side bar took
19 place, recognized there was white noise,
20 distance. Even Ms. Bostwick, who was sitting in
21 the front row, right inside the rail, with the
22 rail to her back, said I couldn't hear, I didn't
23 hear a thing. Didn't hear off the record,
24 didn't hear on the record. And he didn't know
25 what the Lunn policy was. So clearly, he could

1 misinterpret many things. But the most critical
2 thing is that he thought David Jellinek was the
3 prosecutor.

4 Now, the assistant district
5 attorney is not their second witness. The
6 assistant district attorney is our second
7 witness, Judge Joseph's second witness. Was
8 anybody more credible than the woman who stood
9 before you and sat before you and testified?
10 She said that, as far as she was concerned, the
11 off the record was just a continuation of the on
12 the record. She was right there. Nothing was
13 said that gave her the impression that
14 Medina Perez was doing anything other than going
15 out the side door -- excuse me -- going out the
16 front door. Although she may have used the word
17 "misguided," she didn't think that Medina Perez
18 was going out the back door. She said nothing
19 was said in that regard. She thought
20 Judge Joseph was just offering Jellinek time.
21 She didn't know about the Lunn policy either,
22 she knows it now, and she thought that
23 Judge Joseph was complying with it. She also
24 agreed that it was not a good thing for ICE to
25 take the wrong person. If they were looking for

1 help for their second person, they got none, and
2 we got everything we needed.

3 Now, the next witnesses from
4 Special Counsel are the three Newton District
5 Court witnesses that really told us what really
6 happened. And that's what this hearing, and in
7 some respects, if not all respects, is really
8 about. What actually happened that day? And
9 Court Officer Noe said to you three things: ICE
10 isn't there very often, so they don't deal with
11 this often, he had his interaction with ICE, and
12 he claimed to have offered them the opportunity
13 to go down or to stay up and wait at the front
14 door. But Noe didn't know about the
15 conversation ICE had had with Clerk Okstein.
16 And he may or may not ever heard about the Lunn
17 policy. Because he was doing things the old
18 way. That's what he said. In very good faith
19 and very honestly.

20 But the two witnesses that you
21 heard from the Newton District Court that were
22 most critical I would suggest were, one,
23 Clerk Okstein and, two, Judge Mary Beth
24 Heffernan. Now, Clerk Okstein told you that
25 going off the record was nothing to get excited

1 about as far as he was concerned. He told you
2 that people go downstairs in custody for their
3 property. He said that when he spoke to
4 Judge Joseph about ICE in the lobby, she didn't
5 ever say anything to him about them not being
6 able to access through the lockup. All she
7 talked about was whether they could be in the
8 courtroom or not.

9 But he showed, I would suggest,
10 great courage in answering your questions,
11 questions that had never been asked before. He
12 interpreted the order by Judge Joseph to also
13 include that ICE couldn't go anywhere into the
14 lockup, they had to wait out front. He
15 interpreted that as Judge Heffernan's policy.
16 Some seven years later, for the very first time,
17 we heard that out of his lips.

18 And then we heard from
19 Judge Heffernan. Now, Judge Heffernan said that
20 she only knew about Rule 211 anecdotally.
21 Anecdotally is a cute word for I've never read
22 it before. She thought custodies could go down
23 to get property. She told us that Jellinek,
24 when he saw her the morning of April 3rd, never
25 told her this agreement with MacGregor, never

1 told her his involvement with Medina Perez going
2 out the back door, or that Judge Joseph had
3 blessed it.

4 She talked about her e-mail
5 policy discussion with Judge Dawley, and she
6 acknowledged that she had this policy in effect,
7 we've learned that nobody else in the
8 Commonwealth of Massachusetts had it, and she
9 got rid of it. But the critical thing that she
10 said to you were that she claimed that she knew
11 about Lunn, that's what she claimed, she claimed
12 and said that she had acknowledged that she
13 hadn't implemented it. She admitted that the
14 Lunn policy says that, when ICE is present,
15 they're supposed to be able to take the
16 individual from the lockup. But she went on
17 with questioning from Special Counsel to say
18 that, oh, the policy was a little confusing and
19 her policy was not inconsistent with Lunn.
20 Really? Seriously?

21 Now, she acknowledged that it
22 was important to give the defense attorney time.
23 She acknowledged that no one would want ICE to
24 take the wrong person. And critically, she was
25 asked the following questions: Did you feel

1 like she, meaning Judge Joseph, told you what
2 she thought was important as far as you can
3 remember? Answer, yes. You didn't feel like
4 she was holding anything back. Not that I could
5 tell. And that you would have been the one to
6 tell Judge Joseph that Medina Perez went out the
7 back door when you talked that morning. Yes.
8 Mary Beth Heffernan was not trying to reprimand
9 Judge Joseph. She was trying to find out what
10 happened.

11 Now, that same bell, you know
12 the line of bells, and they have the bells that
13 play the same sort of sound, you know, depth and
14 quality. We heard from the other two judges,
15 the senior judges, from Judge Fortes. And
16 Fortes called her in. The conversation was
17 about Newton and it was precisely because they
18 both understood that she had gone off the
19 record. Though Judge Fortes never asked her,
20 that was the focus of the meeting. They didn't
21 get into ICE. Judge Fortes at this point seven
22 years later has no memory of any conversation
23 about Waltham, but you have the documents that
24 support it. As far as Judge Fortes was
25 concerned, it was an educational meeting,

1 permission, permission was accomplished. She
2 never said a word about half truths, part
3 truths, anything other than the truth from Judge
4 Joseph.

5 Probably another of the most
6 important witnesses was judge Dawley. He
7 acknowledged that he hadn't offered any training
8 in the manuals, separate training, whatever on
9 the issue of off the record. He thought being a
10 new judge was like drinking from a fire hose.
11 He acknowledged that Judge Carey, who is the
12 judge of all judges in the Trial Court, had in
13 an e-mail acknowledged that she didn't know
14 about this Rule 211. He, himself, had been off
15 the record on certain circumstances. He laid
16 out what the criteria was for the governor's
17 warrant, and he explained that Lunn was clear
18 and mandated, but the most important thing he
19 said for our purposes here was, I asked him, did
20 you think she was candid, and he said yes.

21 Now, Judge Joseph testified,
22 and you heard her testimony, she worked so hard
23 that morning and afternoon to find out about
24 this policy. But Judge Heffernan was excluding
25 people, ICE, who had a perfect right to be

1 there. She asked Okstein about it. She called
2 down to the office of the administrator of the
3 District Court, they talked her through it, they
4 e-mailed it to her, she followed.

5 When she was speaking, she was
6 asked to go off the record. Before that,
7 Jellinek said, best thing we could do is release
8 him and see if he can dodge ICE, and she
9 interpreted that as, he was asking for more
10 time. And the reason we know that that is a
11 more than reasonable interpretation is the
12 person in this courtroom testifying before you
13 who had the least axe to grind ever interpreted
14 it the same way, the assistant district
15 attorney, because she never heard anything, on
16 or off the record, inconsistent with that, and
17 said she thought one was just a continuation of
18 the other.

19 And at the end of the case,
20 Clerk Okstein turns around and says what? ICE
21 is here, they want to take him. And what does
22 Judge Joseph say? She says, they can't come in
23 here, but he's released. And there are four
24 other ways, three at least, for them to get
25 downstairs. Who knows where ICE is? But ICE

1 can come in the back, ICE can go down the
2 stairs, ICE can take the car around the back,
3 ICE can go down the other set of stairs.

4 Now, there's not one whip of
5 evidence showing, not one scintilla, as
6 Ms. Mulvey said to you at the very beginning,
7 showing that Judge Joseph had any other thought
8 in her mind, any improper, impure thought or
9 motivation. But in addition to that, we put on
10 a case, and we put on the case of involving
11 first Ms. Bostwick.

12 Now, besides Ms. Bostwick,
13 putting a pin in the balloon of the morning that
14 David Jellinek was trying to float, she said one
15 other thing that was telling about the state of
16 mind of David Jellinek. Remember, he said, when
17 he was asked questions by Special Counsel, I saw
18 Ms. Bostwick afterwards, and Ms. Bostwick said
19 to me, oh, I think you obstructed justice.
20 Ms. Bostwick said I have no memory of saying
21 anything like that. David Jellinek, like the
22 central figure in crime and punishment was
23 hearing voices of his crime, and he knew from
24 April 2nd on that he was in deep trouble.

