REPORT AND RECOMMENDATION OF THE COMMISSION ON JUDICIAL CONDUCT

APPENDIX O

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

I. THE COMMISSION'S CLAIMS REST ON AN IMPROPER APPLICATION OF HINDSIGHT BIAS.[1]

A fair analysis of Judge Joseph's conduct requires two things: 1) consideration of each statement or action in light only of what was known to her at the time, and 2) consideration of what was known to other participants in light of their statements and actions at the time. Although a sometimes-difficult thought exercise, any interpretation or inference that is infected by later-acquired knowledge or events must be viewed with extreme caution. The effect of hindsight bias in this case is that Special Counsel's reasoning has become circular: her interpretation of Joseph's conduct assumes, explicitly or implicitly, that Joseph knew of Jellinek's plan and his claim that she was his co-conspirator; that interpretation is then proffered to support the inference that Joseph knew of Jellinek's plan.

[1] Hindsight bias is the tendency to evaluate events differently once the outcome is known, and in particular to see those events as more predictable or foreseeable. This often-unconscious bias affects all types of decision makers. See, e.g., Oeberst, A. and Goeckenjan, I., *When Being Wise After the Event Results in Injustice: Evidence for Hindsight Bias in Judges' Negligence Assessments*, Psychology, Public Policy & Law, 22(3), 271-279 (2016), https://doi.org/10.1037/law0000091; Giroux, M.E. et al., *Hindsight Bias and the Law*, Zeitschrift für Psychologie, 224(3), 190-203 (2016) https://doi.org/10.1027/2151-2604/a000253

When the events that form the basis of the Commission's complaint took place, all of the following were true:

1. It was common and appropriate for judges to afford counsel a reasonable time to investigate facts and advocate for their clients. Joseph's Request for Findings of Fact and Conclusions of Law ("Joseph Request") ¶¶74, 98.
2. Although the usual practice at the Newton District Court was to release defendants from the dock directly into the courtroom, there were exceptions, such that the return of a defendant to the lockup, whether for his property or for normal processing, including a check for other holds, would not raise an eyebrow. Joseph Request ¶¶12, 13, 96, 150.
3. Defense counsel in the NDC had experience in conferring with their clients in the lockup before they left the courthouse, including, where necessary, with an interpreter, so that again, there was nothing unusual about this event. Joseph Request ¶¶15, 96, 150.
4. Under the Lunn policy, the presumptive location for ICE to arrest a defendant who had been released from state custody was in the lockup. Appendix B.
5. David Jellinek had engineered his client's evasion of ICE arrest in a manner that was unprecedented, unethical, and likely illegal. Joseph Request ¶70.
6. Court Officer Wes MacGregor had given conflicting explanations for his decision to release Jose Medina-Perez from the sallyport door, none of which implicated either David Jellinek or Judge Shelley Joseph. Joseph Request ¶¶157-161.
7. David Jellinek had never told anyone about his secret agreement with MacGregor. Joseph Request ¶¶154, 156, 163, 204.

8. David Jellinek had not begun to claim that Joseph had any knowledge of his plan to have Medina-Perez released from the sallyport door, much less that she had explicitly approved that plan. Joseph Request ¶¶154, 155, 156, 163, 204, 215, 216.

With the benefit of hindsight, Special Counsel now seeks to reinterpret the events of April 2, 2018 through a different lens, one informed and markedly colored by, later events. That interpretation is unfair to Joseph, and to every other trial judge who makes decisions in real time based on the information then available to him or her. Until MacGregor opened the sallyport door to let Medina-Perez out, the events in the Newton District Court were largely unexceptional and gave no cause to Joseph—or anyone else in the NDC—to suspect that something unfathomable was about to occur. It is not until after the fact—and not immediately so, but only once Jellinek's extraordinary deception was revealed—that it became possible to look at some of his statements in this different light.

To evaluate properly Joseph's conduct and testimony, as well as the conduct and testimony of the other participants, it is necessary to "roll the tape forward" from the beginning, assessing each statement or action only in light of what preceded it, and not with the combination of later-acquired information and the new insight that information might afford. A few examples of Special Counsel's retrospective analysis will suffice:

- *The assertion that Joseph's acknowledgement at the sidebar that ICE was present conveyed an improper concern with ICE*. See Special Counsel's Proposed Findings of Fact, Conclusions of Law, and Recommendations for Discipline ("SC Request"), at 37, second paragraph.[2] This acknowledgement is entirely consistent with the state of

