

REPORT AND RECOMMENDATION OF THE
COMMISSION ON JUDICIAL CONDUCT

APPENDIX M

COMMONWEALTH OF MASSACHUSETTS
COMMISSION ON JUDICIAL CONDUCT

IN THE MATTER OF JUDGE SHELLEY M. RICHMOND JOSEPH
COMMISSION COMPLAINT NUMBER 2019-22

REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW
SUBMITTED ON BEHALF OF JUDGE SHELLEY M. RICHMOND JOSEPH

PROCEDURAL HISTORY

1. This proceeding arises out of an incident that occurred on Monday, April 2, 2018, at the Newton District Court (“NDC”) in Newton, Massachusetts, in which a defendant, José Medina-Perez, who was the subject of an Immigration and Customs Enforcement (ICE) detainer evaded ICE when a court officer, Wesley MacGregor, and his defense lawyer, David Jellinek, agreed to release him out the back door of the courthouse. Judge Shelley M. Richmond Joseph, who was the judge sitting in the NDC that day, was indicted one year later, in April 2019. Tr. IV:646. The United States Attorney’s Office dismissed the indictment on September 22, 2022. Tr. IV:647; Appendix M. As part of the agreement, Joseph agreed to certain facts related to the incident and referred herself to the Massachusetts Commission on Judicial Conduct (“CJC”) for whatever proceeding the CJC deemed appropriate. Tr. IV:649.

2. On December 22, 2022, the Supreme Judicial Court appointed Judith A. Fabricant as Special Counsel to represent the CJC in the matter. On November 19, 2024, Special Counsel notified Joseph that the CJC had voted to issue formal charges, and Joseph responded on

November 29, 2024. The charges and the response were filed with the Supreme Judicial Court on December 2, 2024. On January 10, 2024, the Supreme Judicial Court appointed Denis J. McInerney, Esq. as the Special Hearing Officer in this case. The parties entered into a Stipulation dated March 25, 2025 containing twenty-eight numbered paragraphs. A public hearing was held on six consecutive days from June 9 through 13 and June 16, 2025. The hearing included a view at the NDC on Monday, June 9, 2025, after which sixteen witnesses testified, and thirty-one exhibits were admitted.

3. None of the people involved in the events of April 2, 2018 took contemporaneous notes. Nor did any of the three judges who spoke with Joseph in the next several weeks take notes or make recordings. It is understandable after seven years, including the intervening federal grand jury investigation and indictment, that memories have faded, are inconsistent, or have been influenced by subsequent events or later-acquired knowledge. I have not tried to reconcile the different memories except where a conversation or event is essential to my findings. I generally credit the testimony cited in these Findings of Fact, except where otherwise noted. Where the CJC has the burden of proof, I have applied the standard of clear and convincing evidence as set forth in CJC Rule 10(B).

JUDGE SHELLEY M. RICHMOND JOSEPH

4. Judge Shelley M. Richmond Joseph (“Joseph”) was appointed as an associate justice of the District Court Department of the Massachusetts Trial Court and was sworn in to that position on November 2, 2017. Stipulation ¶2. Joseph graduated from law school in 1992. Tr. IV:643. She served as a prosecutor in the Suffolk County District Attorney’s Office and the Massachusetts Attorney General’s Office for seven years. Tr. IV:726. She briefly practiced with

a civil firm, and then began to practice as a bar advocate while simultaneously developing a private practice representing persons charged with crimes in the Massachusetts District and Superior Courts. Tr. IV:644; Appendix A. Joseph continued this practice until she was appointed to the bench, making regular appearances in Massachusetts state courts, including the NDC.

5. Joseph received the standard orientation provided to new district court judges. This included a large quantity of written materials, spanning multiple volumes and binders, as well as some electronic resources. Tr. III:569-571. She also sat with other judges for four weeks, observing various proceedings in different courts. Tr. III:570. She was assigned a more senior judge as a mentor whom she could consult with questions. Tr. III:589-590.

6. The training materials provided to Joseph and other new district court judges did not include any reference to Special Rule 211 of the District Court. Tr. III:620-621. Joseph was provided with a West paperback edition that contains rules for all Massachusetts courts, including Special Rule 211. Tr. IV:651. When she was appointed to the bench, she did not read the rules in their entirety but instead focused on the substantive matters that were new to her. Tr. IV:654-655. After this incident, the District Court began to call new judges' attention to Special Rule 211 by including it in the "Ninety Day Guide," a volume intended as a reference for new judges on subjects and situations they were mostly likely to encounter early in their judicial careers. Tr. III:621.

NEWTON DISTRICT COURT

7. The NDC was a relatively quiet court with approximately five to ten arrests per week. Tr. II:215. There was often only one judge sitting in the courthouse. The daily business was generally handled in the first-floor courtroom, while jury trials were held upstairs on the second

floor. Tr. III:496. In the first-floor courtroom, the prosecution would use the left-hand counsel table (facing the judge's bench in the front of the room), while defense counsel sat on the right side. Tr. II:217.

8. The first-floor courtroom has a glass-enclosed dock for defendants in custody. There is a staircase that leads directly from the lockup to the dock, and then a door that opens from the dock into the courtroom. The dock has two openings to facilitate communication between defendants in the dock and persons in the courtroom. During court proceedings requiring an interpreter, the interpreter would stand by one of the openings and interpret for the defendant in the dock. Tr. II:217-218; Appendix U.

9. The First Justice of the NDC was Mary Elizabeth Heffernan ("Heffernan"). III:459. As First Justice, Heffernan was responsible for coordinating the work of the various departments in the court. III:460. She had no disciplinary authority, but was responsible for conveying pertinent information to the Regional Administrative Justice and the Chief Justice of the District Court. III:460-461.

10. There was a standard Massachusetts Trial Court policy about the release of defendants from custody, which required that prisoners be released only from the lockup unless the court ordered otherwise. Tr. III:435; Exhibit 1.

11. The Trial Court policy was supposed to be followed in all courthouses, including the sixty-two district courts. Tr. V:894. However, in practice, defendants were released differently because of physical differences in the courthouse and the preference or practice of local court personnel. Tr. III:419.

12. The usual practice at the NDC was that defendants who arrived at the courthouse in custody and were then released would go directly from the dock into the courtroom. Tr. III:416-

417; Tr. IV:650. This practice, which was inconsistent with the Trial Court policy and the Court Officer Manual, continued even after this incident. Tr. III:448-449; Tr. V:894; Tr. V:896.

13. Heffernan and multiple defense counsel testified that there were various exceptions to the NDC practice of releasing defendants through the courtroom, including for defendants who had property downstairs in the lockup. Tr. I:52-54; Tr. I:151-152; Tr. III:465-466; Tr. V:859-860; Appendix M at 163 ¶3.

14. David Jellinek (“Jellinek”) had had clients released from the back door of the NDC, and was therefore familiar with that manner of exit. Tr. I:104.

15. It was also common for defense counsel at the NDC to confer with clients in the lockup after they were released by the judge but before they left the courthouse. Tr. I:151-152; Tr. I:155; Tr. V:833-834; Tr. V:859-860. This was particularly true for defendants who needed the services of an interpreter. Tr. V:833; Tr. V:860.

16. As a lawyer, Joseph had conferred with clients in the lockup, particularly if the client was being transported elsewhere after the case. Tr. IV:752.

17. The presence of ICE agents at the NDC was rare, occurring perhaps one to three times per year. Tr. III:419; Tr. III:431.

18. Heffernan had a practice of excluding ICE from the courtroom, which was apparently unique to the NDC. III:467. This practice was not written and was discontinued after this incident. Tr. III:468; Tr. III:488; Tr. III:597. At a result of the incident, the practice came to the attention of District Court Chief Justice Paul Dawley (“Dawley”), who had never heard of such a policy and was unclear whether there was legal authority to support it. Tr. III:468; Tr. III:488-489; Tr. III:594-596.

19. First Assistant Clerk Lawrence Okstein (“Okstein”) recalled seeing ICE agents arrest a defendant outside the front door of the courthouse in the past. Tr. II:342. No one was aware of any occasions when ICE agents were permitted into the lockup at the NDC. Tr. II:342.

COMMONWEALTH V. JOSE MEDINA-PEREZ

20. José Medina-Perez (“Medina-Perez”) was arrested by the Newton Police on Friday, March 30, 2018 and charged with two misdemeanor drug possession offenses. Tr. II:220; Appendix F at 027.

21. As a standard part of the arrest process for Medina-Perez, various databases were checked, and there was a match with both a fugitive warrant from Pennsylvania and an ICE detainer. Tr. II:220-221; Tr. V:822.

22. Medina-Perez was held in custody for his first court appearance on Monday, April 2, 2018. At that time, he was brought from the Newton Police Department next door to the NDC. Tr. V:820.

23. Joseph was the only judge assigned to the NDC on April 2, 2018. Tr. IV:661. As the only judge in the courthouse that day, her principal role was to hear the daily list in the first session of the NDC. Tr. III:468-469; Tr. IV:661. This was the first time she had filled that role, although she was generally familiar with the court from her time as a defense lawyer and from the few times she had sat there since her appointment. Tr. IV:645-646; Tr. IV:661-662.

24. The probation department determined that Medina-Perez was marginally indigent, which meant that he was entitled to counsel at a reduced rate. Tr. IV:736; Appendix G at 037. Joseph appointed Elizabeth Bostwick (“Bostwick”), a bar advocate who was the duty attorney for the day, to represent him. Tr. IV:735; Tr. V:819-820; Appendix G at 037.

25. Assistant District Attorney Shannon Jurgens (“Jurgens”), now Shannon McDermott, appeared for the Commonwealth. Appendix G at 037. Throughout these findings, I have referred to her as “Jurgens,” as that is how her name appears in the transcript. Jurgens had been an assistant district attorney for Middlesex County since 2015. Tr. II:213. She was first assigned to the NDC in March 2018, and appeared for the Commonwealth in that court virtually every day. Tr. II:214-215.

26. For most of the day, there was a single ICE agent, Deportation Officer Richard Simmons (“Simmons”), present at the NDC. Tr. II:382; Tr. V:881. Simmons spoke with an unidentified court officer in the morning, asked if he would be able to take custody of Medina-Perez in the lockup after the arraignment, and was told that he could. Tr. V:881; Appendix O.