25 Ms. Khoury, the attorney, said

1 going downstairs to get your property was the
2 thing to do here. Judge Heffernan had agreed
3 with that. Clerk Okstein had agreed with that.
4 And she would have wanted to talk to her client,
5 too.

6 But, you know, one of the most
7 powerful things I would suggest, hope, were the
8 three judges, experienced judges, of the
9 Massachusetts court, who said to you three
10 things: They had been off the record many
11 times, in the District Court, in Superior Court,
12 throughout their careers, and they had seen
13 other judges do exactly the same thing. And it
14 was not for some bad purpose. It was forgetting
15 the business of the court done.

16 Judge Ball, who you heard from,
17 Judge Ball sat in this courthouse six months out
18 of the year, six months in Brockton. Why did
19 they have her here? Because she could move
20 cases. She knew how sausage was made. So other
21 people who are prim could do the trails. And
22 without her -- And they were very happy to have
23 her year after year after year working that
24 hard. She used every tool in her kit to get
25 things done so that the wheels of justice in

1 Suffolk County and Plymouth County did not come
2 to a screeching halt. And even the people
3 sitting here today, we're happy to bless the
4 fact that she used those tools. So to say 2025,
5 oh, some things changed and it's a bad thing, is
6 beyond ridiculous.

7 Judge MacLeod said she did the
8 same thing, and she also told us that justice
9 was a little bit like McCourt, McJustice, you
10 know when you have to move things fast. But the
11 most important thing I would suggest to you was,
12 she talked about the fact that how necessary it
13 was to facilitate people being open and honest,
14 and that was the purpose that she used off the
15 record for.

16 But the most important thing
17 came from the lips of Judge Ball. She said, I
18 trust lawyers, I like lawyers, if somebody asked
19 to go off the record, she believed presumptively
20 that they were there for a good purpose. And if
21 she had done that, as she did for all those
22 years, her trust was never betrayed. What does
23 that mean? That means that she never ran into a
24 David Jellinek. Nor would anybody ever
25 reasonably think that they'd run into a

1 David Jellinek.

2 Now, you heard from the ICE
3 agents through their testimony they needed to be
4 heard. That was their testimony. And they said
5 one key thing, beyond the fact that Jellinek
6 wasn't there. They basically begged to be
7 allowed to go into the lockup, because they knew
8 that the policy, the Lunn policy, and they knew
9 about Lunn, was there for the public's
10 protection and for their protection. And you
11 heard from the chief, now of security,
12 supervising at that time, and he said, when
13 asked about the policies at the Newton District
14 Court, were they, -- I think I was trying to be
15 careful about it -- were they consistent with
16 the Lunn policy, court officer policy, and to be
17 gentle about it. His answer was, no.

18 Now, on April 2nd of 2018,
19 there was one person in that courtroom who knew
20 about the Lunn policy, which is the key in court
21 to the case. Not the 52 seconds. The Lunn
22 policy. That was a policy, as Judge Heffernan
23 described, that Judge Dawley really described,
24 was put together in response to the Lunn
25 decision, recognizing that it was a delicate

1 balance, committees put months of work into it,
2 they worked very hard to put that together, they
3 distributed it widely, they had every
4 expectation that all of judiciary would read it,
5 that court officers, supervisors would get to
6 read it, that everybody would know about it.

7 Judge Joseph, if you read that
8 transcript, did everything right on every case
9 that day, which she particularly did everything
10 right on this case, on the Medina Perez case,
11 because she was the only person in the courtroom
12 who knew about the Lunn policy. She called for
13 it, it was read to her, she wanted to implement
14 it, she got copies. And what did she do with it
15 when she left for the day? She took the
16 policy -- we have it here -- and she dropped a
17 copy on the clerk's desk, she dropped a copy on
18 the first assistant's desk, and she also dropped
19 a copy on Mary Beth Heffernan's desk. Right
20 here.

21 How would you feel if you were
22 the Chief Justice, the Presiding Justice, and
23 you walked in, and your rookie, your baby judge
24 who was filling in for you that day dropped that
25 piece of paper on your desk? I think you would

1 know that there was a policy that nobody in your
2 courthouse seemed to be aware of, not the clerk,
3 not the court officer, not the assistant
4 district attorney. Is it sort of crazy that
5 these people all along have wanted to penalize
6 the only person who made the judiciary look good
7 that day?

8 So I have to say, in closing,
9 when I finally got the chance, when we finally
10 got the chance, and I read the Clerk Okstein's
11 grand jury, I said to myself, oh, my word, this
12 is what really happened. And then I watched you
13 ask him a question that neither counsel asked,
14 which is, did you tell ICE that they could go
15 other ways? And he said no. Why? Because he
16 misinterpreted the policy in Newton and thought
17 that's what Judge Joseph was ordering, even
18 though she hadn't said it. He confessed. And
19 when you ask that question, you got that answer,
20 I thought, oh, that's what really happened.

21 But then Judge Heffernan got on
22 the stand. And she said, I knew about Lunn,
23 whether she did or didn't, but I never
24 implemented. And I thought, oh, my God, oh, my
25 God, that's what happened. Now, you heard her

1 say at the beginning of her testimony, my job as
2 the presiding Justice is getting everybody
3 together, make sure we're on the same page.

4 You heard Judge Bonnie MacLeod
5 say my job is to gather everybody together and
6 make sure that they're on the same page.

7 So if one says it's their
8 responsibility as the Presiding Justice no
9 matter how they divided up authority in the
10 courthouse, and the person who is the
11 Presiding Justice says that's my responsibility,
12 how did the Lunn policy fall through the cracks
13 all these years.

14 Now, it doesn't matter that she
15 claimed that she met Jellinek in the afternoon.
16 It was a little of an ex parte conversation.
17 Because you know that of course Jellinek had his
18 hair on fire and went in in the morning, and
19 there's no way Noe didn't go see her right away,
20 and there's no way that Okstein didn't go see
21 her right away. But who cares? What's really
22 important is that, when she confessed, she
23 added, oh, confusing time, it was, my policy was
24 consistent with Lunn.

25 In what parallel universe is

1 her policy consistent with Lunn? Lunn was
2 there, mandating into the lockup, if at all
3 possible, there was no impossibility that day,
4 mandating that for the protection of the public
5 so that there weren't -- my colleagues --
6 scuffles in the courtroom. And most important,
7 for the protection of our law enforcement people
8 in the lockup. And but for her policy that ICE
9 couldn't go downstairs and but for that, we
10 wouldn't be here today.

11 Now, having said that, I asked
12 the question of Judge Dawley. I said, well, do
13 you think that, you know, she should be
14 complained to the CJC. And I said that simply
15 to make a point. And the point is that her
16 policies were just the contributing cause. She
17 was trying to do the best she could every day,
18 just like everybody else, except one person,
19 David Jellinek.

20 No judge in this courthouse
21 today or before or hopefully in the future has
22 ever met someone like David Jellinek, Judge
23 Ball, who did cases with hundreds of people,
24 Judge MacLeod, who done cases with thousands of
25 people, lawyers from within the Commonwealth,

1 out the Commonwealth, nobody has ever met a liar
2 and a manipulator and a scammer like that. And
3 if there was no David Jellinek, the imperfect
4 policies of Judge Heffernan would probably still
5 be there today. Because he was the stress point
6 that no one anticipated.

7 It's a little bit like,
8 Judge Joseph was walking down the sidewalk, and
9 some scaffold fell on her head, and somebody's
10 blaming her for walking down the sidewalk. Who
11 dropped the scaffolding? Who hoisted the rope?
12 It doesn't do us any good here to cast blame.
13 Because I would suggest to you you're going to
14 take all this in, you're going to write
15 findings, I think that without question the SJC
16 is going to be dying to hear what you have to
17 say and take any kind of remedial measure.

18 But in the end, I would ask you
19 that it's enough. We don't need to throw
20 anybody to the wolves, you don't need to throw
21 another person to the wolves, we don't need to
22 throw other people to the wolves. Other people
23 have been doing the best they can in the
24 judiciary. Only David Jellinek is the criminal
25 here. And if we throw someone to the wolves,

1 the wolves are insatiable, insatiable, and we
2 won't gain anything. We need to be better than
3 them and end this now.