[2] Special Counsel's statement that "[a]fter Judge Joseph alerted him [Jellinek] to the presence of ICE in court that day," (SC Request at 37, third paragraph) is at odds with her proposed finding addressing Jellinek's testimony that he spoke with the ICE agent that morning (SC Request ¶51). Clearly, it was Joseph who had just learned of the presence of the ICE agent, and did not need to "alert[]" Jellinek, who had already formulated a plan with MacGregor

mind of a judge who has just learned during the lunch break that the Commonwealth intended to dismiss the charge based on the Pennsylvania fugitive warrant, and second, that ICE was present in the courthouse. These events bore directly on what would happen to Medina-Perez: first, that there would be no bail request from the Commonwealth, making his release from state custody likely, and second, that in the event of Medina-Perez's anticipated release, he would likely be taken into ICE custody. Joseph Request ¶68.

- *The assertion that anything Joseph said or did created a "reasonable" belief or impression in anyone's mind that she was a willing participant in an illegal scheme.* See SC Request ¶¶100, 119. Viewed prospectively, from the perspective of an impartial observer with no foreknowledge of Jellinek's agreement with MacGregor, Joseph's statement, "If you need more time…" evinced nothing more than a judge's perception of what would normally be requested by a lawyer hoping to persuade ICE not to arrest his client, and an appropriate willingness to give new counsel time to familiarize himself with the facts and advocate for his client. Likewise, the suggestion to hold Medina-Perez overnight was simply a district court judge's recognition of the reality that the sheriff's deputies responsible for transporting prisoners had "miles to go" before they could rest, and would be, at a minimum, disgruntled if asked to delay their departure. Joseph Request ¶74.
- *The assertion that Joseph's agreement to go off the record at Jellinek's request evidenced either an awareness that Jellinek (in the presence of the assistant district attorney) intended to propose something illegal or a willingness to participate in such*

---

that was based on Jellinek's familiarity with Heffernan's policy and the likelihood that the ICE agent would be in the front lobby SC Request ¶67.

a scheme. See SC Request ¶83. There is nothing in the brief exchange, in open court and at sidebar on the record, that suggested anything other than the entirely appropriate offer to afford counsel more time. Joseph Request ¶69-70, 73.

- *The assertion that Joseph's statement to Okstein about the ICE agent's request to visit the lockup was actually a refusal to permit ICE to enter the lockup rather than a reaffirmation of her adherence to Heffernan's policy about ICE in the courtroom.* See SC Request ¶116. Joseph had just spent a significant part of the lunch recess to educate herself about the Lunn policy, which she knew existed but could not locate (either in her own materials or in the courthouse), and to get advice on Heffernan's policy about excluding ICE from the courtroom. Having gone to those lengths, there would be no reason for her suddenly to reverse course. To the extent Okstein misinterpreted Joseph's statement, [3] that misinterpretation flows in large part of his own unfamiliarity with the Lunn policy—which was endemic at the NDC. Joseph Request ¶¶59-61, 137-138, 148, 169.
- *The assertion that Joseph should have volunteered to Heffernan that part of the proceeding had been conducted off the record.* See SC Request at 41, first full paragraph. Joseph, who was unaware of Special Rule 211 when Heffernan approached her and told her that Medina-Perez had escaped without ICE apprehension, had no understanding of how that had occurred, much less that eight months later, Jellinek would begin to accuse her of approving his plan. In Joseph's

[3] Okstein acknowledged that this was his interpretation, and that he conveyed that to the ICE agent without offering alternative means of access to the lockup. Joseph Request ¶137-138. While Special Counsel attempted to elicit Jurgens' agreement with Okstein's interpretation, upon review of the transcript, Jurgens confirmed Joseph's testimony that the statement was an attempt to thread the needle between Heffernan's policy and the Lunn policy. Compare SC Request ¶116, fn. 311, citing Tr: II:239, lines 3-13, with the immediately following lines at Tr. II:239, lines 14-18.

mind at the time, there was no reason to think that the brief off-the-record conference was relevant to the question of why MacGregor released Medina-Perez out the sallyport door. Notably, Heffernan did not suggest that Joseph should have volunteered that fact. Joseph Request ¶¶172-175.