27. At some point during the morning, both Jurgens and Bostwick were aware that there was an ICE officer in the courtroom, seeking to take Medina-Perez into custody if he was released on the state charges. Tr. II:221; Tr. V:825

28. Okstein was the session clerk for the day, filling in for a clerk who was attending her mother’s funeral. Tr. II:342-343; Tr. II:369. He had limited experience in the first session and was not too familiar with first session procedures. Tr. II:335; Tr. II:342-343; Tr. II:355.

29. As is standard practice with a fugitive warrant, Joseph asked if there was a question about the defendant’s identification, and Jurgens responded that it was a “fingerprint hit, Your Honor. So, no.” Appendix G at 038.

30. Joseph put the Medina-Perez matter on for later call to give Bostwick, who had just been appointed, time to speak with her new client. Tr. III:525; Tr. IV:668-669; Tr. V:822-823; Appendix G at 038.

31. After speaking with Medina-Perez, Bostwick informed the court that she believed Medina-Perez was not the actual subject of the Pennsylvania warrant. Appendix G at 038. She received access to a “Triple-I,” which is a record of out-of-state proceedings involving a defendant, Tr. II:300, and sent at least one fax. Appendix G at 038.

32. The identification was important because if the defendant was the subject of the Pennsylvania warrant, he could be held without bail until the Pennsylvania authorities came to take him back to that state. Tr. II:224. This would make him unavailable to ICE. II:306. On the other hand, if the warrant was dismissed, the Commonwealth’s practice was not to seek bail on the misdemeanor drug charges, which would result in the release of Medina-Perez, who would then be subject to arrest by ICE on the detainer. Tr. II:225-226.

33. The Medina-Perez case was called four times during the morning, not including the first call, which is not on the record. Tr. II:222-223; Tr. II:296; Tr. II:343; Tr. II:368-369; Tr. IV:669; Appendix H at 055-056, 075-076, 082, 083. On each occasion, Bostwick needed time to confer with her client and to investigate his identity, and Joseph put the matter on for further call.

34. The grant of time for attorneys to do their jobs was entirely appropriate. Tr. II:300-301; Tr. III:525.

DAVID JELLINEK

35. The CJC’s principal witness was Jellinek. Jellinek has been practicing law since 2000. With the exception of two years in the legal affairs division of the Boston Police Department, Jellinek has practiced as a criminal defense lawyer for his entire career. He has worked for CPCS, as a bar advocate and as private defense counsel. Tr. I:45-46.

36. As of April 2018, Attorney Jellinek had appeared frequently in the NDC, including working in the drug court, which had a session every Tuesday afternoon. Tr. I:46-47. He was friendly with the courthouse staff, and would bring them coffee or snacks on occasion. Tr. I:48.

37. Jellinek testified that he was at the NDC on the morning of April 2, 2018, and first spoke to two people about Jose Medina-Perez at approximately 10:30 a.m. Tr; I:54-55. Jellinek testified that one of these persons claimed to be Medina-Perez's employer and said that he had seen Jellinek argue and that he could do a better job than the bar advocate at getting Medina-Perez released. Tr. I:55; Tr. I:167. Jellinek claimed that the employer showed him a birth certificate for Medina-Perez showing that he was born in Puerto Rico, which would make him a United States citizen, and thus not subject to deportation. Tr. I:61-62.

38. Jellinek has given inconsistent statements regarding the form of payment he received, telling the federal grand jury in 2019 that he received a check for \$1000, telling Special Counsel in December 2024 that it was cash, and then reverting at this hearing to his original testimony that he received a check. Tr. I:141-144. He had no written fee agreement. Tr. I:178.

39. The United States Attorney's Office apparently either never requested or never received check or bank records to support Jellinek's testimony. Tr. I:141; Tr. I:145-146. Special Counsel asked Jellinek to provide bank records, but he did not do so. Tr. I:143-144.

40. Jellinek also carried an iPad on which he would take notes while in court or provide fee agreements for clients to sign. Neither the United States Attorney's Office nor Special Counsel reviewed Jellinek's iPad to confirm any aspects of his story. Tr. I:175-176; Tr. I:178.

41. Jellinek testified that he immediately went down to the lockup and told Medina-Perez that he had been retained to represent him. Tr. I:56. Jellinek also testified that he spoke with ICE agent Simmons in the courtroom during the morning. Tr. I:58. He further testified that he

had a brief discussion with Bostwick and she handed him materials related to Medina-Perez. Tr. I:60.

42. I do not credit Jellinek's testimony about the circumstances leading up to his representation of Medina-Perez. Although Jellinek continued to maintain at the hearing that he was at the NDC and made an argument that morning, Tr. I:167-173, there is no corroboration for that claim. The transcript does not mention Jellinek until his appearance in the afternoon. Appendix G; Appendix H. No witness testified to having seen or interacted with Jellinek before the lunch recess. Tr. II:380; Tr. V:824; Tr. V:883; Appendix O. Simmons recalled that the defense lawyer in the morning was a female, and that Jellinek had not been present during the morning. Tr. V:883; Appendix O. Jellinek never mentioned a Puerto Rico birth certificate, which, if it existed, would be powerful evidence that Medina-Perez was a United States citizen, and therefore not the subject of the ICE detainer. Eric Mendoza, the Spanish interpreter at NDC for the day, testified that his only contact with Medina-Perez in the morning was in the courtroom. Tr. II:265. Mendoza testified that the attorney representing Medina-Perez in the morning was a woman, who was replaced by a different attorney in the afternoon. Tr. II:263. He believed that Jellinek, whom he first encountered in the afternoon, was the prosecutor. Tr. II:278. Thus, it is unlikely that Jellinek, who speaks no Spanish, conferred with Medina-Perez, who by all accounts spoke no English, except immediately prior to Medina-Perez's exit from the courthouse. Tr. I:179; Tr. V:826. Further, since Simmons was the only ICE officer and was in the courtroom only during the morning session, I do not credit Jellinek's testimony that he spoke with the ICE officer in the courtroom. Jurgens testified, and the transcript confirms, that Bostwick represented Medina-Perez up until the lunch recess. Tr. II:89; Tr. IV:737-738. Finally, I credit Attorney Bostwick's testimony that she did not see or speak to David Jellinek before

lunch, and returned to the courthouse at 2:15 p.m. expecting to continue her representation of Medina-Perez. Tr. V:824; Tr. V:829-830; Appendix H at 083.

43. Because I do not credit Jellinek's testimony, and there is no other evidence on how he came to represent Medina-Perez, I am unable to make a finding as to how this occurred. However, I infer from the fact that Jellinek was untruthful about the circumstances of the presentation that the true facts would place him in an unfavorable light. I have considered Jellinek's lack of candor in assessing the credibility of his other testimony, and in particular, his testimony about the unrecorded sidebar conference.

44. During the lunch break, Jellinek spoke with Court Officer Wesley MacGregor ("MacGregor") about Medina-Perez. The two were alone in the courtroom. Tr. I:63; Stipulation, ¶11. MacGregor, who did not testify, told Jellinek that he could release Medina-Perez from the back door if Jellinek could get him downstairs. Tr. I:63.

45. Jellinek knew that the ICE agents were asked to wait outside the courtroom in the front lobby. Tr. I:64-65; Tr. I:66. He therefore thought that his client could avoid ICE if released from the downstairs lockup. Tr. I:64.

46. Jellinek's intent was to assist Medina-Perez in avoiding ICE arrest. Tr. I:97. He admitted that the agreement with MacGregor was his idea. Tr. I:127.

THE LUNN POLICY AND THE EXCLUSION OF ICE

47. Okstein spoke to Joseph in her lobby and informed her that an ICE agent was present to arrest Medina-Perez, and that Heffernan's practice was to exclude ICE personnel from the courtroom. Tr. II:346-348; Tr. II:370-374; Tr. IV:740. That practice was not in writing, and some visiting judges followed it, while others did not. Tr. II:374.

48. Joseph had never heard of such a practice or policy, and was concerned about her ability to exclude ICE from the courtroom, but at the same time, as a new judge, she wanted to respect the practice at the NDC. Tr. IV: 670-671; Tr. 741.

49. The Trial Court distributed a “Lunn policy” on November 10, 2017, which provided trial courts with guidance on interactions with ICE. The policy was transmitted to all judges, clerks, and court officers. Stipulation, ¶3; Appendix B.

50. Joseph was generally aware that the Lunn policy existed, but was unable to obtain a copy from Okstein or to locate a copy among her training materials or various references in Heffernan’s lobby. Tr. IV: 671; Tr. IV:740.

51. During the morning session, Joseph had attempted to reach Heffernan about a different case but had been unable to do so because Heffernan was at a funeral and had turned her cell phone off. Tr. III:490-491; Tr. IV:737. Joseph therefore called the District Court Administrative Office for guidance about Heffernan’s ICE policy. Tr. II:375; Tr. IV:671; Tr. IV:740-741.

52. Ellen Shapiro (“Shapiro”) from the Administrative Office read large sections of the Lunn policy to Joseph, and advised her that there was nothing in the policy that was inconsistent with Heffernan’s practice of excluding ICE. Tr. IV:671-672; Tr. IV:742-745; Tr. IV:750-751; Appendix B.

53. At some point after their conversation, Shapiro emailed Joseph a copy of the policy. The email chain showed that the policy was scanned at 1:53 p.m., forwarded to Shapiro at 1:53 p.m., and emailed to Joseph at 3:19 p.m., all on April 2, 2018. Exhibit 5.

54. Based on her conversation with Shapiro, Joseph determined that, as a visiting judge, she would follow Heffernan’s practice, and so advised Okstein. Tr. II:1347; Tr. II:377-379; Tr.

IV:672; Tr. IV:746. Okstein did not ask Joseph about the point of release for the defendant nor did Joseph address that issue with Okstein. Tr. II: 379-380.

55. Okstein in turn informed the ICE officer Simmons that he should wait outside the courtroom. Okstein also told Simmons that Medina-Perez would be released through the front door. Tr. II:135; Tr. V:884; Appendix O.

56. Joseph never saw or spoke to any ICE agent that day. Tr. IV:753

57. I credit Joseph's testimony, which is corroborated by the times of various emails involving the Administrative Office and the parties' Stipulation dated March 25, 2025, that her conversations with Okstein about the presence of ICE occurred during the lunch recess. Tr. IV:745-747; Stipulation, ¶9; Exhibit 5.

58. Okstein believes that he was aware of a policy that permitted ICE to enter the lockup, but he had never seen ICE go to the NDC lockup. Tr. II:342; Tr. II:356-357.