4 Thank you.

5 HEARING OFFICER: Thank you,
6 Mr. Hoopes.

7 JUDGE FABRICANT: Good morning.
8 Judith Fabricant, Special Counsel for the
9 Commission on Judicial Conduct.

10 I need to make a couple of
11 comments about Mr. Hoopes' argument. I have no
12 doubt that you will make findings based on the
13 evidence and nothing that isn't in the evidence,
14 but we heard quite a bit here in this closing
15 argument that wasn't in the evidence, starting
16 with what was essentially a character reference
17 by Mr. Hoopes when there was no character
18 evidence in the witness -- among the witnesses
19 in the evidence.

20 We heard a speculative theory
21 about Mr. Jellinek paying off Officer MacGregor.
22 There was no evidence of that. In fact,
23 Mr. Hoopes asked Mr. Jellinek a question about
24 that, and Mr. Jellinek said absolutely not. If
25 Mr. Hoopes wanted to bring in Officer MacGregor,

1 perhaps he could have. He didn't. There is
2 simply no evidence of that.

3 Mr. Hoopes said that the
4 assistant district attorney said that what
5 Judge Joseph was doing was to give Mr. Jellinek
6 more time. She didn't say that. She said
7 something different, which we'll talk about, but
8 she didn't say that. So we've had a lot here.
9 And there was some argument about Judge Ball and
10 her role and how the court viewed it. There's
11 been some argument about how U.S. attorneys
12 operate, how the justice department operates.
13 None of that is in evidence. And I know that
14 you will make findings based on the evidence.

15 I also think it's important to
16 note that the Commission is not the U.S.
17 attorney, the Commission's charges are not the
18 indictment, and this hearing is not the trial of
19 the indictment. This is an entirely different
20 matter. The U.S. attorney may or may not have
21 done some things that they would otherwise do,
22 may or may not have had whatever motivation they
23 had, may have not done some things that
24 Mr. Hoopes thinks they should have done. That
25 is not what this hearing is about.

1 This hearing is about the
2 charges made by the Commission on Judicial
3 conduct whose responsibility it is to monitor
4 judges' compliance with the Code of Judicial
5 Conduct and with the provisions of Chapter 211C,
6 and to take action when it has reason to believe
7 that there has been a violation by a judge of
8 those requirements. So that's what this hearing
9 is about, and I know that you will make your
10 findings and your ruling about those issues.

11 Now, as I said when we started,
12 there's one central factual dispute, and that is
13 what was said in the 52 seconds off the record.
14 And we've spent five days of evidence to resolve
15 that one disputed fact. Some of the evidence
16 that's been presented actually bears on that
17 dispute, a lot of it has been peripheral. I'm
18 going to keep my focus on that central issue, on
19 the facts that I ask you to find based on what
20 was said in those 52 seconds, on what Joseph
21 said, Judge Joseph said afterward, and on the
22 undisputed facts.

23 So how do you resolve the one
24 disputed issue. We're all thoroughly familiar
25 with the factors that a fact-finder can

1 consider. You consider whether the witnesses
2 have a bias or motive to tell you anything other
3 than the whole truth, you consider the demeanor
4 of the witnesses, as I know you have and will,
5 you consider whether their testimony is
6 consistent in itself and with their previous
7 statements and with the other evidence, and most
8 important in this case, I suggest is to consider
9 the plausibility of the conflicting versions in
10 light of what was said on the record and in
11 light of the surrounding circumstances.

12 Two most conflicting witnesses
13 obviously are Judge Joseph and Attorney
14 David Jellinek. Judge Joseph is the responding
15 party, her judicial career is at stake, her
16 reputation is at stake. She's biased by
17 definition.

18 What about David Jellinek.
19 He's a practicing lawyer. And you heard a lot
20 about him from Mr. Hoopes. But he's a
21 practicing lawyer who appears in the
22 Newton District Court almost daily and in other
23 courts regularly and has for 25 years and he
24 continues to have positive professional
25 relationships with court personnel.

1 You've heard a lot about his
2 proffer and grant of immunity. Counsel relies
3 heavily on that to suggest that he had reason to
4 make a false accusation. But David Jellinek was
5 fully aware that he could assert a
6 Fifth Amendment privilege, refuse to speak and
7 refuse to testify. He knew what might follow
8 from that, but he also knew that he would defend
9 himself vigorously and he would have had a lot
10 of ground for defense. His duty was to his
11 client, not to ICE. And as Officer MacGregor
12 told him and Chief Court Officer Noe confirmed
13 here, there was no rule at the time against
14 releasing someone out the back.

15 And as respondent has
16 emphasized, the official Trial Court policy
17 favored bringing ICE to the lockup, which was
18 entirely outside Mr. Jellinek's control. So if
19 Mr. Jellinek had asserted his privilege and been
20 prosecuted, he would have had plenty of room for
21 defense.

22 And Attorney Jellinek fully
23 understood that waiving his privilege and
24 accepting immunity was a two-edged sword. He
25 could not be prosecuted if the U.S. attorney

1 believed he told the full truth, but he would
2 lose his immunity and would be prosecuted for
3 perjury at least if the U.S. attorney believed
4 that he told any material untruth.

5 You have the proffer letter and
6 the immunity letter in evidence as AA, and you
7 may be familiar with these types of letters.
8 The phrasing has a certain in terrorem effect,
9 the witness is warned in no uncertain terms that
10 he is at the mercy of the U.S. attorney's
11 unreviewable evaluation of the truth of his
12 statements. Surely, a lawyer with an active and
13 successful practice would not risk his career
14 and his freedom with a fabricated accusation.

15 What about demeanor.

16 Mr. Hoopes has said a lot about demeanor. And
17 you will evaluate demeanor, and I have no doubt
18 you observed the witnesses, and you don't need
19 much comment made on that topic. But I will
20 make a couple of comments. David Jellinek
21 answered the questions from both sides directly,
22 even when the answers would hardly make him look
23 good. He acknowledged that what he did for his
24 client was on the edge of ethical. Mr. Hoopes
25 characterizes it as criminal, Mr. Jellinek

1 disagrees, but he admits this was borderline.
2 He acknowledged what he doesn't remember and he
3 acknowledged that in some respects, particularly
4 when and why he came to Newton that day and when
5 he spoke with various people, his memory after
6 seven years differs from what appears in the
7 full day transcript. He didn't dance around
8 those questions. He answered them directly.

9 What about Judge Joseph's
10 demeanor. She did dance around, as you saw.
11 And I'll mention a couple of examples, and I
12 know you'll review the transcripts and I know
13 you have your own recollection, but I'll mention
14 a couple of examples.

15 The first on a point that was
16 hardly worth quibbling about, but she did
17 quibble. I asked her about the case of
18 Mr. Pineda, second on the list that day, when
19 retained counsel had filed an appearance and
20 appointed counsel, who turned out to be
21 Allison Khoury, a witness here, withdrew. The
22 only significance of this fact is that
23 substitution of retained counsel for appointed
24 counsel is a frequent occurrence. It happened
25 twice that day. It's not a reason to be

1 puzzled, as Judge Joseph said she was in
2 Paragraph 13 of her response to the charges.

3 But instead of just answering
4 yes to my question, she talked around it and she
5 talked about cases when a defendant who's not
6 indigent, but has no counsel on arraignment, so
7 the court appoints counsel just for bail and
8 that lawyer doesn't come back and retained
9 counsel comes in. That might happen. But the
10 transcript was right in front of her, and it
11 shows that that's not what happened in the
12 Pineda case. Attorney Khoury was there on
13 April 2nd because she had been appointed
14 previously. She came back and she was replaced
15 by retained counsel. Nothing significant,
16 nothing unusual, except that judge Joseph didn't
17 want to acknowledge it.

18 A similar example more
19 significant to the issues here is when I asked
20 her whether detention on the fugitive from
21 justice charge would require a determination
22 that the evidence was sufficient to connect the
23 defendant to the warrant, and she talked at
24 length about the factors as if the other factors
25 would somehow justify holding someone without

1 evidence that he was the person named in the
2 underlying warrant.