- *The assertion that Joseph attempted to conceal from Fortes that part of the proceeding had been conducted off the record*. See SC Request at 41, third paragraph. It is clear from the testimony of the two participants that the entire purpose of the meeting was for Fortes to educate Joseph and attempt to correct a misstep by a new judge. Fortes came to the impromptu meeting with a copy of Special Rule 211, and Joseph has admitted that she first learned of the rule at that time. Joseph accepted the information and did not deny that she had been off the record. Joseph Request ¶¶183-187. After the meeting, Fortes treated the matter as settled, only informing Dawley in order to avoid a confrontation with ICE. Joseph Request ¶188.
- *The assertion that Joseph should have acknowledged some responsibility for Medina-Perez's escape*. See SC Request at 43, first, second and third paragraphs. The events at the NDC on April 2, 2018 were truly extraordinary—not because of anything Joseph said or did, but because Jellinek formulated a secret plan that everyone else would have thought unfathomable. At the time of Joseph's meeting with Dawley, Jellinek's plan was not yet known, and he was months away from beginning to accuse Joseph of complicity. No reasonable judge in Joseph's position, with the information known to her, would think of herself as complicit. No reasonable judge would see herself as a contributor to MacGregor's decision to open

the sallyport door by virtue of the grant of permission for counsel to confer with his client. Joseph Request ¶202.

These selected examples demonstrate that the inferences Special Counsel seeks to draw are based on a key claim that was unknown to *any* of the other participants, Jellinek's claim that Joseph approved his plan, and on the implicit assumption that his testimony is credible. In essence, Special Counsel has read the final chapter of a murder mystery, written in the press and in a now-dismissed indictment, and then retraced the earlier chapters to try to identify the clues she now believes point to the killer. As juries are regularly instructed, a person's conduct is to be judged by what is known at the time, and not with the benefit of hindsight.

II. THE TESTIMONY OF SHANNON JURGENS McDERMOTT PERSUASIVELY DEFEATS THE COMMISSION'S ALLEGATIONS.

The second flaw in Special Counsel's argument is the complete lack of acknowledgement of the significance of the contemporaneous actions and current testimony of the assistant district attorney, Shannon Jurgens McDermott. Jurgens was a credible and impartial witness, with no motive to slant her testimony in any way. While she acknowledged some discomfort with the course of events,[4] she was crystal clear that nothing Jellinek said led her to believe that Medina-Perez would not be coming through the courtroom door. Joseph Request ¶¶93-95, 99. Jurgens acknowledged that her concern that Joseph had engaged in a "misguided" attempt to do what she believed to be the right thing might not have been improper, but could simply have represented the judge's appropriate attempt to give counsel time to investigate and advocate on behalf of

[4] Indeed, even her expressed discomfort may be at least in part a product of later events, as the discomfort did not manifest itself in real time. This impact of later events on how participants perceived earlier statements and actions is supported by Jurgens testimony that, until she learned of Medina-Perez's escape, she thought that it was a bit odd, but essentially a normal day. It was only after her confrontation with Jellinek that she called her supervisor. Joseph Request ¶103.

Medina-Perez. Joseph Request ¶97. And certainly, Jurgens' conduct at the time—waiting in the hall with the ICE agents and assuring them that Medina-Perez would be coming out from the courtroom—is powerful evidence that nothing Jellinek said in the missing fifty-two seconds revealed his secret plan. Joseph Request ¶102.

Jurgens' testimony is the key to this case. Her testimony is directly and dramatically at odds with that of Jellinek, the sole witness who claims that Joseph was aware of his plan. Proof of the allegations against Joseph would require the Hearing Officer to accept, as clear and convincing evidence, the claims of a fully immunized witness, whose testimony about the fifty-two seconds off the record was both the only thing he had to offer and the only thing the United States Attorney (and the Commission on Judicial Conduct) had to have. That testimony has evolved over time to its present version that now includes an uncorroborated claim by Jellinek that Joseph explicitly accepted his plan. To accept his testimony would require rejection of the contrary testimony of an unimpeached and unimpeachable impartial third party.[5]

Special Counsel has offered no explanation either for the obvious implausibility of Jellinek's account of how he came to represent Medina-Perez or for the many discrepancies between his version of events and the available (or unavailable) documents and testimony of every other witness. Instead, Special Counsel's requested findings simply parrot Jellinek's testimony about the fifty-two seconds off the record, with no acknowledgement of these many contradictions and inconsistencies. There is simply no way to reconcile Jellinek's and Jurgens' versions of events, and Special Counsel has not tried. Jellinek's complete lack of credibility is

[5] Special Counsel's recitation of Jurgens' testimony about Jellinek's "plan" both vastly overstates what Jurgens actually said and ignores Jurgens' firm insistence that, whatever Jellinek said, she did not interpret his statement to signal the release of Medina-Perez from the lockup. Compare SC Request ¶104 with Joseph Request ¶¶93-94.

fatal both to the charge that Joseph was aware of and involved with his plan, and to the claim that her statement that she was not involved was false.

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