59. The Chief Court Officer, Scott Noe, was not familiar with the Lunn policy, even when it was shown to him, and did not recall any training with regard to the Lunn policy. Tr. III:432; Tr. III:438.

60. Heffernan's initial recollection was that this incident pre-dated the Lunn decision and resulting policy. Tr. III:489. When Special Counsel showed her the transmittal letter of November 10, 2017 and the attached Lunn policy, Heffernan acknowledged her error, and testified that as of April 2, 2018, she had "not yet incorporated" the policy into her practice. Tr. III:489.

61. Other than Joseph, no one at the NDC seemed to be aware of the Lunn policy and its application to the release of Medina-Perez.

THE RECORDED SIDEBAR CONFERENCE

62. Okstein called the Medina-Perez case for the final time at approximately 2:48 p.m. and informed Joseph that Jellinek had filed an appearance for Medina-Perez. Stipulation, ¶¶10-11; Appendix G at 040.

63. Jellinek immediately asked to approach the sidebar. Appendix G at 040.

64. That was the first time Joseph saw Jellinek that day. Tr. IV:754. She knew him from prior cases both as a lawyer and a judge, but did not know him well. Tr. IV:754.

65. I do not draw the inference urged by Special Counsel that Joseph's statement that "[inaudible] is dismissed, so it's my understanding that ICE is here..." communicated to Jellinek a willingness to help Medina-Perez avoid ICE. Tr. VI:960-961. I infer that someone informed Joseph that there would be a motion to dismiss the Pennsylvania warrant, but there is no evidence about how or when she learned that information, other than that it must have happened during the lunch recess because it was clearly not the situation when Bostwick departed for her medical appointment. This new development could leave the question of bail on the state charges and the ICE detainer as the remaining issues to be addressed.

66. While the other participants may have been dealing with or thinking about ICE during the morning, there is no mention of ICE in the transcript of the morning session, and no evidence that Joseph was aware of the presence of the ICE agent in the courtroom or courthouse. Tr. IV:676; Tr. IV:739; Tr. V:882; Appendix O.

67. Although Joseph may have been informed by the clerk that there was an ICE detainer, Tr. II:342, I find that Joseph did not become aware of the ICE agent's presence until informed by the clerk during the lunch break. I credit Joseph's testimony, corroborated by emails sent to her from the Administrative Office, that she spent a significant part of the extended lunch recess

trying to determine whether she could or should follow Heffernan's singular policy that ICE should be excluded from the courtroom. Tr. IV:670-671.

68. Given Joseph's new awareness of the ICE agent's presence, the amount of time and effort she devoted to clarifying Heffernan's policy, and the absence of any discussion about the ICE detainer up to that time, it was entirely understandable and reasonable that Joseph would raise the issue of ICE at the next call of the Medina-Perez case to ensure that everyone was aware that ICE was present to take the defendant into custody if released. The presence of ICE became especially pertinent once Joseph was informed that Jurgens now agreed that Medina-Perez was not the subject of the Pennsylvania warrant, making his imminent release from state custody much more likely.

69. I do not accept the inference argued by Special Counsel that Jellinek's statement that "the best thing for us to do is clear the fugitive issue, release him on a personal and hope that he can avoid ICE" was made because Jellinek believed Joseph would be receptive to the plan he had formulated with MacGregor. Tr. IV:963. There is nothing in the brief exchange before Jellinek's statement that would lead to that conclusion. Appendix G at 040-041.

70. Although Jellinek said that he was getting "close to the edge" before he even initiated any sidebar discussion with Joseph and ADA Jurgens, Tr. I: 72, 104, I credit Jurgens' testimony that she understood from Jellinek's statement about avoiding ICE that he wanted to figure out how to avoid the ICE officer, but that she did not know how he could do that. Tr. II:304-305. I do not infer that Joseph, Jurgens, or a reasonable person with no knowledge of Jellinek's agreement with MacGregor would understand that he was proposing a course of action that was illegal, unethical, or close.

71. Jurgens agreed that one way for Jellinek to have Medina-Perez avoid arrest would be to convince the ICE agent, as he had convinced her with the Pennsylvania warrant, that Medina-Perez was not the subject of the detainer. Tr. II:305.

72. I also credit Jurgens' testimony that she did not interpret Jellinek's statement as implying that Medina-Perez would be released out the back door. Tr. II:304-305.

73. I also credit Joseph's testimony, which is consistent with her response as shown in the transcript, that she interpreted Jellinek's statement as a request for more time. Tr. IV:678; Tr. IV:756-757; Appendix G at 041. I reject Special Counsel's suggestion that this is a "new theory." Tr. VI:976.

74. The suggestion made by Joseph in response to Jellinek's statement about avoiding ICE was that she would give Jellinek until the following day to investigate the defendant's identity, which would be entirely reasonable and proper, particularly given the fact that Jellinek had just entered his appearance, the late hour, and the fact that the same biometric information used by ICE had apparently resulted in a mistaken match with the Pennsylvania warrant. Tr. II:305; Tr. III:525-526; IV:685-686; Tr. IV:732-733; Tr. IV:757; Appendix Q at 295-296.

75. Heffernan agreed that, although it is not the judge's role to be concerned with ICE actions, no one would want ICE to take the wrong person. Tr. III:526.

76. I credit Joseph's testimony that she did not analyze the grounds to hold Medina-Perez in depth because she intended to take that action only with the assent of his counsel, which would avoid any due process concern. Tr. IV:691-692. Her testimony on this issue was supported by Retired Superior Court Judge Carol S. Ball. Tr. V:847-848.

77. It would be reasonable for Joseph to assume that a lawyer who truly believed that there was a mistaken identification would advise his client that it was better for him to remain in

state custody overnight while the lawyer tried to advocate with ICE than to be apprehended by ICE and have his lawyer try to argue the identity question after the fact. Had Jellinek accepted the offer of more time, it would not unreasonably hinder ICE in the performance of its duties to return the following day.

78. While the transcript does not reflect that Jellinek rejected Joseph's offer of additional time, I infer that he did so off the record. Tr. II:309; Tr. IV:757-758; Appendix G at 041.

79. I infer that Jellinek rejected Joseph's reasonable offer because he already had in place his arrangement with MacGregor that would ensure his client's release. Tr. I:159.

80. Further, although Joseph did not analyze the legal basis for detaining Medina-Perez because she did not intend to do so without his consent, she did in fact have the authority to hold him. The Pennsylvania warrant had not been dismissed at the time of this exchange and was not dismissed at the request of the prosecutor until the parties went back on the record. Appendix G at 042. While the charges based on that warrant remained pending, Joseph had authority either to hold the Medina-Perez without bail or to set bail, regardless of the position of the prosecutor on bail. Tr. III:641.

81. Joseph would also have had the authority to set bail for Medina-Perez on the misdemeanor drug charges despite the Commonwealth's lack of a bail request. One reason for her to do that might be if there was a question of identity. Tr. II:307-308. Indeed, when Medina-Perez was returned to court on the misdemeanor charges in December 2021, he was held without bail overnight "due to identity issues." Appendix E at 020.

82. Once her offer of additional time was rejected, Joseph neither attempted to hold Medina-Perez nor imposed a bail requirement. Instead, Joseph assumed that Jellinek intended to

deal with the ICE issue in another forum, once Medina-Perez had been released from state custody and arrested by ICE. Tr. IV:758-760; Tr. IV:777-778.

THE UNRECORDED SIDEBAR CONFERENCE

83. After Joseph offered to hold Medina-Perez to give Jellinek more time, Jellinek then asked if the conference was being recorded. There was an exchange between Joseph and the clerk. It was Jellinek who actually asked to go off the record, although Joseph agrees that she acquiesced. Tr. IV:680; Stipulation, ¶13; Appendix G at 041.

84. Joseph, who was unaware of Special Rule 211 and who had experience as a lawyer with judges going off the record for a variety of reasons, did not see any reason to refuse the request, although she did not know why it was made. Tr. IV:680.

85. Okstein responded immediately to Jellinek's request. He did not question Joseph about the request, and testified that he was not concerned about the request. Tr. II:310; Tr. II:354; Appendix G at 041.

86. Okstein turned off the recorder and returned to his paperwork, so that he did not hear the unrecorded conference. Tr. II:349-350; Tr. II:354.

87. The recorder remained off for fifty-two seconds while Joseph, Jellinek and Jurgens were at the sidebar. Stipulation, ¶15; Appendix G at 041.

88. Both Joseph and Jurgens testified that the on the record and off the record sidebar conferences blended together, and that the off-the-record portion was a continuation of what had transpired on the record. Tr. II:291-292; Tr. IV:684.

89. As noted above, I infer that part of the off-the-record discussion was Jellinek's rejection of Joseph's on-the-record proposal that the defendant be held overnight to give Jellinek more time.

90. A new issue that first arose off the record was Jellinek's request that he be permitted to speak to his client in the lockup with the interpreter. Tr. II:292; Tr. IV:682; Appendix G at 041-043. Jellinek understood when making that request that the judge would not deny him an opportunity to speak with his client. Tr. I:105.

91. On the critical issue, Jellinek testified that he told Joseph off the record that he "had spoken to the court officer and they're allowed to let the gentleman out the basement sallyport door, if I can get him downstairs" and that "might be a way for him to avoid getting into ICE custody." He further testified that Joseph expressly approved his plan, saying "that's what we'll do" or "we'll proceed that way." Tr. I:73-74.

92. I find that it is unlikely under the circumstances that Jellinek would have sought approval for his plan from Joseph, especially in the presence of Jurgens. Jellinek's agreement with MacGregor meant that his plan would succeed as soon as he got Medina-Perez downstairs to the lockup, which he could accomplish simply by asking to speak with his client, a reasonable request that he would expect to be granted. Tr. I:105. For Jellinek to disclose his plan to Joseph and Jurgens would create the unnecessary and unacceptable risk that one or both of them would object and take action to inform the ICE agent. Tr. I:191-192.

93. Jurgens testified that Jellinek and Joseph discussed options to avoid Medina-Perez being turned over to ICE, which included bail or holding him overnight. Tr. II:314. She had the impression that Jellinek implied that he had the situation under control, but did not interpret what he said to suggest that he intended to have Medina-Perez released out the back door. Tr. II:315.