3 A little later I read from the
4 transcript where Mr. Jellinek said, the best
5 thing for us to do is to clear the fugitive
6 issue, release him on a personal, and hope he
7 can avoid ICE. I asked her whether she
8 understood that Mr. Jellinek's goal was to have
9 his client avoid ICE, exactly as he said, and
10 she would not acknowledge that she understood he
11 meant exactly what he said. She insisted that
12 she interpreted that as that he wanted more time
13 to investigate, to see how it pertained to both
14 agencies. That's the theory she's putting
15 forward now, and that the lawyers have argued,
16 but it's not what Mr. Jellinek had just said to
17 her on the record.

18 And then, when she was
19 answering her lawyer's questions, she said that
20 she thought that detaining the defendant
21 overnight, sending him to the jail, was
22 analogous to putting a matter on for further
23 call during the court day. And when I asked her
24 if that was really what she meant, she insisted
25 it was. After a career as a criminal defense

1 lawyer, could she really be so cavalier about
2 sending a defendant to the jail overnight with
3 no legal basis. That's preposterous. But once
4 she had said it, in response to her lawyer's
5 questions, she insisted on sticking to it.

6 The way she answered my
7 questions was reminiscent of Chief Justice
8 Fortes' description of the conversation in
9 Lowell, when Judge Fortes was the Regional
10 Administrative Justice. Chief Justice Fortes'
11 testimony was very precise. She told you that
12 she asked Judge Joseph an open-ended question
13 without any accusation, that she had been told
14 that part of the proceeding was not recorded.
15 But she didn't assume that that meant that the
16 judge had told the clerk to turn off the
17 recording. She knew there were other
18 possibilities. The clerk could have forgotten
19 to turn it on after the lunch break or the
20 equipment might have malfunctioned or otherwise.

21 So she said to Judge Joseph, I
22 understand that part of the proceeding was not
23 recorded. What happened. And Judge Joseph did
24 not say I told the clerk to turn off the
25 recording or the defense lawyer asked to go off

1 the record and I did. The first time
2 Judge Fortes heard Judge Joseph say directly
3 that she went off the record was in Chief
4 Justice Dawley's office on May 8.

5 Instead, in her conversation
6 with Judge Fortes, Judge Joseph danced around,
7 as she did here, she asked questions about how
8 the recording system worked in Newton and how
9 that system was different from the newer system
10 in other courts and she talked about a time when
11 she turned off the record in Waltham because of
12 a malfunction there. And Judge Fortes didn't
13 remember it, but Judge Joseph talked about it
14 here and in my interview with her, which is
15 Exhibit N. But she never directly answered
16 Judge Fortes' question what happened.

17 While we're talking about that
18 conversation, there's another point to mention.
19 Chief Justice Fortes testified that, when she
20 told Judge Joseph that everything has to be
21 recorded, Judge Joseph said she knew that.
22 Chief Justice Fortes did not testify that
23 Judge Joseph said she knew about Rule 211. And
24 I'm not suggesting that you should find from
25 that statement that she did know about Rule 211

1 before Chief Justice Fortes showed it to her,
2 although she should have known about it. What I
3 do suggest is that her position changes with the
4 context and the audience, as it did in her
5 testimony here.

6 Let's turn to consistency as a
7 factor in evaluating credibility. Respondent's
8 counsel has been very thorough and has found
9 some inconsistencies in Mr. Jellinek's
10 statements on periphery points, which
11 Mr. Jellinek has acknowledged. But his account
12 of the material facts has not changed, from the
13 time of his first interview with the U.S.
14 attorney in November of 2018 through his
15 testimony here.

16 Counsel has emphasized that
17 Mr. Jellinek did not go around the courthouse
18 before the afternoon call, before the afternoon
19 call telling people that he had a plan to get
20 his client out the back. Why would he do that?
21 That would destroy the plan. And he didn't go
22 around afterward saying that he had the judge's
23 blessing. Well, why would he do that? He had
24 no reason to want to cause trouble to the judge.
25 To the contrary, he preferred to talk with the

1 judge off the record to protect both himself and
2 her and to keep it as private as possible
3 afterward.

4 Judge Joseph, on the other
5 hand, has taken a series of shifting positions.
6 The most glaring inconsistency is her effort to
7 backtrack on the statement of facts that she
8 agreed to with the U.S. attorney and that she's
9 agreed not to contest before the Commission in
10 return for dismissal of criminal charges in
11 September of 2022.

12 She stipulated that the normal
13 custom and practice in Newton was that a
14 defendant released from custody would be
15 released into the courtroom. We heard from
16 security director McPherson that that should not
17 have been the practice, and we heard from some
18 lawyers that that was not always what happened.
19 But Judge Joseph stipulated that that was the
20 normal custom and practice, and the chief court
21 officer as well as the assistant district
22 attorney, the clerk, and the First Justice have
23 confirmed that it was. And it didn't depend on
24 whether somebody had property. The assistant
25 district attorney and the chief court officer

1 said the court officer would run down and get
2 the property, or would bring it up if the court
3 officer had reason, as in this case, to believe
4 that the person was going to be released on
5 personal recognizance.

6 Judge Joseph started
7 backtracking on her stipulation during her
8 interview under oath in June of 2023, and you
9 can see this in Appendix N, Pages 190 to 192.
10 Her positions on what she knew and didn't know,
11 what she intended, and what she did and didn't
12 do have also shifted. She told Chief Justice
13 Dawley that the off the record conversation was
14 about the Pennsylvania warrant. She told him
15 nothing about any discussion about ICE. He
16 could hear a reference to ICE on the recording,
17 but not more than that. And of course he did
18 not know and could not know, aside from what she
19 told him, anything that was said off the record.

20 And when Chief Justice Dawley
21 asked her whether she had anything to do with
22 the defendant being released out the back or any
23 responsibility for it or any knowledge of it,
24 she denied it. Emphatically and adamantly.

25 In her interview with me under

1 oath on behalf of the Commission, she gave the
2 same emphatic denial. But she also said that
3 she thought she had a responsibility to
4 determine whether the defendant was the right
5 person for ICE, she thought she had that
6 responsibility to ICE, and she intended to pause
7 the ICE arrest to allow for an attorney/client
8 conference. She resisted acknowledging that in
9 her testimony here, but you will see that in the
10 transcript of her interview which is in
11 evidence.

12 In her response to the
13 Commission's charges, Paragraph 32, she says
14 that her conduct had the unintended effect of
15 assisting in the defendant's avoidance of ICE.
16 She did not say that in her interview with me
17 and she did not say any of these things in her
18 meeting with the Chief Justice Dawley. These
19 are all material inconsistencies.

20 Whose version of what happened
21 is more plausible? Which version finds support
22 in the recorded part of the proceeding and in
23 the testimony of other witnesses? The recording
24 has no bias. It cannot lie or spin or
25 misremember. David Jellinek's version is

1 consistent with what both he and Judge Joseph
2 said on the record and with the other witnesses
3 on the record.

4 Judge Joseph was the first to
5 mention ICE as soon as they were at side bar.
6 David Jellinek did not open that topic. She
7 said it's my understanding that ICE is here.
8 What did this communicate to Mr. Jellinek? It
9 conveyed that she was concerned about ICE, she
10 understood that he would be concerned, and she
11 was inviting him to discuss how to deal with
12 that concern.

13 And what does it tell us? She
14 had said that she didn't know why he asked to go
15 to side bar. But this tells us she did know or
16 at least she inferred ICE was there, and that
17 was the topic to be discussed at side bar.

18 David Jellinek heard this as an
19 invitation to do exactly what he hoped to do, he
20 made his argument about identity and then he
21 told the judge clearly and directly what he
22 wanted to accomplish, release on personal and
23 try to avoid ICE.

24 Her statements gave him reason
25 to think she would help him and she now

1 acknowledges that she was trying to help him.
2 She says so in Paragraph 12 of her response to
3 the charges. She says she made what she thought
4 was a good suggestion for his client, keeping
5 the defendant in state not Federal custody.