94. Jurgens was clear that she would not have participated in a plan to have Medina-Perez avoid ICE. Tr. II:293. While Jurgens does not recall exactly what Jellinek said off the record, he did not say that Medina-Perez would be released out the back door, nor did he say anything that gave her the impression that would happen. Tr. II:293-294.

95. Jurgens does not believe that she would have forgotten a statement indicating that Medina-Perez would be released from the back door. Tr. II:294-295. She has no reason to believe that Joseph knew that David Jellinek was going to have his client released out the back door. Tr. II:295.

96. Jurgens testified that she was uncomfortable with the sidebar conversation, as she did not believe that ICE issues should be involved in a criminal case. Tr. II:236. Her only firm memory of the conference was that Jellinek asked to speak with his client downstairs, which she thought was odd. Tr. II:311-313. However, she acknowledged that she had no experience in conferring with a defendant, and that the lockup would be one of the few, and perhaps the only, private place under the circumstances. Tr. II:316-317. Defense counsel familiar with the NDC testified that it was not unusual to confer with a client in the lockup. Tr. I:151-152; Tr. I:155; Tr. V:833-834; Tr. V:859-860.

97. Jurgens interpreted Joseph's conduct and statements as the judge's "misguided attempt to do what she thought was right." Tr. II:84. By that, she meant the idea that Joseph was discussing a way that Medina-Perez might not be arrested by ICE, including the offer to hold the defendant overnight. Tr. II:295-296. She knew that Jellinek was adamant that his client was not the person sought by ICE, and agreed that no one would want ICE to take the wrong individual. Tr. II:295-296.

98. Jurgens did not know whether Joseph was simply trying, as she had done in the morning, to give Medina-Perez's lawyer more time. Tr. II:296. She agreed that it would be entirely appropriate for a judge to give a lawyer time to do his or her job. Tr. II:301.

99. Jurgens has no reason to believe that Joseph knew about Jellinek's plan to have Medina-Perez released out the back door. Tr. II:295.

100. Despite her overall discomfort with the situation, Jurgens did not believe that Medina-Perez was going to escape, but expected that he would be released from state custody, and be taken into ICE custody. Tr. II:293-295.

101. Jurgens later told Chief Court Officer Scott Noe ("Noe") that Jellinek had asked at sidebar for Medina-Perez to be released so he could get an immigration attorney, and Jurgens responded that she didn't know how that could happen because ICE was waiting for him. Tr. III:456.

102. Jurgens' testimony at this hearing is corroborated by her conduct at the time. She left the courtroom by the front door and stood waiting with the ICE agents. She was surprised to see them, and said that Medina-Perez might still be talking to Jellinek. Tr. II:241. Her expectation was that Medina-Perez would come out the courtroom door, and she told the ICE officers he had to come out that way. Tr. II:241-242; Tr. II:293. She had no thought that he might be released another way. Tr. II:241. She would not have told the ICE agents that Medina-Perez would come out from the courtroom if Jellinek and Joseph had agreed that he would be released out the back. Tr. II:293.

103. It was only after Jurgens learned that Medina-Perez had avoided ICE, provoking a heated reaction from ICE, that she called her supervisor to report the incident. Until then, she

believed that the Medina-Perez hearing and Jellinek's requests were "odd," but considered them within the scope of an ordinary day in court. Tr. II:327-328.

104. I do not credit Jellinek's testimony either that he said that he intended to have Medina-Perez released out the back door or that Joseph expressly approved that course of action. Joseph denied any knowledge of that plan, and I credit that testimony. Tr. IV:760. Having observed the courtroom and the sidebar area, which is relatively confined, I credit Jellinek's testimony that Jurgens was within a foot and a half of him as he spoke. Tr. I:87. Jurgens, who was right next to Jellinek, testified that Jellinek did not disclose such a plan. Tr. I:87; Tr. II:293-295. Jurgens was a credible and persuasive witness with no interest in the outcome of this proceeding. I credit her testimony in its entirety.

105. Jellinek testified that Joseph's statements gave him the impression that "she also did not want ICE necessarily to pick up the wrong person or pick up Mr. Medina-Perez and was trying to find a solution." Tr. I:71. While the transcript and Joseph's testimony support the fact that she was willing to give Jellinek time to investigate his client's identity, I find nothing in her words or actions that would leave Jellinek or any reasonable observer to believe that she would acquiesce in his plan to have Medina-Perez avoid ICE.

106. Jellinek testified that he would have said the same thing if Joseph had not permitted the conversation to go off the record. Tr. I:73. This undermines his testimony even further, as I do not find that a lawyer would ask on or off the record for his client to be released in such a manner as to avoid ICE.

ERIC MENDOZA

107. Eric Mendoza worked as a Spanish court interpreter in Massachusetts for approximately one and a half to two years. Tr. II:250. He was assigned to the NDC on about 6-12 days during that time. Tr. II:250. Mendoza was not permitted by the Commonwealth to become a certified interpreter, and left his position shortly after this incident. Tr. II:260-261.

108. While interpreting in the courtroom, Mendoza would stand next to the dock and speak to the defendant through one of the openings in the glass. Tr. II:252. When not interpreting, he would sit in a chair on the left side of the courtroom near the dock. Tr. II:252-253.

109. Mendoza was assigned to the NDC on April 2, 2018, when he provided interpretation services for Medina-Perez, as well as for other defendants. Tr. II:253; Tr. II:262.

110. Mendoza encountered Medina-Perez twice during the morning when he was brought upstairs to the dock. Tr. II:262-264. He had no other contact with Medina-Perez until the afternoon. Tr. II:264.

111. Mendoza was aware of the ICE detainer and the presence of the ICE agent. Tr. II:254.

112. Both the prosecutor and the defense attorney in the morning session were women. Tr. II:263.

113. In the afternoon, Mendoza was sitting on the left side of the courtroom, where he heard portions of the sidebar, which he incorrectly remembered as being on the left side. Tr. II:254; Tr. II:273; Tr. II:284. Mendoza did not believe it was his role to listen to the sidebar, and believed that sidebar discussions were not recorded. Tr. II:273-274.

114. Mendoza heard “bits and pieces” of the discussion at sidebar. Tr. II:276. Both his location in the courtroom, at some distance from the sidebar, and the “white noise” intended to prevent the audience from hearing sidebar conversations, impacted his ability to hear what was said. Tr. II:273-274.

115. Mendoza’s testimony about what he overheard was vague and non-specific. On direct examination by Special Counsel, Mendoza testified that he overheard something that suggested to him that Medina-Perez would be released from the back of the courthouse. Tr. II:256-257. However, when cross-examined by Joseph’s counsel, he did not repeat that testimony, but simply said that he heard that Medina-Perez would be “released”—a fact that no one disputes. Tr. II:275-276.

116. After the proceeding concluded, Mendoza went downstairs to the lockup with Medina-Perez and Jellinek. Tr. II:257. Jellinek asked him if he was “good with all this” and Mendoza responded that it was not his decision, that his role was to interpret. Tr. II:258.

117. Mendoza spent a couple of minutes interpreting in the lockup. He then saw the Medina Perez go down the hallway, take a right, and exit the courthouse through the open door. Tr. II:258-259.

118. To the extent that Mendoza testified that he heard a sidebar discussion indicating that Medina-Perez would be released out the back door, I do not credit this testimony. There was white noise that was intended to prevent the public from hearing sidebar conferences. Tr. I:94; Tr. II:273. I infer that the participants followed the customary practice of speaking softly while at side bar. Okstein, who was marking papers a few feet away, did not hear what was said. Tr. II:349-350; Tr. II:354. I credit the testimony of Bostwick, who was seated inside the bar in the area for attorneys, on the same side as the sidebar, and was therefore closer to the conversation

than Mendoza, that she could not hear the sidebar discussion. Tr. V:831-832. If Mendoza simply intended to convey that he heard the word “release,” that does not shed any light on the crucial question of what Jellinek said off the record, as there is no dispute that Medina-Perez was being released from state custody.

THE ARRAIGNMENT

119. After the unrecorded sidebar conference, proceedings resumed in open court. Jellinek repeated his position that Medina-Perez was not the subject of the Pennsylvania warrant, and Jurgens agreed and moved to dismiss the fugitive charge. Appendix G at 042.

120. Medina-Perez was arraigned and given required statutory drug warnings. A pretrial conference date of May 29 was set. Appendix G at 042.

121. Okstein then reminded Joseph that there was a representative from ICE “to visit the lockup.” Joseph responded, “That’s fine. I’m not gonna allow them to come in here. But he’s been released on this.” Appendix G at 043.

122. I find that Joseph intended to adhere both to Heffernan’s practice, which prevented ICE agents from entering the courtroom, and the Lunn policy that had just been read to her, which permitted ICE to enter the lockup and expressed the strong preference that ICE take custody of the defendant in the lockup rather than in a public area. Tr. IV:701-702; Tr. IV:704-705; Appendix B; Appendix N at 218.

123. Joseph also stated on the record that Jellinek had requested to interview his client downstairs in the lockup with the assistance of the interpreter and that she had granted that request. This memorialized the portion of the off-the-record discussion that was new. Appendix G at 043.

124. I credit Heffernan's testimony that Joseph's actions were reasonable and appropriate, and in accordance with the Lunn policy. Tr. III:520-522.

125. I credit the testimony of Bostwick that it was not unusual to speak with clients with an interpreter in the NDC lockup. Tr. V:833-834. I also credit Joseph's testimony that this was a familiar practice for a defendant who would be leaving the building in custody, as she assumed would be the case with Medina-Perez. Tr. IV:751-752; Tr. IV:760.

126. Joseph's statement that it was "fine" for ICE to visit the lockup also supports the inference that she knew nothing of Jellinek's plan. It would be illogical for her to permit the ICE agents to go the precise location where she expected Jellinek to effect Medina-Perez's escape.

127. The Medina-Perez proceeding ended at 2:54 p.m. Stipulation, ¶17.

128. Once Medina-Perez's arraignment was concluded and he left the courtroom, Joseph's role was finished. Tr. IV:761-762. The judge is not involved in the transfer of custody, which is arranged between court security personnel and ICE, outside the presence of the judge. Tr. III:503; Tr. IV:761-763. Joseph left the courtroom at 3:00:22. Exhibit 3.

129. Joseph handled two more matters that afternoon and left the courthouse at approximately 4:30 p.m. Tr. IV:763-764; Appendix H at 086-089; Exhibit 3. She assumed that Medina-Perez had been taken into ICE custody, and was not informed otherwise. Tr. IV:764.

THE ESCAPE AND THE ICE AGENTS

130. Jellinek, along with Mendoza, accompanied Medina-Perez downstairs to the lockup. Tr. I:78; Tr. I:96; Stipulation, ¶17.

131. Jellinek testified that he spent only 15-30 seconds speaking with Medina-Perez before MacGregor used his key card to open the sallyport door. Medina-Perez then went out the door to the parking lot behind the NDC and the Newton police station. Tr. I:70.

132. The court security records establish that MacGregor's access card opened the sallyport door from inside the building at 3:01:03. Tr. V:873; Stipulation, ¶18; Exhibit 3. This is approximately seven minutes after the courtroom proceeding ended on the record.

133. Based on the transcript and the door access log, I find that Medina-Perez remained in the lockup, and therefore available to ICE, for longer than Jellinek claims. In the normal course, it would be the practice of the court security staff to check other agencies to make sure no one else has a reason to hold a subject before his physical release from the building. There is no evidence about whether MacGregor or anyone else followed this practice. Tr. III:435-436; Tr. V:898.

134. There is no evidence about what was said in the lockup. Mendoza did not testify about the conversation between Jellinek and Medina-Perez, who has not waived his attorney-client privilege. Two female detainees who were in the lockup until 3:30 p.m. were not called as witnesses to any conversations they heard or observations they made. Tr. III:453; Exhibit 4.

135. Noe arrived at the NDC at approximately 2:00 p.m. and learned from the Court Officer Michael Walsh that there was one remaining case and that they expected that the defendant, who was the subject of an ICE detainer, would be released from custody. Tr. III:420-422.

136. Noe went to the lobby where the ICE agent was waiting. He told the ICE agent that Medina-Perez would be released soon and would be coming through the courtroom, but also

offered him the opportunity to go around to the sallyport, although there was already a van in the fenced area. Tr. V:884-885; Appendix O.

137. Okstein testified that he interpreted Joseph's response to his reminder about the ICE agent as a prohibition on ICE entering the lockup. Tr. II:356-357; Tr. II:390. He based that interpretation not on what Judge Joseph said but on his understanding of Judge Heffernan's policy Tr. II: 389-390. Based on his own interpretation, Okstein then spoke to Simmons, who was waiting in the lobby, and told him that he could not enter the lockup through the courtroom. Tr. II:358-359; Tr. II:383; Tr. II:390-391.

138. Okstein did not explain to the Simmons that there were other ways to access the lockup. Tr. II:390. In particular, there was a sallyport door that allowed direct access to the lockup area from the parking lot behind the NDC, through a fenced area intended to accommodate a transport vehicle. Tr. III:415.

139. Okstein also testified that he was expecting that Medina-Perez would come up the stairs from the probation department, accompanied by a court officer. Tr. II:361-362. He was the only witness who suggested that a defendant such as Medina-Perez who did not need to check in with probation, would be released in that manner.

140. The ICE agent does not acknowledge Noe's offer, and claims that his conversation with Okstein occurred at 2:10 p.m., which was before the Medina-Perez case was called in the afternoon. Simmons expressed concern to Okstein that he was alone, while the defendant had an associate in the courtroom, and said that he intended to call another agent for assistance. Tr. II:359-360; Tr. V:885-886; Appendix O.

141. Okstein called the chief court officer and asked him to come to the lobby to serve as a backup for ICE. Tr. II:360.

142. Simmons was joined by Deportation Officer Domenico Federico, who arrived at approximately 2:50 p.m., around the time the Medina-Perez proceeding ended. Tr. V:886; Tr. V:889; Appendix O; Appendix P.

143. While Jellinek was in the lockup arranging for Medina-Perez to be released through the sallyport door, Jurgens left the courtroom through the public entrance and met the ICE agent in the lobby. She told the ICE agent that Medina-Perez would come through the courtroom door, and stood and waited with him. Tr. II:326; Tr. V:996; Appendix O.

144. When Medina-Perez did not appear, Jurgens asked Mike Walsh, the victim witness advocate if there was another door Medina-Perez might have used. Tr. II:326; Tr. V:887; Appendix O. Walsh replied that a defendant could leave from the lockup, but he and Jurgens both expressed disbelief that the court officer would permit that to happen. Tr. V:887; Tr. V:890; Appendix O; Appendix P.

145. When Medina-Perez did not appear, Federico went around the outside of the building to the lockup. Tr. V:887; Appendix O. He spoke with a court officer, whom I infer was MacGregor, who was talking with corrections officers in the sallyport area. Tr. V:890; Appendix P.

146. MacGregor answered Federico in an “arrogant tone” that he had let Medina-Perez from the back. Tr. V:890-891; Appendix P. When asked why MacGregor had done that knowing that ICE agents were present with a detainer, MacGregor simply replied that he just let him go from the back. He did not mention Jellinek or Joseph, or his agreement with Jellinek. Tr. V:891; Appendix P.

147. Overall, I find that both Noe and Okstein were credible witnesses, although their memories and testimony differ. I credit Simmons’ statement that he called for backup because he

intended to arrest Medina-Perez in a public area. I cannot determine whether that was due to Okstein's refusal to permit him to enter the lockup or due to his own choice, perhaps because there was a van in the sallyport. A third possibility is that Okstein refused entry to the lockup, the ICE agent called for backup, and then Noe offered access through the sallyport but the ICE agent decided to wait for his colleague in the lobby. Tr. III:440.

148. Although I credit Okstein's testimony that his statement was a result of an honest misunderstanding, his refusal to permit the ICE agents to enter the lockup was a significant factor in permitting Medina-Perez to avoid ICE. If the Lunn policy had been followed, or if ICE had simply been permitted to enter the lockup by any one of the available means, Medina-Perez would likely not have escaped. Had Simmons entered the lockup to take custody of Medina-Perez, it is likely that this entire situation would have been avoided.

149. On any view of the facts, I do not find that any action or inaction by Joseph caused ICE to remain in the front lobby rather than going to the lockup. I credit her testimony that when she said, "That's fine. They can't come in here," she was attempting to accommodate Heffernan's unique policy barring ICE from the courtroom while at the same time following the Trial Court's Lunn policy that had just been read to her by allowing ICE to enter the lockup through alternative means. Tr. IV:762; Appendix B.

150. While it may have been usual at the NDC to release defendants directly from the courtroom, I credit the testimony of multiple witnesses that it was custodial defendants with property would often go downstairs for that property before release. Tr. V:860 (Koury); Tr. V:898 (McPherson); Tr. I:53 (Jellinek). It was neither unheard of nor prohibited to permit defense counsel to confer with a client in the lockup. Tr. I:151-152; Tr. I:155; Tr. V:833-834; Tr. V:859-860. It would be prudent for his attorney to explain to Medina-Perez the proceedings that had

occurred during the day, the current status of the charges against him, and the anticipated future course of events. Further, as part of his arraignment, Medina-Perez had been informed of his right as a defendant charged with drug offense to a medical examination, which pursuant to M.G.L. c.111E, must be exercised within five days. A prudent attorney would explain to his client this right and how to invoke it.

151. I do not find that Joseph's decision to allow Jellinek to consult with Medina-Perez in the lockup inadvertently or unintentionally assisted Jellinek's plans. This decision was entirely proper, within the scope of her authority as the presiding judge, in compliance with the Lunn policy, and in no way violative of her duty to remain neutral. To the contrary, Joseph was attempting to balance the interests of the defendant, the Commonwealth, the First Justice, and the ICE agents. In accordance with the Lunn policy, Medina-Perez was supposed to be processed out of custody from the lockup, and ICE was supposed to take him into custody there. As evidenced by Jurgens' statements and conduct, there was no reason for Joseph to understand that Jellinek intended to use his presence in the lockup for anything other than a client conference. While in a sense every decision made by Joseph—including her decision to accept the Commonwealth's recommendation to release Medina-Perez on personal recognizance—allowed Jellinek's plan to succeed, I do not find that this constituted "assistance," which implies an active role. Further, MacGregor had told Jellinek that he [Jellinek] simply needed to get Medina-Perez downstairs. Tr. I:63-64. It is entirely plausible that MacGregor might have released Medina-Perez through the back door in accordance with his prior agreement with Jellinek even if Joseph had denied Jellinek permission to speak with his client downstairs.

152. After Medina-Perez's escape, Jellinek went up the stairs from the lockup into the courtroom, out the courtroom door, and into the lobby. Tr. I:71. He encountered Jurgens. Tr.

I:111-112. Jellinek has at different times placed this encounter both in the courtroom and in the front lobby. Tr. I:79, I:112. He asked her what was wrong, and if she was “pissed” at him, and she responded that she was. Tr. I:79; Tr. I:100-101. He also claimed that he observed Jurgens with the ICE agents, who appeared to be angry with her. He walked away without intervening or accepting responsibility for what had happened. Tr. I:113.

153. Jurgens saw Jellinek leave the courtroom with a plastic prisoner property bag. Tr. II:242; II:326-327. He went into the conference room off the lobby with the men who were associates of Medina-Perez. Tr. II:242.

154. At that point, Jurgens figured out what had happened and understood that Jellinek had somehow “facilitated” Medina-Perez’s escape. Tr. II:243; Tr. II:79. Either before or after Jellinek met with Medina-Perez’s associates, Jurgens said to Jellinek that, “I know what you did and that was not the right thing to do.” Tr. II:242-243; Tr. II:290. He smiled and walked away without responding. Tr. II: 290. In particular, he did not deny what Jurgens had said, and did not reference any conversation at sidebar where Joseph approved his plan. Tr. II:78-289-290; Tr. II:387. Jellinek admits that he met with Medina-Perez’s associates, but claims that the conversation occurred in the back of the courtroom. Tr. I:99.

155. I credit Jurgens’ version of this conversation. On either version of the conversation, Jellinek did not say anything to Jurgens to suggest that he believed Joseph had approved his plan or that Jurgens had been aware of his plan from the sidebar conversation. Tr. I:113-114. I find that it would have been natural for Jellinek to respond to Jurgens’ accusation of wrongdoing by reminding her of what he now claims was said in her presence at sidebar, and that Jellinek’s failure to make such a statement or respond in any way further undermines his credibility.