6 What remained for David
7 Jellinek was to tell Judge Joseph how he had
8 proposed to accomplish his goal and what he
9 needed from her to make it possible. He needed
10 his client to go back downstairs, contrary to
11 what she has stipulated was the normal practice
12 in that court. If the defendant went back
13 downstairs, he thought he could get him released
14 out the back. That's why he asked to go off the
15 record and that's what he told her off the
16 record. Her response as he remembers it was,
17 that's what we'll do, we'll proceed that way, or
18 something like that. This version makes sense,
19 it's plausible and consistent with the record
20 and with what happened.

21 Mr. Jellinek acknowledges that
22 his conduct was skirting the edge of ethical.
23 Would an attorney characterize his own conduct
24 that way if he were fabricating? If there were
25 a more favorable version for himself, wouldn't

1 he offer it? And would he do what he did if he
2 didn't think he had the judge's permission?
3 Mr. Jellinek had too much to lose without the
4 judge's permission. He was and still is a
5 regular in the Newton District Court, he
6 cultivates relationships with court personnel,
7 and he benefits from those relationships. Would
8 he jeopardize all of what he had gone through?

9 David Jellinek felt the need
10 for the judge's blessing. He came in to the
11 side bar discussion knowing what he needed from
12 the judge and looking to gauge whether he had
13 that opportunity. Her statements on the record
14 signaled to him that he did have the opportunity
15 he needed, her suggestion to hold the defendant
16 overnight, ICE is going to get him, what if we
17 detain him. He listened carefully, and he saw
18 the opportunity he was looking for. That's when
19 he asked to go off the record in that context.
20 He had a specific purpose to tell her how he
21 would accomplish what he was trying to do and
22 what he needed from her to make it possible. He
23 tells her exactly why he needed to go off the
24 record, what he wanted to say to her, and did
25 say to her.

1 Her version is implausible, it
2 doesn't make sense. She would have you believe
3 that Mr. Jellinek asked to go off the record for
4 no reason with no purpose, not to say anything
5 secret or private, not to say anything other
6 than exactly what was said later on the record.
7 Would a lawyer ask to go off the record with no
8 purpose for no reason with no intention to say
9 anything private?

10 There's been evidence that some
11 judges did go off the record in the years when
12 she was practicing, and that may be so. But
13 context is key. She knew what came immediately
14 before the request to go off the record. She
15 knew that ICE was the topic and
16 Attorney Jellinek's hope that his client could
17 avoid ICE. And she was the first to mention
18 ICE. There was no room for doubt that that was
19 what he wanted to talk about. It was with that
20 knowledge that she immediately granted his
21 request to go off the record.

22 What about the other witnesses
23 to this conversation? Assistant District
24 Attorney Jurgens, Shannon Jurgens McDermott and
25 Interpreter Eric Mendoza have different memories

1 of what they heard, but the general sense of
2 what they heard both on and off the record and
3 the impression that they both gleaned is
4 consistent, the judge was trying to help the
5 defendant avoid ICE.

6 Eric Mendoza is a bit rough
7 around the edges, but he has no bias and no
8 reason to want to incriminate anyone. He
9 doesn't remember much about the morning, when he
10 served on a number of cases and nothing unusual
11 happened. He doesn't remember whether the
12 defense attorney on this case in the morning was
13 male or female. It didn't matter to him. He
14 couldn't hear everything at side bar and he
15 doesn't claim that he could and he can't quote
16 specific words or phrases. But he heard enough
17 to get an impression, the impression that the
18 judge was unhappy about ICE being there and she
19 was suggesting that this particular person be
20 let go out the back, and that a decision was
21 made for him to be let go out the back.

22 He remembers that because it
23 bothered him. He felt disappointed in the
24 court. As he said it, you kind of lose faith in
25 the system a little. He's spent a lot of time

1 in courtrooms. He may not understand the fine
2 points, but he has a sense of what is supposed
3 to happen and what is not supposed to happen,
4 and he knew this was not supposed to happen.
5 That's why he remembered it.

6 What about Shannon McDermott?
7 Her testimony was clear and precise and
8 consistent with her previous statements. She
9 fully understood her role. She said right away
10 that ICE was outside her role, she would take no
11 position regarding ICE. She was there at the
12 side bar, and she listened. But having said she
13 would take no position, her focus was not on the
14 discussion about ICE. Her focus was the
15 criminal charges that she was there to
16 prosecute.

17 Her memory of the conversation
18 at side bar was limited and does not fully match
19 David Jellinek's testimony or Eric Mendoza's.
20 She does not remember anyone saying anything
21 about going out the back. Although, Chief Court
22 Officer Noe testified that she -- and he
23 testified to this on cross-examination, that she
24 told him later that she had a sense that that
25 might happen, that she couldn't believe a court

1 officer would do that.

2 She heard and understood enough
3 of the conversation between Attorney Jellinek
4 and Judge Joseph to make her uncomfortable with
5 the judge and the defense attorney talking about
6 how the defendant could avoid ICE. She
7 described the conversation as sketchy. That was
8 in her grand jury testimony. She acknowledged
9 it in her testimony, she's a few years older and
10 a little more professional and maybe that's not
11 a word she would use today, but that was the
12 word she used and she acknowledged it. She
13 remembers the judge saying, what should we do.
14 Well, what should we do about what? It had to
15 be about ICE. There was nothing else left for
16 the court to do in that case that day. The
17 fugitive from justice charge was dismissed and
18 there would be no bail request on the
19 misdemeanor charge.

20 Counsel pointed out, and we had
21 some discussion with Ms. McDermott on this
22 topic, that a judge can set bail even if the DA
23 doesn't request it, especially if there is
24 reason to think the defendant won't come back to
25 court. And if ICE takes him, they might not

1 bring him back to court, whether he's the right
2 person or the wrong person. So that might
3 prevent him from appearing.

4 There was some suggestion that
5 maybe Judge Joseph would have set bail to keep
6 him in state custody so that he would appear in
7 court. But if that were the purpose, then it
8 would have been necessary to keep him detained
9 until the case was resolved, unless she thought
10 ICE was going to forget about it, which is
11 extremely unlikely. Maybe a judge would do that
12 on a charge of rape or robbery or drug
13 trafficking that might lead to a sentence of
14 incarceration with credit for the period in
15 detention. But these were misdemeanor charges
16 with no criminal record. The docket is in
17 evidence and you can see that the case was
18 ultimately disposed by pretrial probation, not
19 by incarceration. Unless the motive were to
20 keep the defendant away from ICE, this would not
21 be a case where a judge would set bail without a
22 request from the DA.

23 Respondent puts a lot of
24 emphasis on Ms. McDermott going out to the main
25 lobby after the proceeding ended and waiting

1 with the ICE officer, telling him that the
2 defendant would come out from the public
3 doorway. Ms. McDermott told us why she did
4 that. She knew there was a sallyport
5 downstairs, although she didn't use the office,
6 she didn't go downstairs, but she knew it was
7 there. But she didn't believe a court officer
8 would release a defendant that way, knowing that
9 ICE was waiting upstairs, and she knew that the
10 normal practice was that a defendant would come
11 out through the courtroom as indeed Judge Joseph
12 has stipulated.

13 Let's talk about what happened
14 after the matter went back on the record and
15 back to open court. There was no more
16 discussion of the defendant's identity for ICE,
17 no more mention of whether he was the right
18 person for ICE. Why not? Because it was no
19 longer a concern. There was a plan. The judge
20 and the defense attorney knew what was about to
21 happen.

22 You heard from
23 Judge MacLeod, -- and this was interesting --
24 she had a long judicial career first on the
25 District Court and then on the Superior Court.

1 She said, and I think this is not what she was
2 brought in for, I think she was brought in to
3 testify that judges go off the record, but she
4 said that, when she would go off the record, she
5 would then put a sanitized version of that
6 discussion on the record.

7 That was exactly what happened
8 here. Judge Joseph and Mr. Jellinek engaged in
9 a little performance for the benefit of everyone
10 in the courtroom, especially the court officers
11 who had control of the secure doors. The
12 attorneys established that the defendant was not
13 the right person for the Pennsylvania warrant,
14 so the fugitive from justice charge would be
15 dismissed, there would be no bail on the drug
16 charges, and the defendant would be released on
17 personal recognizance.

18 Then Mr. Jellinek made public
19 his request that the defendant go back
20 downstairs. He said I think he has some
21 property downstairs and I'd like to speak with
22 him downstairs with the interpreter, if I may.
23 Judge Joseph said, that's fine, of course. So
24 at this point, everyone in the courtroom knows
25 he's going downstairs, and the arraignment

1 proceeds.