156. Jellinek further testified that he encountered Bostwick outside the courthouse and told her that he “had gotten Mr. Medina-Perez out the back, he avoided ICE, and I was pleased, I thought it was the right result.” Tr. I:79-80. She said she thought he might have obstructed justice. Tr. I:118. Jellinek admits he did not tell Bostwick that Joseph had approved his plan. Tr. I:111. Bostwick has no memory of that conversation. Tr. V:834. I note, and find, that Jellinek does not claim that he said at that time that Joseph was aware of or had approved his plan.

157. As part of his effort to assist the ICE officers in locating and apprehending Medina-Perez, Noe called the lockup and spoke to MacGregor. Tr. III:425. When Noe asked where Medina-Perez was, MacGregor hesitated, and then said he had released the defendant from the back door. Tr. III:425-426.

158. In subsequent days, MacGregor gave inconsistent responses to Noe when they discussed the incident. He initially claimed that he did not have the detainer in hand, but acknowledged being aware of it. He was unable to explain why or how that led to Medina-Perez’s release from the back. Tr. III:426.

159. On a different occasion, MacGregor told Noe that he did not bring Medina-Perez through the courtroom because the judge was on the bench. Tr. III:427.

160. At no point did MacGregor tell Noe about his agreement with Jellinek, nor did he claim that he had permission from Joseph to release Medina-Perez through the sallyport. Tr. III:442.

161. I infer from MacGregor’s conflicting explanations, including his failure to disclose his agreement with Jellinek, and his failure to claim that he believed Joseph had approved of Medina-Perez’s release from the sallyport door, that MacGregor was aware that his covert agreement with Jellinek was impermissible and might cause trouble for both of them.

THE AFTERMATH

162. Jellinek spoke with Heffernan on April 3, 2018, the day after Medina-Perez's escape. Tr. I:123; Tr. III:470. He testified that this meeting took place at 8:45 a.m., before the judge took the bench. Tr. I:123.

163. Jellinek claimed that he wanted Heffernan, as the presiding judge in the courthouse, to know that something had occurred in the courthouse the day before that at least some people did not think was proper and that ICE had been angry with the district attorney. Tr. I:80-81. He did not tell Heffernan that any portion of the proceedings had been conducted off the record. Tr. I:81. He did not tell her about his agreement with Court Officer MacGregor. Tr. I:82. He claims that he was trying to tell First Justice Heffernan that "something had happened" and that ICE was mad at Jurgens. Tr. I:81. He claimed that he wanted Heffernan to know that the prosecutor, who appeared in her courtroom every day, "had been aggrieved," but admits that he did not explain how she had been aggrieved, and that Heffernan did not ask. Tr. I:204-205. He did not say anything about Joseph or conversation he claimed to have had with her. Tr. I:83; Tr. I:128. He claimed that he told Heffernan that Medina-Perez had gone out the back door, and that she told him that it was not his problem and that he shouldn't worry about it. Tr. I:80; Tr. I:126.

164. Heffernan testified that the conversation occurred at approximately 1:00 p.m., after the drug court meeting from 12:00-1:00. Tr. III:492. She testified that she had not heard anything about the incident as of that time. Tr. III: 470; III:492. Jellinek's recitation did not convey to her any unusual incident or information. Tr. III:493. Jellinek simply told her that he had a client with a fugitive warrant from Pennsylvania, and that the judge had allowed him to go down to the lockup to speak with the defendant with an interpreter about the status of the

warrant. Tr. III:469-470. He did not mention ICE. Tr. III:494. He did not further describe the discussion with Joseph, nor did he tell her that any portion of the discussion had been off the record. Tr. III:470. Heffernan did not recall Jellinek telling her that Jurgens was upset or angry, which was Jellinek's stated reason for approaching Heffernan. Tr. I:194-195; Tr. III:500-501. Nor did she learn from Jellinek that Medina-Perez had been released out the back door and avoided ICE. Tr. III:499-500.

165. I credit Heffernan's testimony that she did not know about Medina-Perez's escape, and that Jellinek did not tell her. I do not credit Jellinek's testimony to the contrary. I infer that this was a significant event, and Heffernan is likely to remember how she learned of it. Jellinek's stated reason for approaching Heffernan was his concern that Jurgens was upset. Nothing in either version of the discussion is consistent with that testimony, and I reject Jellinek's version.

166. Heffernan first learned of the escape from Noe, who told her that a defendant had gone out the back door of the courthouse while ICE was in the lobby, and that ICE was not happy about it. Tr. III:471.

167. Noe's recollection is that Heffernan was already aware of what happened. Tr. III:444. Noe told Heffernan what he had learned from interviewing Walsh, Jurgens and Okstein. Tr. III:455. When Noe asked Jellinek what had happened, Jellinek shrugged his shoulders but did not respond. Tr. III:456.

168. Noe created a new policy, dated April 4, 2018, to reinforce the existing practice that all defendants would be released from custody through the front door, which he presented to Heffernan for her approval. Tr. III:447-448; Tr. III:471; Exhibit 2.

169. Although the policy created by Noe is inconsistent with both the Court Officer Manual and the Lunn policy, it has continued in effect, as least through the remainder of Noe's tenure. Tr. III:448-449; Tr. III:505; Tr. V:896-897.

170. Okstein recalled discussing the incident with Heffernan, but he was unclear on which day they spoke or whether there was more than one conversation Tr. II:363-364. He told her that there had been a defendant who evaded ICE. Tr. II:364.

171. At some point, Okstein also informed Heffernan that a portion of the proceeding had been conducted off the record. Tr. III:471. He did not relate any particular alarm or concern about that fact, although First Justice Heffernan recalls that he was "quite alarmed." Tr. II:364; Tr. III:473. She did not recall when Okstein told her that there was a "gap" in the tape. Tr. III:483.

172. On April 4, 2018, Joseph was again sitting in the NDC. Tr. III:472; Tr. IV:706. Heffernan asked Joseph about the incident, as she was trying to figure out what happened. Tr. III:472; Tr. III:507. Joseph recalls that it was during this conversation that she learned Medina-Perez had escaped. Tr. IV:764-765.

173. Joseph asked Heffernan what had happened, and Heffernan said that was what she was trying to figure out. Tr. III:506-507; Tr. IV:706-707; Tr. IV:765. Heffernan does not recall that part of the conversation, but agreed that it sounded probable. Tr. III:507.

174. Joseph, who did not know that there was a rule requiring all proceedings to be recorded, did not say that a part of the hearing had been off the record, and Heffernan did not ask. Tr. III:473; Tr. IV:707; Tr. IV:765-766. From this, I infer that Okstein was not as alarmed as Heffernan now recalls, or that her conversation with Okstein took place after her discussion with Joseph, or both.

175. At the conclusion of the conversation, Heffernan believed that Joseph had told her what Joseph believed was important, and was not holding anything back. Tr. II:506. She did not testify that her feeling on that subject has changed in any way as a result of later-acquired information, and I infer that it has not.

176. The focus of the discussion between Heffernan and Joseph was the events that led to Medina-Perez's escape, which Heffernan viewed as a security issue. I find that Joseph candidly responded to Heffernan's questions in that context.

177. After Heffernan spoke with Joseph, she spoke with then-Regional Administrative Justice Stacey Fortes. Tr. III:476; III:510; III:535. At Fortes' request, Heffernan summarized the incident in an email on April 5, 2018. Tr. III:478; Tr. III:537; Appendix V at 540-541. The email summary included information Heffernan had gained from multiple sources, including Jellinek, Joseph, Okstein and Noe. Tr. III:479-482; Tr. III:499.

178. Heffernan's email included a statement that Medina-Perez had been headed to the probation department. Tr. III:441. Appendix V at 541. While there was some suggestion by Special Counsel that this information, which was incorrect, came from Joseph, and was part of her effort to conceal facts from her supervisors, it appears that the source of that statement was Okstein. Tr. III:424-425; Tr. III:441.

179. Heffernan's summary did not include the fact that part of the discussion had been off the record, which suggested to her that Okstein had not yet informed her that part of the conversation was off the record. Tr. III:511. Fortes believes that Heffernan told her that part of the proceeding was off the record, and that she instructed Heffernan to get the recording and listen to it. Tr. III:536-537. Heffernan does not recall speaking with Fortes after the email summary. Tr. III:477.

180. I infer from their testimony and the contemporaneous email that there was some discussion about a proceeding off the record, but that it was not a matter of alarm, or, as Heffernan now recalls it, the clerk came in with his “hair on fire.”

181. Heffernan spoke with Joseph by telephone for ten minutes on April 6, 2018, the day after her email to Fortes, but does not recall the conversation. Tr. III:509; Tr. IV:767. I therefore infer that Heffernan learned nothing new or significant during that call, which is consistent with Joseph’s testimony that they discussed the public safety concerns that might accompany the escape of an unidentified defendant. Tr. IV:767.

182. Sometime between April 5, 2018 and April 20, 2018, Fortes spoke with Joseph in her lobby at the Lowell District Court, where both were sitting on that particular day. Tr. III:540. Unlike her current role as Chief Justice, Fortes had no disciplinary authority over other judges, but tried to handle issues that did not require the Chief’s attention. Tr. III:530-531; III:592. I infer that Joseph’s off-the-record conversation was one of those issues that the RAJ could resolve by educating the judge involved.

183. Fortes did not inform Joseph in advance of her plan to meet, nor did she tell her that she wanted to discuss the Medina-Perez incident. Tr. III:555; Tr. IV:709. The two met in Fortes’ lobby at lunchtime, and after some casual conversation, Fortes asked Joseph about the Medina-Perez incident. Tr. III:542; Tr. IV:768-769.

184. Fortes said that it was her understanding that part of the proceeding wasn’t recorded and asked what had happened. Joseph explained the court proceedings, including the question about the defendant’s identity. Tr. III:543. Joseph did not deny or otherwise contest Fortes’ statement that the proceeding was off the record. Tr. III:556. Fortes did not ask if Joseph had turned off the recording system, and Joseph did not directly say that she had. Tr. III:544.

185. During the discussion, Joseph also described to Fortes another occasion when she had gone off the record in Waltham because the recorder microphone was broadcasting the sidebar conference to the audience. Tr. IV:713.