2 And there's been a lot of talk
3 about whether it was common for a lawyer to go
4 down to the lockup with a client after the
5 client had been ordered released with the
6 interpreter if necessary. And maybe it was.
7 Although Judge Joseph has stipulated again that
8 the normal practice was to release a defendant
9 into the courtroom and out the front door, and
10 you've heard from various witnesses, that a
11 court officer would go down and get the property
12 if he hadn't already brought it back up with the
13 defendant.

14 But whether it was common to go
15 downstairs or not, Judge Joseph clearly thought
16 that she needed to give permission for them to
17 go downstairs, and she said on the record that
18 she did give permission. When Officer MacGregor
19 asked if the defendant was released, she
20 responded, he is. And then she said,
21 Mr. Jellinek asked if the interpreter can
22 accompany him downstairs to further interview
23 him and I've allowed that to happen.

24 The clerk then reminded her
25 that ICE was present to visit the lockup. She

1 responded, fine, I'm not going to let them come
2 in here, but he's released on this. Why say
3 that at that moment? She had already told the
4 clerk to follow the First Justice's practice of
5 excluding ICE from the courtroom, and there was
6 no request to change that at this point.

7 In context, her saying that
8 might seem to be a kind of nonsequitur, but it
9 was not a nonsequitur. It expressed her
10 awareness of the effect of excluding the ICE
11 officer from the courtroom. ICE was not there
12 to see and hear what was happening and when, to
13 know that she had ordered the defendant released
14 and had allowed the defendant to go down to
15 lockup. She knew ICE wasn't in the courtroom to
16 hear it and she made sure it would stay that way
17 long enough for Attorney Jellinek to put his
18 plan into effect.

19 Both the clerk and
20 Attorney Jellinek interpreted her response as
21 indicating that she would not allow ICE to go to
22 the lockup. She rejects that interpretation and
23 emphasizes that there were other ways to get
24 there. Indeed there were. Only there were
25 obstacles. If they were go through the

1 building, they need to be escorted by someone
2 with a security pass and to get there before the
3 defendant left. And if they were to go around
4 outside to the back and into the fenced area
5 where a sheriff's van was waiting for another
6 detainee, and then knock on the door to seek
7 entry to the lockup, they would have to know
8 exactly when he was going downstairs and when he
9 was going to be released and maybe they'd also
10 have to have someone wait upstairs in case he
11 changed the plan and went back that way. Not
12 being in the courtroom to see and hear, they
13 could hardly accomplish any of this.

14 I want to be clear. In
15 excluding ICE from the courtroom, Judge Joseph
16 was following the practice of the First Justice,
17 and the Commission does not fault her for that.
18 She was new, she was not in charge of that
19 courthouse, and that was the First Justice's
20 practice. But in announcing at that moment that
21 I'm not going to let them come in here, she was
22 acknowledging that she knew the effect in this
23 case. ICE is waiting outside the courtroom,
24 expecting him to go out through the courtroom,
25 according to the normal practice, having no way

1 to know that he's going another way and no way
2 to do anything about it.

3 So why would she do this?

4 Excuse me just a moment.

5 (PAUSE)

6 Why would she do it? There's
7 been no suggestion that she was a political
8 activist or a zealot of some kind, and the
9 Commission doesn't contend that she was. The
10 contention, rather, is that she stepped out of
11 the judicial role. She was trying to help. She
12 saw a problem, a potential injustice. ICE might
13 arrest the wrong person. She wanted to prevent
14 that. But that was not her role as a
15 Massachusetts District Court judge. Her role
16 was to address the state charges before her.

17 Regarding ICE. Her obligation
18 was to be neutral, both in reality and in
19 appearance, to do nothing to help or hinder, as
20 Chief Justice Fortes said and as Judge Joseph
21 repeated. The assistant district attorney
22 understood that. She was neutral regarding ICE.
23 That's exactly what Judge Joseph should have
24 done. The assistant district attorney was three
25 years out of school, but she knew that that's

1 what she was supposed to do and that's what
2 Judge Joseph should have done.

3 Instead, as Ms. McDermott said,
4 the judge's conduct on that day was a misguided
5 effort to do what she thought was right, to help
6 the defense attorney get his client out of a
7 difficult situation. Having stepped out of her
8 role then, instead of acknowledging error and
9 taking responsibility for it -- if she had done
10 that, I don't think we'd be here, but instead of
11 acknowledging her error and taking
12 responsibility for it, Judge Joseph has
13 continued to claim that she did have some proper
14 role regarding ICE.

15 In response to the charges in
16 Paragraph 23, filed in December of 2024, six and
17 a half years, more than six and a half years
18 after the fact, says she was trying to help, she
19 wanted to resolve the issue of whether the
20 defendant was the person ICE wanted. She
21 thought it was her responsibility.

22 Her further response in
23 Paragraph 12 says that David Jellinek resisted
24 what I thought was a good suggestion for his
25 client.

1 Paragraph 15 says that she
2 wanted to ensure that defendant's conference
3 with his attorney would happen before he was
4 taken into ICE custody, not that she wanted to
5 give him more time to investigate. That's a
6 theory that she's presented here. But that's
7 not what's in her response to the charges. None
8 of this was within her role.

9 And now, in this hearing,
10 instead of acknowledging that she did facilitate
11 what happened, she has this new theory she was
12 just trying to give the defense attorney more
13 time, even though he never asked for more time,
14 and even if it would mean sending the defendant
15 to jail overnight with no legal basis to do
16 that.

17 Let's turn to what happened
18 after April 2nd. On April 4, she had a
19 conversation with Judge Heffernan. There was no
20 falsehood. But she did not volunteer relevant
21 information. She was not candid. If what she
22 says now is true, that this conversation was
23 when she first learned that defendant was
24 released out the back -- And I'm not suggesting
25 she learned the outcome earlier, but that she

1 learned what was going to happen.

2 But if this was the first time
3 she had heard about it, wouldn't it have dawned
4 on her in this conversation that she had
5 unwittingly facilitated, that she had allowed it
6 to happen? As she said in her response to the
7 charges, that she unintentionally facilitated,
8 although she did not say it in her testimony
9 here. Wouldn't she have wanted to share that
10 new recognition with the First Justice?
11 Wouldn't she have wanted to ask what should I
12 do, how do I keep this from blowing up? Or if
13 she didn't feel comfortable with the
14 First Justice enough to do that, wouldn't she
15 have called someone else to talk it through and
16 think about what to do? Her mentor? A judge
17 friend?

18 Then sometime within the next
19 couple of weeks she had a conversation with the
20 regional administrative justice. Again, there
21 was no falsehood, but no acknowledgment in
22 response to Judge Fortes' question, what
23 happened. There was a lot of talking around it,
24 but she never said I told the clerk to turn off
25 the record. She was not candid and she was not

1 honest about that conversation after in her
2 interview under oath with me on behalf of the
3 Commission. In that interview, she said she
4 acknowledged going off the record immediately.
5 That's in Appendix N, Page 240, Line 13.

6 And in her testimony here she
7 said she did acknowledge it. That's not so.
8 Chief Justice Fortes testified that that was not
9 so. And in Judge Joseph's response to the
10 charges at Paragraph 37, she said she assumed
11 that the Regional Administrative Justice knew.
12 Judge Fortes didn't assume anything, but she now
13 says she assumed.

14 If it had happened the way she
15 says now, then by the time of her conversation
16 with the Regional Administrative Justice, she
17 knew that the defendant avoided ICE, she knew
18 what she had said and what Attorney Jellinek had
19 said on the record, and now she knew she had
20 violated the rule. Wouldn't it have dawned on
21 her then, if it hadn't already, how it would
22 look to others? Wouldn't she have realized what
23 she says in her response that she
24 unintentionally facilitated and that others
25 would think she facilitated intentionally,

1 wouldn't she have wanted to explain to the
2 Regional Administrative Justice what happened,
3 again, to ask what should I do, how do I keep it
4 from blowing up, do I have to tell the chief?
5 But she didn't do that. She talked about the
6 recording equipment, the Waltham incident, the
7 issue of the defendant's identification for
8 Pennsylvania. Again, if she didn't feel
9 comfortable enough with the Regional
10 Administrative Justice, wouldn't she have wanted
11 to call her mentor or a judge friend to talk it
12 through?

13 Then comes May 8th, the meeting
14 with Chief Justice Dawley. At this point she
15 had listened to the recording. She knew that
16 the recording showed she went off the record and
17 she knew that that violated Rule 211. There was
18 no way to deny it. She had to acknowledge it
19 and show remorse for it. So she did. She also
20 knew what the recording would reveal about what
21 was said on the record.

22 Now, you heard the original
23 recording. It actually doesn't reveal a whole
24 lot, but she knew what it could reveal. Surely
25 she could perceive how it would look and surely

1 she understood by this point that she had
2 facilitated what happened, even if, as she
3 claims, her involvement was unintentional.

4 But in response to the Chief's
5 direct questions regarding her involvement in
6 the release of the defendant from the lockup,
7 she adamantly denied having anything to do with
8 it. She didn't say she was concerned about ICE
9 taking the wrong person, she didn't say, as she
10 told me under oath, that she thought she had the
11 responsibility to determine his identity for
12 ICE, she didn't say, as she told me under oath,
13 that she intended to pause the ICE arrest to
14 make sure his attorney could have a conference
15 with him first, and she didn't say, as she is
16 now, that she was trying to give his attorney
17 more time to investigate. Even she has now
18 acknowledged that her denial of having anything
19 to do with this release out the back was not
20 fully accurate. Her position in response is
21 that she did facilitate unintentionally, that by
22 allowing the defendant to go downstairs, she
23 allowed it to happen. But she didn't tell the
24 Chief Justice that. She tried to protect
25 herself rather than to participate candidly and

1 honestly in a discussion of what was now a
2 problem for the court and how the court would
3 have to deal with it.

4 Again, the issue is role. She
5 wasn't a school child called to the principal's
6 office, she wasn't a criminal suspect with a
7 right to remain silent, or even a civil deponent
8 who's best advised to answer the questions and
9 volunteer nothing. She's a judge in a position
10 of high honor and great -- and high authority
11 and great responsibility, including the duty to
12 be candid and honest with court leadership.

13 And even now, after all this
14 time and opportunity to think about what
15 happened and to think about the role of a judge,
16 and after all of what she has suffered, and
17 there's no doubt she has suffered, she still
18 doesn't acknowledge what it means to be a judge.

19 Paragraph 22 of her further
20 response compares her suspension from the bench
21 during her indictment with the immunity granted
22 to the defense attorney as if there were some
23 unfairness in their different treatment. But a
24 judge is held to a higher standard than an
25 attorney, indeed a higher standard than almost

1 anyone. Apparently she still doesn't accept
2 that higher standard.

3 I submit that Judge Joseph
4 facilitated what happened not inadvertently, not
5 unintentionally, but knowingly, understanding
6 that by allowing the defendant and his attorney
7 to go downstairs after she ordered the defendant
8 released, she was providing an opportunity to
9 the defendant to be released out the back while
10 ICE waited in front.

11 She didn't know there was an
12 arranged plan. She didn't know about the
13 conversation between Mr. Jellinek and Court
14 Officer MacGregor, but she knew what
15 Attorney Jellinek hoped would happen and she did
16 what she could to make it possible. She did it
17 not out of any political motive and not out of
18 any ill intention. To the contrary, she did it
19 in an effort to prevent what she thought was an
20 imminent injustice. But in doing so, she
21 violated her obligation as a judge to serve the
22 rule of law, to uphold both the reality and
23 appearance of integrity, impartiality, and
24 independence of the judiciary.

25 When she realized that her

1 conduct was coming to light, she tried to
2 protect herself. She was not candid and honest
3 with the Chief Justice as the code required her
4 to be. What she told the Chief Justice was
5 false.

6 In her interview with me on
7 behalf of the Commission under oath, she gave
8 the same falsehood. She offered various
9 explanations, as she has here, but she still did
10 not acknowledge, as she did in her response to
11 the charges, that she even unintentionally
12 facilitated what happened, and she repeated her
13 denial to you here in this courtroom, without
14 acknowledging that she facilitated what happened
15 even unintentionally.

16 Judge Joseph has garnered
17 sympathy in some quarters, and indeed she is in
18 a sympathetic position. The United States
19 attorney went after her in a way that came as a
20 shock to the judiciary and the bar and surely
21 came as a shock to her, based on conduct when
22 she had been a judge for only five months. She
23 was indeed new as a judge when she encountered
24 the Medina Perez case. The relationship between
25 the Massachusetts judiciary and Federal

1 officials was tense and the atmosphere around
2 ICE in courthouses was fraught.

3 A more experienced judge might
4 have recognized that this was the time to be as
5 careful as one could ever be, to be completely
6 transparent, not just to stay on the record, but
7 to stay in open court so that there could be no
8 question about what was happening. She was not
9 experienced, and perhaps she could be excused
10 for not recognizing how dangerous the situation
11 was.

12 But it doesn't take experience
13 to be honest, to tell the truth, the whole
14 truth. What it takes to do that is courage,
15 especially when what you're going to tell
16 doesn't make you look great. Judge Joseph did
17 what she did and she said what she said when she
18 was asked about it, and what she did and said
19 undermined public trust and confidence in the
20 Massachusetts judiciary and brought the judicial
21 office into disrepute. Sympathy cannot protect
22 her and cannot protect the public from the
23 consequences of her conduct.

24 Excuse me for just a minute.

25 (PAUSE)

1 Turning to the violations.
2 General Laws Chapter 211C authorizes the
3 Commission on Judicial Conduct to discipline
4 judges for violations of the Code of Judicial
5 Conduct as well as for willful misconduct under
6 Section 2(5)(B) and conduct prejudicial to the
7 administration of justice for unbecoming the
8 judicial office that brings the judicial office
9 into disrepute.

10 I will address the code
11 violations and explain which ones the Commission
12 contends also violate these statutory sections,
13 starting with the least serious and ending with
14 the most serious.

15 First, Judge Joseph violated
16 District Court Rule 211 by going off the record.
17 She concedes that she did that. She said she
18 didn't know about the rule, but it was her
19 obligation to know. She says others did the
20 same. That doesn't change the violation.

21 The definition section of the
22 Code of Judicial Conduct, which is on the screen
23 there, -- I'm sorry that it's not big enough,
24 but it's on the screen -- the definition says,
25 defines law to include court rule. Rule 2.2 of

1 the Code of Judicial Conduct requires a judge to
2 uphold and apply the law.

3 So the violation of District
4 Court Rule 211 was a violation of Rule 2.2 of
5 the Code of Judicial Conduct. The violation of
6 District Court Rule 211 was also a violation of
7 Rule 1.2 of the Code of Judicial Conduct, also
8 on the screen, which requires that a judge act
9 at all times in a manner that promotes public
10 confidence and independence, integrity, and
11 impartiality of the judiciary and avoid
12 impropriety and the appearance of impropriety.

13 Comment 5 to Rule 1.2 teaches
14 that violations of law violate Rule 1.2. The
15 violation of District Court Rule 211, if she
16 didn't know about Rule 211, is also a violation
17 of Rule 2.5 of the Code of Judicial Conduct,
18 which requires the judge to perform judicial
19 duties and administrative duties competently.
20 The judge has to know the law and the rules that
21 apply to the court she sits on and has to apply
22 the law and the rules.

23 Accepting that she did not know
24 about the rule, I do not argue that this
25 violation was willful. If she did know about

1 the rule then, I would suggest it was willful.
2 Either way, it was prejudicial to the
3 administration of justice and unbecoming a
4 judicial officer and has brought the judicial
5 office into disrepute in violation on
6 General Law 211C, Section 2(5)(B).

7 The second more serious
8 violation is that Judge Joseph demonstrated bias
9 and gave the appearance of bias as between the
10 defendant and ICE by what she did in assisting
11 defense counsel in implementing his plan and by
12 what she said on the record and by going off the
13 record in this context.