186. Fortes' main purpose was to make sure Joseph understood that she should not go off the record. Tr. III:554-55.

187. I credit Joseph's testimony she believed Fortes was aware she had gone off the record, and that she believed that she had acknowledged it. Tr. IV:712; Tr. IV:770. This belief is supported by Fortes' testimony that "she was trying to figure out why there was a portion that wasn't recorded," Tr. III:545, and that everyone was working on the understanding that a portion had not been recorded. Tr. III:556. Joseph's belief is further supported by Fortes' testimony that she had made a copy of Special Rule 211 before the meeting and gave it to Joseph, implying that she understood Joseph had gone off the record. Tr. III:546; Tr. III:556; Tr. IV:710; Tr. IV:715. Joseph's belief is further supported by her discussion of the unrelated Waltham matter as another time when she was off the record. Tr. IV:713-714.

188. After that discussion, Fortes considered the matter handled. She did not inform Dawley of the Medina-Perez incident at that point, and made no notes of the meeting. Tr. III:555. The focus of the meeting was Special Rule 211, and Fortes did not delve into the ICE issues. Tr. IV:772. I find that Joseph candidly responded to Fortes' questions in the context of the meeting.

189. It was not until April 20, 2018, two and a half weeks after the Medina-Perez incident, that anyone informed Dawley. Tr. III:591. On the date, Fortes sent an email to Dawley. Tr. III:538; Appendix V at 540.

190. I infer that both Heffernan and Fortes had considered the matter resolved as a result of their individual discussions with Joseph and it was, as stated in the email, concern about the impending ICE meeting and not any belief that Joseph had acted improperly that prompted them to inform Dawley.

191. Dawley responded that “I don’t think this situation, even if raised by ICE, is a problem. It sounds like court personnel were just trying to accommodate the attorney-client relationship by use of the interpreter.” Appendix V at 538’ This is consistent with Joseph’s testimony.

192. Several days later, Dawley requested a meeting with Fortes and Joseph in his office because of his concern that the recording had been stopped. Tr. III:598-599.

193. According to Fortes, Dawley asked Joseph if she had instructed the clerk to go off the record, and she responded that she had, and that she understood that she should not have done that. Tr. III:550; Tr. III:599-600; Tr. IV:772-773.

194. Dawley told Joseph that this was a serious matter, and that he wanted to make sure she understood that all proceedings had to be recorded. He emphasized that the tape could protect a judge against allegations of wrongdoing. Tr. III:601; Tr. IV:773.

195. Dawley also asked Joseph if she had any knowledge that the defendant was being released from the back door, and she denied it. Tr. III:603; Tr. IV:718.

196. Dawley remembered that the meeting, which he described as initially “stern,” the progressed to a more positive discussion about how Joseph would move forward as a judge. Tr. III:604. Overall, he viewed the whole meeting as a training issue, and not a disciplinary matter. Tr. III:604.

197. Fortes recalled that the meeting ended in similar fashion to her meeting with Joseph, with Joseph being “very apologetic about going off the record, saying she understood the policies, that she was apologetic for taking everyone’s time.” Tr. III:550-552; Tr. IV:717.

198. Dawley believed Joseph had been candid with him. Tr. III:615. He did not testify that his feeling on that subject has changed in any way as a result of later-acquired information, and I infer that it has not.

199. Dawley and Joseph exchanged emails shortly after the meeting. Appendix V at 534. The tone of those emails is supportive and positive, and does not support any inference that Dawley was dissatisfied with Joseph’s responses or believed that she had committed a disciplinary violation.

200. The contemporaneous documentation supports the inference that the supervisory judges viewed this as a “learning experience” for a new judge, whose only error had been to go off the record. Tr. III:614-615; Tr. IV:773-774, Appendix V at 534.

201. There is nothing to suggest that any of the three supervisory judges believed that Joseph had knowledge of Jellinek’s plan or was otherwise complicit in Medina-Perez’s escape. Indeed, Heffernan believes that Medina-Perez would not have been allowed to leave by the back door if she had been there, because she is more senior than Joseph and in charge of the courthouse. She does not think they “would have pulled it” with her there. Tr. III:508.

202. I do not accept the inference urged by Special Counsel that Joseph was less than candid when she did not acknowledge that her actions inadvertently or unintentionally facilitated Medina-Perez’s escape. Tr. III:603-604; Tr. VI:976-977. By the time Joseph, Fortes and Dawley met, everyone had listened to the recording of the proceedings, was aware that Joseph had permitted Jellinek to speak with his client in the lockup, and was aware that Medina-Perez had

been released from the back door. Tr. III:597. Joseph's actions were entirely proper, and as previously noted by Dawley, were intended to "accommodate the attorney-client relationship." Tr. III:517-521. There is no evidence that Dawley believed that Joseph's grant of permission to Jellinek to speak with Medina-Perez in the lockup "assisted" Jellinek's plan or that he made such a suggestion or inquiry to her. She could not reasonably be expected to assume responsibility for Jellinek's extraordinary and unforeseeable actions. It is important to remember that at the time of that May 2018 meeting, Jellinek had not disclosed to anyone his agreement with MacGregor or his role in effecting Medina-Perez's release, much less begun to suggest that Joseph was aware of or had approved his plan. Nor had MacGregor implicated either Jellinek or Joseph in response to inquiries by Noe. At the time of that meeting, all participants viewed this as a "court officer" problem, where MacGregor had made a decision to release Medina-Perez from the sallyport. Joseph had no reason to suspect that she would later be accused of wrongdoing, and thus no reason to defend herself, or to attempt to conceal her conduct.

203. I do not find that a reasonable judge would view the grant of permission for a lawyer to consult with a client in a secure setting—and the precise location from which that client should have been taken into ICE custody—as "inadvertently facilitating" or "assisting" the defendant's escape. I do not find that a reasonable judge would or could anticipate that MacGregor and Jellinek would formulate and execute the plan that they did, that Okstein would deny the ICE agents access to the lockup in clear contravention of the Lunn policy, or that ICE would decline Noe's offer to enter the lockup to arrest Medina-Perez.

JELLINEK'S EVOLVING TESTIMONY

204. Nothing in Jellinek's conduct or responses on the April 2, 2018 or the following days suggested that he believed that his plan to have Medina-Perez avoid ICE was permissible, or that he had Joseph's "blessing" for his plan. To the contrary, he did not attempt to justify his conduct, and when he spoke with Heffernan, concealed MacGregor's actions, his own role as the architect of the plan, and even Medina-Perez's escape.

205. Jellinek had two conversations with MacGregor after the fact. Tr. I:130. He thanked MacGregor for what he had done and asked if MacGregor was "okay in his job." Tr. I:130. This question further undermines Jellinek's credibility, as there would be no reason for concern about MacGregor's job if he had been following Joseph's instructions. Jellinek has never claimed that he told MacGregor that Joseph was aware of and had approved their agreement. The following year, Jellinek was the only lawyer joining four court officers at a retirement celebration for MacGregor. Tr. III:430; Tr. III:445.

206. In the fall of 2018, a lawyer representing Okstein called Jellinek to tell him that Okstein had been subpoenaed to testify before a federal grand jury, and that Jellinek should expect to be subpoenaed as well. Jellinek retained a lawyer to represent him. Tr. I:84.

207. Jellinek proffered to the United States Attorney on November 8, 2018 and received a full immunity agreement on January 17, 2019. Tr. I:86.

208. The critical fact supplied by Jellinek in exchange for full immunity was his uncorroborated testimony that Joseph was aware of his plan. Tr. I:138-139. Jellinek is the only witness who has ever made this claim. Without Jellinek's testimony, there was (and is) no evidence implicating Joseph in Medina-Perez's escape.

209. Jellinek originally told the federal agents that he thought the assistant district attorney didn't understand what had been said at sidebar, and that what he said was "subtle enough" that "she might not have gotten it." Tr. I:88-89; Tr. I:108.

210. Jellinek expanded on that testimony at the hearing, stating that she was relatively young and he didn't think "fully understood" that there was an "issue of how to release the gentleman." Tr. I:89-90.

211. At the hearing, Jellinek retracted his claim that what he said was "subtle" and suggested that Jurgens might not have been "paying too much attention" once the conversation shifted from the Pennsylvania warrant to ICE. Tr. I:110.

212. Having observed Jurgens and heard her testimony, I find it not credible that she was "not paying attention" during an off-the-record discussion that lasted only 52 seconds, or that she wouldn't understand Jellinek's direct statement that he intended to have Medina-Perez released out the back door and Joseph's agreement to that plan, if that had happened.

213. Jellinek originally told federal authorities that he believed it was permissible for Medina-Perez to be released from the lockup area. Tr. I:162-163. A release from the lockup would have complied with both the Court Officer Manual policy and the Lunn policy. In that initial statement, Jellinek said nothing about avoiding ICE.

214. Two months later Jellinek embellished his claim, adding a new facet, and now stating that he told Joseph that the defendant could be released "out the back door." Tr. I: 163. Tr. I: 198-199. Unlike a release "from the lockup," which would comport with the applicable policies, a release "out the back door" would imply the ability to avoid ICE.

215. Jellinek also told federal agents that he "had no idea what was in Judge Joseph's mind during or after the side bar conversation in the courtroom." Tr. I:164; Tr. I:196-197.

216. Jellinek did not tell federal authorities that Joseph had voiced approval for his plan. Tr. I:186. It was not until he was interviewed by Special Counsel on December 20, 2024, after formal charges were filed against Joseph, that Jellinek first made the claim that Joseph understood the sidebar request, and stated that she had explicitly approved his plan. Tr. I:164-165.

217. Jellinek did not begin to implicate Joseph, in either formal statements or casual conversations, until after he had received full immunity from the United States Attorney. His first statement that was inculpatory of Joseph was that he disclosed his plan at sidebar, but that it was so “subtle” that the Jurgens did not understand what he was saying, and further, that he had no idea what was in Joseph’s mind. In December 2024, Jellinek first made the claim that Joseph had affirmatively agreed with his plan. I infer from this sequence, first, that Jellinek’s recent claim that Joseph explicitly and verbally agreed with his plan is not credible; and second, that Jellinek has demonstrated a clear willingness to shape or improve upon his testimony to serve his own self-interest. I do not accept Special Counsel’s argument that Jellinek should be believed because he would have preferred to assert a Fifth Amendment privilege and defend himself in a potential federal indictment rather than be untruthful to the federal authorities. Tr. VI:949-951. Jellinek faced not only the potential for significant federal criminal charges that carried with substantial penalties, but probable repercussions for his bar license and his livelihood. Tr. I:137-138.