14 On the record she introduced
15 the topic of ICE, which was not within her
16 proper concern. She said ICE is going to get
17 him. First, she said, I understand ICE is here.
18 Then she said, ICE is going to get him, what if
19 we detain him. Then she went off the record
20 right after the defense attorney had told her
21 that his goal was to avoid ICE. Her comments
22 and going off the record in that context gave
23 the appearance that she was trying to help the
24 defendant avoid ICE, as indeed she was. All the
25 witnesses who heard some or all of the

1 discussion, David Jellinek, the assistant
2 district attorney, and the interpreter got that
3 impression.

4 Her demonstration of bias as
5 between the defendant and ICE and the appearance
6 of bias was a violation of Rule 2.2 of the
7 Code of Judicial Conduct which requires a judge
8 to perform all duties of the judicial office
9 fairly and impartially. It was also another
10 violation of Rule 1.2 of the Code of Judicial
11 Conduct which requires a judge to act at all
12 times in a manner that promotes public
13 confidence in the independence and integrity and
14 impartiality of the judiciary and avoid
15 impropriety and the appearance of impropriety.

16 The demonstration of bias I
17 suggest was willful in violation of Chapter
18 211C, Section 2(5)(B). She knew that she was
19 supposed to be neutral toward ICE and to appear
20 neutral, but she chose to do otherwise. It was
21 also prejudicial to the administration of
22 justice and unbecoming a judicial officer, and
23 there can be no question that it has brought the
24 judicial office into disrepute in violation of
25 Chapter 211C, Section 2(5)(B).

1 Third and most serious, lack of
2 candor and honesty. In her meeting with
3 Chief Justice Dawley and in her interview under
4 oath with me on behalf of the Commission, as
5 well as with you as hearing officer in this
6 proceeding. This is a violation of Rule 2.16 of
7 the Code of Judicial Conduct which says a judge
8 shall cooperate and be candid and honest with
9 judicial disciplinary authorities.

10 The First Justice and the RAJ
11 are not disciplinary authorities, so her lack of
12 candor with them did not in itself violate
13 Rule 2.16. But part of their roles was to pass
14 on information that the Chief Justice should
15 have in fulfilling his duties, so that a lack of
16 candor with them was effectively with the
17 Chief Justice as well.

18 With Chief Justice Dawley and
19 in her interview with me and here in this
20 courtroom, she was more than just not candid,
21 she was dishonest. This I submit was willful
22 misconduct prejudicial to the administration of
23 justice and unbecoming a judicial officer, that
24 brought the judicial office into disrepute, in
25 violation of General Laws Chapter 211C, 2(5)(B)

1 and (D) .

2 The violation of Rule 2.6, and
3 particularly a willful violation, goes to the
4 essence of the judicial rule. Honesty of every
5 judge is essential to public trust and
6 confidence in the judiciary which in turn is
7 essential to rule of law.

8 I'm going to turn to mitigating
9 and aggravating factors and recommend sanctions.

10 There are two mitigating
11 factors, and I've already mentioned both.
12 First, she was very new as a judge. And second,
13 she's already suffered quite a lot. There's no
14 question about that. I suggest there is one
15 aggregating factor. It is essentially the flip
16 side of what I said a few moments ago. The
17 aggregating factor is the context of the
18 controversy in which this event occurred.

19 Judge Joseph was new as a
20 judge, but she was not new as a lawyer, and she
21 could not have been living in a bubble. She had
22 to know that anything involving ICE would
23 trigger scrutiny and she had to know that the
24 way a judge handled it would affect public trust
25 and confidence in the judiciary. That context

1 and her failure to recognize it and respond to
2 it appropriately was an aggravating factor.

3 As for sanctions, I'll address
4 the three categories of misconduct from least to
5 most serious.

6 First, going off the record in
7 violation of District Court Rule 211, and based
8 on that District Court rule violation, in
9 violation of 2.2, 1.2, and 2.5 of the Code of
10 Judicial Conduct. Now, I've recited a list of
11 rules. But this is the least serious of the
12 violations. If it stood alone, it would warrant
13 minimal discipline. But where a matter has
14 become as public as this matter has, the
15 resulting discipline has to be public, because
16 the public has a right to know the result. Any
17 private discipline would fail to promote public
18 confidence in the judiciary as the Commission is
19 mandated to do.

20 Lowest level of public
21 discipline authorized by law is a public
22 reprimand, and so that is the recommendation I
23 make to you, a public reprimand with conditions
24 of monitoring for a period of time.

25 The next more serious violation

1 is actual bias and the appearance of bias in
2 violation of Rules 2.2 and 1.2 of the Code of
3 Judicial Conduct. Here it is necessary to
4 differentiate between actual and apparent. I
5 urge you to find both. Based on both, the
6 appropriate sanction is a public censure, which
7 is the higher level of public condemnation above
8 public reprimand. Again, with a period of
9 monitoring.

10 If the violation were the
11 appearance of bias without actual bias, that is,
12 if she had created the appearance of bias by
13 what she said on the record and by going off the
14 record, but did not actually assist in the
15 defendant's avoidance of ICE, then I would
16 suggest that the appropriate sanction would be
17 public reprimand, again, with a period of
18 monitoring.

19 Finally, the third violation is
20 the lack of candor and honesty with disciplinary
21 authorities, in violation of Rule 2.16 of the
22 Code of Judicial Conduct, including under oath
23 in this courtroom and in her interview with me
24 and on behalf of the Commission as well as with
25 Chief Justice Dawley.

1 As has been the case in so many
2 other contexts, the attempt to cover up, to
3 deny, and obfuscate, her refusal to accept
4 responsibility is more serious than the
5 underlying violations and warrants the most
6 severe sanctions.

7 In past cases, when a judge has
8 violated Rule 2.16, the SJC has concluded that
9 the judge can no longer command respect and
10 authority essential to the performance of a
11 judicial function and on that basis can no
12 longer serve as a judge. That is all the more
13 necessary where, as here, this violation occurs
14 in the context of other violations.

15 The SJC does not in itself have
16 authority to remove a judge from office. That
17 authority rests with the legislature and
18 governor. The highest level of discipline the
19 SJC can impose and what it has done in past
20 cases when a judge has violated Rule 2.16 is
21 indefinite suspension without pay and referral
22 to the legislature and the governor. That I
23 suggest is the appropriate sanction for this
24 violation.

25 I know you have listened

1 carefully to all of the evidence and that you
2 have reviewed and will further review all of the
3 materials before you and will make findings and
4 rulings based on all of the evidence. That is
5 all the Commission asks for.

6 Thank you for your attention
7 throughout this matter of great importance to
8 the Massachusetts judiciary.

9 HEARING OFFICER: Thank you,
10 Special Counsel, and thank you, Mr. Hoopes.

11 It's been extremely helpful to
12 hear your arguments today, and I want to commend
13 all counsel for the quality of your arguments
14 and the presentation of the evidence during this
15 hearing.

16 As we've discussed on Friday,
17 it's my understanding that we will have final
18 transcripts from the hearing by this Thursday.
19 Counsel will then submit your initial post
20 hearing briefs with your proposed findings of
21 fact and conclusions of law by Thursday,
22 July 3rd, and your responses to each other's
23 initial briefs by the following Thursday,
24 July 10th. At that point the hearing will be
25 closed, and I will then issue my report and

1 recommendation within 30 days.

2 I also want to express my deep
3 appreciation for your exemplary professionalism
4 throughout this matter, including your
5 commitment to working so cooperatively with each
6 other throughout this process. That is very
7 much appreciated.

8 I look forward to reviewing
9 your upcoming submissions.

10 And with that, I believe we're
11 done for today, unless there's anything else
12 either of you have.

13 MR. HOOPES: Thank you.

14 JUDGE FABRICANT: Thank you.

15 HEARING OFFICER: Thank you
16 very much.

17 We're adjourned.

18 (The proceedings adjourned
19 at 11:00 a.m.)
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21
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25

C E R T I F I C A T E

I, LISA L. CROMPTON, Registered
Professional Reporter, hereby certify that the
foregoing is a true and accurate transcript of my
stenographic notes of the proceedings in this
matter on the date and time specified in the
caption hereof.

IN THIS WITNESS WHEREOF I have hereunto
set my hand this 27th day of August, 2025.



LISA L. CROMPTON

REGISTERED PROFESSIONAL REPORTER

MY COMMISSION EXPIRES 1/17/2031

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