218. I also infer that the absence of any suggestion from Jellinek that Joseph had knowledge of his plan to effect Medina-Perez’s escape influenced the tenor of the conversations among Joseph and the supervisory judges. At the time those conversations occurred, the supervisors had no reason to probe Joseph’s knowledge, and Joseph had no reason to deny an

accusation that had not been made. Those conversations must be viewed in the context of the events known to the participants at the time, which were essentially the two unrelated facts that Joseph had conducted part of the proceedings off the record, and MacGregor, apparently acting alone, had opened the sallyport door for Medina-Perez.

OFF-THE-RECORD DISCUSSIONS

219. Jellinek testified that he had previous experience with off-the-record conferences, which had been common in earlier 2000s. Tr. I:81. He was not aware of revision to Rule 12 prohibiting off-the-record plea discussions. Tr. I:82. He was also not aware of Special Rule 211, requiring most proceedings to be recorded. Tr. I:205.

220. Okstein, too, had experience with off-the-record conferences. He testified that the practice varied by judge, and that the conference generally concerned something personal. Tr. II:352-353. He was not aware of Special Rule 211. Tr. II:354.

221. After this incident, Dawley arranged for the District Court Committee on Education to incorporate Special Rule 211 into the training for new judges, as he learned that not everyone knew of the rule and its importance. Tr. III:605; Tr. II:620-621. The practice of going off the record varied widely both over time and among judges. Heffernan testified that she “learned anecdotally” that she should never turn the tape off. Tr. III:461. Heffernan and Fortes testified that they had never been off the record. III:463; Tr. III:533. Fortes agreed that it might happen that, as with other rules, including the Lunn policy, Special Rule 211 might not always be honored. Tr. III:553. Dawley had been off the record as a judge. Tr. III:582.

222. Three retired judges testified regarding the practice of going off the record.

223. Judge Bonnie MacLeod retired in 2016 after twenty-seven years as a judge, split almost evenly between the District Court and the Superior Court. Tr. V:786-787. In her experience, it was common practice to go off the record for various reasons. Tr. V:793-796.

224. Judge Carol S. Ball practiced extensively in the District Court before her appointment to the Superior Court, where she sat for nineteen years before retiring in 2015. Tr. V:839-841. She also testified that off-the-record discussions were common and varied. Tr. V:841-842; Tr. V:845-846. There was a preference for sidebar discussions over “lobby conferences” because the public could see the participants engaged in the proceedings and understand that court business was being conducted even if they could not hear everything that was said. Tr. V:842. In her experience, she was able to get helpful information because lawyers might be more candid in an off-the-record discussion. Tr. V:842-843. She trusted that lawyers requested to go off the record for reasons that were consistent with representing their client effectively. Tr. V:846.

225. Judge Sevelin B, Singleton III spent twenty-five years on the District Court, retiring in 2014. Tr. V:865-866. He testified that, although he was reluctant to go off the record, and generally pressed lawyers to justify a request, he had been off the record on occasions. Tr. V:866.

226. Lobby conferences dealing with plea discussions were required to be recorded by a separate rule, Mass. R. Crim. P., Rule 12, which is not applicable here. The interpretation of Special Rule 211 as it applied to other proceedings was a matter of discussion among judges. Tr. V:792; Tr. V:814-815.

227. From all of the testimony, I infer that the practice of going off the record was common in earlier years, and had become less so, but not obsolete, by 2018. Although not

common by 2018, no one suggested, and I do not infer, that a lawyer's request to go off the record would raise a suspicion that something improper or untoward was about to happen. The presence of opposing counsel and the ability to return to the record at any time and to make a statement reflecting off-the-record events combine to make it unlikely that anything untoward would occur. Tr. V:846.

228. I credit Joseph's testimony that she was unaware of Special Rule 211 on April 2, 2018, and that she has not gone off the record since learning of the rule from Fortes. Tr. IV:766,

CONCLUSIONS OF LAW

1. Special Counsel charges that the decision by Joseph to go off the record violated Rules 1.2 (confidence in the judiciary), 2.2 (impartiality and fairness) and 2.5 (competence, diligence and cooperation) of the Code of Judicial Conduct (“the Code”), as well as M.G.L. c.211C §25B (conduct prejudicial to the administration of justice and unbecoming a judicial officer and bringing the judicial office into disrepute). Tr. VI:985-987. I do not find that Special Counsel has proved this charge. While Joseph’s agreement to conduct part of the Medina-Perez hearing off the record was not consistent with Special Rule 211, I do not find that conduct rises to the level of a disciplinary violation. As the evidence in this case demonstrates, there are numerous instances when court rules or policies are not followed that do not result in disciplinary action. The three supervisory judges who spoke with Joseph in 2018 did not view her conduct as warranting a report to the CJC. There is no evidence that any Massachusetts judge has ever been subject to discipline for going off the record since Special Rule 211 was implemented in 1989. There is no evidence that any Massachusetts judge has ever been subject to discipline for being unaware of a court rule—much less a rule that was unknown to many and regularly disregarded.

As evidenced by the supervisory judges’ treatment of the incident, this was a momentary lapse by a new judge who, like many other people, was not aware of Special Rule 211. Joseph’s conduct during the rest of the day, including attempting to reach Judge Heffernan with a question on another case, granting repeated requests for additional time for Medina-Perez and other defendants, diligently researching the court rules relating to ICE, and attempting to harmonize Heffernan’s unusual practice with the Lunn policy, in a courthouse prone to unusual practices, presents a portrait of a conscientious judge who tried to accommodate the interests of all parties.

2. Special Counsel charges that Joseph demonstrated bias by her statements on the record and by assisting defense counsel in implementing his plan for Medina-Perez to escape, and thereby violated Rules 1.2 (confidence in the judiciary) and 2.2 (impartiality and fairness), as well as M.G.L. c.211C §25B (conduct prejudicial to the administration of justice and unbecoming a judicial officer and bringing the judicial office into disrepute). Tr. VI:987. As noted above, I do not find that Joseph’s “introduc[tion]” of the topic of ICE on the record was anything other than a reflection that she had, since the previous call, learned of a new aspect to Medina-Perez’s legal issues. Further, as noted, I do not find that Special Counsel has proved that Joseph was aware of Jellinek’s plan or that she had any reason to suspect he intended to do anything unethical, improper, or illegal. To the contrary, I find affirmatively that Jellinek did not disclose his plan at sidebar. This finding is supported by the testimony of Joseph and of Jurgens, an impartial witness whose testimony was entirely credible. Thus, Special Counsel has not proved the factual premise of these charges, and has not proved a violation of these Rules.

Further, the transcript belies Special Counsel’s assertion that Joseph “went off the record right after the defense attorney had told her that his goal was to avoid ICE.” Tr. VI:987. In fact, the transcript shows that Joseph went off the record—not on her own initiative but at Jellinek’s request—after her offer to detain Medina-Perez overnight “if you [Jellinek] need more time to figure this out.” Appendix G at 041. While Joseph did not know the reason for Jellinek’s request, her grant of that request did not demonstrate bias. The record demonstrates that Joseph was trying to respond to Jellinek’s concern that his client was not the subject of the ICE detainer by giving the lawyer sufficient time to investigate that issue, and potentially to convince ICE.

I do not find that Special Counsel has proved that Joseph stepped outside the boundaries of appropriate neutrality. The transcript demonstrates that Jellinek was advocating that his client

was not the subject of the ICE detainer, an argument that he had just made successfully with respect to the Pennsylvania warrant. The thrust of Joseph's statements was that she was offering Jellinek additional time, presumably to attempt to persuade ICE that Medina-Perez was not the person subject to the detainer. While it was not her responsibility to advocate for Medina-Perez vis-à-vis ICE, or to determine the identity question as it related to ICE, it was certainly appropriate for her to allow Jellinek a reasonable time to do those things.

I do not find that Special Counsel has proved that Joseph's conduct was responsible for a loss of confidence in the independence, impartiality, or integrity of the judiciary. To the contrary, Joseph, as a new judge, attempted to reconcile the competing interests and conflicting policies before her in a manner that respected the rights of all parties, including ICE. All proceedings were conducted in full public view, and there is no evidence that persons not present at sidebar could tell what was on or off the record—or even that part of the discussion was off the record. There is no evidence that, but for Jellinek's extraordinary actions, anyone would ever have sought to obtain the recording of an otherwise unremarkable state court misdemeanor drug charge.

3. Finally, Special Counsel charges Judge Joseph with “lack of candor and honesty” in her statements to Chief Justice Dawley, to Special Counsel herself, and to this Hearing Officer, in violation of Rule 2.16 (cooperation with disciplinary authorities) and M.G.L. c.211C §25B (conduct prejudicial to the administration of justice and unbecoming a judicial officer and bringing the judicial office into disrepute). Tr. VI:988-989. Special Counsel charges, without specification, that Joseph was “more than just not candid, she was dishonest.” Although Special Counsel did not specify what statement she claims to be dishonest, presumably, this charge refers

to Joseph's denial that she had anything to do with Medina-Perez's escape, and in particular, that Jellinek informed her of his plan.

To the extent that Special Counsel's charge of dishonesty refers to that denial, I find that Special Counsel has not proved that charge. As noted, I do not credit Jellinek's testimony, and find that he did not disclose his plan to Joseph and that she had no reason to suspect that he would take such an action. Thus, her denial was truthful. To the extent that Special Counsel rests this charge on Joseph's lack of acknowledgement that she "inadvertently" assisted defense counsel's plan, I find that Special Counsel has not proved that charge. I do not find that any reasonable judge under the circumstances would have viewed her conduct in that light.

4. To the extent that the Medina-Perez incident has created an unfavorable view of the courts, that circumstance results solely from the conduct of David Jellinek, which was not known to Joseph, and which could not reasonably have been anticipated by her. This conclusion is supported by the many years of off-the-record conferences, none of which have been shown to result in any loss of public confidence. It took the singular action of Jellinek to do that.

The Respondent
SHELLEY M. RICHMOND JOSEPH
By her Attorneys,

/s/ Michael B. Keating

MICHAEL B. KEATING
Meehan Boyle Black & Bogdanow, P.C.
100 Cambridge Street, Suite 2101
Boston, Massachusetts 02114
617 523-8300
mkeating@meehanboyle.com

/s/ Thomas M. Hoopes

THOMAS M. HOOPES
ELIZABETH N. MULVEY
Libby Hoopes Brooks & Mulvey, P.C.
260 Franklin Street, Suite 1920
Boston, Massachusetts 02110
617 338-9300
thoopes@lhbmlegal.com
emulvey@lhbmlegal.com